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[14/02/1997; High Court (England); First Instance]
Re O. (Abduction: Consent and Acquiescence) [1997] 1 FLR 924, [1997] Fam Law 469



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**IN THE HIGH COURT OF JUSTICE**

**FAMILY DIVISION**

**Royal Courts of Justice**

**14 February 1997**

**Bennett J**

**In the Matter of O.**

**Ian Karsten QC and Michael Hosford-Tanner for the mother**

**Mark Everall QC and Debbie Taylor for the father**

**BENNETT J: The father applies to this court under the Hague Convention for the summary return of his son, B, born on 15 December 1993 who is therefore 3 years old.**

**On 28 August 1996 the mother removed B from Western Australia where he was habitually resident to England, and the mother and B have been in this country ever since. The father alleges the removal was wrongful, in that it was in breach of his rights of custody because the consent he gave in writing was not true consent. The mother says that (a) the father truly consented to her removing B prior to 28 August 1996, and/or (b) after his removal, the father acquiesced in the removal of B.**

**The father, who is 35 years old, is an Australian citizen and works on oil and gas rigs at sea. The mother, who is 31 years old, is a British citizen. In December 1988 the mother, then in Australia, met the father. They fell in love. They married on 18 March 1989. The mother became pregnant, but miscarried. In December 1993 B was born. There were considerable stresses in the marriage. The father was banned for life from driving motorcars, though under Australian law he has an 'extraordinary licence' which enables him to drive to and from work. The mother accuses him of being a substantial user of drugs. By June 1996 the mother says that the marriage was effectively over and the father was aware of that.**

**On 9 June 1996, with the consent of the father, the mother and B flew to England because the mother's grandfather had died and she wanted to attend the funeral. The mother's father purchased one-way tickets for the mother and B from Australia to England. The mother and B stayed with her parents, at their home in Cheshire.**

**On 20 August 1996 the mother and B arrived back in Western Australia and were met by the father. The mother and B travelled on return tickets (ie England-Australia-England) purchased by the mother on the father and the mother's credit card. The mother told me in evidence that she returned to Australia for a number of reasons. She returned because she wanted to tell the father face to face that, not only was the marriage over, but that she wanted to return to England with B permanently, for which she wanted the father's approval. She also went back to sort out her affairs and pack up the belongings of her and B. She expected all that to take some time, possibly several months. She denied she came back to get the father's written consent.**

**When the father met the mother and B at the airport on 20 August 1996, he detected something was amiss. She was not affectionate to him. They went back to the matrimonial home near Fremantle in Perth. Later that day, the father says that the mother told him that she did not love him and wanted to go back to England with B. The father said he could not believe what he was hearing. The father says he was so upset that he telephoned his brother, P, to come over. According to the father, there was a heated argument in the presence of P. The father told her she could leave Australia if she wished, but that B could not. Then the mother is said to have become distraught and on several occasions during the argument she is said to have threatened to kill herself and B if the father would not allow her to leave Australia with B and go to England. The father says that the mother had hatred in her eyes. He says he believed what the mother was threatening to do. He says the mother said that the father should sign a document to the effect that the father would permit her to take B to England.**

**The father's brother has sworn an affidavit on 12 December 1996. He did not give oral evidence. In his affidavit he says that on the day in question (ie the same day as the father says) the mother said that she 'would kill herself and B before the father could have her baby or stop her from going' (ie to England). He said it is difficult to describe, but the way the mother was acting and the way she made the threat to kill herself and B made him believe that that is what she would do if the father did not agree to let her go. After the mother made these threats, he says he took the father away from the house to calm down. The father was very upset. He told the father that they would give her the money for the tickets to calm her down. He told the father to go and see a lawyer.**

**So far as the mother's version of the events of 20 August 1996 are concerned, the mother says that, while she was unpacking in B's bedroom, there was a discussion about the marriage. The mother told the father that the marriage was over and that she wished to live in England with B. She says the father told her that he had met someone else. The father told the mother to get out of the matrimonial home, and eventually agreed to give her 3 days to get out. The mother says she had made no threats that day at all. P was not present. The next day, the father left the matrimonial home. On 24 August 1996 the mother and B left the matrimonial home and went to live temporarily with a friend called S.**

**The father says that during that week the mother told him that she needed cash to repay her father for the air tickets he had bought. He asked his brother, P, to arrange for cash to be made available to the mother, to reimburse the mother for the tickets on which she flew home, whereas in fact, the mother was asking for reimbursement of the cost of the air ticket in June 1996.**

