COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

5 April 2004

Wall LG and Gage J

Counsel: Charles Howard QC and Indira Ramsahoye for S.; Andrew McFarlane QC for the father; Henry Setright QC for the mother.

WALL LJ:

1. This is a judgment of the court.

2. On 11 March 2004, at the conclusion of the argument, we announced our decision, and reserved our reasons. Our decision was that the appeal should be allowed; that the order of Hughes J made on 18 October 2002 would be set aside- and that the Originating Summons under the Child Abduction and Custody Act 1985 (the 1985 Act) dated 12 March 2002 would be dismissed. Our reasons for making that order follow.

3. We have before us an appeal under the Hague Convention on International Child Abduction (the Convention) as incorporated into English Law by the Child and Abduction Custody Act 1985. The appeal has several unusual features. These are: -

1) that the appellant is not either of the parents of the children concerned but one of those children himself,

2) the events that give rise to the appeal occurred largely after 18 October 2002;

3) following Hughes J's order of 18 October 2002 the judge dealt with committal proceedings arising from breaches of undertakings given by the father to Johnson J on 14 August 2000 in previous proceedings under the Convention, and made series of strong findings that the father had indeed been in breach of those undertakings; and

4) that on 5 December 2002, Thorpe LJ refused an application by the children's mother for permission to appeal.

4. The case is also remarkable for the length of time, which elapsed between the issue of the father's second Originating Summons under the Convention on 12 March 2002 and the hearing of that summons before Hughes J in October. In addition, it is a simple fact that the children have been in this jurisdiction since 6 December 2001, when the mother brought them here from Croatia for the second time. That period of some two and three-quarter years inevitably means that the children have established themselves in this jurisdiction.

The facts

5. The father of the two children concerned is forty-four. He is Croatian. The mother is thirty-four and English. The parents met on a holiday in Greece in 1990, and the mother moved to Croatia to co-habit with the father in Zagreb. Their first child, S, was born on 24 May 1991 in England. The mother returned to England in January 1991 for his birth, and returned with him to Croatia in the summer of that year. The parent's second child, I was born in Croatia on 24 May 1995.

6. The parents never married, and by 1999 their relationship was under strain. On 30 June 2000 the mother removed the two children to England. She made serious allegations of domestic violence against the father, which included both physical and sexual assaults.

7. On 19 July 2000 she applied under the Children Act 1989 for a residence order, and those proceedings were transferred to the High Court shortly before an Originating Summons under the 1985 Act was issued by the father in which he applied for the children to be returned to Croatia. The mother filed a detailed statement and an affidavit setting out her allegations against the father. However, when the Originating Summons came before Johnson J on 14 August 2000 the mother acknowledged that her removal of the children from Croatia had been in breach of the father's rights of custody under Article 3 of the Convention, and appears to have accepted advice that her allegations against the father did not reach the high threshold required by Article 13(b) of the Convention. As a consequence, there was an order by consent for the orderly return of the children with the mother to Croatia. However, that was on the basis of a series of significant undertakings given by the father as follows:-

1. to refrain from assaulting, threatening, pestering or harassing the mother or the children;

2. to abide by any interim or final recommendations over the issues of residence and/or contact of the said children following an investigation of the said issues by the appropriate authorities in Croatia;

3. not to remove the children from the care and control of mother save for the purposes of agreed contact and not to remove the said minors from the care and control of the mother on their arrival back in Croatia and to encourage the children to reside with their mother in the interim upon their return.

8. In the normal way those undertakings were to continue until further order or directions were made or given by the relevant Croatian authorities. On 21 August 2000, before the mother left for Croatia, the father acknowledged and confirmed the undertakings by a letter from his solicitors. The mother had asked for this assurance because she suggested that he had told a friend that he did not consider himself bound by them.

9. On the same day 21 August 2000, the mother returned to Croatia by air with the two children. They arrived at Zagreb airport at 11:00pm, and in what Hughes J subsequently found to be a flagrant breach of his undertakings the father removed the children from their mother and took them away with him. Furthermore, on the following day, and again in clear breach of the undertakings he had given he refused to hand the children over to the mother. Instead, he had purchased bicycles for them in an attempt to entice them to stay with him. On one of the following days the father took the two children to the mother's address, but refused to allow the younger child to stay with her unless she handed over one of his two passports. This, as Hughes J subsequently found, was a further breach of his undertakings.

10. In order to be able to see I, the mother surrendered S's passport. Hughes J subsequently accepted the mother's evidence that during the period following the return to Zagreb she saw a great deal of the boys but the father effectively was the one who had the last word about where they were and when. There were also further unpleasant incidents between the parents, which resulted in critical findings by Hughes J both in his judgment given on 18 October 2002 and in his findings under the subsequent committal proceedings.

11. On 24 November 2000 the Zagreb Welfare Centre, Dubrava office decided that the children were to live with their father and to have contact with their mother. This brought to an end the undertakings given by the father in the English proceedings.

12. There were further incidents in December and early January 2001. On 4 January 2001 the mother suffered serious injuries in what Hughes J described as a fight between the parents, in respect of which the father was subsequently prosecuted and fined. However, either 5 or 6 January 2001, as a result of the incident on 4 January 2001 the mother left for England leaving the two children in Croatia. She was seen by her general practitioner on 10 January 2001 and her injuries noted.

13. On 23 February 2001 the Ministry of Labour and Social Welfare, which is the second instance authority in Croatia overturned the decision of the Zagreb Welfare Centre and ordered that the two children were to live with their mother. In April 2001 the mother returned to Croatia. The father did not accept the decision of the Ministry of Labour and Social Welfare and initially refused to hand over the children. He then appealed the decision. The mother's case is that thereafter he made it difficult for her and did not comply with the order.

