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[28/05/2004; High Court (Family Division) (England and Wales); First Instance]
Re C (Abduction: Settlement) [2004] EWHC 1245 (Fam)

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

28 May 2004

Singer J

Re C (Abduction: Settlement)

COUNSEL: Henry Setright QC (instructed by Reynolds Porter Chamberlain) for the Plaintiff Father; Alison Ball QC and James Gatenby (instructed by Ballam Delaney Hunt) for the Defendant Mother; Michael Nicholls (instructed by Cafcass Legal) as Advocate to the Court

Singer J:

Background

[1] On 12 December 2003 I handed down a judgment [2003] EWHC 3065 (Fam.) in this case, which has been reported as Re C (Abduction: Interim Directions: Accommodation by Local Authority) [2004] 1 FLR 653. There I considered the basis and extent of the court's power to give directions under section 5 of the Child Abduction and Custody Act 1985 (CACA), and in particular the power to direct a local authority to make such arrangements as are necessary for a child to be placed with an appropriate person, institution or other body where such a course is necessary 'for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application'.

[2] Between 1 and 3 March 2004 the substantive hearing of the father's originating summons seeking an order for the return of the child pursuant to the Hague Convention on the Civil Aspects of International Child Abduction resumed part-heard before me. This is my judgment in relation to that hearing, which should be cited in any report as Re C (Abduction: Settlement).

[3] For the factual background I need do no more for present purposes than to repeat what appears at [3] of the earlier judgment. The American father and the Irish mother (to whom I shall refer as F and M) married in California in 1994. Their only child S was born in the same year and is ten today. Until December 1998 the family home was in California, but in

that month M kept S in Ireland after the end of an agreed holiday there. F instituted Hague Convention proceedings in Dublin and in July 1999 a consent order for the child's return to California was made. It was envisaged that M and the child would both arrive there in time for a hearing before the California courts later that month, but M did not appear at court and took no further part in the proceedings, with the result that in October 1999 that court made an interim custody order in F's favour. What had apparently happened was that shortly after she and the child returned to America M re-abducted the child in the same month of July 1999, but this time made her way to England. There she assumed names for herself and the child in order to escape detection, which indeed she did until they were traced to Liverpool more than four years later. Just before the first hearing before me on 17 October 2003 S had on 15 October 2003 been removed from M and placed pursuant to a police protection order in foster care provided through the good offices of the relevant local authority.

[4] To bring the history up to date, S was reunited with M on 31 October 2003 subject to a variety of conditions, including the tagging order which (at the suggestion of M) I had made, and with which the earlier judgment also deals. M and S were seen by a Cafcass officer at their home on 19 November 2003 pursuant to a direction I had made, for a report to be prepared dealing in particular with S's maturity and any objections to her return to America within the terms and meaning of article 12, and the officer's observations concerning her degree of settlement in relation to article 12. The Cafcass officer arranged for contact to take place, observed and supervised by her, on 24 November 2003. That contact seemed to go encouragingly well. Sadly the same cannot be said of the next attempt at direct contact which took place on 20 December, when M was to be present throughout. Whatever the reasons for whatever took place (and both are highly contentious) this was in the result a disaster, although (once it becomes clearer to the parties whether or not S is to return to America) a setback which may hopefully be surmountable. There has only been indirect contact since then. No clear picture emerges, on the written evidence before me, to establish the true reasons for or the extent of the child's distress arising from that incident.

[5] In the course of the hearings before me last December both parties had expressed interest in availing themselves of the opportunities for mediation available, in appropriate cases, through Reunite. To facilitate what might have been a productive alternative or adjunct to the court process, I had in an order dated 17 December 2003 included a declaration that:

'if prior to the resumption and determination of the substantive hearing of the application in the originating summons the parties agree to attempt to resolve the issues between them (or some of the issues) through mediation, nothing said or done by either party in agreeing to make such an attempt or in the course of the proposed mediation will be admissible in evidence herein (whether as evidence of acquiescence on the part of the plaintiff or otherwise) and that the court will draw no inference about the strength or otherwise of a party's case in the proceedings from his or her agreement to make such an attempt.'

But as it transpired this initiative did not in this case bear any fruit, and the case resumed before me on a fully-contested basis.

[6] There is no dispute but that in July 1999, for the second time, S was wrongfully removed by M from America, the country of the child's habitual residence, in breach of the rights of custody of F, and that her whereabouts from then until October 2003 were deliberately concealed from F. The concealment involved assuming new identities for both M and S which included, in the case of the child, elaborate and planned arrangements for her to take over the birth date as well as the name of a child who had died. In terms, therefore, of the

degree of parental determination displayed to follow through the abduction and to sever the child's relationship with her father, this case is at the extreme end of the range.

[7] M seeks to justify, or at least to explain, what she did by reference to what she alleges was the course of conduct to which F subjected her and the child during and after cohabitation. Those are matters with which I will deal when considering the quality of the defence which M raises under article 13(b) of the Convention. But at this point may I simply acknowledge that, as between these adults, M has seriously wronged F by what she has done. If the issues were simply adult issues then it would be easy, and reasonable, to adopt the standpoint that it would be morally objectionable to permit her to derive benefit or advantage from that course of conduct.

The introductory questions of law relating to article 12(2)

[8] When I adjourned the hearing last December I had canvassed with counsel the difficulty which, as a matter of first impression, I felt in aligning my preliminary understanding of article 12(2) with the relatively limited observations upon that provision contained in English caselaw. Counsel agreed that there did appear to be a point of substance, and accordingly I invited Cafcass Legal to instruct counsel to attend the adjourned hearing as a friend of the court (without involving any representation of S) to provide me with assistance concerning the provisions relating to settlement and to the one-year period specified in article 12 of the Convention. Thus it was that Mr Michael Nicholls came back into the case to present submissions on these questions alone, but did not participate beyond the point where I made my ruling on what I will call the introductory questions of law posed below. I am very grateful to all counsel for the depth and breadth of their researches which have helped and enabled me to form my view of the meaning and import of article 12.

[9] The Convention must of course be read as a whole, but two key provisions are engaged for present purposes once (as in this case) it is established or conceded that the child in question was habitually resident in the requesting state at the time of the wrongful removal or retention, and that that removal or retention was in breach of the rights of custody of the parent left behind. Those provisions are articles 12 and 13 which are (so far as material) in the following terms:

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.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

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 was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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.

[10] A further question arises about the effect of article 18, which provides:

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

[11] The proceedings in this case were perforce commenced more than a year after the date of the wrongful removal, F having been kept in ignorance of his daughter's whereabouts from July 1999 until last October. Article 12(2) (as we have come to call it) therefore applies. Three questions of law as to the interpretation and effect of that provision seem to me to arise

-In an article 12(2) case, if it is indeed 'demonstrated that the child is now settled in its new environment', does the Convention give rise to a discretion nevertheless to order return, or is there quite simply no remaining Convention jurisdiction to make any such order?

-What if any impact does article 18 have on these questions?

-How if at all is the answer to the first question affected if the child's whereabouts have been actively concealed from the left-behind parent for part or the whole of the time since wrongful removal or retention?

[12] I reached the following conclusions, and ruled accordingly during the second day of the March hearing (reserving to this judgment my detailed reasons).

-If in such a case the court is satisfied that 'settlement' has taken place then the application falls from the Convention's ambit entirely, and no discretionary power to order return subsists.

-Article 18 creates no residual jurisdiction to make a return order under the Convention. Its purpose and effect are to make it clear that the Convention in no way limits or precludes the receiving country from ordering return pursuant to its own domestic laws.

-Deliberate concealment does not stop the year's time running, although it may be and often is highly material when the court considers whether settlement is demonstrated.

Conclusions on the evidence

[13] Upon this analysis, clearly the first question for consideration in the light of the documentation filed in the case (for I was not asked to nor did I hear any oral evidence) was whether S was settled in her new environment, for if so the Hague Convention application fails irretrievably. That is indeed my finding, for the reasons which I will explain below. But I will also consider what the position would be if my conclusions in relation to settlement are

wrong. The final parts of this judgment therefore deal with my decisions concerning the article 13 defences raised of S's objections to an order for return, and the contention that to order her return will give rise to 'grave risk that ... return will expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'. Upon the basis of the existing caselaw I conclude that neither defence would be made out.

Interpretation of article 12(2)

[14] Mr Nicholls submits that the only rule of direct jurisdiction to be found in the Convention is article 12, and that the meaning of the text is clear. Where wrongful removal or retention is established within the terms of article 3, then article 12(1) requires the relevant authority in the requested state to order 'the return of the child forthwith' to the state of habitual residence. That order is mandatory (subject to article 13) where proceedings are commenced within a year from the removal or retention.

[15] If that year has elapsed before proceedings are commenced the authority concerned 'shall also order the return of the child' (but not expressly, be it noted, 'forthwith'). That obligation to order return is also subject to article 13.

[16] If, however, 'it is demonstrated that the child is now settled in its new environment' then (submits Mr Nicholls, supported by Miss Ball for M) the use of the word 'unless' preceding that phrase not only removes the obligation to order return but renders it impermissible to do so. If in such a case there is no power to order return, then there is clearly no room to imply a discretion to order return once a finding of 'settlement' has been made.

[17] A discretion not to order return does arise as a result of the express words of article 13, to the effect that the relevant authority of the requested state 'is not bound to' (but therefore still may) order the return of the child if either of the two 'exceptions' under article 13(a) or (b) is established by the person opposing return. Similarly the next paragraph establishing what in shorthand can be described as the 'child's objections defence' envisages that the relevant authority 'may also refuse' to order return, giving rise to a like discretion to order return notwithstanding established objections.

[18] English and other courts have consistently construed article 13 in this way. The exceptions or defences are not knockouts. They simply open the door to the option, exceptionally, to decline to order return. The law reports show many examples of cases where courts exercise this option to order return notwithstanding an established defence, usually when the court concludes that the importance of maintaining the underlying policy purposes of the Convention outweighs the consequences of consent or acquiescence, the article 13(b) risk, or the strength of the child's objections. The classic statement of the ingredients of this balancing exercise is the judgment of Waite J (as he then was) in W v W (Abduction: Acquiescence) [1993] 2 FLR 211.

[19] But there is nothing express in the wording of article 12 to require, nor does its structure leave scope for any implication, that some analogous balancing exercise arises in a settlement case. Stripped to its essentials article 12 has three mandatory requirements once wrongful removal or retention is established:

-to order return forthwith; unless

-more than the relevant year has elapsed, in which case nevertheless order return; unless in addition

-settlement is demonstrated, in which event make no order under the Convention.

[20] The fact that the obligation to order return may be lifted if an article 13 'exception' is established does not impinge on a case where there is neither obligation nor power to make that order. Where the option to order return does not arise because the Convention makes no provision for it, there is no Convention balance to be struck.