**The mother says that on 24 August 1996 she went to the local Citizens' Advice Bureau and saw a lawyer called Campbell. On Sunday, 25 August 1996 the mother says she went to the matrimonial home with B and picked up the dog, and took him to an animal rescue establishment and asked that establishment to find him a good home. She says the father**

**knew that the dog was being disposed of. She and B then returned to the matrimonial home for a meeting with the father. P was present. The mother described to me that she and the father had had a heated argument in their bedroom, P was in the kitchen. The mother and the father went to the kitchen. P was trying to mediate. The mother was holding B.**

**The mother told the father and P that she had been to the Citizens' Advice Bureau on Friday, 23 August 1996 to obtain advice as to how she stood legally about leaving Australia with B. P said to the father that he should get something in writing about his visitation rights to B, both in England and Australia. The mother agreed with that. The father, mother, B and P then moved into the lounge. The arguing and shouting continued. P kept saying to the father that he should get something in writing. P said something to the effect that the mother was not to leave the house until she had agreed to put something into writing about the father's visiting rights. According to her, P had tried to stop her leaving the house. The mother says that she believed that the father and P might try to physically take B from her, or prevent her from leaving the house with B. It was at that stage, she says, that she in high temper, and without truly meaning what she said, said that, if either the father and/or P tried to prevent her leaving the home, or prevent her from taking B from the home with her, she would kill herself. She denies threatening to kill B. She said she made the threat to kill herself once, and once only. The mother was allowed to leave the matrimonial home with B.**

**It is common ground between the father and the mother that, whatever the nature of the threats, and whenever they were made, they were not repeated after the day on which they were made. Further, it is common ground that the mother has never, in any way, harmed B, or ever threatened to do so prior to the events on or after 20 August 1996.**

**That Sunday, the mother returned to S's house. She told me that she decided to draft a document to protect her and the father's rights in respect of B. She drafted a document in manuscript. She had read about the Hague Convention in newspapers and magazines. The next day, Monday, 26 August 1996, she faxed it to a typing agency. The father telephoned her. She says that she told him what she had done. They agreed to go to the zoo after picking up the typed document at the agency. The mother and father walked with B to the typing agency. The father stayed outside with B whilst the mother went in to collect the document. She says that she had several copies made, one of which she handed to the father on leaving the agency. The father read it and agreed with it. The father says these events happened the next day on 27 August 1996.**

**It is common ground that the typed document which came into existence is the same document that appears in the bundle. It reads as follows:**

**'Letter of agreement for access rights to: [B] DoB 15-12-93**

**The first and foremost priority of this agreement is for the constant well-being of [B].**

**Both parents will at all times keep within this agreement.**

**[B] will remain in the care of his mother in the UK or where she chooses to live.**

**[The father] will always be allowed solo visits/holidays within the UK and/or phone calls and correspondence as often as his father feels necessary -- with no threat of abduction from [the father].**

**[B] will always have the freedom to contact his father if he so wishes as often as he likes.**

**Until [B] is of the age to travel unaccompanied to Australia, with the full guarantee that his father will not implement the Hague Convention as a devious means of keeping [B] longer than the agreed visitation period.**

**All travel and accommodation expenses to be solely met by [the father].**

**[The father] gives his wife full consent to take [B] out of Australia.**

**This agreement has been drawn up amicably by the parents so as to cause minimal distress and suffering to [B].'**

**On 27 August 1996 the parties met in Fremantle with B. They went to the park and then had some lunch. They then went to Perth, to the Citizens' Advice Bureau, and saw the same lawyer, Mr Campbell, that the mother had seen the previous week. The father says that he read the document at the offices of the Citizens' Advice Bureau. He did not know what the Hague Convention was, and nobody explained what it meant. The father says he told Campbell he was unhappy about signing it. The mother denies that. The father says that the lawyer said that the document was worthless. The father also says that on that day, prior to signing the document, the mother agreed that she would not leave Australia until after Father's Day on 1 September 1996. The mother disputes that. She says that such a conversation did not happen on 27 August 1996 but on 25 August 1996, when she said that she would have to talk to S to see if it was possible to stay with her for that length of time.**

**On 27 August 1996, in the presence of Campbell in the Citizens' Advice Bureau, the father and the mother signed and Mr Campbell witnessed their signatures. The father admits that he signed the document, but alleges that he signed it under 'duress'. He asserts that he had to agree to B going to England with the mother because he believed the threats made by the mother to kill herself and B. He says he had no one to turn to for help and that he did not want to take a chance with B's safety.**