14. On 5 November 2001 the father's appeal against the order of 24 May 2001 was dismissed by the Ministry of Labour and Social Welfare.

15. On 6 December 2001, the mother brought the two children to England for the second time alleging that she was frightened of the father's behaviour and that the children had been psychologically damaged by their experiences in Croatia. On 7 December 2001 the decision of the Welfare Centre was made final.

16. On 12 March 2002 the father issued his second Originating Summons under the Hague Convention seeking the return of the children and an injunction against the mother prohibiting further removal. He also applied for parental responsibility.

17. On 21 March 2002 Holman J gave conventional directions and listed the case for further mention on 11 April 2002. On that date the Originating Summons was further adjourned. On 26 April 2002 the mother's public funding was amended to cover committal proceedings in respect of the father's breach of the undertakings given to Johnson J on 14 August 2000.

18. On 29 April 2002 the Originating Summons came before the President, Dame Elizabeth Butler- Sloss P. She made a number of directions including a direction that the CAFCASS reporting officer was to interview the children prior to the next directions appointment on 16 May 2002 and was to attend that appointment to give oral evidence. She also directed that the anticipated committal proceedings and the mother's proceedings under the Children Act 1989 were to be adjourned and placed before the judge at the directions hearing on 16 May 2002. The Foreign and Commonwealth Office was to assist the father in obtaining a visa so that he could attend the hearing.

19. On 7 May 2002 the committal proceedings were served on the father's solicitors. On 14 May 2002, the two children met the CAFCASS officer, and she reported on 29 May 2002. Her report is an important document to which we shall return.

20. The father came over from Croatia in time for the directions appointment on 16 May 2002, and saw S prior to that date.

21. On 16 May 2002 further directions were given by HH Judge Bloom Q.C (sitting as a High Court Judge). We understand that the CAFCASS officer attended that appointment, and was directed to file her report by 7 June 2002. Both parents were directed to attend the final hearing to give oral evidence in relation to the committal, and the CAFCASS reporting officer was to attend the final hearing unless released by the parties. The father was to have reasonable contact pending the final hearing, and the usual orders prohibiting removal remained. The father was also prohibited from going to the town in which the mother was living.

22. In September 2002, S began his secondary education at a local school.

23. On 14 October the hearing of the father's Originating Summons commenced before Hughes J. It lasted three days and unusually both parents gave evidence. However, the judge did not hear evidence from the CAFCASS reporting officer, nor did she attend the hearing. On 18 October 2002, Hughes J gave judgment. He made a number of serious findings against the father but came to the conclusion that the high threshold set by Article 13(b) of the Convention had not been met. He also decided on the written evidence of the CAFCASS reporting officer that the defence advanced by the mother under Article 13 that S objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of his views was likewise not made out. As a consequence, he made an order that the two children should be returned.

24. On 5 November 2002 the judge gave judgment in the committal proceedings. While stating in terms that the husband deserved to go to prison for his breaches of his undertakings the judge decided to make

no order on the committal summons on the basis that he did not think that it was in the interests of the children that they might be allowed to think that they had been the cause of their father being in prison.

25. The judge refused permission to appeal his order under the Hague Convention and on 5 December 2002 at an oral hearing without notice to the father, Thorpe LJ refused the mother permission to appeal. He described the case as "an unusual one by any standards" and expressed considerable concern that the case had taken from 22 January 2002 to 18 October 2002 to be decided. He described that as ,

"a serious departure from this jurisdiction's commitment to endeavour to determine an Originating Summons within six weeks of issue"

and said that it was regrettable.

26. Thorpe LJ plainly regarded the matter as finely balanced. In paragraphs ten and eleven of his judgment, Thorpe LJ said this:-

"10. The second defence was dependent upon the written report from the Children and Family Reporter since there was no other independent evidence of the children's wishes. The judge considered that report but concluded that it did not amount to evidence sufficient to make good the defence and accordingly his order was for the return of the children, again subject to undertakings to ensure the protection of mother and children from a dangerous father and to ensure that the children would not be separated from her care.

11. Mr Setright has advocated this application with his customary persuasion. He makes an overwhelming point, the obvious point that where a volatile, violent father has once been trusted by an English judge and has proved himself unworthy of that trust he should not again be given precisely the same opportunity to re-offend. That, of course, is a powerful submission and it would not have surprised me in any way if the judgment of Hughes J stood as one of the rare examples in which a judge in this jurisdiction finds the Article 13 defence made and refused the order for return: but it was essentially a matter for the judge who had the opportunity in this case, unusually, of hearing the oral evidence of the parties."

27. Thorpe LJ went on to say:-

"16. Despite Mr Setright's valiant endeavours, I conclude that these were issues for the trial judge. Having seen and heard the parties, he arrived at a conclusion, which was one that could rightly be characterised as a fine one in a borderline case, but the conclusion was for him, and I do not think that any error of principle is demonstrated in either the written skeleton or the oral submissions.

17. So I come to consider the second attack upon the judgment, and that relates to the judge's assessment of the children's wishes. I, hardly contributed: as the younger brother he understandably did not wish to be drawn into the arena. S, equally understandably, was more forthcoming. He said a number of things to the children and family reporter, some of which are extremely worrying. Most particularly he said that his father had been directly violent to him but even more so to his mother, violence which he had witnessed. He said that his father often asked him if he wanted to live with him in Croatia and he usually said "yes" to please his father. He said that above all he could not imagine living away from his mother and that he wanted to live in England with her. He identified the fear that his father might take him away from his mother as being paramount.

