COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

19 October 2004

Thorpe, Waller and Maurice Kay LJJ

Cannon v Cannon

COUNSEL: Henry Setright QC and Ian Lewis for the father.; Alison Ball QC for the mother.

SOLICITORS: Reynolds Porter Chamberlain; Ballam Delaney Hunt

THORPE LJ:

Introduction.

1. This is an appeal from the judgment of Singer J given on the 28th May 2004 and reserved from a three-day hearing commencing on 1st March 2004. The hearing was almost entirely concerned with legal argument as to the meaning and effect of Articles 12 and 18 of the Hague Convention on the Civil Aspects of Child Abduction incorporated into our law by the Child Abduction and Custody Act 1985. Singer J himself granted permission to appeal, no doubt because his preferred construction of those articles rejected all previous authority in the courts of the United Kingdom. That bold course was open to him since none of the previous decisions were directly binding upon him.

2. The first orthodoxy rejected by Singer J was that the phrase "the child is now settled in its new environment" imports far more than mere ostensible physical settlement. The second orthodoxy rejected by Singer J was that a judicial finding of settlement only opens the gate to the exercise of a judicial discretion to order or refuse the child's return to the jurisdiction from which it had been abducted. In advance of the hearing the judge had sought the assistance of an Advocate to the Court and at the hearing all three counsel (Mr Setright QC for the father, Miss Ball QC for the mother and Mr Nicholls as the advocate to the court) were agreed that the judge would exercise a discretion to order or refuse return should he conclude that the mother had proved that the child was settled within the meaning of Article 12. When Singer J indicated that he was likely to take a different view Miss Ball for the mother naturally enough swam with the tide. Perhaps more surprising is that the judge converted Mr Nicholls. We are told that in his final oral submissions Mr Nicholls sided with Miss Ball, submitting that a finding that the child was settled precluded the judge from ordering a return

3. In all these circumstances it is not surprising that Singer J's reserved judgement is full and erudite. He reasons and almost argues the case for his stance. Accordingly we are perhaps less disadvantaged by the absence of any advocate to the court.

The facts.

4. I turn now to record briefly the facts giving rise to the legal issue. Singer J, during the course of his management of the interlocutory stages of the case, delivered a judgment settling the extent of the court's power to remove the child into Local Authority accommodation as an interim measure. His judgment is reported as Re C (Abduction: Interim Directions: Accommodation by Local Authority) [2004] 1 FLR 653. Singer J's summary of the essential history is to be found at paragraph 3 of the reported judgment and repeated at paragraph 3 of his May judgment. I gratefully adopt his summary:

"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 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 the 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."

5. Some elaboration is recorded at paragraph 6 of his judgment which reads as follows: -

"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."

The issues.

6. Having set out the terms of Articles 12, 13 and 18, Singer J continued: -

"Three questions of law as to the interpretation and effect of Article 12 (2) 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?"

7. Mr Setright criticises the judge's analysis on the ground that he has put the cart before the horse. I see some force in that criticism and for the purposes of this appeal I would define the two issues that we are required to determine as: -

i) What is the proper construction of the phrase "the child is now settled in its new environment"? (Hereafter Issue 1)

ii) Once the defendant has proved that the child is now settled in its new environment, does the court nevertheless retain a residual discretion to order the child's return? (Hereafter Issue 2)

8. During the course of his comprehensive judgment Singer J dealt with a number of issues and submissions canvassed during the course of the hearing before him. Parallels were sought to be drawn from a consideration of the provisions of the revised Brussels II regulation, (formally known as 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). Similarly parallels were drawn with the 1996 Hague Protection Convention. Another section of the judgment deals with considerations raised by the Human Rights Act 1998. Then both Mr Setright and Miss Ball endeavour to draw support from the Vienna Convention on the law of Treaties. Another area covered is the jurisprudential foundation for the American doctrine of tolling, a doctrine commonly but not universally adopted in the United States of America for determination of issues arising under Article 12 (2).

9. I do not propose to consider any of those more or less related areas. They have insufficient potential to contribute to the resolution of the two issues which I have defined. Given that the Convention has been in force in this jurisdiction for eighteen years there is, in my judgment, ample material in our case law, supplemented by reported decisions in other jurisdictions, to give adequate guidance as to the proper determination of the defined issues.