**On 28 August 1996 the father telephoned the lawyer in the firm of Dwyer Durack who acted for the union of which the father was a member. He telephoned the lawyer to receive advice, he says, on how to prevent B leaving the country with the mother. He told the lawyer of the agreement, yet, on his own admission, he did not tell the lawyer of the threats made on 20 August 1996. He mentioned to the lawyer that the agreement referred to the Hague Convention, and, according to him, the person he spoke to told him that that did not apply and he could still institute proceedings. According to him, the lawyer advised him that he might be able to get B back to Australia, but that after 6 months of court proceedings, the court would give custody to the mother and she could live wherever she wanted in the world. He says that he was told that a court would not take B off his mother unless she was a prostitute or a drug addict. The lawyer, he says, invited him to make an appointment, which he did for the next day, but he did not keep that appointment. He says he was devastated by the advice. He also says that his understanding of what he had been told was no matter what he did, the mother would, in the end, be allowed to live wherever she liked with B.**

**The mother meanwhile says that she had been told by S on 27 August 1996 that she had to leave her home on 28 August 1996. The mother then decided to book a flight to England to leave on 28 August 1996 for her and B. The mother did not tell the father about what she was doing because, she told me, she did not want an emotional scene with the father at the airport. She had already refused to allow him to come to the airport if she was to fly to England after 1 September 1996. The mother booked a flight for herself and B using the tickets paid for in England. At the airport the mother bumped into the father's aunt and other relatives, the aunt who was flying to Bali for a holiday. The father says he was alerted that day by a telephone call from the airport that the mother and B were there. He says he**

**telephoned the federal police at the airport to see if he could prevent B leaving Australia, but was told that without a court order they could do nothing. The father made no attempt to get any court order, and never contacted a lawyer.**

**At the airport on 28 August 1996, the mother had to fill out and sign out-going passenger cards for herself and B. She told me in evidence that she was given these cards to sign when standing in a queue at the airport. B was restless. She was unsure how to fill the cards out. The cards are to be found in the bundle. The mother had to fill in for herself and B their names and passport numbers and nationality and dates of birth. Then on one side of the card, there are three columns D, E and F. I am only concerned with E and F. Column E is for a resident of Australia departing temporarily; column F is for a resident departing permanently. The mother, albeit that she says that she was departing permanently, filled out column E, namely for a resident departing temporarily. Under 'intended length of stay abroad', she put '7 months', and for the main reason for her and B going abroad, she ticked 'holiday'. She did not, of course, in any way complete column F. She then signed the cards for her and B.**

**It is apparent from the print next to her signature that the Australian legislation required that she should answer all questions truthfully. The mother told me that she was concerned that if she completed column F, she and/or B might not be allowed back into Australia in the future when B came to Australia for contact with his father, either on his own or with the mother. She accordingly completed column E believing that that would give her and B the maximum flexibility to return to Australia for contact purposes, and that that would be in the interests of the father as well. She emphatically denied that she did not complete column F so as to prevent the immigration authorities asking awkward questions about why she was leaving and so as to forestall any inquiries the immigration authorities might make of the father before allowing the mother to board the plane. The mother told me that she was not concerned that the father might be asked because the father had already consented in writing to her going to England and she held a copy of his written consent.**

**In opening this case for the father, Mr Mark Everall QC submitted that there were four issues for me to decide. The first issue was: did the father validly consent to the removal of B? The second issue was: whether 'consent' falls under Art 3 or Art 13(a) of the Hague Convention. The third issue was whether the father subsequently acquiesced. The fourth issue is: if either consent and/or acquiescence were established, how the court should exercise its discretion under Art 13(a).**

**Before making my findings on the issues of fact, I should say something about the mother and the father as witnesses. The mother struck me as a truthful witness. She seemed to me to want to tell the truth. By contrast, I am not prepared to accept the father's evidence, in particular where it conflicts with the mother's. I was most impressed with the mother's evidence that she decided to return to Australia to say to the father directly that the marriage was over and ask his approval for B to live with her in England. She could so easily have stayed in England and tried to end the marriage by letter and telephone. The father's case is that the mother returned to get the father's approval, and she was determined to persuade him to give his written consent, even to the extent that she would threaten him because she knew what would effect him and what would not. As will be apparent, I shall reject that case.**

**The first issue**

**There is no doubt that, absent the threats, the father consented to B being removed by the mother. That is plain from the document. The father seeks to deny the validity of that**

**document by asserting that the threats the mother made to him on 20 August 1996 so overbore his willpower that he signed the document believing that, if he did not, the mother would kill herself and B. Mr Everall put it this way: has the father truly consented? He submits that the father did not truly consent to the mother leaving Australia with B. His mind did not go with his act of signing because the threats that the mother made on 20 August 1996 influenced him to do something, ie sign, which he would not otherwise have done.**