18. The judge said of that that the picture was of a boy who expressed the wish to live in England as principally, if not entirely, a wish to be with his mother. He said:

"It is, however, quite clear that the dominant feature of his view is his wish to live with his mother. He does not have a real objection to a return to Croatia in the mother's care."

19. Mr Setright asserts that the judge's summary of the interview is flawed and in particular that the judge failed to note that what the father was asking of S was not if he wanted to live in Croatia but whether he wanted to live with him in Croatia. It is undoubtedly the case that the judge's summary of the report omits those two words from the sentence - the two words are, of course, "with him" -- but overall I do not think that it can be said of this experienced judge that he unfairly summarised the contents and the thrust of the report.

20. Of course, the judge, having heard no oral evidence from S or from the Children and Family Reporter, is in no better position than I am, but I do not think overall that the criticism made of the judge is sufficiently substantial to found the grant of permission.

21. I accept Mr Setright's general complaint that there is some degree of mismatch between the approach that the judge takes to an evaluation of the father's conduct in determining the application under the Convention, and the evaluation of his conduct when he comes to the committal application. That, I suppose, is an understandable mismatch in that judges, when dealing with litigants in contempt, have a natural tendency, and perhaps a need, to underline the importance of undertakings and the importance that the court attaches to due performance, and consequently the severity with which the court views a breach. It might have been better had the judge left the whole issue of committal to be dealt with at a separate and later hearing; but all in all I must record my admiration for a judgment which is clear and coherent and which has throughout proper regard to principles that are to the fore in the determination of any application brought under this international treaty.

22. I recognise that the outcome is for the mother a very hard outcome. I recognise that for her to implement this judgment must seem unbearably difficult, but the question that I have to ask needs any feeling of sympathy for the mother to be stripped from the answer. The question has to be: does this application meet the high test that is set by this court for admitting an application for permission to a full hearing? I have come to the clear conclusion that this application does not meet that standard and it is refused".

Subsequent Events

28. Following the refusal of permission to appeal on 11 December 2002, S made contact with, and instructed, Mrs Anne Carolynn Usher, a solicitor and partner in the firm of Reynolds, Porter Chamberlain in London. Mrs Usher is a well-known and highly competent family solicitor specialising in this kind of work. S had been referred to her by Re-Unite, who had in turn been contacted by S.

29. Mrs Usher has filed a total of five affidavits in the proceedings. She came to the conclusion on her first interview with S that: -

1) he was capable of giving her instructions.,

2) he appeared to be expressing his own views;

3) he would not go back to Croatia emphasising that he was very unhappy there because of his father's behaviour;

4) No one could control his father not even the court and that accordingly a return to Croatia meant living with his father; and

5) he hated his Croatian school where he was bullied and friendless, and where he was not doing well.

30. On 18 December 2002, the father applied to enforce Hughes J's order. On the following day the case came before Black J and Mrs Usher filed her first affidavit. Black J adjourned the case to 20 January 2003, and gave Mrs Usher permission to see all the papers.

31. On 17 January 2003 applications were issued by Mrs Usher for S to be joined to the proceedings and to be represented by her. She also applied for a stay of Hughes J's order and for permission to appeal that order out of time based on fresh evidence.

32. On 20 January 2003 the applications were adjourned by Singer J, and execution of Hughes Fs order was stayed until 28 January 2003. On that day Singer J adjourned all outstanding applications generally with liberty to restore so that mediation under the auspices of Re-Unite could take place. Hughes Fs order was stayed until further order, and the father confirmed that he would take no point concerning any delay on the part of S pursuing his prospective appeal.

33. We are told that three mediation sessions took place in March but were not successful. Mrs Usher also tells us that contact took place between S and his father on 16 March 2003, but that during the course of it, the father had put S under pressure to visit Croatia and had taken passport photographs of

S. There was a further contact on 18 March 2003 following which S gave further and similar instructions to Mrs Usher. Indeed, the father putting pressure on S is a theme of S's instructions to her and the affidavits she has placed before the courts.

34. On 2 July 2003 the father issued an application for holiday contact in Croatia during the forthcoming summer holidays. On 21 July 2003 Sumner J joined S to the proceedings as second defendant and adjourned the question of holiday contact to 25 July 2003. On that Sumner J refused permission for a holiday in Croatia; he gave permission for the two boys to have a holiday with their mother in Spain and reserved his reasons to 30 July 2003. In his judgment given on that day he found that S's wishes were clear and consistent and that they should be given considerable weight because of his age and maturity. On 22 October 2003 Sumner J heard S's application for permission to appeal and granted it with reasons to follow. Those reasons were given on 31 October 2003 and an appellant's notice was filed on S's behalf on 12 November 2003.

The appeal

35. Although Mr Charles Howard QC and Ms Indira Ramsahoye sought to keep alive an argument under Article 13(b) the main thrust of their argument, and the basis upon we decide this appeal, is on the discrete head of relief provided by Article 13 namely: -

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.

36. We have already set out the chronology leading to the children being interviewed by the CAFCASS reporting officer. Her report is dated 29 May 2002. Her interview with the two children, as is customary, took place at the offices of CAFCASS in the Principal Registry on 14 May 2002. The officer interviewed S first and alone, and then I, who requested that S be present. The officer had read the statements and other supporting documents in the case. She reports that the interview focused upon the children's feelings about their removal from Croatia their country of habitual residence, and their wishes in respect of their future residence and care.

37. The CRO records S as telling her that, in general, he was happy in Croatia. He had a half-sister and grandparents there whom he loved and whom he missed. When asked how he thought he would deal with not seeing them, S said he hoped contact would be sustained by letters, cards, e-mails and telephone calls.

