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[16/12/2003; High Court (England and Wales); First Instance]

A v A (Children) (Abduction: acquiescence) [2003] EWHC 3102 (FAM), [2003] All ER (D) 284 (Dec)

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

16 December 2003

Sumner J.

A v A (children) (abduction: acquiescence)

COUNSEL: Michael Nicholls for the father; Clare Renton for the mother.

SOLICITORS: Kingsley Napley; Percy Short & Cuthbert

SUMNER J:

Introduction

1. This is a claim in Hague Convention proceedings by the father, 56 year old J A, a Portuguese national, for the return of 2 of his children to Portugal. They are 13 year old F, born on 16 May 1990 and his sister 9 year old I, born on 10 August 1994. This claim is defended by the children's mother, 41 year old P A, who was born in Angola but is also a Portuguese national. I shall refer to the parties as the mother and the father.

2. The 2 children had been living with their father for 4 years. They came to this country to stay with their mother for the summer holiday this year. The mother says the father acquiesced in their continued stay in England. The father denies this. That is the dispute I have to resolve.

Background

3. The parties were married in Angola in February 1991. They have 5 children. The 2 older, B who is 19 and C who is 18, both live in the Netherlands. The next child is Z who is 16, followed by F and I.

4. The parents last lived together in L, Portugal. They separated in 1997. They remained in the same home until the mother left in 1999. She made allegations about the father's conduct which he denies. The 3 youngest children remained living with their father.

5. In late 2002 the mother moved from Portugal to England. In March 2003 the mother asked the father to let Z join her in England. The father agreed.

6. In August 2003 the mother was living with Angolan friends in a major English city. The parents agreed that F and I would come to England to spend the summer holiday with their mother.

7. When the 2 children were with their mother, both she and a friend of hers in Portugal tried to persuade the father to agree that the 2 children should remain in England. The father did consent at the end of August, agreeing also to send the children's clothes from Portugal.

The Issue

8. The mother says that the conversation between her and the father in late August is not disputed. The father consented to the 2 children remaining in England. The mother says this was acquiescence.

9. The father denies this. His consent was a pretence. He feared that the mother would move the children to another address if he did not agree.

10. When he realised the mother was not going to allow the children to return to Portugal, he went to the Central Authority in Portugal on 6 October 2003. As a result an originating application for the return of the children under the Hague Convention was issued in the Family Division of the High Court on 30 October 2003.

The Hague Convention

11. The 1980 Convention was incorporated into English law under the Child Abduction and Custody Act 1985. In essence it provides for a summary procedure whereby children abducted from one Convention country are ordered to be returned to another.

12. The formalities provide that the child must have been habitually resident in the country from which it was abducted. The parent demanding the child's return must also have rights of custody.

13. The authority to return a child and the defence relevant to this application are to be found in Articles 12 and 13.

Article 12.

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith

Article 13.

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) The person, institution or other body having the care of the person of the child subsequently acquiesced in the removal or retention

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

Subsequent Events

14. On 30 October 2003 an order was made in the Family Division of the High Court that the mother hand over all travel documents relating to herself and the children. It was not possible to serve that order on the mother because she and the children were not at the address which the father knew.

15. It subsequently transpired that the mother had moved to stay with friends near N with the 2 children. M, the daughter of a Portuguese friend of the mother's, was staying at her former address. She did not know where the mother had moved but she had her mobile telephone number.

16. On 31 October 2003 Mr Justice Hughes made orders directed to the Department of Works and Pensions to trace the mother and the 2 children. On the same day he made further orders providing that N City Council should provide any information in their possession which related to the whereabouts of the children and their mother.

17. M subsequently telephoned the mother to tell them that the police had called at the address seeking her whereabouts. As a result of receiving that information the mother went to a police station in N and her location became known.

18. I made further interlocutory orders on 6 November 2003. The mother swore an affidavit giving her address in N on 24 November. I am informed that she has subsequently returned to local authority accommodation in the major English city.

19. There is also an affidavit from the father and from M. Finally there is a report of a CAFCASS meeting with the children on 6 November 2003 to see if they objected to returning to Portugal. The views of the children are of importance.

CAFCASS Report

20. The children were seen by Mrs H-W on 6 November 2003. F knew the reason that he was being interviewed.

21. He spoke of happy memories of life in Portugal. He did not know how his parents decided that he should live with his father. Apart from missing his mother very much he was generally happy living with his father.

22. He regarded his paternal grandmother who he saw almost every week as the other central person in his life. The only unhappy experience was at school in Portugal where he felt that some teachers and pupils had been racist towards him.

23. He had expected to come to England for a month. He was not aware they had overstayed until told by his mother that his father was seeking their return. He said he did not mind going back to his father because he missed him but he also did not want to leave his mother.

24. He was not at that stage attending school here. It would be okay to stay in England but he would miss his dad. He thought the best solution was for his mother and father to be together. If he was ordered to return to Portugal, he would like to be able to spend holidays with his mother.