**I accept the mother's evidence that at no time did she ever, even in temper, threaten to harm B. I am quite satisfied that she has never, ever harmed B, and has never given any indication that she might. I find that she did make a threat on 25 August 1996. It was said in temper and was a threat to harm herself if she and B were not allowed to leave the matrimonial home. She did not mean to carry out that threat. The threat in any event had nothing to do with her proposal to go to England with B. If the mother had truly made the threats suggested by the father, I am sure he would not have allowed the mother to look after B and he would not have left the matrimonial home and, at the least, he would have gone immediately to a lawyer to get advice about how he could protect his son from the seemingly unstable mother. The threats, according to the father, were made on 20 August 1996, yet he took no action to protect B before the mother and B left on 28 August 1996.**

**The father in his oral evidence was adamant that the threats had been repeated on several occasions on 20 August 1996. However, a reading of his and his brother's statements do not to me give that impression at all. To my mind, a most persuasive point against the father is that he never told the union lawyer on 28 August 1996 of the threats at all. That is astonishing. He says he only signed the document because of the mother's threats, yet he never told the lawyer of them. How then can he have expected the lawyer to give any sensible advice to him? His explanation for not mentioning them was unconvincing. He told me that even if he had told the lawyer of the threats there was nothing they could do, and there was no point in telling the lawyer of the threats after the advice he was given. In my judgment, the truth is that he never told the union lawyer of the so-called threats because (a) they were never made (which I find they were not); and/or (b) he did not believe them even if they were made.**

**In my judgment, the father has attempted to deceive the court. He has twisted the mother's threats to kill herself if she and B could not leave the matrimonial home, which I find he did not believe anyway, into threats to kill herself and B if she and B could not go to England permanently. He has done that in order to try to wriggle out of the plain effect of the document, under which he knows and knew he gave his free and willing consent to the mother and B leaving Australia to live in England permanently. Having seen and heard the father and mother give evidence, I find that there is clear and cogent evidence that the father did truly consent.**

**The father says that he only gave his 'consent' to the mother and B leaving Australia on the strict understanding that she was not to leave before Father's Day on 1 September 1996 and the mother had agreed to that. I reject that evidence. In my judgment, what happened was that on 25 August 1996, the father suggested to the mother that she should not leave Australia until after 1 September 1996, but the mother said she would have to see if S could accommodate her until then. She spoke to S about the matter, but S told her on the evening of 27 August 1996 that the mother and B would have to leave the next day.**

**On the evening of Sunday, 25 August 1996, S's parents had returned from Melbourne and S's mother had a broken arm and nose. There were six people, S and her child, the mother and B and S's parents, living in very cramped conditions. S, therefore, told the mother that**

**she had to leave on 28 August 1996. The mother had nowhere to go in Western Australia and so she went to England. It is significant to my mind that the father made no attempt or effort nor made any suggestion to put into the agreement a passage to the effect that the mother would not leave Australia until after Father's Day on 1 September 1996. A simple manuscript addition would have sufficed. He had ample opportunity to consider the document, having been given a copy of it by the mother on 26 August 1996, the day before it was signed.**

**The second issue**

**Mr Karsten QC for the mother submits that when a parent gives his or her consent to the other parent removing their child or children from the country in which the children are habitually resident to another country, then the court must first consider whether or not Art 3 has been breached. He submits that if Art 3 has not been breached, then the removal cannot be wrongful, and thus Chapter 2 of the Convention, in particular Arts 12 and 13, never come into play. Mr Everall, whilst conceding that in some cases 'consent' must undoubtedly come within Art 3 of the Hague Convention, nevertheless submitted that once there was a prima facie case of lack of consent, then consent falls to be considered under Art 13(a).**

**As I understand his submissions, he contended that a prima facie case of lack of consent arises as soon as the aggrieved party goes on oath that he did not consent or had not consented. He relied on the decision of Holman J in Re C (Abduction: Consent) [1996] 1 FLR 414 where Holman J decided that the issue of consent fell to be considered under Art 13(a).**

**Before I come to the detailed submissions of Mr Karsten and Mr Everall, I propose to set out the relevant Articles of the Hague Convention. Chapter I of the Convention is headed 'Scope of the Convention'. Article 3 provides:**

**'The removal or the retention of a child is to be considered wrongful where --**

**(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and**

**(b) at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.**

**The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'**

**Article 4:**

**'The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of sixteen years.'**

**Article 5:**

**'For the purposes of this Convention --**

**(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;**

**(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.'**

**Chapter II of the Convention is headed 'Central Authorities'. By Article 7, the only Article in that chapter:**

**'Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.**

**In particular, [the Central Authority] shall take all appropriate measures [in respect of the matters set out in nine separate subheadings].'**