10. Professor Perez-Vela's report is plainly in a different category. However on the first issue, although in general terms supportive of Singer J's conclusion the text is in some crucial passages ambiguous. On the second issue her observations seem to me to be plainly contrary to Singer J's conclusions. Thus overall I do not draw much from Professor Perez-Vela's commentary. However I will return to her report briefly when considering each of the two issues.

The Articles of the Convention.

11. Before I do so I must set out the Articles of the convention with which this appeal is principally concerned:

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.

Where the judicial or administrative authority in the requested state has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

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."

12. Article 12 is the crucial article that in its first paragraph imposes the obligation to return once the Convention conditions are met. This appeal is, however, concerned with the second paragraph, which for convenience I will hereafter refer to as Article 12(2).

Counsel's submissions.

13. Both Mr Setright and Miss Ball had prepared us for the appeal by submitting very full skeletons. Mr Setright presented his argument under the following sub-headings: -

i) The relationship between the fact of concealment and the concept of settlement within the meanings of Article 12(2).

ii) Whether there is any residual discretion to order a return under the Convention, notwithstanding a finding of settlement.

iii) The exercise of any such discretion in the particular circumstances herein.

14. Mr Setright's essential submission on i) above was that concealment, and particularly concealment under a false identity was inconsistent and incompatible with the concept of settlement written into Article 12.

15. As to ii) above Mr Setright naturally submitted that Singer J erred in his conclusion that in proceedings commenced more than one year after wrongful removal or retention, and where the child was settled, there was no residual power or discretion under the Convention to order a return. It is unnecessary to record Mr Setright's submissions on iii).

16. In relation to both i) and ii) Mr Setright submitted that Singer J's conclusions were contrary to the purpose and objects of the Convention and therefore contrary to a purposive interpretation of the provisions of the Convention. It would weaken the effect of the Convention, because it would endorse the objectionable outcome of an abducting parent taking advantage of a wrongful act to defeat the Convention. It would be inconsistent with the International determination to construe parallel defences provided by Article 13 against abductors, particularly in those cases where the abductor has relied on his or her own conduct to set up the defence.

17. As to the foundation of the discretion to order return despite a finding of settlement Mr Setright submitted that it was to be implied since Article 12(2) did not expressly exclude it. Alternatively he submitted that the discretion was expressly provided by Article 18.

18. Miss Ball's task was made light by the range and power of the judgment below. It was almost enough for her to say that the judge was right on both issues for the reasons which he gave.

Issue 1.

The Perez-Vela Report.

19. The language of Paragraphs 106-109 is, I accept, generally supportive of Singer J's conclusion. However there are passages in Paragraphs 108 and 109 that are sufficiently ambiguous as to cast doubt upon her explanation.

The Authorities.

20. In this jurisdiction five authorities have been cited which I will briefly review.

21.(A) Re S (A Minor)(Abduction) [1991] 2 FLR 1. In a judgment with which Lady Justice Butler-Sloss agreed Purchas LJ said at 23: -

"I now turn to the last matter, which is art. 12, as to whether in these circumstances it has been demonstrated that K. in now settled in her new environment. Mr Karsten submitted that the President made no finding on this matter. I have read the relevant passages from his judgment. It is perfectly clear that he considered art. 12 at some length, and that he considered the submissions of counsel and, as I have said, before he started the hearing had been fully acquainted with the documents and the history. The countervailing submissions as to whether K. could really be said to be settled in this environment, looking at the historical record of the mother and the numerous movements and schools and so on, must be a matter of considerable debate. For my part, I would not disturb the approach that the President has made on this aspect of the case. He made a specific finding on the matter. 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 one 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 of art. 18, the court may or may not order such a return. Bearing in mind the many moves to which our attention is drawn by Miss Scotland, for my part, I would not consider that it had been demonstrated that Katharine was settled in the new environment. There was from April 1989, and certainly August 1989, a dispute going on with which she must have been concerned about her future and where she was to live. She had established, it is obvious, a relationship with her half-sister, who had come through many of the other vicissitudes with her. But 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. Sir Stephen Brown P was not satisfied. I, for my part, would not disturb his decision on that matter. In any event, in all the circumstances of the case, Sir Stephen Brown P exercised his discretion within art. 18, and observed the underlying comity of this Convention in supporting, rather than interfering with, a foreign court properly seized with the management and control of the welfare of K. who had been under its jurisdiction as a result of divorce proceedings which took place in that court."