38. S is recorded as telling the CRO that he did not particularly enjoy school in Croatia because he found the work difficult. He said that he enjoyed school in England more because the lessons were taught at a slower pace, which made it easier for him to follow.

39. S told the CRO that he loved and missed his father. He said that he would like to see him and speak to him more often. He hoped that his father would visit them in England as often as possible, and that they would visit him in Croatia. The CRO asked S if his father believes he wants to be returned to Croatia and S said yes. When the CRO asked him why S said that his father always asks him if he would prefer to live with him in Croatia and he usually says yes, but only to avoid upsetting him. The CRO asked S if he had every witnessed any violence from his father. S replied that his father had been violent to him, but in most cases the violence was against his mother, which he and I witnessed. She reports, however, that S seemed eager to point out that he was not estranged from his father. He was able to recall happy times when, as he saw it, his father was there for them too particularly to indulge in outdoor pursuits.

40. Of his relationship with his mother, S said that he could not imagine living anywhere without her. He said that he wanted to live in England with her. Apart from enjoying life here, he firmly indicated that living with his mother was the most important aspect of his life now. He described her as being able to listen to his problems, and being there for him when he feels upset. As an extension of his relationship with his mother, S said that most of his friends in England were the children of his mother's friends.

41. S volunteered to the CRO that he knew his father was quite upset about the absence of religion from their upbringing. He said that his father was of the Catholic faith and he would want them to attend mass regularly. However, since they have been in England, he has hardly attended, which he said is

inconsequential, although, at this stage, he wishes to continue in the Catholic faith. Mr Howard placed considerable reliance on the following paragraph in the CRO's report: -

4.8 I asked S what worries him the most about the situation. He replied that he is frightened of the prospects of any future violence from his father and, in particular that his father might take him away from his mother.

42. The CRO found it difficult to engage in conversation with I. He consistently replied, "I don't know" to the CRO's questions. She gained the impression that he was not going to be drawn into the battle between his parents. He nodded his agreement when she put to him that he found it difficult to express his feelings because he did not wish to upset either of his parents. He also agreed that he found it difficult to consider expressing a choice between either parent. He was however, very clear that he did not wish to be separated from S. In short, I struck the CRO as a child who was totally bewildered and confused by what had happened in his life and the breakdown of his parent's relationship. He was, she commented, at an age where, for many children, the effects of any trauma they had experienced were not easily ventilated.

43. The CRO's conclusions were in the following terms: -

6.1 S and I are two children who have been asked to reflect upon the earlier years of their childhood and, as they see it, to balance these experiences against their present circumstances. This has clearly not been easy for them. Although S was perfectly capable of articulating his wishes and needs in respect of his mother, he did not hesitate to express his need for generous direct and indirect contact with his father. I formed the impression that, even then, he seeks reassurance from his father that he would be returned to his mother at the appropriate time, should arrangements be made for him and his brother to visit their father in Croatia.

6.2 Children are almost inevitably overcome by feelings of guilt whenever they feel that they are being asked to express what they see as a preference in respect of which parent would be their main carer. They often feel the need to compensate either by giving clear indications of their need for an ongoing relationship with the absent parent, as in S's case, or to remain silent, as in the case of I.

6.3 Even though S has confirmed that he witnessed and experienced his father's violence, like many children, this appears not to have affected his love for his father or the need to have contact with him. For many children, they simply want the parents' behaviour to stop.

6.4 Whatever the court decides should be the most appropriate disposal of this matter at the final hearing, it will remain the responsibility of the parents to help their children to overcome their unhappy experiences of the acrimony that seems to have characterized their relationship.

6.5 It is my opinion that whichever parent is granted residence of S and I, every effort must be made to ensure that the anxieties related to the separation from the other parent is minimised.

44. The judge dealt with question with the children's wishes in the following way. He summarised I's responses (on which no point is taken) he then continued: -

S, the older boy, was somewhat more forthcoming. He knew the purpose of the enquiry. He said that he had been happy in Croatia and that he wanted to stay in contact with his family there. He preferred his English school to his Croatian because the lessons were a little easier. He told the children and family reporter that he loves his father and misses him and would like to see him and speak to him more often. He said that the father had been violent to him but more so to his mother, which he had seen. He wanted to make it clear that he was not estranged from the father and that he remembered happy times with him. S said that he could not imagine living away from his mother and that he wanted to live in England with her. He also said that when his father asked him if he wanted to live in Croatia he usually said yes, to please his father. That is, of course a wholly natural reaction for a boy of 11.

When he asked what worried him he identified the fear that father might take him away from mother. Overall, the picture is very clearly of a boy who wants most of all to maintain a close relationship with both parents. It is a picture of a boy whose expressed wish to live in England is principally, if not entirely, a wish to be with his mother.

45. The judge then dealt with the Article 13 defence based on S's objections in the following way: -

The Hague Convention requires that children who have been wrongfully removed shall be summarily returned. There are very limited exceptions. Wrongful removal is conceded, rightly, in this case. For the mother, Mr Scott-Manderson's carefully formulated and persuasive submissions preserve the argument that return to Croatia should be refused on the grounds that S objects. I am prepared to assume that at 11, he is of an age when it is appropriate to take account of his views, and the tenor of his discussions with the child and family reporter confirms that. It is, however, quite clear that the dominant feature of his view is his wish to live with his mother. He does not have a real objection to a return to Croatia in the mother's care. That is what is in question, since the mother naturally and responsibly says that however disappointed she would be she would not abandon the children, but would return with them if they had to go back.

Accordingly, the child objection defence is not raised on the facts of this case and it follows that it is unnecessary for me to go on to consider the sometimes complex legal position where one child does have objections and another younger one has not expressed views.