**Chapter III of the Hague Convention is headed 'Return of Children'.**

**Article 8:**

**'Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence, or to the Central Authority of any other Contracting State for assistance in securing the return of the child . . .'**

**The Article then goes on about what the application shall contain and what may accompany or supplement it.**

**Article 12:**

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

**Article 12 then refers to other matters. Article 13, so far as it is relevant to this case, provides:**

**'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; . . .'**

**Article 14:**

**'In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formerly recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.'**

**Article 15:**

**'The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.'**

**Article 16:**

**'After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, 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.'**

**Mr Karsten submits that it is the purpose of the Hague Convention to secure the prompt return of children who have been unilaterally removed from, or retained out of, the State of their habitual residence, ie in breach of the custody rights attributed to the 'non-removing' parent. Rights of custody include the right to determine the child's place of residence. It is submitted that the natural meaning of the words 'wrongful' and 'in breach of custody rights' does not cover a case where the 'non-removing' parent has consented to the removal of the child to another country. Another way of putting that submission is that the words 'wrongful' and 'in breach of custody rights' do not cover a situation where the 'non-removing' parent exercises his rights of custody by deciding, whether in consultation with the other parent or not, that it is in the best interests of the child to leave the country where he is habitually resident and live in another country.**

**Mr Karsten and Mr Everall cited to me the explanatory report by Professor Eliza Perez-Vera, the Professor of International Law at the University of Madrid, who was the Rapporteur to the Commission which drew up the Hague Convention. In my judgment, there are helpful passages in that report. At para 64 it is said:**

**'Article 3 as a whole constitutes one of the key provisions of the Convention, since the setting in motion of the Convention's machinery for the return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention. Now in laying down the conditions which have to be met for any unilateral change in the status quo to be regarded as wrongful, this article indirectly brings into clear focus those relationships which the Convention seeks to protect. Those relationships are based upon the existence of two facts, firstly, the existence of rights of custody attributed by the State of the child's habitual residence, and secondly, the actual exercise of such custody prior to the child's removal.'**

**In para 71 it is said:**

**'Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise . . . It seeks, more simply, to prevent a later**

**decision on the matter being influenced by a change of circumstances brought about through the unilateral action by one of the parties.'**

**In para 114 it says:**

**'With regard to article 13, the introductory part of the first paragraph highlights the fact that the burden of proving the facts stated in sub-paragraphs a and b is to be imposed on the person who opposes the return of the child, be he a physical person, an institution or an organization, that person not necessarily being the abductor. The solution adopted is indeed limited to stating the general legal maxim that he who avers a fact (or a right) must prove it, but in making this choice, the Convention intended to put the dispossessed person in as good a position as the abductor who, in theory, has chosen what is for him the most convenient forum.'**

**Finally, para 115:**

**'The exceptions contained in a arise out of the fact that the conduct of the person claiming to be the guardian of the child raises doubts as to whether a wrongful removal or retention, in terms of the Convention, has taken place. On the one hand, there are situations in which the person who had the care of the child did not actually exercise custody rights at the time of the removal or retention. The Convention includes no definition of "actual exercise" of custody, but this provision expressly refers to the care of the child . . . It follows from this that the question of whether the custody is actually exercised or not must be determined by the individual judge, according to the circumstances of each particular case.**

**Moreover, by relating this paragraph to the definition of "wrongful removal or retention" in article 3, one must conclude that proof that custody was not actually exercised does not form an exception to the duty to return the child if the dispossessed guardian was unable actually to exercise his rights precisely because of the action of the abductor. In fact, the characterization of protected situations, contained in article 3, governs the whole Convention and cannot be contradicted by a contrary interpretation of any of the other articles.'**

**Mr Karsten further relied upon a passage in the judgment of Lord Donaldson MR in Re C (A Minor) (Abduction) [1989] 1 FLR 403. At 412F-413D he said:**

**'I give a separate judgment only because I wish to emphasize the international character of this legislation. The whole purpose of such a code is to produce a situation in which the courts of all Contracting States may be expected to interpret and apply it in similar ways, save in so far as the national legislatures have decreed otherwise. Subject then to exceptions, such as are created by s 9 of the 1985 Act in relation to Art 16, and s 20(4) of the 1985 Act in relation to para (b) of Art 10(2), the definitions contained in the Convention should be applied and the words of the Convention, including the definitions, construed in the ordinary meaning of the words used and in disregard of any special meaning which might attach to them in the context of legislation not having this international character.**