[21] Mr Nicholls submits in relation to article 18 that, again, its meaning is clear. 'The provisions of this Chapter' to which it applies are Chapter III, entitled Return of Children and comprising articles 8 to 19 inclusive. Those provisions of this Convention could only 'limit the power of a judicial or administrative authority to order the return of the child at any time' if the Convention code were to be read as supplanting or suppressing the ordinary, internal, powers of those authorities of the requested state. This is clearly not the case. In this jurisdiction, for instance, the failure of a Hague application may and often does lead more or less seamlessly to an investigation of what is in the best welfare interest of the child in the context of a Children Act 1989, or wardship or inherent jurisdiction application, one outcome of any of which may be an order for the child's return.

[22] It would, on the face of it, be hard to read article 18 as conferring an additional or residual power to order return under the Convention in a case which does not fall within it.

The route to interpretation

[23] Thus far, in considering the interpretation of the Convention, I have dealt with what was submitted to me and what does seem to me at first blush to be 'the ordinary meaning to be given to the terms of the treaty in their context'. That phrase is taken from Section 3 (Interpretation of Treaties) of the 1969 Vienna Convention on the Law of Treaties which applies to treaties between States (article 1). The relevant provisions are:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

[24] How does the postulated reading of article 12 fit with the second requirement of article 31(1) of the Vienna Convention, that ordinary meaning must be given to the terms of the treaty 'in the light of [the Hague Convention's] object and purpose'?

[25] The objects and purposes of the Hague Convention are to be found first in the terms of its preamble, and in article 1:

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[26] I need not rehearse the sound policy reasons which led to the negotiation of the Hague Convention in the first instance, and which subsequently have contributed to its spread and development as a most efficacious international mechanism. But for present purposes I have emphasised the use in both the preamble and the opening article of the key word 'prompt'. 'Prompt' in this context does not refer to the separate requirement (encapsulated in article 2) for Contracting States to 'use the most expeditious procedures available' to secure the implementation of the Convention's objects. 'Prompt' relates to the time lapse between wrongful removal or retention and the 'return of the child forthwith' to be ordered under article 12(1) where the interval is less than a year: to be contrasted (I repeat) with the less urgent obligation to order return envisaged where more than a year has run.

[27] That contextual meaning for 'prompt' is supported by two (no doubt amongst other) observations of senior English judges. In Re HB (Abduction: Children's Objections) (No 2) [1998] 1 FLR 564 Hale J (as she then was) at 568 said:

It is obvious that there are now very serious questions about where the best interests of both these children lie. Mr Nicholls points out that the object of the Hague Convention is set out in its preamble. In essence this is to further the best interests of children by ensuring their speedy return to the country where they have been habitually resident. Once the time for a speedy return has passed, it must be questioned whether it is indeed in the best interests of a child for there to be a summary return after the very limited inquiry into the merits which is involved in these cases. Article 12 of the Convention recognises this by allowing the court to refuse to return the child if proceedings are brought more than a year after the wrongful removal or retention of the child when the child is now settled in its new environment.

[I recognise, in passing, that Hale J in using the permissive 'allowing' rather than the mandatory 'requiring' may have assumed that settlement in a more-than-one-year case does not bar a Convention return order: but the point did not require consideration in that case which fell within article 12(1).]

[28] More recently, in Re C (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 FLR 478 (again a case within article 12(1)) Thorpe LJ referred at 488E to the consideration that 'this is intended to be a hot pursuit remedy'.

[29] It does not seem to me that any of the materials which form part of the contextual matrix and which are referred to in article 31(2) of the Vienna Convention, or any such agreement, practice or rules as are to be taken into account under article 31(3), arise in relation to the interpretation of article 12 of the Hague Convention. There is, in particular, no scope to find that 'subsequent practice in the application of the treaty' has established 'agreement of the parties regarding its interpretation' so far as the settlement provisions are concerned, as a review of some of the stances taken internationally will reveal. Nor can I find any basis upon which to conclude that any 'special meaning' was intended for the term 'settlement' such as might invoke the rule in article 31(4) of the Vienna Convention.

[30] One strand of Mr Setright's submission was however that recourse must needs be had to the 'supplementary means of interpretation' permitted under the Vienna Convention's article 32 because the postulated exclusion of settlement cases from the Hague Convention's ambit 'leads to a result which is manifestly absurd or unreasonable' when set against the

very high premium which the Convention's framers put upon the importance of ordering return forthwith, and the high hurdle erected by the rigorous scrutiny to which article 13 defences are to be subjected. I for my part do not accept that the interpretation of article 12 which I will adopt leads either to any manifestly absurd or unreasonable result, or to a meaning which is ambiguous or obscure. I will deal below in greater detail with Mr Setright's customarily powerful (but on this occasion less than compelling) points on behalf of F.

[31] Further support for the distinction between the objective of returning promptly after the wrongful act takes place, and the expedition which should attach to the procedures, can be derived from passages in the Explanatory Report prepared by Professor Pérez-Vera, to which courts have consistently referred as an aid both to construction and to the underlying thought processes of those involved in the negotiation of the Convention.

[32] The first observation which I make upon the Report is that in section D from paragraph 27 onwards, entitled 'Exceptions to the duty to secure the prompt return of children', the Professor deals only with the article 13 defences (and with article 20, not incorporated into English law by CACA, which relates to the protection of human rights and fundamental principles), but reserves article 12 for separate and distinct consideration.

[33] Professor Pérez-Vera deals with articles 12 and 18 together, in commentary commencing at paragraph 106, of which the relevant parts are reproduced below.

Articles 12 and 18 - Duty to return the child

106 These two articles can be examined together since they complement each other to a certain extent, despite their different character

Article 12 forms an essential part of the Convention, specifying as it does those situations in which the judicial or administrative authorities of the State where the child is located are obliged to order its return. That is why it is appropriate to emphasise once again the fact that the compulsory return of the child depends, in terms of the Convention, on a decision having been taken by the competent authorities of the requested State. Consequently, the obligation to return the child with which this article deals is laid upon these authorities. To this end, the article highlights two cases; firstly, the duty of authorities where proceedings have begun within one year of the wrongful removal or retention of a child and, secondly, the conditions which attach to this duty where an application is submitted after the aforementioned time-limit.

107 In the first paragraph, the article brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it - something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard.

108 Several questions had to be faced as a result of this approach: firstly, the date from which the time-limit was to begin to run; secondly, extension of the time limit; thirdly, the date of expiry of the time-limit. As regards the first point, i.e. how to determine the date on which the time-limit should begin to run, the article refers to the wrongful removal or

retention. The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence. Secondly, the establishment of a single time-limit of one year (putting on one side the difficulties encountered in establishing the child's whereabouts) is a substantial improvement on the system envisaged in article 11 of the Preliminary Draft drawn up by the Special Commission. In fact, the application of the Convention was thus clarified, since the inherent difficulty in having to prove the existence of those problems which can surround the locating of the child was eliminated. Thirdly, as regards the terminus ad quem, the article has retained the date on which proceedings were commenced, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interests of parties protected by the Convention.

To sum up, whenever the circumstances just examined are found to be present in a specific case, the judicial or administrative authorities must order the return of the child forthwith, unless they aver the existence of one of the exceptions provided for in the Convention itself.

109 The second paragraph answered to the need, felt strongly through the preliminary proceedings, to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that 'the child is now settled in its new environment'. The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return 'forthwith' but merely of return.

...

112 Finally, article 18 indicates that nothing in this chapter limits the power of a judicial or administrative authority to order the return of the child at any time. This provision, which was drafted on the basis of article 15 of the Preliminary Draft, and which imposes no duty, underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorises the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of the Convention. This may happen particularly in the situations envisaged in the second paragraph of article 12, i.e. where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment.

[34] The comment in paragraph 107 that 'in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after examination of the merits of the custody rights exercised over it – something which is outside the scope of the Convention' encapsulates both the problem and its appropriate resolution which, to my mind, the Convention has adopted.

[35] The principle enshrined in the preamble, that prompt return to the state of their habitual residence is in the best interests of children and best protects them from the

harmful effects of unlawful removal or retention is entirely laudable. But it must surely at some point give way in factual circumstances where that presumption is outweighed by the competing interest of the child in not again being removed from a settled situation.

[36] Article 12(2) draws the line. Where more than (and it might well be much more than) the relevant year has elapsed and where settlement is established, the framers of the Convention decided that the interests of the child can no longer be generalised to support a Convention order for return. Over that line the Convention recognises that it is in the child's best interests to investigate the merits. Investigation of the merits is not however an activity to be undertaken in the context of a Convention application. Once the relevant authorities in the Requested State have received notice of a wrongful removal or retention to their territory, article 16 requires that they 'shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention ... .' This prohibition seems to me further to reinforce the interpretation of article 18 which I prefer, envisaging as it does a two-stage process, and rendering permissible investigation of the merits in accordance with domestic law once it has been decided that the treaty obligation to return does not apply.

[37] The decision to fix a one year time-limit is described in paragraph 180 as 'a substantial improvement on the system envisaged in article 11 of the Preliminary Draft drawn up by the Special Commission.' What had been proposed was that return would be mandatory if less than six months had elapsed from the time of the abduction; but that where the child's whereabouts were unknown the period might be extended to a maximum of 12 months. The wording of the relevant paragraph envisaged that where the location of the child was unknown the six-month period would run from the time of discovery, although the total time period could not exceed one year from the date of the wrongful removal or retention. In that context it is easy to understand how Professor Pérez-Vera referred to the present provision as an improvement which clarifies the Convention's application 'since the inherent difficulty in having to prove the existence of those problems which can surround the locating of the child was eliminated'. However, those comments would be entirely unfounded and unjustified if the same (or a similar) concept of 'time not running' was still either required or permissible. This consideration supports my conclusion in relation to the third of the questions of law posed and answered at [11] and [12] above.

[38] It is not conceptually surprising to find a clear time-limit set beyond which this Convention does not extend if but only if the necessary ingredient of settlement establishes justification for tempering its impact. Without this degree of flexibility it might be said that the Convention is too blunt an instrument. One understands Professor Pérez-Vera's viewpoint that although the time-limit might be arbitrary, nevertheless the solution was the 'least bad' answer to the concerns which had been raised. On the one hand there are cases where, after return is ordered, investigation of the child's welfare by the courts of the country of habitual residence demonstrates that, on the merits and in the child's best interests, removal should indeed be permitted. Conversely there will inevitably be thoroughly unmeritorious cases (from an adult perspective) when notwithstanding that concealment has cheated a left-behind parent of the opportunity to pursue a Hague Convention application before settlement can be achieved, the fact that the child has become integrated in its new environment takes the case outside the Convention.