22. (B) Re N (Minors) (Abduction) [1991] 1 FLR 413. This is a seminal decision which had subsequently been considered, and generally approved, in subsequent cases not only in this jurisdiction but also elsewhere. For Bracewell J this was virgin territory other than the then recent decision of the Court of Appeal in Re S and another first instance decision of the President in the case of M v. M (Unreported) given on the 8th October 1990. Her conclusion as to the degree of settlement that had to be proved is expressed in the following paragraphs: -

"The second question which has arisen is: 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. Purchas LJ in Re S did advert to art. 12 at p.35 of the judgment he said:

If in those circumstances it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of art. 18 the court may or may not order such a return.'

He then returned to the 'long-term settled position' required under the article, and that is wholly consistent with the approach of the President in M v M and at first instance 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 insofar 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 the 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 its own peculiar facts..."

23. (C) In the case of Re M (Abduction: Acquiescence) [1996] 1 FLR 315 I referred to the decisions in Re S and in Re N and added at 321A: -

"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."

24. (D) Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433. Wilson J directed himself to in Re S and Re N. This is how he put it: -

"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) [1992] 2 FLR 1, 24C, Purchas LJ described what was required as a long-term settled position; and in Re N (Minors) (Abduction) [1991] 1FLR 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."

25. (E) Re H (Abduction: Child of Sixteen) [2000] 2 FLR 51. In this case Bracewell J returned to consider again the question of settlement expanding the views that she had earlier expressed in Re N by relying upon the approach that Wilson J had adopted in Re L. The relevant passage commences at 54H: -

"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.

I am satisfied that the father first knew of the children's whereabouts in December 1998 when he received a letter from K. Even if the mother wrote in May 1998 and whether or not the father received such a letter, it does not, in my judgment, affect this aspect of the case because the mother did not set out her address and indicated that she would be staying in England for at least a few months. At that date, on any view of the matter, the mother was making representations which did not constitute a determination to remain permanently in this jurisdiction. It was in fact misleading as far as the father was concerned, because I am satisfied that when the mother wrongfully removed the children she intended to stay permanently within this jurisdiction but had no intention of so informing the father. The mother in effect was playing ducks and drakes with the father. She did not disclose her address and she did not inform the school in Australia that she was removing the children. When K did inform the father of the address shortly thereafter there was a removal to another address, and plainly, on the totality of the evidence, the mother was unwilling to have any meaningful contact with the father or to give him any information which might assist him to take any proceedings in relation to the children. 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.

It is plain from the authorities what settlement consists of and, so far as these children are concerned, I do not find that they come into the ambit of the test in Re N (Minors) (Abduction) [1991] 1 FLR 413. Settlement has to be looked at at the date of commencement of proceedings and it is to be given its ordinary meaning with two constituents physical and emotional."

Scotland.

26. Two relevant Scottish authorities have come to our attention. The first is Perrin v. Perrin [1994] SC45, a decision of the Inner House of the Court of Session. In construing Article 12 of the Convention the court adopted and applied the test defined by Bracewell J in Re N.

27. In Soucie v Soucie (1995) SLT 414 the court noted that the decision in Re N had been accepted and adopted in Perrin v. Perrin and applied to the facts of that case. In reviewing the judgment below the court added this additional consideration: -

"Furthermore the question of settlement had to be considered in the context of the spirit of the Convention whereby the fundamental duty of the court is to order a return of the child to the proper jurisdiction when there has been a wrongful removal or retention."

United States of America.

28. American case law on the proper construction of Article 12 in any case where the lapse of more than 12 months has been caused or contributed to by concealment on the part of the abductor has been strict. The American jurisprudence has developed the concept of tolling or equitable tolling. In simple terms that doctrine requires the court, in calculating the length of time between the date of the commencement of the proceedings from the date of the wrongful removal or retention, to disregard all time during which the child has been concealed. Mr Nichols in his written skeleton below traces the genesis of the concept to the State Department's Legal Analysis of the Convention: -

"If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child and thereby delayed the commencement of a return proceeding by the applicant, it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations."