46. Mr Howard and Miss Ramsahoye attack both the CRO's report and Hughes J's decision based on it in a number of ways. They argue that the judge dismissed S's objections on what may have been the false premise that what he objected to was separation from his mother as opposed to a return to Croatia. They criticised the CRO for not asking the specific question: -

"Do you object to returning to Croatia"?

They further submit that the judge failed to give adequate weight to S's well-founded fears of his father particularly in the context that he had made known to the CAFCASS officer his views relating to his father's conduct towards both S and his mother, and the fear that he expressed that his father might take him away from his mother.

47. Counsel also criticise the judge for failing to give adequate weight to the findings which he himself had made about the circumstances in which S had found himself in August 2000 following his return to Croatia namely the enforced separation from his mother and I, and not being returned to his mother's care after the custody decision in May 2001. These, counsel submitted, were likely to have had an impact on his views about returning to Croatia. In short, the judge was wrong not to conclude that it was reasonable for S to take the view that in the light of his history, a return to Croatia posed a serious risk of separation from his mother.

48. However, counsel laid greater emphasis on their submission that the judge's conclusion in relation to S's objections could not now stand in light of the fresh evidence (admitted without objection by either mother or father) contained in the four affidavits of Mrs Usher. Counsel submitted that these demonstrated that S's views had developed and crystallised to such an extent since the interview with the CRO in May 2002 that it would now be wrong for the court not to revisit those views. They submitted that S's views as expressed to his solicitor had been clear, consistent, credible and not influenced by any adult and in particular by his mother.

49. Furthermore, they submitted, the passage of time, which had elapsed since the order of the judge in October 2002 could not and should not be ignored in the context of S being at grave risk of physical or psychological harm if now returned to Croatia contrary to his wishes.

50. S's appeal was, naturally, supported by his mother. For the father, Mr Andrew McFarlane QC was in a difficult position. The father was not present but had made a statement, which was placed before us indicating that he was not able to be present because his father was having a serious heart operation in Zagreb on 12 March 2003, and the father would be taking him to hospital.

51. In his statement however the father argued that the order of 18 October should be upheld. He was critical of the delay in the hearing of the second Hague Convention proceedings, and felt that the delay had very much prejudiced the success of enforcing the return order so far. He pointed out that nobody had required the CRO to attend court or challenged her conclusions. He pointed to the fact that S had expressed a need and a desire to have regular contact with his father, and that the effects of separation should be minimised.

52. He pointed out that the delays in the case had meant that there had been a long period of isolation when the children had not being able to see their Croatian family at all and that this isolation had caused S's feelings towards him to be altered. Previously, matters had been improving.

53. The father also asserted that there had, very sadly, been manipulation of the children, which had played an important part in changing their attitude towards him. The absence of contact had lessened the children's feelings. There had been "supervision" in England for the ostensible purpose of preventing the father re- abducting the children, although there had never been any hint that the father was planning to do so. None the less, he had been branded as somehow "bad" and undesirable. The whole climate of contact had been designed to present him as somehow "dangerous and to be feared - not to be trusted alone with my own children".

54. He had read Mrs Usher's affidavits. He did not accept that S was in fear of him. He pointed out that S did not become involved in the proceedings until after his mother's application for permission to appeal had been dismissed. He believed that S had been manipulated by his mother, and that his application was designed to complete what she had started but failed to achieve. He said that when the order was made in October 2002 he spoke to the children who reported their mother as telling them that they were not going back. He said that they had been excited when they thought they would be seeing their relatives again. There was, he said, no evidence of fear or unwillingness to return.

55. He joined issue on a number of points in Mrs Usher's affidavits. He denied blaming S or trying to pressurise him. He was hurt by the way in which S now said that he did not enjoy life in Croatia, and by the way in which he was portrayed in the evidence. He says that he is constantly frustrated in his attempts to speak to the children on the telephone. He says that the children's half sister had suffered from not seeing her brothers. He asks the court to uphold the judge's order.

56. For the father, Mr McFarlane recognised that he was in a very difficult position. He was without specific instructions apart from those contained in the father's statement. He acknowledged that the wishes and feelings now reportedly expressed by S were incompatible with those expressed to the CRO and that S, on that evidence, made out a powerful case under Article 13.

57. Mr McFarlane repeated the criticism made by the father of the delay in hearing the second Hague Convention proceedings and pointed out that the father did not appear responsible for any delay in that time. The delay, however, he acknowledged was plainly favourable to the mother's position and the case now put forward on behalf of S. It was, equally plainly, highly detrimental to the father's position.

58. He recognised that S was now expressing strong opposition to a return to Croatia. The father also recognised that. That father's position however was that S was not in a position to form a balanced judgment on the issue having being away from Croatia for so long. Mr McFarlane's instructions were that if the order was enforced and that if after a period of time in Croatia S continued to express a wish to live in the United Kingdom then the father would respect his wishes and agree to a move to the United Kingdom.

59. Finally, and most helpfully, Mr McFarlane accepted that if the appeal was allowed it was not in the interests of the parties or the children for there now to be a re-trial of his application. The father, accordingly, accepted that if the appeal were successful, his application under the Hague Convention would be dismissed. In other words, no distinction would be made between S and I. We have no doubt that this is the right approach.

The authorities

60. There are, of course, several leading authorities on the question of a child's objections to return under Article 13 of the convention. The classic identification of the principles to be applied is contained in the judgment of Balcombe LJ Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242. The latest distillation of the principles is set out in the judgment of Ward LJ in this court in the case of Re T (Abduction: Child's Objections to Return) [2000] 2FLR 192. We cite the seven points identified by Balcombe LJ in the former case, and set out by Ward LJ in the latter at [2000] 2FLR 192 at 202: -

1. The part of Article 13 which relates to the child's objections to being returned is completely separate from paragraph (b) and there is no reason to interpret this part of the Article as importing a

requirement to establish a grave risk that the return of the child would expose her to harm, or otherwise place her in an intolerable situation.