[39] Paragraph 109 of the Explanatory Report makes the point that article 12 extends the obligation to order return no matter how long it has been since the wrongful removal or retention, subject only to settlement being established (or, of course, the child attaining the age of 16). But the Report also deploys the counterpoint that the obligation to return 'disappears' when settlement is established. That phraseology is inconsistent with the

existence of a Convention duty, or even power, nevertheless to order return unless some discretion is exercised not to make such an order.

[40] The reference in the same paragraph to 'preserving the contingent discretionary power of internal authorities in this regard' I take to relate to the question of 'how settlement is to be proved'. It points out that there is scope for each country to establish its own rules as the Convention is silent on the point. The French text refers to a 'pouvoir d'appréciation': that margin of appreciation with which ECHR decisions have made us more familiar. But certainly in this jurisdiction it has been accepted that the task of establishing settlement falls upon the party opposing what in its absence remains a mandatory requirement to order return.

[41] As to article 18, I draw assurance from the observations in paragraph 112 that it 'imposes no duty', and that it 'underlines the non-exhaustive and complementary nature of the Convention.' The Professor furthermore refers to article 18 as a provision which 'authorises the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end.' This is entirely consistent with the final sentence of the paragraph, which specifically refers (using the phrase that 'the return of the child may be refused') to the situation which arises if, after more than the relevant year has passed, settlement is established. I do not take the use of the word 'may' as supporting any implication that there is power to make such a return order notwithstanding a finding of settlement.

[42] Before I leave these passages of the Explanatory Report I would like to draw attention to some conclusions which I feel can validly be drawn from a comparison of the French and English texts. The final words of the full text of the Convention refer to both the English and French language versions as being equally authentic. The side-by-side dual-language publication of the Explanatory Report makes it clear at its commencement, however, that the English text of that document is a translation performed by the Permanent Bureau. Maybe that is how an inconsistency has arisen which I hope it is not too fanciful to suggest is illuminating, and from which I tentatively derive some assistance as to the meaning of 'settlement' for the purposes of article 12(2). The French phrase employed in the Convention for 'unless it is demonstrated that the child is now settled in its new environment' is 'à moins qu'il ne soit établi que l'enfant s'est intégré dans son nouvel milieu'. One is therefore unsurprised in the dual text of the Report for the most part to see derivatives of the verb 'intégrer' level on the page with some variant of 'settled'. But in paragraph 107 'l'intégration de l'enfant' is rendered as 'integration of the child'. That highlights what I believe is a nuance of meaning between the two languages. Perhaps because of the reflexive formation of the French verb, 's'intégrer' conveys to me more of an activity than the rather limp 'is now settled', which makes it sound as though gravity was all that might be required. This marginally more symbiotic relationship with an environment is also hinted at by Professor Pérez-Vera's use in paragraph 109 of the words 'nouvel enracinement' (translated as 'establishment in a new environment'). The concept of putting down roots may be helpful when one comes to ask whether settlement is established.

The position thus far in English law

[43] I at once concede that the conclusions which I have recorded at [12] run contrary to the flow of the rather brackish current of reported judicial observation in this jurisdiction as to the interrelationship of articles 12, 13 and 18, and upon the impact of concealment on the question whether settlement in the child's new environment has been demonstrated. To the earlier decisions I now turn, with the opening observation that I have of course considered

long and hard before coming to these contrary views: views which I have therefore thought it necessary to attempt to justify at what may be unnecessary and unhelpful length.

[44] I confess that I find it surprising that combined research has unearthed only five reported decisions which touch in a relevant way upon article 12(2), notwithstanding that in the 18 years during which CACA has been in force a very substantial body of caselaw has been developed around the Convention's provisions by the judges of the Family Division who have exclusive first instance jurisdiction, with correction administered as necessary from time to time by the Court of Appeal and (occasionally) the House of Lords. I suspect that in part the reason for this paucity of authority may lie in what I hope may not immodestly be described as the efficacy with which procedures to ascertain children's whereabouts are available through the courts. Thus, if a child has indeed been concealed in England or Wales it is extremely likely in most cases that the means and resources available and routinely deployed will lead reasonably rapidly to that child or the abductor.

[45] The first relevant dicta come from Purchas LJ in the case of Re S (A Minor) (Abduction) [1991] 2 FLR 1, at 24. He was dealing with an appeal from the President, Sir Stephen Brown, in a case where amongst the gamut of objections raised to the return of a 12 –year old girl to Minnesota was reliance on article 12(2). The President had concluded that the evidence in any event failed to establish settlement, and the Court of Appeal found no reason to disagree with far less to upset that decision. But, in delivering the leading judgment, Purchas LJ then commented, at page 24:

'The purpose of art. 12 is to give relief where the period which has passed between the wrongful removal and the application is more than a year. If in those circumstances it is demonstrated that the child is settled, there is no longer an obligation to return the child forthwith but, subject to the overall discretion in art. 18, the court may or may not order such a return.'

[46] Nowhere in the judgment can I find explanation for the view there expressed, that article 18 would give rise to any discretion to order return even if settlement had been established. The question did not fall for decision. I am unable to regard this as an example of a considered expression of Purchas LJ's opinion to which great weight would ordinarily attach. In my respectful opinion it is not in these circumstances binding upon me.

[47] The next relevant reported decision is the first instance case of Re N (Minors) (Abduction) [1991] 1 FLR 413. Here Bracewell J considered the degree of settlement required to be demonstrated before section 12(2) operates, involving both physical and emotional components, a topic to which I return below. She held that the mother (on whom the burden lay) had not demonstrated that the children were settled to the necessary degree, an unsurprising conclusion on the facts of the case where proceedings were commenced one year and only two days after the abduction. Bracewell J however went on to consider what the outcome would have been if her decision on that point had been that settlement was demonstrated, and at 416F stated that, 'then this Court has a discretion under article 18 as to whether or not the children should be ordered to return'. She repeated this reference to such a discretion at 417C and at 419D without further elucidation.

[48] Bracewell J was referred to in the course of argument to Re S (supra), but observed (at 417 E) that there was 'little judicial authority upon the interpretation of article 12.' As with the Court of Appeal judgment in that case, whether these observations about the existence of this discretion were accurate or not made no difference to the outcome.

[49] In similar vein in the next case, Re M (Abduction: Acquiescence) [1996] 1 FLR 315 Thorpe J (as he then was) referred at 318 to article 12(2) 'opening the door to the exercise of

a judicial discretion' whether or not to order return, but again in the context that the question did not arise unless the left–behind Greek father demonstrated that the child's removal to England was 'wrongful' in Convention terms. On the expert evidence made available to the court in that case he concluded that the state of uncertainty as to the interpretation of the relevant but only recently-introduced provisions of Greek law was such that the father failed to establish his case of wrongful removal. The subsidiary questions (amongst them the applicability of article 12(2)) did not directly arise, notwithstanding which (at 320) Thorpe J 'shortly' stated his conclusion in the following terms:

'The first is the door to judicial discretion opened by the mother's contention that the summons is issued more than a year after the alleged abduction and J is now well settled in his new environment.'

[50] As he decided that he would have found not only settlement to be established, but also the mother's alternative case of acquiescence, it is understandable that Thorpe J did not in the event comment at all on how he would have exercised the supposed discretion.

[51] Next comes a decision of Wilson J in Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433. The ratio of the decision to return the children to Florida under the Convention was that the fact that there were pending criminal proceedings which might result in the mother's arrest if she accompanied them there did not create a grave risk that they would be exposed to an article 13(b) situation. That was the mother's primary contention, and it failed. The mother's second defence sought to rely on article 12(2), but the factual evidence upon which she relied for a finding of settlement had not been deployed in evidence by the time of the hearing. Refusing an adjournment which would have permitted the mother to remedy this defect, Wilson J (at 440 H) said:

'The mother might or might not have demonstrated that the children were now settled in their new environment. The proposition is harder to demonstrate than at first appears. In Re S (A Minor) (Abduction) [1991] 2 FLR 1, 24C, Purchas LJ described what was required as a long-term settled position; and in Re N (Minors) (Abduction) [1991] 1 FLR 413, 418C, Bracewell J observed that the position had to be as permanent as anything in life could be said to be permanent. Whether a Danish mother who has been present with the children in England for a year only because it has been a good hiding-place and who faces likely extradition proceedings could demonstrate the children's settlement in England within the meaning of those authorities is doubtful.

If, however, she had demonstrated it, then, instead of an obligation to order a return, there would have arisen a discretion in the court as to whether to make the order. In Re S (A Minor) (Abduction), above, at 24B, Purchas LJ noted that the discretion arises from Art 18 of the Convention, which states that:

'The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.'

At first I wondered whether this was a reference to a power outside the Convention, for example arising in the inherent jurisdiction, in relation to which the children's welfare would be the paramount consideration. But both counsel are agreed, and I am now satisfied, that the power referred to in Art 18, focused as it is upon the return of children who have been wrongfully removed or retained, is a power arising within the Convention and thus by virtue of the 1985 Act; and that the discretion which arises under Art 12 when it is demonstrated that the children are settled in their new environment is analogous to that which arises when any of the matters referred to in Art 13 is established or found. In other words, to use the phrase of Lord Donaldson of Lymington MR in Re A (Abduction: Custody

Rights) [1992] Fam 106, 122E, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14, 28F the discretion must be exercised 'in the context of the approach of the Convention'. The welfare of the children is not paramount but it is a factor; and it is hard to conceive that, if established under Art 12, the settlement of the children could ever be unimportant. But the discretion is to choose the jurisdiction which should determine the merits of the issues as to with whom, and in which country, the children should live and therefore where they should reside in the meantime; that is the context in which, as one factor, their welfare falls to be appraised.

I am clear that this is a case where the policy behind the Convention would outweigh the other factors in the exercise of any discretion that might have arisen under Art 12 or indeed, had my finding about grave risk been otherwise, would have arisen under Art 13(b). The mother wrongfully removed the children from Florida. Then she removed them from Denmark in flagrant defiance of an order. If they are settled in their new environment in England, it is because for 10 months she hid them here, with the result that the father could take no earlier action to secure their return. Apart from the fact that the mother was once an au pair here, neither parent had any connection with England prior to 1 December 1997. Florida is where they and the children lived; where the father still lives; and where custody proceedings, in which the mother has participated, have been on foot for almost 2 years.

In a moving plea Miss Cox says that the welfare of the children must not be sacrificed on the altar of high-sounding moral principle. I consider that, at least other than in the very short term, the welfare of the children would not be prejudiced by an order for their return to Florida. On the contrary, in resolving some of the paralysing conflicts ranged above their heads in three jurisdictions and in enabling them to begin to enjoy again a relationship with each of their parents, I believe that the order would be likely to be for their benefit.