29. In the majority of the reported American cases the concept of tolling has been applied, certainly where the conduct of the abductor has attracted strong condemnation. The decision in Mendez-Lynch v. Mendez-Lynch is an instance of its application but that decision has since been criticised. At an appellate level the US Court of Appeals for the 11th Circuit in Lops v. Lops left open the question as to whether "some tolling, interruption or suspension" could apply to the 12-month time limit in cases of concealment. In summary there is no Federal Appellate Court authoritative decision. However it is plain that an abductor who has gained time by concealment will not ordinarily prove settlement within the meaning of Article 12 in an American court.

Other jurisdictions.

30. For the following citations I am indebted to Marion Ely, Legal Officer at the Hague Conference who prepared for the appellant's solicitor a summary of the relevant decisions held on the Conference's INCADAT record. In the Irish case of P v. B (2) (Child Abduction: Delay) [1999] 4 IR 185 settlement was found proved in a case in which proceedings were not commenced until 20 months after the wrongful retention and 12 months after the discovery of

the child. In Switzerland in the decision of the Lausanne court given on the 6th July 2000 a return was ordered. The court noted that the child had not become settled in his new environment given the clandestine nature of his existence over the previous four years, during which he had not attended school or developed any social relationships. The most extreme case within the summary appears to be the case of J. E. A. v. C. L.M. [2002] 220 D. L. R. (4th) 577 (N. S. C. A.). A return order was made despite the fact that it had been seven years since the child's wrongful removal. The reasoning was as follows: -

"However, the Convention's objective of deterring abduction would be served by ordering return in this case. The circumstances of this abduction were particularly egregious. The mother and those who had assisted her must be shown that courts will deal firmly and unequivocally with child abduction and that Nova Scotia is not a haven for child abductors.

The objective of having the child's best interests determined by the court of the habitual residence would also be served by an order for return even though the child had been absent from her habitual residence for the past seven years. The child's father and extended family were in the United States, as were those who investigated allegations of abuse. The courts there were thus in the best position to continue the process begun in 1995 to determine what was in the child's best interest.

The child is now established in her new environment in terms of school, friends and activities, but the court must also consider the instability of her position and that of her mother, on whom the child is dependant."

Australia.

31. Australia is the only jurisdiction that appears to favour a more limited and literal construction of Article 12(2). In the case of Director General, Department of Community Services v. M. and C. and the Child Representative [1998] FLC 92-829 the Full Court of the Family Court of Australia (Nicholson CJ presiding) rejected the statement of principle by Bracewell J in Re N which had been previously approved by the full court in the case of Graziano v. Daniels [1991] 14 Fam. LR 697. In rejecting what I would describe as the conventional construction Nicholson CJ stated: -

"In our opinion this statement does not represent the law so far as the Australian Regulations are concerned. As the majority of the High Court pointed out in De L's case it is the Regulations that must be applied. Nowhere in the 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. That test is to be applied either at the time of the application being made or at the time of trial. It is unnecessary to consider which date is the relevant one in the context of this case, given the short period between the two dates."

32. A similar conclusion was reached in the later case of Townsend v. Director-General, Department of Families, Youth and Community [1999] 24 Fam. LR 495. Again the court rejected the approach that had been endorsed in Graziano, (namely that there must be a degree of settlement more than mere adjustment to surroundings and that there is both a physical element and an emotional constituent of settlement) labelling it an unnecessary gloss on the legislation. The only test to be applied was whether the children had settled in their new environment.

33. However in relation to these Australian decisions it is be emphasised that they are decisions upon the construction of the Australian enactment, namely Regulation 16(1) of the Family Law Rules.

34. There can be little doubt that Singer J was much influenced by the recent Australian decisions. From the later case of Townsend he cited the following three paragraphs: -

"33 Firstly the notion that the abductor "must establish the degree of settlement which is more than mere adjustment to surrounding" 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."

35. Singer J continued to set out his conclusions in the following two paragraphs which I cite in full: -

"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 are arguable one way, and thus no doubt the other.

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 a child would be a second dys-location, potentially inflicting cumulative trauma."

Issue 2.

The Perez-Vela Report.

36. Here the final sentence of paragraph 112, considering the bearing of Article 18 on Article 12 (2), suggests that a finding of settlement leads the court to the exercise of a discretion to refuse return.

The Authorities.

37. I turn now to review briefly the state of the authorities on the second issue. Here the stream of past decisions is almost all one way, establishing that a finding of settlement does not result in the dismissal of the plaintiff's application but only opens the gate to the exercise of a judicial discretion as to whether or not to order a return under the Convention.