**We are necessarily concerned with Australian law because we are bidden by Art 3 to decide whether the removal of a child was in breach of "rights of custody" attributed to the father either jointly or alone under that law, but it matters not in the least how those rights are described in Australian law. What matters is whether those rights fall within the Convention definition of "rights of custody". Equally, it matters not in the least whether those rights would be regarded as rights of custody under English law, if they fall within the definition.**

**"Custody", as a matter of non-technical English, means "safekeeping, protection, charge, care, guardianship" (I take that from the Shorter Oxford English Dictionary); but "rights of custody" as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is "the right to determine the child's place of residence". This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right, in so far as the child is to reside in Australia, the right being that of the mother; but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the Convention. I add for completeness that a "right to determine the child's place of residence" (using the phrase in the Convention) may be specific, the right to decide that it shall live at a particular address, or it may be general, eg "within the Commonwealth of Australia".'**

**Next, Mr Karsten relied on Re B (A Minor) (Abduction) [1994] 2 FLR 249. At 254H, Waite LJ said:**

**'The central issue**

**Her counsel, Mr Munby, has not sought to suggest that the mother's conduct, or that of the maternal grandmother, can be defended on any equitable or moral ground. The judge's finding that:**

**"the mother, assisted by her own mother, cruelly deceived the father; and she now seeks to profit by her deceit", is not challenged. The crucial issues are:**

**(1) did the father have "rights of custody" within the terms of the Convention at the date of F's removal from Australia; and, if so,**

**(2) does the fact that the father's consent to that removal was obtained by deception, require him to be treated as though he had never consented at all, so as to render the removal a breach of his "rights of custody"?'**

**Waite LJ then sets out the relevant Articles of the Convention. At 256H he continues:**

**'It was common ground before Connell J that the mere fact of his paternity of F as an illegitimate child gave the father no automatic custodial right of any kind under the law of Western Australia. The judge held, however, that he had acquired rights amounting for Convention purposes to "rights of custody" -- first through his active role in the care of the child, secondly through the status which the mother and the grandmother had themselves accorded to him as a party whose consent was necessary before F could be removed from the jurisdiction or issued with a passport, and thirdly through the rights recognised or accorded to him when the mother signed the second minute. He held, further, that the father's consent to F's removal from Australia was not a true consent -- it having been obtained by the deceit of both mother and maternal grandmother -- and that the removal was therefore without his authority and in breach of his "rights of custody".'**

**At 260E, Waite LJ continued:**

**'(2) Does the fact that the father's consent to that removal was obtained by deception require him to be treated as though he had never consented at all, so as to render the removal a breach of his "rights of custody" (assuming such rights to be established)?**

**Mr Munby contends that the father's consent to F's removal on 25 August 1993 was a genuine consent, however fraudulently obtained by the mother and maternal grandmother. The deceit may be reprehensible, but the fact that consent was given makes it impossible to say that the removal was wrongful in the sense of involving a breach of the father's rights of custody. Mr Holman submits that the judge was right to hold that a consent obtained by deceit is no consent.'**

**At 261G, Waite LJ continued:**

**'As for the issue of consent, the question whether a purported consent to the child's removal obtained from the aggrieved parent was or was not a valid consent is similarly to be determined according to the circumstances of each case. The only starting-point that can be stated with reasonable certainty is that the courts of the requested State are unlikely to regard as valid a consent that has been obtained through a calculated and deliberate fraud on the part of the absconding parent. That applies in my judgment whatever the purpose for which the consent is relied on -- whether it be to nullify what would otherwise be considered a wrongful breach of rights of custody for the purposes of Art 3, or as a consent of the kind that is expressly referred to in Art 13(a).'**

**In the instant case prima facie the father gave his consent, but seeks to say that it was not a valid consent for the reasons I have given. If it was a valid consent as I have found it was, then it seems to me as a matter of principle it is open to me to find that the father's rights of custody have not been breached, for it was he who exercised them by agreeing to B leaving Australia and living in England and that, accordingly, the removal was not wrongful within Art 3.**

**I now turn to consider the decision of Holman J in Be C (Abduction: Consent) [1996] 1 FLR 414. At 415H he said:**

**'The father now applies for the return of the children under the provisions of the Child Abduction and Custody Act 1985 and the Hague Convention.**

**It is common ground, and there is no doubt about it, that immediately before 11 January 1995:**

**(i) both children were habitually resident in Alaska;**

**(ii) under the law of that State each parent had equal rights of custody in the Convention sense over and in relation to their children; and**