2. The questions whether: (i) a child objects to being returned; and (ii) has attained an age and a degree of maturity at which it is appropriate to take account of its views, are questions of fact which are peculiarly within the province of the trial judge.

3. It will usually be necessary for the judge to find out why the child objects to being returned. If the only reason is because it wants to remain with the abducting parent, who is asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion.

4. Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. (As a matter of fact, the child S, whose objections prevailed, was only 9 years old.)

5. If the court should come to the conclusion that the child's views have been influenced by some other person, for example the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views.

6. On the other hand, where the court finds that the child has valid reasons for her objection to being returned, then it may refuse to order the return.

7. Nevertheless it is only in exceptional cases under the Hague Convention that the court should refuse to order the immediate return of a child who has been wrongly removed.

61. In the instant case, Hughes J presumed, and we accept, that S has attained an age and degree of maturity at which it is appropriate to take account of his views. The door, accordingly, is open to exercise of a discretion not to return. In identifying the matters which require to be established in relation to age and maturity, Ward LJ at [2000] 2FLR 192, 204: -

3. So a discrete finding as to age and maturity is necessary in order to judge the next question, which is whether it is appropriate to take account of child's views. That requires ascertainment of the strength and validity of those views which will call for an examination of the following matters, among others: -

(a) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is her views which. have to be judged appropriate.

(b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?

(c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?

(d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?

The application of these principles to the facts of this case

62. Mr Howard took us through Mrs Usher's affidavits, and the statements made by S to her. The first point that we need to make - and it is an important one - is that Mrs Usher was satisfied that S had not been put up to making his objections by his mother, and that, in Ward LJ's words, his views had not "been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent".

63. It is, of course, highly unusual for a child to be represented in Hague Convention proceedings. A child's wishes and feelings are normally ascertained by the CRO, and reported by the CRO to the court either in writing, or orally, or both. As the procedure is summary, it is by no means unusual for the children to be seen on the day of the hearing itself, and their views reported to the judge orally by the CRO.

64. What happened in the instant case is, we think, slightly unusual and perhaps unfortunate. Because of the delay in the hearing, the CRO interviewed the children on 14 May 2002 (2 days before the directions appointment before Judge Bloom on 16 May 2002), and reported in writing on 29 May 2002. There was then a very substantial gap before the matter was heard before the judge in October.

65. In these circumstances, it is, to our mind, somewhat surprising given S's subsequently expressed views that the CRO was not invited to interview the children for a second time, shortly before the October hearing in order to report their up to date views to the judge. The mother was, however, represented by highly experienced counsel and solicitors before Hughes J, and it may be that a decision not to ask for a further CRO report was taken on the basis that to do so might open up the mother to criticism that she was indeed attempting to influence S in the period running up to the hearing. In any event, none of that can affect S's right to advance his case now that he has been given permission to do so, and we have admitted fresh evidence on his behalf.

66. The second point we need to make is that where a child is to obtain separate representation, it is inevitably of the greatest importance that the court in permitting that representation and giving permission to appeal should, once again, be satisfied that the child has an independent viewpoint which needs to be placed before the court and which has not been advanced. Once again, it is of the utmost importance to ensure that the child is acting independently, and wishes to put across a discrete point of view.

67. In the instant case we have the advantage of a judgment from of Sumner J giving permission which carefully considers all the relevant factors and reaches the following five clear conclusions: -

1. the clear consistent and long held objections of S to being returned to Croatia;

2. the behaviour of the father which gives credence to those objections;

3. the length of time S has been in the United Kingdom;

4. the success of his school progress here as compared to his school experience in Croatia;

5. the good prospect that the evidence will be admitted and weight given to it.

68. We do not think it necessary to traverse Mrs Usher's evidence in the detail set out in Mr Howard's and Miss Ramsahoye's position statement. It is, however, important to note that when Mrs Usher saw S for the first time on 11 December 2002, she had not been briefed and came to the matter cold. She had not seen any of the court papers, and as we have already indicated saw S as a result of a referral from Re-Unite. Whilst S was brought to the appointment with her by his mother, Mrs Usher saw S on his own and rapidly formed the view that he was an articulate and sensible boy who was capable of giving her instructions.

69. S gave Mrs Usher a description of the family's life in Croatia and the domestic violence, which he and his brother had witnessed and occasionally experienced themselves.

70. S also described what happened when he, his brother and his mother returned to Croatia in August 2000. He described his father taking his brother and himself from his mother at the airport, and that he was frightened for her and did not know where she was. He said his father had refused to let his brother and himself see his mother for periods and had told them lies about their mother. A number of aspects of life in Croatia made him unhappy. These included what he described as his father "playing around with us" - in particular refusing sometimes to allow them to see their mother or, if he did allow them to see her, arriving and then taking them away. He was also extremely upset by the fact that his father had assaulted his mother and in particular had seen the bruises and scratches on his mother following a particular incident when his mother had refused to hand over her passport. He told Mrs Usher that he was scared of his father because "we know what he has done to mum". He appears certain that nobody could control his father, not even the courts, so that it would be inevitable that he would be returned to live with his father if he returned to Croatia.

71. According to Mrs Usher it was the father's obsessive control which seemed most to disturb S. He said, "dad controls me too much" and described his father as being like a policeman. He was always demanding to know, after every visit or telephone call where the family was, what they were doing, and

who we were with. His father had been extremely angry when his mother had obtained custody of the children. According to S he went mad and was breaking things. S said he was really frightened. He described another incident when his father compelled him to go through his mother's handbag " looking for an address or anything". He said that he hated doing this.