38. It might be said that the outcome of this legal debate is of little practical consequence since the dismissal of the plaintiff's application under the Convention does not in any way inhibit an alternative application for a return order under domestic law, whether under the statutory provisions contained in the Children Act 1989 or the court's inherent jurisdiction in wardship. However the outcome of the debate is clearly regarded as consequential by the parties to this appeal. For the exercise of a discretion under the Convention requires the court to have due regard to the overriding objectives of the Convention whilst acknowledging the importance of the child's welfare (particularly in a case where the court has found settlement), whereas the consideration of the welfare of the child is paramount if the discretion is exercised in the context of our domestic law.

39. The authorities cited above in relation to the proper construction of the meaning of settled within Article 12(2) are the authorities that also establish the court's discretion to order a return under the Convention where settlement has been proved. Again the genesis is the case of Re S in this court and all that is relevant is there to be found in the passage already cited. It is to be noted that in sentences at letters B and D on p.24 Purchas LJ specifically states that the residual discretion to order return is provided by Article 18. Those statements have been adopted, sometimes expressly, by judges at first instance in later cases. In Re N there are two clear references to Article 18. At 416E Bracewell J stated: -

"The next matter arising is whether art. 12 is applicable to this case, and whether the mother has demonstrated that the two children have settled in their new environment...If the answer to that question is 'yes' then this court has a discretion under art. 18 as to whether or not the children should be ordered to return."

At 417 D she repeated: -

"in the event of the court being so satisfied, then a discretion arises under art. 18 as to whether or not to order the return of the children."

40. In the case of Re M, shortly before the passage cited above, I only said: -

"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."

41. Much more extensive is Wilson J's consideration of the residual discretion and its foundation in the case of Re L. Immediately following the passage already cited is the following: -

"If, however, she had demonstrated it, 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 the 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."

Scotland.

42. Again the cases cited above on the first issue also plainly demonstrate that the Scottish courts exercise a residual discretion to order return in cases where settlement in the new environment has been proved. By way of demonstration I need only cite two brief passages from the judgment of the court in Soucie v. Soucie: at 418A is the following sentence: -

"Such a balancing exercise may be appropriate when considering the discretionary powers of the court under Article 18, which will come into play if the proviso to Article 12 is established or indeed if any of the matters contained in Article 13, which will come into play if the proviso to Article 12 is established or indeed if any of the matters contained in Article 13 are established."

43. This theme returns in the final paragraph when the court recorded: -

"We should add that we were addressed on the matter of discretion which would have arisen under Article 18 if we had been satisfied that either of the main issues should be decided in favour of the respondent."

United States of America.

44. Since the USA has generally adopted the equitable tolling approach it is harder for defendants to establish settlement which no doubt explains why there is little consideration of the existence and origin of the residual discretion in the American reports.

Other jurisdictions.

45. We were not referred by Mr Setright to any consideration of this issue in other States with the exception of the Australian authorities to which I will come under a separate heading. However in the INCADAT memorandum I note the case in the Republic of Ireland of P v. B (2) (Child Abduction: Delay) [1999] 4 IR 185. In that case the court concluded that the child in question had become settled in its new Irish environment during the twenty months between the wrongful retention and the commencement of proceedings. However the court recognised the existence of the discretion to order return nevertheless, but exercised that discretion to refuse the return.

Australia.

46. Within the Australian jurisprudence there is a powerful voice that influenced Singer J's conclusion that, once settlement has been proved, a return may not be ordered under the convention. Kay J, the liaison judge for Australia in Hague Convention cases and a noted expert and teacher in this field, delivered a strong opinion in the case of State Central Authority v . Ayob [1997] FLC 92-746. The relevant extract is fully cited in the judgment below at paragraph 60 thus: -

"I digress for a moment to say that whilst there is some suggestion in some English cases that finding of "settled in a new environment" still leave a discretion in the Court to order the return of a child, I must respectfully disagree with those views. If those view 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 wall 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."

47. However it cannot now be said that Kay J's rejection of the English authorities represents the state of the law in Australia. For his view was doubted by the Full Court in the case of Director General of the Community Services v. M and C. Below the passage already cited there appears the following section of the judgment: -

"Additional Matters Relevant to "Settlement"

95. Before leaving this aspect of the appeal, we think it is necessary to draw attention to the obiter view taken by Kay J in Ayob's case as to whether in a case where one year has elapsed since the child's wrongful removal (or retention) and the filing of an application pursuant to the Hague Convention, a finding under reg 16(1) that a child is settled in a new environment, still leave a discretion in the Court to order the return of a child.