**(iii) the father as well as the mother was actually exercising those rights.**

**In defence of the father's application the mother says that:**

**(i) in fact the father consented before [the abduction in January 1995] to the permanent removal of the children to England; . . .'**

**At 416F the judge continues:**

**'Thus the sole effective issue in this case is consent. The mother says that this removal was not "wrongful" or an "abduction" at all, since she came to England with the full knowledge and agreement of the father that it was a permanent move following on the break-up of the parties' marriage.**

**Such a case does in fact raise an interesting question on the construction of the Convention and the interrelation of Arts 3, 12 and 13. The summary provision of Art 12 only applies "where a child has been wrongfully removed or retained in terms of Article 3 . . .". Under Art 3:**

**"The removal or the retention of a child is considered to be wrongful where --**

**(a) it is in breach of rights of custody . . ."**

**Obviously, it is difficult to characterise a removal as "wrongful" or "in breach of rights" if it is done with the consent of the other party. Thus it is arguable that where there is consent one never gets as far as considering Art 13, the effect of which is to provide certain discretionary "exceptions" to the otherwise unqualified duty to order the return of the child under the first paragraph of Art 12.**

**On this argument:**

**(i) the burden of proof would be on the applicant to negative consent (ie to prove a "breach" of his rights), just as it is on him to prove such matters as the State of prior habitual residence and the existence of a right of custody under the law of that State; and**

**(ii) if there is consent then there is no wrongful removal at all, and the exercise of a discretion under Art 13 does not arise.**

**There is much force in this argument, but it ignores the fact that the Convention specifically places the issue of consent firmly within Art 13.'**

**The judge then sets out the relevant parts of Art 13. He continues:**

**'It is quite clear from both the English and the French texts that the word "subsequently" in Art 13(a) only qualifies the word "acquiesced", and that the words "had consented to" clearly refer to a consent before the act of removal or retention.**

**It is also to be observed that although the issue of whether rights of custody were actually being exercised also forms part of the "definition" of "wrongful removal" within Art 3 itself, that issue, too, is also specifically placed within Art 13(a). This must have been done deliberately, and proper force must be given to it. The Convention clearly intends that once it has been shown that:**

**(i) there has been a removal from or retention away from the State of habitual residence; and**

**(ii) that is prima facie in breach of rights of custody; and**

**(iii) consent is put in issue,**

**then the onus shifts firmly onto the person or body which opposes the return of the child to prove that the removal or retention was by consent. Further, even if that is proved the court still has, and must exercise, a discretion.'**

**At 419D, the judge continued:**

**'However, I am in complete agreement with Wall J that the issue of consent is a very important matter. It needs to be proved on the balance of probabilities, but the evidence in**

**support of it needs to be clear and cogent. If the court is left uncertain, then the "defence" under Art 13(a) fails.'**

**The facts of that case, which are fully set out in the judgment, disclose that there was a dispute between the parents as to whether the father had given any consent at all. By contrast, in the instant case, there is strong prima facie evidence from the written agreement that the father had exercised his rights of custody in that he had agreed to B leaving Australia to live in England permanently. The father in the instant case seeks to avoid his consent by asserting that it was not a valid consent by reason of the threats. It is, perhaps, significant that in his first affidavit sworn on 20 December 1996 it was the father who himself exhibited the agreement, and then adduced evidence as to why it was not a valid consent.**

**Mr Everall relied upon Re C. He points to the undoubtedly powerful point made by Holman J at 417B (the passage to which I have already referred). Mr Karsten submitted that Art 13 (a) is to be invoked in situations, for example, where the custody of a child is in the court as in wardship, and the removal of the child by one parent is with the consent of the other but without the leave of the court. Another situation is where there is an embargo by the court on removal without the leave of the court, when one parent agrees to the child's removal by another. I reject those submissions. With respect, they seem very contrived.**

**In my judgment, whether 'consent' comes within Art 3 or Art 13(a) will depend on the facts of each case. If the 'non-removing' parent asserts or effectively has to concede that on the face of it he gave his consent, but asserts that it is vitiated by deceit or threats or some other vitiating factor, which he must raise in order to establish that his consent was no true consent, then the matter falls to be dealt with under Art 3. If, on the other hand, the very fact of consent is in issue, as it was in Re C, then the matter comes within Art 13(a) and the burden falls upon the person who asserts consent to prove it.**