72. S also described in some detail and with some strength of feeling his strong dislike of his school in Croatia. He said, "he hated" it. He said that he was bullied by his classmates and some of his teachers because he was different; that everyone at the school said that there was nothing good about him; that he had no friends except one "sort of friend"; and that he didn't get the extra help with his school work that he does in England. By contrast he showed Mrs Usher a number of documents indicating how well he was doing at his English school.

73. Mrs Usher reports S's understanding that a return to Croatia was a return to both the care and (more particularly) the control of his father as well as a return to a situation where he believed, his father would continue to be abusive and violent to his mother and to both children. She gave the impression that nothing could change that perception.

74. S confirmed to Mrs Usher that he had told the "Welfare Officer" by which he meant the CRO (what he had told her). However, he did not think that the CRO could have explained it all "properly to the judge". 75. In answer to further questions from Mrs Usher, S confirmed that if his father came to England it would be "okay" to see him, provided she could guarantee that his father would not be able to remove him from his present home, where he feels happy and settled. S craved certainty and safety above all.

76. Following the making of the application for permission to be joined to the proceedings and for permission to appeal Hughes J's order on 17 January 2003, Mrs Usher saw S for the second time on 19 January 2003. She reported on that meeting in an affidavit sworn on 28 January 2003. By this time, of course, she had seen the court papers. Mrs Usher formed the clear impression that S had not in anyway been "primed", and the language used to her was wholly age appropriate. He struck her as a sensible child with maturity in some ways beyond his years. She explained to him that she wished to discuss with him what he had said to the CRO.

77. S told Mrs Usher that whilst he had explained to the CRO that he did not like his school in Croatia, he had not told her about the problems that he had had at school there. Mrs Usher asked why not and he replied that he thought that he had told her more than what was in the report but that he was " a bit nervous" when he first met her and did not tell her the whole story. He said that he just told her a bit, and that she did not ask anymore. He gave Mrs Usher some details about his family in Croatia, and then talked fluently and quite vehemently about how much he disliked his school. He gave her a number of details including the description of an occasion when the teacher had put all the names of the pupils in the class on the blackboard, and invited each member of the class to nominate those they liked and those they did not. He (S) had come out as one whom "nearly everyone disliked". He had found this humiliating. He appeared fixed in his determination not to return to Croatia. He said that he would not get on the plane. He repeated his two principal objections to a return. Firstly, he did not want to go back to the unhappy situation that he had endured for sixteen months on the last occasion, and which he is certain will be repeated. He repeated his belief that his father wanted him to go and live with his father and "he'll do what he wants". The second reason which S gave for finding it intolerable to return and was the prospect of going back to the school which he clearly has very unhappy memories.

78. S's views remain consistent throughout the period leading up to the hearing before us in an attendance note which she made on 20 October 2003 Mrs Usher recorded:

(When asked what he would do if the Court ordered a return he said simply "! Won't go" - and I did not push the issue further). He finds the shadow of the proceedings difficult but is able to disregard them for significant periods of time. When he is obliged to face the possibility of him returning to Croatia he finds it troubling and frightening. The passage of time has not dimmed his recollections of the difficulties they encountered when living in Croatia nor his own resolve about not wanting to return there to live. He is bemused by his father's approach but very determined - now that he has clearly settled in this country and made sure that I understood, very clearly, that his instructions to me were to make sure that the judge understood S's very strong wish to remain here, his strong objection to returning to Croatia and his determination to remain here with his mother and brother.

79. In her final affidavit sworn on 3 March 2004, Mrs Usher reported on contacts, which Shad had with his father, and in particular the pressure, which he felt, his father was putting on him to see his father. He repeated to Mrs Usher his adamant wish not to return to Croatia and Mrs Usher formed the view that it was his father's behaviour over the past two years which had further alienated S, and increased his determination to fight for his current settled world which he clearly enjoyed - the litigation apart.

80. Mrs Usher concluded with the following paragraph: -

I was really very very concerned for this child. He has been under enormous pressure and clearly feels responsible for his mother and brother as well as his own decisions. His father apparently seeks to blame S but the effect has been to increase this young man's determination not to return to Croatia - and his principle reasons remain (a) his father's unpredictable behaviour and abusive language and (b) the inability of anyone to persuade Mr Jane that we should listen to S's views and wishes (c) he is settled and happy at school (in contradiction to his experience of his Croatian school) in his present environment does not wish that to be interrupted.

81. We are of course dependent for our assessment of S's wishes and feelings on the accuracy and integrity of Mrs Usher's reporting. In addition, however, it is quite clear that S's reasons for his objection to a return to Croatia are, as Ward LJ put it in Re T [2000] 2FLR 192 at 204 "rooted in reality".

82. That this is so is demonstrated by the fact that Hughes J made a series of findings in the proceedings, and in particular, having seen and heard both parties, was satisfied on the criminal standard of proof that the father had breached the undertakings previously given to Johnson J. Indeed, the findings of fact which the judge made about the father's behaviour at the airport when the mother and children arrived were based on the father's own evidence. The judge said in terms that the father's actions at the airport were a clear breach of his promise and indeed a flagrant one. He had simply overridden the mother's objections and left her with the choice of obeying or causing as scene, which was likely to be painful. The judge made a similar finding about the events of the following day, basing himself once again upon the father's own evidence.

83. The judge then goes on to describe the father refusing to allow I to stay with his mother unless she handed over at least one of the boy's passports to him. And he describes the father keeping I as a hostage or guarantee until the passport was indeed handed over. That he described as a very clear breach of what the father had promised in court.