But, if I am wrong and if and to the extent that the order would not serve their welfare, it would not merely be an order loyal to abstract principle. It would be an order contributing in a very small way to the welfare of those numerous other children who live in the Contracting States across the world and whose parents would be deterred from abducting them and re-abducting them and secreting them by a growing public awareness that what would then happen would, in all probability, be an order for return.'

[52] I have quoted from Wilson J's judgment at such length to demonstrate fully the context in which, in that case, he applied the discretion he conceived he would have had to exercise if the mother's case had succeeded under either 12(2) or article 13(b). It clearly and strikingly demonstrates what has become the ordinary response of English Judges to the very considerable importance of Hague Convention policy considerations, including the deterrent effect of return orders, even at the cost of quite substantial short-term detriment to the particular child or children in question.

[53] But was Wilson J right to rely on the concession of both counsel in the case that article 18 endows 'a power arising within the Convention and thus by virtue of [CACA]'? That led him on to adopt the analogy with the article 13 discretion assumed and espoused in the earlier cases, whereas his own instinct to consider article 18 rather in the context of powers arising outwith the Convention was, I suggest, sounder.

[54] That, on reflection, is now also the view of Mr Nicholls who appeared for the father in Re L and who frankly accepted in the course of discussion before me that the concession to which he was a party was not sound in law.

[55] Finally, one comes to another decision of Bracewell J in Re H (Abduction: Child of 16) [2000] 2 FLR 51. There (at page 55 G) she found that the mother had not established that

the children had become settled in accordance with what she described as 'the ambit of the test' in Re N. But before arriving at that conclusion she made a number of observations concerning article 12(2) which I feel it necessary again to cite in their entirety.

'It is the case, looking at the relative dates, that these proceedings were commenced after the expiration of the period of one year from the date of removal. It is, in my judgment, necessary to consider why the proceedings were so delayed. That, in my opinion, is relevant to the question of settlement because it was made plain in the case of Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433, 441 that time in hiding cannot go to establish settlement and it is not good law for the abducting parent to be able to say 'well, I have managed to evade the wronged parent; I have managed to hide my address and whereabouts of the children and I am going to rely on that in advance of the argument that the children have been so long in the jurisdiction that they have now settled in that environment and the court should exercise a judgment not to return them to the original jurisdiction'. Further, in that context it is relevant to consider when the father knew of the whereabouts of the children.

Bracewell J then expressed the reasons for her conclusion that from the time of the wrongful removal in April 1998 the mother had deliberately misled the father and had concealed the children's address from him until he discovered it in December 1998. The Hague return application was issued on 16 December 1999. The learned Judge then continued (from 55 E):

'Having regard to the fact, as I find, that the father did not know the whereabouts of the children until December 1998, it follows that within 12 months of that time he did in fact bring proceedings. That is a relevant matter in considering whether or not the children had settled. I find that the mother cannot, in the circumstances of this case, rely upon the settlement of the children in this jurisdiction.'

[56] I confess that I have misgivings about the extent to which Bracewell J appears in these passages to be attributing an even more – indeed arguably an absolutely – restrictive approach to article 12(2) in cases where there has been deliberate concealment. I am unable to construe anything on page 441 of the report in Re L (included in its entirety in the passage cited within [51] above) nor indeed elsewhere in Wilson J's judgment in that case to support the assertion that 'time in hiding cannot go to establish settlement', which smacks of the 'tolling' approach adopted by some United States courts and to which I will refer below.

[57] Nor do I easily understand why, or how, the question of fact whether the children are or are not settled can be influenced by a consideration of how long the wrongdoing parent managed to keep them concealed, or of how long after hearing of their whereabouts it was before the left-behind parent commenced proceedings. Such considerations might be relevant to the question how a discretion analogous to that which arises under article 13 might be exercised in the light of policy considerations, but Bracewell J appears to suggest that it was not open to the mother even to argue that she could rely upon settlement as a defence.

[58] My conclusion on the English authorities is that I am unable to follow the obiter observations upon and the approach to articles 12(2) and 18 which have hitherto been adopted without, I venture to suggest, full or fully-argued consideration of the essential question whether article 12(2) in effect prescribes the limit beyond which the Hague Convention ceases to operate if settlement is established in a more-than-one-year case.

The position developed in other jurisdictions

[59] I have been assisted by Counsel to carry out a review of the position as it has developed on this question in a number of other jurisdictions. I also acknowledge the helpful commentaries in two textbooks The Hague Convention on International Child Abduction (Beaumont & McEleavy: OUP, 1999) and International Movement of Children: Law Practice and Procedure (Lowe, Everall and Nicholls: Family Law, 2004).

[60] The first jurisdiction to which I will refer is Australia, where it appears (so far as could be ascertained by Counsel) that this very question remains unresolved, whether article 12(2) defines the limits of the Convention's operation, or rather whether establishment of settlement in a more-than-one-year case gives rise to a 'quasi-article 13 discretion'. The lone voice in favour of the former view has been Kay J (as he then was) in the case of State Central Authority v Ayob (1997) FLC 92-746. After quoting paragraphs 106 to 109 of the explanatory report of Professor Pérez-Vera (set out at [33] above), in a passage at 84,072 headed 'If the child has settled in her new environment is there a discretion to exercise' he said:

'I digress for a moment to say that whilst there is some suggestion in some English cases that a finding of "settled in a new environment" still leaves a discretion in the Court to order the return of a child, I must respectfully disagree with those views. If those views are simply saying that by operation of common law or local statute law, as distinct from Hague Convention law, the Court has jurisdiction to order the return of a child, then there is no dispute between myself and the other learned judges. If, however, it is suggested that within the four walls of the Hague Convention there is room for discretion in respect of a child who has met the criteria of being more than one year away from the wrongful retention or removal and now settled in its new environment, then in my view there is no such room. In my view, the Convention and the [Australian implementing] Regulations have no further application in respect of such a child.

[and then, at 84, 073, after citing from Re N, referring to Re S and setting out article 18, he continued:]

In my view, Article 18 does no more than indicate that the Convention makes up part of the law of a country exercising Convention powers and that it does not seek to codify the entire law relating to dealings with children about whom it is argued there are jurisdictional questions or about whom it is argued their welfare requires them to be taken to another country. In my view, if I concluded that this was a Hague child who had been wrongfully removed or retained, and that more than one year had passed prior to application being made, and I was satisfied the child was settled in her new environment, that would be the end of the matter under the Hague Convention and under the Regulations.'

[61] Other first instance decisions have assumed or postulated the existence of a discretion to order return notwithstanding the finding of settlement: Director-General of the Community Services v Apostolakis (1996) FLC 92-718, and Director-General, Department of Families, Youth and Community Care v Thorpe (1997) FLC 92-785. At appellate level however the position has been expressly left open in two decisions of the Full Court of the Family Court of Australia for full argument in a case where the question directly arises: Director-General of the Community Services v M and C (1999) 24 Fam LR 168, and Director-General, Department of Families, Youth and Community Care v Moore (1999) Fam LR 475.

[62] I of course acknowledge that as with the English cases Kay J's observations were obiter. There was no evidence before him which could have led to a finding of settlement: indeed the child had been kept in Malaysia for nearly 18 months before being brought to Australia less than a month before the judgment was delivered. And I also take account of the fact that in

M and C the Full Court (Nicholson CJ, Holden and Dessau JJ) commented at [98] that they were not necessarily persuaded that Kay J's decision is correct. For my part, however, I must say that his views accord entirely with my own upon the scope of the Convention on this point.

[63] Looking closer to home, in Scotland in Soucie v Soucie 1995 SC 134 the Inner House of the Court of Session appears to have assumed that the effect of article 18 is to give rise to a discretion analogous to that under article 13, if ever settlement is established. There is nothing in the report of the case to indicate that any alternative construction of the Convention was considered.

[64] In the United States of America the debate concerning article 12(2) has centred upon the correct approach to the passage of time in cases of active concealment of the child, rather than upon the question whether any discretion analogous to that under article 13 arises. The approach adopted by some courts and criticised by others is to 'deduct' time spent in hiding from the computation of the year's passage necessary to found the article 12(2) exception. This is known as 'equitable tolling' and can be expressed either as a principle of equity (with its objective to prevent a wrongdoer from benefiting from such activity) or as an incident of a statutory limitation provision. The approach therefore gives mechanistic effect to the understandable reaction to concealment typified by Bracewell J's observations in the passages I have cited from Re H. A further consideration which emerges from the American authorities is that nothing should be allowed which would condone such undesirable parental behaviour, or which would water down the deterrent impact of robust implementation of the Hague Convention's laudable objectives.

[65] Mr Nicholls' research demonstrated that Federal District courts are split on the issue, and that no Federal appellate court has spoken authoritatively on the point. The only decision at appellate level which was drawn to my attention during submissions was Lops v Lops, 140 F. 3d 927; (1998) United States Court of Appeals for the Eleventh Circuit, which left open the question whether equitable tolling may apply.

[66] Since submissions before me concluded a further United States authority on the tolling question has been notified on the International Child Abduction Database (INCADAT: www.incadat.com) maintained by the Hague Bureau. This is the decision of the United States Court of Appeals for the Eleventh Circuit in the case of Furnes v Reeves, decided on 10 March 2004. The more generally important aspect of the decision may be that Court's refusal to adopt the view established by Croll v Croll 229 F 3d 133 (2d Cir 2000), US Ct of Appeals, which held that the right to determine a child's place of residence did not constitute a 'right of custody' for the purposes of article 3 of the Convention. But for present purposes the interest of Furnes lies in the fact that this was a concealment case which, by virtue of the passage of time, fell within the literal words of article 12(2). The Court of Appeals however sustained the trial court's finding that the left-behind parent's application (made over a year after the wrongful removal or retention) had been made within the one year time limit, observing (to adopt the words of the INCADAT summary):

'The Court of Appeals noted that in the USA limitation periods were customarily subject to the principle of "equitable tolling", unless tolling would be inconsistent with the text of the relevant statute. In accordance with this principle the one year time limit was only due to commence on the date that the father located his daughter. The rationale being that otherwise an abducting parent who concealed children for more than a year would be rewarded for their misconduct by creating eligibility for an affirmative defence which was not otherwise available.'

[67] It might be suggested that such reactions have spilled over too far into imbalance when they take courts beyond the point recognised by Professor Pérez-Vera as where the Convention obligation to return the child 'disappears' once the child has become settled in its new environment (see paragraph 109 of the passage cited at [33]), and more than a year has elapsed since the adult wrongdoing.