96. At 84,072, his Honour respectfully differed from the approaches of Bracewell J in Re N at 417 and Purchas LJ in Re S (A Minor) (Abduction) (1991) 2 FLR 1 at 25 to the extent that those case "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... ". Although that set of circumstances was not found to be the case before his Honour, he said that had such facts been the case "that would be the end of the matter under the Hague Convention and under the Regulations." In his Honour's view, the matter would fall to be decided under common law or other statute.

97. While the factual aspects of the children's being "settled" was subject to a good deal of argument in this case, the consequences in respect of discretion under the Regulations was not. We therefore do not propose to deal with that issue which should await full legal argument.

98. We should say however, that we are not necessarily persuaded that Kay J's view is correct."

48. In summary it seems plain to me that whatever may have been the drafting intention and whatever may be the academic criticism, the global judicial community in the main construes Article 18 to confer upon the court a discretion nevertheless to order return in a case where the defendant has established both that the proceedings were commenced more than twelve months after the abduction and that the child is settled in a new environment.

Conclusions.

Issue 1.

49. I reject Miss Ball's submission that Article 12(2) was drafted specifically, if not exclusively, to deal with concealment cases and thus inferentially did not intend judges to use the fact of concealment to override the provisions of Article 12(2). In my experience there have been many cases where the Article 12(2) time limit has been breached without any acquiescence on the part of the plaintiff or concealment on the part of the defendant. Many potential plaintiffs are entirely ignorant of the existence of the Convention. They may be unable to afford legal advice. They make seek the aid of local lawyers who are incompetent, slothful or generally unfamiliar with remedies in this specialist field. Accident or illness may disrupt the pursuit of the Convention's remedies. Furthermore there are many jurisdictions without fully effective Central Authorities. Not all Central Authorities are as experienced, well resourced and effective as the Central Authorities of the three jurisdictions of the United Kingdom.

50. There must be at least three categories of case in which the passage of more than twelve months between the wrongful removal or retention and the issue of proceedings occurs. First there are the cases demonstrating, for whatever reason, a delayed reaction, short of acquiescence, on the part of the left behind parent. In that category of case the court must weigh whether or not the child is settled and whether nevertheless to order return having regard to all the circumstances, including the extent of the plaintiff's delay and his explanation for delay. On the other side of the case there may be no misconduct on the part of the defendant beside the wrongful removal or retention itself.

51. In other cases concealment or other subterfuge on the part of the abductor may have caused or contributed to the period of delay that triggers Article 12(2). In those cases I would not support a tolling rule that the period gained by concealment should be disregarded and therefore subtracted from the total period of delay in order to ascertain whether or not the twelve-month mark has been exceeded. That seems to me to be too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome.

52. In his skeleton argument for the hearing below Mr Nicholls offered this conclusion: -

"Each case should be considered on its own facts, but it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return."

53. I would support that conclusion. A broad and purposive construction of what amounts to "settled in its new environment" will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay. There are two factors that I wish to emphasise. One relates to the nature of the concealment. The other relates to the impact of concealment on settlement.

54. Concealment or subterfuge in themselves have many guises and degrees of turpitude. Abduction is itself a wrongful act, in that it breaches rights of custody, but the degree of wrong will vary from case to case. Furthermore abduction may also be a criminal offence in the jurisdiction where it occurred. The abductor may have been prosecuted, convicted, and even

sentenced in absentia. There may be an international arrest warrant passed to Interpol to execute either in respect of a conviction and sentence. The abductor may have entered the jurisdiction of flight without right of entry or special leave. The abductor may therefore be, or may rapidly become, an illegal immigrant.

55. At this point I would draw a parallel between an assertion that a child has become settled in a new environment and our case law regarding the acquisition of habitual residence. There is obvious common ground between proving that a child is settled in a new environment and proving the acquisition of an habitual residence in a new environment. The decision of Sir George Baker P in Puttick v. Attorney General [1980] Fam 1 clearly establishes that a fugitive from foreign justice will not acquire habitual residence in this jurisdiction simply by reliance on a temporal period during which the claimant has outwitted authority.