25. I was more guarded. She had been happy in Portugal apart from the loss of her mother. She had no complaints about living with her father who was a good father. She missed her grandmother in Portugal.

26. She would miss her mother if she went back. She gave as one reason because her mother gave her more cuddles. She loved both of her parents. She enjoyed school in Portugal. She liked both countries. She would be very sad because she would miss her mother if she went back to Portugal.

27. Mrs H-W described the children as gentle and well-mannered. They had a healthy and loving relationship with both parents. She had no hint that they were caught up in any controversy between the parents. They were well adjusted. She was assisted by an interpreter.

28. She concluded that neither child had expressed any significant objection to being returned to Portugal. Her concern was that neither child should be made to feel responsible for the outcome.

Representation

29. The father was represented by Mr Nicholls. The mother was represented by Miss Renton. I am grateful to them both for their clear and succinct arguments.

The Father's Case

30. Mr Nicholls started with the agreement between the parties. The mother in her affidavit said –

"The Plaintiff also spoke to the children and eventually during a telephone conversation at about 10.00pm on a Friday evening at the end of August he finally agreed that they should stay with me. He even agreed that he would send the rest of the children's clothes."

31. The father said that he had already enrolled both children in school in Portugal. In relation to the agreement he said –

"I recall the telephone conversation on the Friday evening to which the Defendant refers. By that stage I was scared that the Defendant was planning to take the children to another address where I could not find them. The Defendant was putting a lot of pressure on me to consent to the children remaining in England. Every telephone conversation we had was dominated by this topic. On this occasion I considered that there was a significant possibility that the Defendant would take the children to another address so I pretended that I would allow the children to remain in England and that I would send the children's clothes to the Defendant. However, at the time I had no intention of allowing the children to stay in England and I never intended or indeed sent their clothes to the Defendant."

32. On this issue of acquiescence he referred me to the speech of Lord Browne-Wilkinson in Re: H (Abduction: Acquiescence) (1997) 1 FLR 872. At p.881A he said –

"The fact that there has been some active conduct indicating possible acquiescence does not, on any view, justify ignoring the subjective intentions of the wronged parent. Even on the test laid down in Re: A (Minors), it is only where the wronged parent has said or done something which is clearly and unequivocally inconsistent with the summary return of the child that his actual subjective intentions are to be disregarded."

At p.882E

"In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstance of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions."

At p.883H

"My Lords, in my judgment these exceptional circumstances can only arise where the words or actions of the wronged party show clearly and unequivocally that the wronged parent is not insisting on the summary return of the child: they must be wholly inconsistent with a request for the summary return of the child."

33. Mr Nicholls then turned to examples of what he said was not acquiescence, mostly arising from Lord Browne-Wilkinson's speech.

i) It "could not be inferred simply from the wronged parent having concurred in a temporal arrangement with a view to arriving at an amicable solution", p.882C.

ii) It was not visiting the abducting parent with a view to reconciliation, p.882C.

iii) Judges he suggested "should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child", p.882G.

iv) Attempts to produce a resolution of problems by negotiation or through religious or other advisers if the attempts fail, p.882H.

v) Clear and unequivocal conduct "is not normally to be found in passing remarks or letters written by a parent who has recently suffered the trauma of the removal of his children", p.883H.

vi) Without prejudice negotiations even if they included the child remaining for some 2 years, P v P (Abduction: Acquiescence) (1998) 2 FLR 835.

34. Mr Nicholls accepts that there is no authority which covers the situation of a father who says that he was only pretending to agree. He says that the question is what the father acquiesced to and to what extent the mother changed her position on the basis of his promise.

35. Whilst I agree with the first question I have reservations about his formulation of the second. This is not estoppel. Even if the mother had done nothing further, where there were clear and unequivocal action or words that led the mother to believe he was not asserting or going to assert his right to summary return of the children that might well be sufficient.

36. There are however 3 factors he says which assist the father. Firstly his fear that the mother might move to an unknown address was realised before the Hague Convention proceedings were commenced. He did not know of the mother's address near N, neither did M.

37. Secondly, having given his consent, he says that as soon as he knew that the mother was not going to return the children, he did not send their clothes as promised but went to the Central Authority. It is not clear how quickly his lawyer was able to advise about his rights to seek a summary return of the children. It is I accept inconsistent with what he told the mother unless he was either pretending when he gave his consent or later changed his mind.

38. Thirdly, the father's consent was says Mr Nicholls no more than "passing remarks by a parent who has recently suffered the trauma of the removal of his children". Here the question was not the trauma of the removal. It was according to the father two inter-linked factors.

39. It was the pressure he was being put under by the mother to agree to their staying contrary to his wishes such that he feared that if he did not agree she would move to an unknown address. It does not undermine his fear and the need to pretend that, after his consent, she moved with the children to an address without saying where it was. Rather it reinforces his fear.