[68] Finally, by way of two footnotes to this albeit only partial review of the relevant authorities in other jurisdictions, I wish to cite a passage from the case of Toren v Toren, 26 F. Supp. 2d 240; (1998) United States District Court for the District of Massachusetts, to which Mr Nicholls has drawn my attention. There District Judge George A. O'Toole Jr. made some observations concerning article 12 (although as in so many other cases they were not pivotal to the outcome). In a case which on his conclusions did not in fact involve any element of concealment, he observed:

'the language of the Convention is unambiguous, measuring the one-year period from the "date of the wrongful removal or retention."… It might have provided that the period should be measured from the date the offended-against party learned or had notice of the wrongful retention, but it does not. That is not surprising, since the evident import of the provision is not so much to provide a potential plaintiff with a reasonable time to assert any claims, as a statute of limitation does, but rather to put some limit on the uprooting of a settled child. Thus, even in the unlikely event that the potential plaintiff had no notice of the wrongful retention until after a year had expired, it is the Convention's prescription that the child who is settled in a new environment ought not to be ordered returned under the Convention's auspices.'

[69] The report of the judgment contains no explicit reference to any of the decisions on tolling. For all I know, the judge's observations may in terms of US jurisprudence be the equivalent of obiter, per incuriam or plain unsustainable. But I do nevertheless draw some comfort from the fact that he has expressed a view so much in accord with my own concerning the scope of the Convention, and moreover because his comments concerning 'the uprooting of a settled child' so aptly underline the regard which the Convention shows for the welfare interests of a child who after a minimum stipulated period has become settled in a new environment.

[70] To similar effect are the views expressed by District Judge James L. Graham in Anderson v Acree, 250F. Supp. 2d 872; (2002) United States District Court for the Southern District of Ohio, Eastern Division. Specifically in reference to earlier reported decisions where effect had been given to equitable tolling, the Judge said (at 875):

'However, this court is not convinced that the one-year period referred to in Article 12 is a statute of limitations. A petition for the return of the child is not barred if it is filed over one year from the date of removal. Rather, the drafters of the Hague Convention decided that after the passage of a year, it became a reasonable possibility that the child could be harmed by its removal from an environment into which the child had become settled, and that the court ought to be allowed to consider this factor in making the decision whether to order the child's return. This potential of harm to the child remains regardless of whether the petitioner has a good reason for failing to file the petition sooner, such as where the respondent has concealed the child's whereabouts. There is nothing in the language of the Hague Convention which suggests that the fact that the child is settled in his or her new environment may not be considered if the petitioning parent has a good reason for failing to file the petition within one year.'

[71] As is by now perhaps only too fully apparent, I find myself in agreement with those observations. My overall conclusion therefore in relation to the United States cases is that the concept of tolling to which a number of them give effect is not one which should have any place in my approach to the construction of article 12.

'Brussels IIA' and 'the 1996 Hague Protection Convention'

[72] I am very conscious that with effect from 1 March 2005 the way in which article 12(2) (and other provisions) of the Hague Convention operate will be 'supplemented' by certain provisions of Council Regulation (EC) (No 2201/2003) of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility (repealing Council Regulation (EC) (No 1347/2000)) (Brussels IIA). Modifications to the Hague Convention will apply in cases involving any two EU Member States (with the exception of Denmark, but including all ten of the countries which acceded on 1 May 2004). The Regulation will be directly applicable in the Member States and will prevail over national law. The relevant provisions of the Regulation will also prevail over the rules of the 1980 Abduction Convention (and, in due course, over the 1996 Hague Protection Convention, where, for instance, the child concerned has his or her habitual residence on the territory of an EU Member State, except Denmark: article 61(a) of Brussels IIA).

[73] Once the Brussels IIA Regulation is in force from 1 March 2005 article 10 thereof will provide that in relevant cases of intra-EU abduction the Member State of the child's habitual residence at the time of the wrongful removal or retention retains jurisdiction (thus triggering the obligation to order the child's return there under the Hague Convention):

'until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11 (7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.'

[74] Article 10(b) of the Regulation thus introduces the concept that time does not begin to run (towards the year required before the defence of settlement can arise, if one of the four

conditions is also met) until the claimant party 'has had or should have had knowledge of the whereabouts of the child.'

[75] The wording of article 10 of the Regulation derives from another international instrument which, although predating Brussels IIA in conception and in its drafting, will very likely only enter into force (so far as EU Member States are concerned) after the Regulation does so on 1 March 2005. Article 7 of that earlier instrument, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Hague Protection Convention'), will so far as relevant for present purposes provide:

'Article 7

1 In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

b the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

3 So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.'

[76] What the framers of the 1996 Hague Protection Convention had in mind emerges from a passage taken from [46], [47] and [49] of the Explanatory Report on this Convention drawn up by Paul Lagarde (www.hcch.net/e/conventions/expl34e.html):

'Article 7 (wrongful removal or retention of the child)

46 The Special Commission had not been able to reach agreement on a text determining jurisdiction in the case of a wrongful removal or retention of the child within the meaning of Article 3 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The Diplomatic Conference succeeded in doing so after long discussions.

The underlying idea is that the person who makes a wrongful removal should not be able to take advantage of this act in order to modify for his or her benefit the jurisdiction of the authorities called upon to take measures of protection for the person, or even the property, of the child. But, on the other hand, the wrongful removal, if it persists, is a fact that cannot be ignored to such a point as to deprive the authorities of the new State, which has become that of the new habitual residence of the child, of this jurisdiction over protection. The difficulty consists therefore in determining the temporal threshold from which jurisdiction would pass from the authorities of the State from which the child has been wrongfully removed, to those of the country to which he or she has been taken or in which he or she has been retained.

This difficulty is partly resolved, at least as concerns rights of custody, by Article 16 of the Hague Convention of 25 October 1980 mentioned above, under the terms of which, after

having been informed of the wrongful removal or retention of the child `the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.' A provision of the Convention confirming the primacy of the 1980 Convention would have, for questions of custody rights, dealt with the problem, but only in the relations between Contracting States of the future Convention and States Parties to the Convention of 25 October 1980 (see, in this sense, Art. 50 below). A specific general provision was nonetheless necessary in order to resolve this question in a uniform way in respect of all the Contracting States, whether or not they are Parties to the Convention of 25 October 1980. Article 7 goes in this direction.

Paragraph 1

47 The first paragraph maintains the jurisdiction of the authorities of the Contracting State in which the child had his or her habitual residence immediately before the wrongful removal or retention, until the time when the child has acquired a habitual residence in another State and certain other conditions are fulfilled. In maintaining this jurisdiction, the text does not presume that the child has retained, more or less fictitiously, his or her habitual residence in the State from which he or she was wrongfully removed; it accepts, to the contrary, the possibility of a loss of habitual residence in that State, but it is intended to avoid that, during any period of hiatus between the loss of the old and the acquisition of the new habitual residence, jurisdiction might pass to the authorities of the State on the territory of which the child might be simply present in accordance with Article 6, paragraph 2 (see above). In this period of instability for the child, it is indeed desirable to avoid too frequent changes of jurisdiction.

Moreover, it does not suffice, in order for the authorities of the State of the former habitual residence of the child to lose their jurisdiction, that the child has acquired a habitual residence in another State. Other conditions must yet be fulfilled, which the Convention presents in an alternative manner, following as closely as possible the substance of the conditions posed by the Convention of 25 October 1980.

49 b In the absence of acquiescence in the wrongful removal or retention, the second branch of the alternative which could bring about the loss of jurisdiction on the part of the authorities of the child's former habitual residence is constituted by the conjunction of the three following conditions: i) residence of the child in the State of his or her new habitual residence for a period of at least one year after the holder of rights of custody has or should have knowledge of the whereabouts of the child; ii) the lack of any request for return, presented during this period and still pending; iii) the child being settled in his or her new environment (Art. 7, paragraph 1 b).

These conditions bring to mind those which are posed by Article 12 of the Convention of 25 October 1980. This text permits the requested authority not to order the return of the child where the proceedings for return have only been commenced after the expiration of a period of one year and it is demonstrated that the child is settled in its new environment. The discordance arises from the fact that, in the Convention of 25 October 1980, the period of one year starts with the removal or retention, while in the new Convention, as indicated above, this point of departure is later. Therefore, one cannot eliminate the hypothesis in which the authorities of the State to which the child has been removed or in which the child has been retained are not bound to order the return of the child B which might make one think that the child's habitual residence has been transferred to that State and that its

authorities have acquired jurisdiction, in any case under Article 5 of the 1961 Convention, to take measures of protection and decide in particular on custody and rights of access B while this jurisdiction over protection would still belong, under the new Convention, to the authorities of the State in which the child had his or her habitual residence immediately before the wrongful removal or retention. If, in this hypothesis, the authorities of this latter State, which have jurisdiction under Article 7 of the new Convention, decide to change the custody rights, it seems that the authorities of the State to which the child has been wrongfully removed will have to recognise and enforce this decision in accordance with Articles 23 et seq. of the new Convention. But if this State is not a Party to the new Convention and is a Party only to that of 25 October 1980 (or even to the Convention of 5 October 1961), it will not be bound to recognise this decision; and it may, it seems, consider itself alone to have jurisdiction.'

[77] The structure and terminology of article 10 of the Regulation and of article 7(1) of the 1996 Hague Protection Convention do seem to be incompatible with the principle established in England that in relation to children, both of whose parents have parental responsibility, the unilateral act of one cannot change that child's habitual residence by wrongfully removing the child to or retaining the child in another jurisdiction (see Re P (GE) (An Infant) [1965] Ch 568 at 586). We may therefore be faced with the need, in order to comply with the requirements of these instruments as they come into force, to develop alternative legal constructs for so fundamental and basic a building-block as 'habitual residence' which, chameleon-like, may need to change hue to reflect whatever is the particular background against which it is to be understood and applied: whether Hague 1980 un-supplemented (where one or both the relevant countries are Contracting States to that Convention but are outside the EC, or include Denmark); or Hague 1980 as supplemented by Brussels IIA (where the relevant countries are both EU Member States but do not include Denmark); or where one or both States are part of the Hague 1996 community but are not Hague 1980 Contracting States; or in the case of an intra-UK abduction case, where 'habitual residence' is to be construed to conform with the quite distinct 'one-year' provision to be found in section 41 of the Family Law Act 1986; or where (for instance) the phrase may need to be considered for some wholly domestic purpose, such as to decide on jurisdiction to entertain divorce proceedings. Other countries will be developing their own judicial response to these conundra. Perhaps this is what is intended to be conveyed by the idea of an 'autonomous concept' which (as I very likely misunderstand it) is EC-speak for a legal principle which is to be interpreted and applied in the context of the international instrument in which it is found rather than in accordance with any domestic meaning which it may have achieved internally. If so, it would seem that 'autonomous concepts' may need to take on the additional nuance that they may vary significantly in the construction to be applied to them according to which of a number of international instruments is under consideration, so that the same word or phrase will mean different things to different states in different contexts and constellations. This could become quite confusing. Indeed there are those who suggest it already is: see the discussion at paragraphs 4.27 to 4.31 of International Movement of Children: Law Practice and Procedure (op. cit.).