56. This brings me to the second factor namely the impact of concealment or subterfuge on an assertion of settlement within the new environment. The fugitive from justice is always alert for any sign that the pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrest.

57. This consideration amongst others compels me to differ from the opinion of the Full Court in Australia rejecting the previous acknowledgment that there were two constituent elements of settlement, namely a physical element and an emotional element. To consider only the physical element is to ignore the emotional and psychological elements which in combination comprise the whole child. A very young child must take its emotional and psychological state in large measure from that of the sole carer. An older child will be consciously or unconsciously enmeshed in the sole carer's web of deceit and subterfuge. It is in those senses that Mr Nicholls' proposition holds good.

58. There will often be a tension between the degree of the abductor's turpitude and the extent to which the twelve-month period has been exceeded. Obviously the present case illustrates the possibility that the considerable turpitude of the mother's conduct will be outweighed by the quality of the false environment and the years of history that it has achieved. It is of course an injustice to the deprived father that the longer the deprivation extends the less his prospects of achieving a return. The other side of the same coin is that the longer the mother persists in her deceit the more likely she is to hold her advantage. Not only does she increase her chances of resisting an application for a return order but she also complicates the process of reintroducing the father into the child's life and reduces the prospects of ever restoring the relationship that might have been between father and daughter but for the lost years.

59. The third category of case might be termed manipulative delay, by which I mean conduct on the part of the defendant which has the intention and effect of delaying the issue of proceedings over the twelve-month limit. An instance is the Canadian case of Lozinska v. Bielwaski [1998] 56 OTC 59. In ordering the return of the child the court held that the father had engineered the delay in the proceedings in order to invoke Article 12(2). The court accordingly ruled he could not take advantage of the delay he had created. In this category of case the rejection of the defence comes closer to the application of a principle of disregard than to arriving at the same result by a broad and purposive construction of the asserted settlement. Such an approach is consistent with that taken to a defence under Article 13(b): an abducting primary carer cannot create a defence by relying on circumstances that flow from his or her refusal to return with the abducted child: see Re C (A Minor) (Abduction) [1989] 1 FLR 403.

Summary.

60. I accept that Singer J was entitled to reject a fourteen-year current of domestic authority since no single case was binding on him in a strict sense. But that current was well established, well recognised and generally followed not only throughout the United Kingdom but throughout the common law world. Furthermore it was sustainable on the basis that it supported the

objectives and policy of the Convention and conferred upon judges a discretion that increased their prospects of achieving supportable outcomes in individual cases.

61. Departure from that current of authority, although open to him, was bold and in my judgment unwarranted. I would unhesitatingly uphold the well-recognised construction of the concept of settlement in Article 12(2): it is not enough to regard only the physical characteristics of settlement. Equal regard must be paid to the emotional and psychological elements. In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased. The judges in the Family Division should not apply a rigid rule of disregard but they should look critically at any alleged settlement that is built on concealment and deceit especially if the defendant is a fugitive from criminal justice.

62. Even if settlement is established on the facts the court retains a residual discretion to order a return under the Convention. The discretion is specifically conferred by Article 18. But for Article 18 I would have been inclined to have infer the existence of a discretion under Article 12, although I recognise the power of the contrary arguments. Singer J's rejection of the discretion is not only contrary to UK authority but, viewing global authority and academic writing, rests on weaker foundation than his more literal construction of the concept of settlement.

63. Whilst these judgments may seem to be significant in that they settle issues arising under Article 12(2) definitively, at least at this appellate level, I doubt that more than a handful of cases each year worldwide will be directly affected by our conclusions.

64. Given that neither party below sought to adduce oral evidence, it would have been open to this court to have exercised its own judgment to determine whether or not the child of the parties was settled in a new environment and, if so satisfied whether nevertheless it should exercise its discretion to order a return. However in the day allowed for the appeal we were hard pressed to hear full argument on the two issues of principle. Given the difficulties of re-constituting the court finality may be achieved sooner by remitting all outstanding issues to the Family Division. That question can be settled after enquiries have been made of the Court of Appeal listing officer and the clerk of the rules in the Family Division.

65. I would therefore allow the appeal on the two issues that have been argued. The ultimate form of our order must await further submissions.

WALLER LJ:

66. I would allow the appeal and make the orders suggested for the reasons given by Thorpe LJ.

MAURICE KAY LJ:

67. I agree.

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