84. The judge then went on to make a number of clear and serious findings against the father in relation to his contact, in particular his crude and inappropriate sexual behaviour towards her.

85. Later in the judgment, during the period after which the undertakings had expired the judge describes a further confrontation engineered by the father with the mother in which the judge describes the father as not being fully in control of himself and his behaviour as to some extent alarming.

86. The judge further describes a serious incident on 4 January 2001 in which the father must have struck the mother hard and several times on the face since her face the following day was badly swollen and her eyes unpleasantly bruised. She also had abrasions and scratches down one side of her face. The judge describes this as a wholly unjustified assault, whether or not the mother hand angered the father by interfering with his telephone book. As we have already indicated, the father was prosecuted in Croatia and fined.

87. The judge also accepted the mother's evidence that the father was angry at the decision of the Croatian authorities to give her custody of the children, and that he prevaricated for some days before returning them to her.

88. These findings by the judge plainly give substantial credence to S's statements to Mrs Usher, and strongly re-enforce the strength of his objection to a return to Croatia. Such return, he believes, would be to his father's care and he has good cause to fear his father's behaviour.

89. In all these circumstances, we are satisfied that S's Article 13 defence is made out. He is of an age and degree of maturity at which it is appropriate to take account of his views. His views are clear and coherent. They are rationally based. They are not unduly influenced by the views of his mother.

90. Furthermore, the reality is that S has been living in this jurisdiction with his mother and brother consistently since 6 December 2001 a period in excess of two years. He is well settled and is doing well at school. Whilst we share the father's anxiety about the delays leading up to the hearing before Hughes J in October 2002, it does not seem to us that any delays after that date are culpable or lie at S's door. Singer J adjourned the application in January 2003 for mediation: mediation was not successful. The father restored the matter for enforcement on 2 May 2003. We understand the father applied to Sumner J for contact in Croatia an application, which the judge refused on 29 July 2003. The application for permission to apply was, we are told, opposed by the father, and thus was not heard by Sumner J until 22 October 2003. No application was made by the father for expedition in this court, and we can only comment that, if the father had conceded the permission application, the matter would have reached this court at a substantially earlier date.

91. In any event, the reality is that S and his brother are now settled in England. They have been here for double the period within which a Hague application has to be made, and in our judgment it would be a wholly inappropriate exercise of discretion not to take the delay into account when considering whether or not S and his brother should be returned to Croatia.

92. In all these circumstances, the appeal succeeds; the order of Hughes J will be set aside and the Originating Summons dismissed. This means, of course, that both S and I will remain living with their mother in the United Kingdom.

93. We add together two riders to this judgement. The first relates to the decision of Hughes J. Although his findings about S's wishes and feelings cannot stand in the light of the additional information we have read, we share Thorpe LJ's admiration for a judgment, which is clear and coherent, and which throughout has proper regard to principles which are to the fore in the determination of any application brought under the Convention. Thorpe LJ recognised - as indeed the judge recognised - that the outcome Hughes J's judgment was very hard for the mother. Cases under the Hague Convention are often hard cases. The English mother returning to this jurisdiction with her children in the belief that she is coming home has become a common place of the Convention. To fulfil the international obligations to which Thorpe LJ refers, judges often have to return children to the country of their habitual residence in circumstances in which, were they hearing proceedings under the Children Act 1989, they would almost certainly grant residence orders in the mother's favour.

94. This case, accordingly, underlines the importance of insuring that when the Article 13 defence, which has succeeded in this case is being advanced, all appropriate steps have been taken to ensure that the information required for the judge to determine that application is before the court. As we have already commented, the abducting parent may well feel inhibited in presenting such a defence in fear of the accusation that the child had been primed or pressurised into objecting. That anxiety, however, should not inhibit the presentation of a genuine case. CRO's and judges are astute to weed out cases where the objections are synthetic. What, we think, was unfortunate in the instant case is that there was such a substantial gap between the filing of the CRO's report and the final hearing. As we commented earlier, if the CRO had been invited to see S a second time nearer the final hearing, it may well be that the CRO would have reported in different terms.

95. In any event, we are entirely satisfied that this was a proper case for S to be separately represented and we are extremely grateful to Mrs Usher for the care and integrity that she brought to that representation.

96. Our second rider is that this is a case in which these children have now twice been wrongfully removed from the country of their habitual residence. It is now imperative that the stability that they have begun to enjoy over the past two years is consolidated. It is, however, equally imperative that they do not lose the Croatian side of their heritage. Inevitably, the events through which this family have passed, and the intense anxiety brought about by the litigation means that trust and mutual respect have been almost entirely eroded. No doubt it will take substantial time for the situation to be repaired, but we urge both parties - and in particular the father - to signal their acceptance of the present situation and to attempt to put in place a regime of contact which permits the father to restore his relationship with both S and I. It may well be sometime before sufficient trust can be restored to enable the children to visit their Croatian relatives in Croatia, and in this context much will depend upon the father's reaction to the outcome of these proceedings. But we are in no doubt at all that the father loves both children and we are equally in no doubt that it is in their best interest for there to be a proper

relationship between them and their father. We do not think that S was lying to the CRO when he was able to tell her about happy experiences with his father in Croatia, and we think it highly likely that the relationship between the two children and their father is capable of being restored. It seems to us, however, imperative if this is to occur that the father accepts that the two boys will now be living permanently in England with their mother. If he can accept that, and can show the boys that he accepts it that will go a long way towards restoring mutual trust and confidence.

97. These are all, however, not matters for us but for the future. Our function is to adjudicate upon the appeal, which we have done.