[78] I simply draw attention to these developments, which introduce a concept somewhat analogous to 'tolling': but they do not affect my approach or my conclusion in the context of this case. The fact that these changes to the operation of the Hague Convention are to be introduced if anything supports the proposition that such is not the effect of concealment under the Convention as it was originally adopted and is currently in force. Moreover, where one or more of the States involved in a 1980 Convention application is outside the EC (or is Denmark) the construction of article 12(2) will fall for consideration subject to the text of that article which in this judgment I have considered, unsupplemented and/or

uncomplemented in any way. Thus, in my view at least, these prospective changes shed no light on the construction question with which I have been concerned.

[79] The European Community's objective (per the preamble to the Regulation) is to create 'an area of freedom, security and justice'. Realising that aim has brought in its train these (and other) very considerable additional layers of complexity to add to the already multi-faceted operation of interlocking domestic, EC, 1980 Abduction and/or 1996 Protection Hague Conventions (each of these at any given time with their own distinct and growing Contracting State constituency), Council of Europe, and non-convention sets of rules and procedures to be invoked to deal with the problems of unilateral transfrontier movement of children. Whether it has been proportionate to add these 'supplements' to the Hague Abduction Convention for the benefit of the numerically small group of affected children within even the enlarged number of States where article 10 of Brussels IIA will operate (by comparison, for instance, with the volumes of children which it is estimated are trafficked for sexual and other services into and within the same area) is perhaps not a topic for here, now, or me.

The submissions

[80] Mr Nicholls in argument supported the construction of article 12 which I have propounded, as did Miss Ball on behalf of M. Mr Setright for F urged me to adopt a rigorous reading of article 12 in combination with articles 13 and 18, concentrating on the purpose and intent of the Convention rather than on any simplistic approach.

[81] I recognise the Convention's aims as universally beneficial in their intent. They include the considerations that it is in the welfare interest of abducted children to be returned promptly to the country of their habitual residence, which in turn will have the knock-on effects of deterring such abductions, advancing comity and discouraging parental forum-shopping. And of course I agree with Mr Setright that it is important in pursuit of these aims that those charged with decision-making in the various Contracting States should be both rigorous and vigorous in the approach to the Convention which they adopt, and should strenuously avoid being drawn into welfare appraisals of allegations which fall short of the deliberately high threshold set by the wording of article 13 with its in-built supplemental discretion nevertheless to order return of a child demonstrated to be within one or other of its exceptions. The high burden upon the person seeking to establish that the threshold is surpassed; the reluctance even then of the English courts to refrain from ordering return; and the emphasis given in the exercise of discretion to those very purposes of the Convention to which I have referred, are all so generally known and recognised that citation here of decided caselaw is unnecessary.

[82] But where I find myself at odds with Mr Setright is in the constructional leap which he invites me to make, so as to create in relation to article 12(2) a discretionary add-on which the plain words of the Convention seem to me to rule out. Unless my approach is flawed, there seems no room for the application to article 12(2) of the same gloss which has accrued around the article 13 discretion, which has had the practical effect of limiting virtually to the point of extinction the circumstances in which prompt return under article 12(1) is not ordered.

[83] Mr Setright also raised tentatively, if I may so, and with restraint the question whether Human Rights Act issues might be engaged if the operation of article 12(2) deprived a left-behind parent of the right to a fair hearing as well as of his or her enjoyment of family life. He pointed out that the corpus of ECHR law in relation to the Hague Convention is somewhat limited, and limited in scope to considerations of enforcement. I do not however

accept his submission that such human rights considerations should lead the court to construe article 12 very restrictively to avoid such risks. In the first place, as it seems to me, the Convention draws a clear and legitimate distinction, once the ingredients for article 12(2) are established, which of its very nature promotes and prefers, for legitimate reason, the rights of the child before those of the left-behind parent. Moreover the failure of the Hague application where article 12(2) applies is not necessarily the end of the matter: the left-behind parent is certainly able in this jurisdiction to pursue other remedies designed to produce a fair trial on the merits, having regard to welfare considerations which in that context are paramount.

[84] Mr Setright understandably made no concession in relation to the question whether the establishment of the article 12(2) criteria gives rise to a discretion nevertheless to order a return. Nor did he make any concession concerning the question whether concealment of the child either prevents time running, or precludes a parent from relying upon article 12(2). But I hope that I do not misrepresent his position as being to reserve the thrust of his arguments directed to the proposition that, as a matter of analysis and fact, concealment and settlement are such mutually inconsistent concepts that where the former is present the latter cannot be established.

[85] The burden of his proposition is that any apparent settlement in a new environment which involves living a lie does not deserve the word, however well integrated the child may appear to be. Thus, on the one hand, if an ingredient in the circumstances following the child's removal consists in obscuring or excising important elements of the child's upbringing and heritage (such as the child's identity and the relationship with the left-behind parent) then settlement for the purposes of article 12(2) is not achieved, and the word itself should be interpreted restrictively so as to lead to such a finding. Mr Setright described how, inevitably, deliberate concealment of the child by the wrongdoing parent involves imposing upon the child a life which is to a greater or lesser extent false. Not only does the child lose part of his or her life, but is made to live a life which in some at least of its aspects is not genuine. Evoking powerful imagery, Mr Setright likened the position of a child living in such concealment to that of a child living in a well-appointed house built on the edge of a slumbering volcano. The sense of security which the child may feel in such surroundings would be illusory, and self–evidently so to an objective adult to whom the underlying instability of the situation would be apparent. Living on the edge of a volcano, suggested Mr Setright, was very much the situation in which this mother and as a result this child subsisted. For M must always be on guard, looking over her shoulder and anxious lest she and the child be traced.

[86] I recognise that these submissions have force, and that this approach may well be thought consistent with the judicial response as it has developed to the article 13 exceptions, and to the natural human (and thus also judicial) response to the notion that article 12(2) provides immunity and awards the fruits of success to the parent who has acted wrongfully. Furthermore, that result if sanctioned by the court may well encourage others not only to abduct but also to conceal and thus to frustrate the intended deterrent effect of the Convention.

[87] Mr Setright suggested that the negativing impact of concealment upon the attainment of settlement continues to operate no matter how long the child remains in the situation of living a lie on the brink of the volcano. Thus, it seems to me, the logical conclusion of his proposition must be that until concealment is at an end settlement cannot really commence.

[88] I must confess that for a number of reasons such a cut and dried but nevertheless strained approach to the meaning of settlement for the purposes of article 12(2) does not

seem to me to be permissible. I prefer the proposition that each case should be considered on its own facts, and that upon that basis the fact of concealment may have different impact in different circumstances. Every individual case should be looked at in the round, without decisive or even predominant weight being given as a matter of principle to any given factor (including, where present, concealment) over others.

[89] Another consideration potentially affecting the ability of a child to attain settled status might be the irregularity or illegality of the child's immigration status. The suggestion was canvassed that comparisons might be drawn between what was suggested might be the negative effect of unlawful presence in this jurisdiction upon the acquisition of habitual residence, when considering how settled the child could be said to be when at risk (with the child's parent) of immigration control and/or deportation. Even assuming, without deciding, that the deceptions practiced by M to bolster concealment involved some acts of illegality, I heard no submissions to suggest that in this case any intervention by the Secretary of State for Home Affairs might put C's residence here at risk.

[90] But if such a case were to arise (or if I am wrong, and it is a real possibility in this case) then some assistance is in my judgment to be derived from the decision of the Court of Appeal in Marks v Marks (Divorce: Jurisdiction) [2004] EWCA Ci. 168, [2004] 1 FLR 1069. The Court there held that it is right to distinguish, between the manner in which 'habitual residence' should be construed contextually rather than absolutely, so as to allow to a court a margin of discretion in determining whether or not an element of illegality tainting the entry or stay within the jurisdiction of a spouse precludes the acquisition of domicile of choice for the purpose of founding jurisdiction to entertain divorce proceedings. Similar considerations seem to me to apply when the mixed question of fact and law under consideration is the degree of a child's 'settlement'. But I stress that I heard no submissions in relation to this decision, which was not cited to me in argument.

[91] It is also for consideration whether the fact that a destabilising event may occur in the future (deportation; the eruption of the volcano) impairs before it even occurs such settlement in the child's circumstances and way of life as has been achieved and has become established. The chance or even perhaps the likelihood of upset ahead does not self-evidently undermine pre-emptively the settled nature of the situation. I will revert to this when considering the dictum of Bracewell J in Re N at 418C where she imported a requirement for 'a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent'.

The meaning of 'settlement'

[92] What therefore is it necessary to show to establish that a child is now settled in his or her new environment?

[93] In Re S Purchas LJ at 24 commented (on the facts of that case) that 'to say that within art. 12 it is demonstrated that there was a long-term settled position in the environment in England is, in my view, a difficult question upon which to be satisfied.' That reference to 'a long-term settled position' apart, the indicia of 'settlement' in English law have been the subject of decision at first instance level only, in cases already referred to above: Bracewell J's decision in Re N, the decision of Thorpe J (as he then was) in Re M, and Wilson J's case of Re L. A feature of the decisions has been a clear intent on the part of the judges to require that settlement be demonstrated to a high degree. That indeed has been the thrust of the English authorities, even before the second presumed hurdle of a discretionary power nevertheless to order return has to be taken. For my part I certainly accept that it is

consistent with the overall philosophy of the Convention, having regard to the twin requirement that there should be more than one year's delay before the institution of proceedings and that the child should be settled in his new environment, that the burden upon the person seeking to rely upon the escape clause should be significant rather than token.

[94] Bracewell J in Re N set the tone in a manner which has certainly guided (although not with universal approbation) subsequent debate. The relevant passage commences at 417G of the report in these terms:

'What is the degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the mother can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word "settled" in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly I find that it has an emotional constituent denoting security and stability.

[and then, after referring to the phrase 'a long-term settled position' used by Purchas LJ in Re S:]

The phrase "long-term" was not defined, but I find that it is the opposite of "transient"; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent in so far as anything in life can be said to be permanent. What factors does the new environment encompass? The word "new" is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se the relationship with mother, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings.

Every case must depend on it own peculiar facts, and I have considered all the circumstances set out in [the evidence and submissions]. …

I find that it is early days in relation to any question whether or not the children are settled and I am not satisfied that the mother has so demonstrated.'