40. On what the father has said, he was agreeing to prevent the mother disappearing when he might otherwise be unable or have difficulty in tracing the children. He had reservations about the mother's real wishes and it was only confirmation of them that made him act promptly to secure their return.

The Mother's Case

41. Against that Miss Renton argues that this was no agony of the moment agreement by the father. It was not mentioned before the father's affidavit of 2 December. Furthermore this was not a mother in hiding as she voluntarily went to the police when she knew that her whereabouts was being sought.

42. The father had mobile telephone numbers for the mother. The father went to the Central Authority before the last return date on the tickets of 11 October which suggests he changed his mind about his consent. There is no evidence that the mother threatened to go on the run.

43. She says that the father was guilty of inertia for over a month, a delay that is fatal. She accepts however that the children should otherwise have gone back on 17 September when schools started in Portugal.

44. She argues that this was no subterfuge rather a father who subsequently changed his mind. This was after all the same father who had agreed to Z coming earlier in the year.

45. If which is not accepted it was a pretence, then there was an onus on the father to use it for no longer than strictly necessary. He had to act promptly and he did not do so.

46. Finally it is rare in a case of acquiescence for the court not to exercise its discretion. The children's lack of English is not a reason for this. F's is not too bad. Though he has not yet started school, he is motivated to succeed.

Conclusion

47. I am concerned with the subjective state of the father at the time that he agreed to the children staying. I see no reason to doubt the father when he says that he saw giving consent as a means of maintaining the mother and the children at a known address. I accept Mr Nicholl's arguments.

48. He is not to be condemned for resorting to a pretence in the hope that his children would not disappear. But where he acts in this way it is not acquiescence provided he moves reasonably quickly to make clear his true intentions, which is to secure the return of the children.

49. I am satisfied that, despite his apparent agreement, he still believed the mother would return F and I. It appears likely that the failure of the mother to return the children by the time that schools started prompted his action to obtain their return. He then acted I find without unreasonable delay in reaching the Central Authority in Portugal in 3 weeks.

50. I am not prepared to hold that a father who agrees to his children staying in those circumstances can properly be said to have acquiesced. This was a mother who had not seen the children for more than 6 months. The father was only agreeing originally to holiday contact. The father responded understandably to pressure being put on him and the fears he had which were subsequently realised.

51. It was the balance of risk. He either ran the risk of saying no and not finding the children or yes and running the risk that he would have been held to acquiesce.

52. When the father knew that the children were not coming back I am satisfied he acted promptly. In these circumstances I do not consider that his words showed clearly and unequivocally that the father was not insisting on the return of the children. It was not in the circumstances inconsistent with the return of the children.

53. Mr Nicholls accepts that if the father had done nothing for a year then his defence to acquiescence might well disappear. That is not this case. It is far closer to the passing remark in the agony of the moment which is retracted soon afterwards. Even if it had been a change of mind, I would have doubts about holding his consent was sufficiently clear and for a sufficient time to amount to unequivocal conduct.

Discretion

54. My decision is not whether F and I should live with their father or their mother. I have to decide whether it is Portuguese or English courts that should determine that important matter.

55. I am bound by the terms of the Hague Convention. I must order their return to Portugal unless the mother has satisfied me that there is a defence of acquiescence. If she does so, I have a discretion.

56. For the reasons I have endeavoured to set out, I am not satisfied that the mother has made out a defence of acquiescence. If I was wrong about that, this is one of the rare cases of acquiescence where I would not exercise my discretion in favour of the mother.

57. I reach that conclusion for a number of reasons. The weight I attach to them is not necessarily in the order in which I set them out. Individually the reasons are persuasive. Together they are compelling.

58. These are Portuguese children of Portuguese parents with no connection to England. The mother's presence here, judging from the children's conversation with Mrs H-W, may be no more than to advance her training.

59. Save for F when he was very young, they have not lived outside of Portugal. They have been happy living with their father alone for the last 4 years. They enjoy the regular visits to their paternal grandmother in Portugal.

60. The children are not English speakers. It is evident that, while they love their mother as they do their father, they were happy in Portugal, though missing their mother. That was caused by her decision to come to England.

61. The children believed their visit was only holiday contact. The pressure to remain appears likely to have come from the mother.

62. The parents intended it to be holiday contact. I have held there was no acquiescence. As Mrs Justice Hale, as she then was, observed in *Re: HB (Abduction: Children's Objections)* (1997) 1 FLR 399, it is particularly important that the policy of the Convention is upheld where children come to another Convention country for visits. If this happens, a parent can let children go with the knowledge that the children will be returned at the end without difficulty. Otherwise such visits may not happen.

63. I am satisfied that, in the spirit of the Convention, the circumstances of this case show that even if there was acquiescence, the prompt actions of the father and the circumstances of the children indicate that they should return to Portugal. It is for the courts there to determine with which parent and in what country they should live.

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