[95] That (I repeat) was a case where the children in question were 4 and almost 3, and the period between wrongful removal and institution of proceedings was one year and two days. As I have already suggested, it is unsurprising that in that context sufficient settlement was not established. Moreover, although throughout that period the children had been living with their mother in England, they had done so initially at their grandmother's home, and they had only been living in their mother's own council house and attending school during the month or so preceding the institution of proceedings.

[96] In Re M Thorpe J emphasised the twin elements of emotional/psychological settlement and physical settlement, but did not refer specifically to future prospects and risks. After referring to Re N he said at 321A that 'It seems to me that any survey of the degree of settlement of the child must give weight to emotional and psychological settlement as well as to physical settlement. The distinguishing ingredient is the solidity and security of the arrangements the mother has developed in taking advantage of family support.' In the light of the length of the child's relationship with his grandparents for 15 months of his 4 years, the judge was satisfied that settlement in his new environment had been sufficiently demonstrated by the mother for the purposes of article 12(2).

[97] Wilson J in Re L, in the absence of factual evidence in support of the children's settlement, did no more than invoke Purchas LJ's Re S reference to 'a long-term settled position' and Bracewell J's Re N observation that the position to be demonstrated 'had to be as permanent as anything in life could be said to be permanent'. As I read his judgment (at 441B) he cast doubt upon rather than ruled out a parent's prospects of demonstrating settlement in a concealment case where that parent faced likely extradition proceedings. But the burden of his judgment goes not to the ingredients of settlement so much as to the manner in which the supposed discretion should be operated to accord with the deterrent principles of the Convention.

[98] I was not referred to any other decision taken in this jurisdiction that throws light upon the manner in which article 12(2) settlement should be defined and interpreted. There has however been a fair amount of comment from abroad in particular upon the proposition emerging from Bracewell J's Re N judgment regarding permanence and looking to the future. Differences of opinion have emerged, especially in the Australian jurisprudence relating to article 12(2).

[99] The dissension most clearly emerges in the case already referred to of Director General, Department of Community Services v M and C. At [12] and [13] the judgment of the Full Court recites the key passages from the judgment of Bracewell J in Re N, cited above, which had been adopted as the test by the trial judge, Baker J. That judge's conclusion was 'that the children had become well established environmentally in the Australian community and emotionally attached to their grandmother who has been their primary care giver over the past two years.' At [51] and [52] the Full Court cast doubt upon earlier Australian authority (including Graziano and Daniels (1991) FLC 92-212) to the effect that 'the test must be more exacting than that the child is happy, secure and adjusted to those surrounding circumstances', and taking the view that there is no warrant for reading more into the expression 'settled' than its ordinary meaning. At [62] the Full Court dismissed as 'untenable' the proposition that because the children needed counselling in relation to past abuse they were therefore not settled. 'A person can be settled into an environment and still experience severe problems.'

[100] At [88] to [93] the Full Court considered the proposition extracted from Re N that in considering whether the children are settled it is necessary to look not only at the past and present situation, but also into the future. In their opinion the paragraph from that judgment at 418B, concluding with the reference to permanence, contained propositions which were not good law so far as Australia is concerned:

'Nowhere in the [Australian implementing] Regulations are the words "long term" to be found and there is in our view no warrant for importing them. The test and the only test to be applied, is whether the children have settled in their new environment.'

[101] It is to be noted that immigration issues and uncertainties had been canvassed as indicia of lack of settlement, as to which the Full Court at [93] left the question open for future consideration but expressed the opinion that it would still be arguable that the children were settled at the relevant time.

[102] The M and C approach was approved and adopted in the subsequent Full Court case of Townsend v Director General, Department of Families, Youth and Community Care (1999) 24 Fam LR 495. The Full Court considered more fully the rival contentions: of (amongst others) Graziano following Re N that it was necessary to 'establish the degree of settlement which is more than mere adjustment to surroundings'; as against the M and C 'ordinary meaning' test. The key passages in the main judgment are as follows:

'33 Firstly the notion that the abductor "must establish the degree of settlement which is more than mere adjustment to surroundings" suggests that there are degrees of settlement, only some of which satisfy the legislative requirement. It therefore suggests a more exacting test than the Regulation actually requires. It may also be taken to imply that matters which would demonstrate adjustment to the environment are somehow irrelevant or to be discounted. The suggested contrast with "mere adjustment to surroundings" thus tends in our view to complicate the issue and distract the court from the task of determining whether the child is settled in his or her new environment.

34 Secondly it could be misleading to say that "settled" has two constituent elements, one physical and one emotional. While the various matters mentioned in the quoted passages are undoubtedly relevant, the analysis of the term into those two distinct components is unhelpful in our view. There are numerous ways in which the various relevant matters could be categorised. One might, for example, include "educational" as a separate category. The two-component categorisation adopted in Graziano might lead trial judges to approach the task in a way different from that required by the words of the Act. It could, especially in finely-balanced cases, affect the weight to be attached to various matters.

35 In our view, therefore, insofar as Graziano suggests that the test for whether a child is "settled in his or her new environment" requires a degree of settlement which is more than mere adjustment to surroundings, or that the word "settled" has two constituent elements, a physical element and an emotional constituent, it represents a gloss on the legislation and should not be regarded as accurately stating the law. We agree with the Full Court in M and C (the correctness of which was not challenged before us) that "the test, and the only test to be applied, is whether the children have settled in their new environment".'

[103] The Re N formulation appears to have been adopted uncritically in Scotland, for instance in the case (already referred to) of Soucie. But there has been academic criticism of the proposition that 'projection into the future' and permanence 'insofar as anything in life can be said to be permanent' are constituent requirements in Dicey and Morris on the Conflict of Laws (13th edn., Sweet and Maxwell, 2000), at paragraph 19-096.

[104] The last thing that I wish to do is to attempt to make things clearer by applying a further coat of gloss, when my instinct is that I should try to reposition myself, if at all, closer to the unvarnished words of the Convention. But by way of comment may I make the point that it seems to me that there is room, in the evaluation whether settlement has or has not been achieved in the particular case, to encompass whichever evidential strands appear most relevant to that consideration. Thus, surely it must be going too far to say that the future can be ignored: take the case of an abducting parent who after many years in country A, or town B or house C, at the relevant time has the firm intention and is in the midst of making plans to achieve a move to a different country, town or home. At the other end of the spectrum may be some more speculative or distant but nevertheless fundamental uncertainty about the pattern of the child's life. In between may be doubts about immigration status, of the sort which the Full Court in M and C regarded as arguable one way, and thus no doubt the other.

[105] Viewed in this light, article 12(2) defines the point of transition. Established settlement after more than one year since the wrongful removal or retention is the juncture in a child's life where the Hague judge's legitimate policy objective shifts from predominant focus on the Convention's aims (for the benefit of the subject child in particular and of potentially abducted children generally) to a more individualised and emphasised recognition that the length and degree of interaction of the particular child in his or her new situation deserve qualitative evaluation, free of Hague Convention considerations and constraints. If (by

analogy with the judicial response to the exercise of the article 13(b) discretion) too high a threshold is set for establishing settlement the consequence is not so much that the Hague aim of speedy return will be frustrated, but rather that a child who has in his or her past already suffered the disadvantages of unilateral removal across a frontier will be exposed to the disruption inherent in what for that child would be a second dys-location, potentially inflicting cumulative trauma.

My findings and conclusion re 'settlement'

[106] On the evidence available to me:

i) Since the wrongful removal in July 1999 S (who was 9 years 5 months old when these proceedings commenced last October) has lived in the care of M in England and in the same city.

ii) After staying for a month with a relative, she and M lived for one year at one address, and then at their present home for the 38 months prior to institution of these proceedings. This child has therefore not lived a nomadic life. Her mother has not so much been 'on the run' with her but rather has 'gone to ground'.

iii) The last move just referred to did not involve a change of school, and thus S has attended the same school since September 1999 when she was 5.

iv) S's home routines have followed a regular pattern in that M has worked throughout, since October 2000 in continuous employment as an administrative officer for a government agency.

v) S has maintained relationships with various members of her maternal extended family living in Ireland and England, but has had no contact of any sort with F.

[107] External observations of S in her environment include the following:

i) From her school, whose head-teacher has written of the close and caring relationship between mother and daughter; of S's development in confidence and self-esteem; and of her excellent progress educationally, socially and in extra-curricular activities such as French classes, Brownies and sports. The head-teacher also comments favourably about the strong friendships S has made amongst her peers; her popularity and good behaviour; and the positive aspects of her (and M's) participation in parish activities through their involvement with their church. My comment is that S appears to have developed inter-dependence with others as she has developed in age and maturity, and has formed and forged relationships outside her home and beyond and beside her immediate carer, her mother.

ii) From a local authority social worker who carried out an individual assessment when S came to their attention and into their physical care under a police protection order and subsequently in the early stages of these proceedings. Notwithstanding the child's prompt and recent removal from home at that point she was described as not appearing to be emotionally disturbed by these events but presenting as an emotionally stable child, able to express herself clearly, and demonstrating clear attachment with M. The social worker recorded information confirming S's involvement in school, social and community activities. She wrote 'she has built a life [in the locality], has friends and is held in very high regard in her local school. … She has very little recollection of her life in Los Angeles.' The conclusion reached by the social worker was that there were no child protection concerns (save an anxiety that S's identity had been changed); social services (from their perspective) had no role to play; that M had the capacity and ability to meet her needs; and that it was not in S's

interests to remain in local authority care. She was assessed as articulate with good understanding, clear and concise use of language and excellent conversation skills; of above average intelligence for her age; of an independent disposition, well able to express her wishes and feelings; a child who when asked to 'describe things in her life' replied 'very good'.

iii) When seen by a woman police officer on the day of her removal from M, S commented that she felt safe living as she did, loved her school and did not want to leave. She was opposed to the prospect of returning to America and made reference to unhappy recollections of time spent with F.

iv) Friends and neighbours from the church and school, and S's uncle, bore witness to the stability and fulfilment of various interlocking aspects of S's life as it has developed over time.

[108] Furthermore on 19 November 2003 an experienced Cafcass officer, Mrs Werner-Jones, met S and M at their home to investigate and report on S's maturity and her objections to returning to California for the purposes of the article 13 exception relied upon by M; and to record her factual observations pertinent to the settlement issue. She had been provided with the documentation in the case as it then stood, including the local authority's Initial Assessment. She also took the opportunity to visit S's school and to speak to the head-teacher and to the class teacher. Subsequently, on 24 October 2003 she observed the first direct contact meeting between F and S.

[109] Mrs Werner-Jones' observations concur with those of the school and the social worker, and her conclusion was that S's level of maturity and understanding was commensurate with her age. I will deal separately with what she reported on the question of S's objections, none of which seem to impinge on the settlement issue, except perhaps that S made clear her attachment to her school, teachers, class friends and Brownies, as well as to M and M's family.

[110] In relation to settlement, Mrs Werner-Jones primarily recorded information derived from the teachers which expands upon but is consistent with the picture painted in the head-teacher's letter. S is described as 'hitherto happy and well rounded' although 'destabilised' by the period of foster care and the uncertainty clouding her future. For my part such uncertainty and the setbacks it produces seem to me to be inevitable, whether S is settled or not, and thus do not of themselves reflect on that question one way or the other. I am only sorry that this judgment seems unlikely to resolve the pattern of her future, and that a further period of uncertainty, for her and her parents, may lie ahead.

[111] What seemed, at that stage, encouraging and (if I may so) refreshingly unusual in my experience in cases at all like this is that S at that stage had an unrepressed natural curiosity about F, and had been kept in one way in touch with him through photographs around the home (including one above her bed). S welcomed the prospect of meeting F even though the recollections of him which she expressed were negative. That first meeting it seemed, as I have said, to go encouragingly well although I know that a subsequent meeting, for whatever reason, did not.

[112] Recollections of life with her father apart, S is said to retain very little by way of memories of her life in America. This is hardly surprising, as she was effectively removed from that country in December 1998 when she was only four-and-a-half. She thus spent less than the less sentient first half of her life there. If she retained substantial meaningful connections with that country, then that might impact on the question whether she is settled in her new (or, in terms of its duration, in this case not-so-new) environment here: see the

approval of observations to that effect in the Florida District Court decision in the case of Bocquet v Ouzid (2002) 225F. Supp. 2d1337 at 1349. But although in some case that may be a valid consideration it would not apply here, even though, (as well as F) S has relatives on her mother's side who live or lived near the family during their time in California.

[113] I regard that as an adequate summary of the features of the evidence which I find to be supportive of a finding of article 12(2) settlement. To be set in the balance to contrary effect are the following considerations upon which Mr Setright relied.

i) This is an extreme example of deliberate concealment involving the fabrication of new identities for M and S. M's evidence deals with the manner in which she obtained birth certificates in assumed names selected from gravestone inscriptions. Mr Setright describes them as a family in flight whose underlying lifestyle is unstable, secretive and based upon a web of lies. He comes close, as I understand him, to suggesting that upon such basis a child can never become settled. But I disagree: it does seem to me to matter significantly whether flight and the concealment last five minutes, five months or five years. From this child's perspective she had been brought to what has become a haven since she and M came to live in their penultimate home, and she started at what has remained her school.

ii) Rumbling along beneath the apparently calm surface has all this time been the deceptively quiescent volcano, representing the everyday risk of being found, which indeed erupted last October. Settlement on such a false-secure basis is not really settlement. Again, were this proposition to be accepted, it would seem impermissibly (in my view) to follow that article 12(2) is not available to benefit any child whose parent has escaped detection.

[114] My conclusion on these adverse aspects comes to this. I do not suggest that in no case could they be relevant, or that in some they might not be determinative. Looking at all the circumstances of this case in the round they give way to the positive factors earlier enumerated. In my view S was by October last year settled in her new environment within the meaning and intent of article 12(2), and on that basis the application for her return to America under the Hague Convention fails.

In the alternative …

[115] The length of this judgment must however be further extended, for I must deal with a number of 'what-if' scenarios.

[116] If I am wrong in concluding that once settlement is established in a more-than-one-year case no discretion nevertheless to order return arises, then in this case I would emphatically exercise such discretion against the disruption which such an order (made summarily without consideration of the merits) would risk wrecking. I believe that response would be self-evidently justified upon the basis (already discussed) that a finding of settlement should ordinarily take a case outside the procedures and approach of the Convention's scheme and into the realm envisaged by article 18 where a welfare investigation should precede potentially disruptive as opposed to peremptory restorative return.

[117] Such a welfare-based investigation can take place here. This is not necessarily the most convenient jurisdiction for such an enquiry, particularly from F's point of view. As against that, the quality of what has become the status quo which has developed in S's life can readily be investigated here with input from her teachers and others involved over time in her daily life. Furthermore, in S's welfare interests the question whether she should continue to make her home in England would demand decision before and not after the current

continuity of her life is broken, even for only however long the case might take to reach a conclusion in the other jurisdiction.

[118] If I am wrong to find settlement established, so that article 12(2) is not engaged at all, other issues open up concerning which I should clarify what my findings would be, were those issues thus to become material to the Hague application for return. I propose to do this in a summary fashion only, for I heard no oral evidence and the materials upon which my conclusions are based (should they fall for reconsideration elsewhere) are as accessible to another court as to me.

[119] Furthermore, in particular in relation to the article 13(b) exception, reliance was placed by M on a number of potentially alarming aspects of F's alleged behaviour. If S's future home, home state and contact arrangements fall to be determined in this jurisdiction, then it may prove unhelpful and indeed prejudicial to one party or another for this judgment to give any even provisional indications of where I think the truth may lie. I thus do take very much into account an observation Mr Setright made in closing submission. He pointed out that there were allegations made against F with which he had not attempted to deal in his written evidence. Mr Setright suggested that perhaps he had chosen to maintain silence on these topics because the advice he received about the impact of the allegations could well have been that the extremely restrictive response to an attempt to raise an article 13(b) exception which English case law has developed is such that the allegations, even if left unchallenged or unexplained, would not surpass the very high threshold that has been set.

[120] I shall take the child's objections exception first. What emerged very clearly from the interview with the Cafcass officer was S's perception that a return to America would involve leaving her mother, as well as losing contact with family, school, friends and teachers. She had anxieties about what life living with F would entail. Her objections, as expressed, were inextricably bound up with the concept of a change of carer. It is unimportant for present purposes how she came to equate the two concepts: the consequence is however that her objections to return are tainted by this confusion of thought. It may indeed reflect upon the level of her maturity and capacity to deal with these complex and emotionally charged issues.

[121] It is unnecessary for me to take this question any further. I am unpersuaded that this defence has been made out. I have of course considered the valuable points of principle set out by Ward LJ in Re T (Abduction: Child's Objections to Return) [2000] 2 FLR 192. The onus is upon M to establish this exception and she fails.

[122] I find more problematical M's assertion under article 13(b) that 'there is a grave risk that … her return would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation.' Of course I recognise that, in this jurisdiction, the standard set to meet that test is exacting. But I am not sure that I agree, from the perspective of a judge exercising Hague Convention jurisdiction, with the position which Mr Setright represented (genuinely and professionally, as of course I accept) as his client's: that the concerns raised could not in the current state of English caselaw add up to this exception. I would be unhappy if the Conventionally correct judicial response to the cumulative impact of these concerns (if soundly-based) had to be that they stopped so far short of the requisite scale to cross the hurdle and open the door to the discretion. But it may be that I am aberrantly soft in this area: as witness two of my decisions which were corrected on appeal in TB v JB (Abduction: Grave Risk of Harm) [2001] 2FLR 515 and Re H (Abduction: Grave Risk) [2003] EWCA Civ. 355, [2003] 2FLR 141.

[123] However, for the reasons I have given, it seems entirely desirable that I should avoid expressing any view about whether M's allegations or any of them are made out on the present state of the evidence, and having regard to the fact that the same issues may figure in a welfare-based investigation to be conducted in this jurisdiction. In the event that the correctness of my decision that the article 13(b) defence is not made out in this case as the law here has developed, requires reconsideration, then the detail can be developed from the documentation.

[124] M alleges that during the period prior to her departure from America:

i) She suffered physical and emotional abuse and had (and retains) reason to fear threatened both physically and psychologically by F's behaviour which, she contends, was intensely manipulative and obsessive.

ii) During cohabitation he demonstrated a high degree of irresponsibility to her and to S both in terms of providing secure accommodation and financial support.

iii) He resorted to exceptionally deceptive and manipulative behaviour fraudulently to secure welfare benefits on the false basis that he and M lived separately.

iv) He obtained court orders on a deceptively inaccurate factual basis.

[125] She alleges that since her departure from America:

i) He has deliberately misstated the position in relation to criminal proceedings which have been instituted against her, in particular by asserting that no warrant for her arrest had been issued.

ii) He has expressed his determination to see her imprisoned.

iii) He has behaved bizarrely and has demonstrated irrationality in the tone and content of letters he has written to S, to M and to others.

iv) His manner of intended presentation to S (in letters from the contents of which she was hopefully shielded) of two supposed half-sisters, whose initials are K and K, lacked consideration (at the least) and is further evidence of irrationality and lack of consideration for the child.

v) He has been inconsistent concerning the paternity of K and K which he has sometimes asserted.

vi) Grave concerns are raised by his convictions in April 2000 for serious emotional and physical abuses perpetrated on K and K are compounded by his disingenuous presentation of incomplete and/or inaccurate information concerning these events and any appeal against his conviction and sentence.

vii) He may be inappropriately motivated to generate publicity concerning this case and the issues involved, regardless of potential adverse consequences for S.

viii) There are grounds to believe he will not comply to undertakings he made to the English court.

[126] If the case turned on a positive finding in relation to either of the article 13 exceptions advanced, and if (contrary to the conclusions I have stated) I had decided that either or both exceptions were established, then I would have regarded the very considerable length of time

which in fact S has spent here, and the undoubted connections she has made here, as justifying exercise of the discretion against ordering her return.

[127] If I am wrong on all counts, and obliged consistent with the requirements of the Hague convention and CACA to order S's return, then I would certainly have regard to the fact that on any view these proceedings did not commence until more than a year after the wrongful removal. The obligation to order S's return would thus not need, pursuant to article 12(1) to be 'forthwith'. If such had been or should be my conclusion then, in the absence of any agreement between the parents, I would have wished to regulate an orderly but not over-hasty return, yet not one so drawn-out as thereby to prolong anguish. The time until the end of the school year and to permit an opportunity for some holiday time here before departure would also allow F to demonstrate his ability to put in place the necessary structures and arrangements and his willingness to honour whatever undertakings might be agreed or (if appropriate) imposed, as pre-conditions to S's return. In fact, by the conclusion of the hearing before me F had not clarified his position in relation to requests made on behalf of M in an attempt to resolve practical problems in the event that S's return were ordered. I emphasise that the expectation would of course only be that such 'holding' arrangements should continue simply until replaced by whatever a United States court seised of the issues between the parents might deem more appropriate.

The way forward

[128] I anticipate that whether in Children Act or in wardship proceedings questions concerning S will need determination. M will seek to assure her continued residence here and with her. F may seek an order for her return to America and may seek an order for her to live with him. On any outcome it is likely that contact will need to be regulated. I shall give directions as to the timetabling of evidence, including the provision of any reports, and hope to be able to fix a date for what should on this basis be the determinative hearing which should settle S's future.

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