**In my judgment, this approach is consonant with the explanatory report and the authorities of C v C and Re B. If Holman J in Re C is stating a principle that consent must always (my emphasis) come within Art 13(a), then I respectfully disagree with him. On the facts of Re C, the matter did fall to be dealt with under Art 13(a). As I have said, Mr Everall conceded in argument that there must be some cases of 'consent' which fall to be dealt with under Art 3. In my judgment that concession was rightly made. However, I reject his submission that the instant case falls to be dealt with under Art 13(a) for the reasons I have given.**

**Accordingly, in my judgment, the removal was not wrongful and the application will be dismissed on that ground. However, if I am wrong on this issue, it is right that I should go on and decide issues 3 and 4.**

**Issue 3**

**Before I come to the facts I should direct myself as to how I am to approach the issue of acquiescence as a matter of law. The latest decision on this subject is H v H (Abduction: Acquiesence) [1996] 2 FLR 570. In that case the parents were members of the Orthodox Jewish faith. The family were living in Israel when the mother, without warning to the father, removed the children to England. Each parent then invoked the jurisdiction of their local rabbinical court. The mother also obtained orders from the county court in England. In April 1996 the father invoked the Hague Convention and in May 1996 the father sought a return order. The issues before the court were (1) were the children habitually resident in Israel at the date of the removal and, if so, (2) had the father subsequently acquiesced in the removal of the children, and (3) if yes, should the court in its discretion make a return order?**

**The judge at first instance ruled that the answer to the first issue was 'yes' and to the second 'no'. The third issue, therefore, did not arise. The judge directed an immediate return to Israel. The mother appealed. The Court of Appeal, consisting of Stuart-Smith, Waite and Otton LJJ allowed the appeal.**

**The ratio decidendi of that case is to be found at 574 in the judgment of Waite LJ, with which Otton and Stuart-Smith LJJ agreed:**

**'The law**

**Article 13 provides . . .'**

**Then Waite LJ sets out Art 13(a). He continues:**

**'The phrase "subsequently acquiesced in the removal or retention" has been elaborated in England by case-law. The governing authorities are Re A (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14, Re AZ (A Minor) (Abduction: Acquiesence) [1993] 1 FLR 682 and Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819. Their general effect, to summarise it shortly, is as follows. In order to establish acquiescence by the aggrieved parent, the abducting parent must be able to point to some conduct on the part of the aggrieved parent which is inconsistent with the summary return of the child to the place of habitual residence. "Summary return" means in that context an immediate or peremptory return, as distinct from an eventual return following the more detailed investigation and deliberation involved in a settlement of the children's future achieved through a full court hearing on the merits or through negotiation. Such conduct may be active, taking the form of some step by the aggrieved parent which is demonstrably inconsistent with insistence on his or her part upon a summary return; or it may be inactive, in the sense that time is allowed by the aggrieved parent to pass by without any words or actions on his or her part referable to insistence upon summary return. Where the conduct relied on is active, little if any weight is accorded to the subjective motives or reasons of the party so acting. Where the relevant conduct is inactive, some limited inquiry into the state of mind of the aggrieved parent and the subjective reasons for inaction may be appropriate.'**

**Mr Everall was leading counsel for the father in H v H. He tells me that the House of Lords allowed the father's appeal after submissions on either 7 or 8 November 1996 and said reasons would be given later. No reasons have yet been given. I caused inquiries to be made and my understanding is that no date has yet been set for the delivery of their Lordships' reasons. In such circumstances, I asked Mr Everall and Mr Karsten how I should approach the matter in this unusual and possibly unique situation. Neither Mr Karsten nor Mr Everall asked me to adjourn the case to wait for the House of Lords' reasons. If such an application had been made, I doubt very much that I would have acceded to it, because the interests of B, and/or his parents demand that I decide the case speedily. Neither counsel were able to cite any authority as to how I should approach the matter in these circumstances.**

**Mr Karsten submitted that I should direct myself in accordance with the dicta of Waite LJ to which I have referred since it was not yet known upon what basis the House of Lords allowed the father's appeal in H v H. Mr Everall submitted that the Court of Appeal in H v H based their decision upon their finding that the father's conduct was inconsistent with the children's summary return to Israel and that a distinction had to be made between active and passive acquiescence and that, when considering active acquiescence, little if any weight is accorded to the subjective motives or reasons of the acquiescing party. Mr Everall submitted that it was inevitable that by allowing the appeal, the House of Lords must have found or will find that the ratio decidendi of the Court of Appeal's decision was wrong in**

**law. Mr Everall further submits that in the instant case I should rely on Re A (Abduction: Custody Rights), Re AZ (A Minor) (Abduction: Custody Acquiescence) and Re S (Minors) (Abduction: Acquiescence) rather than the ratio decidendi of the Court of Appeal in H v H. In particular he submits that I should rely on the judgment of the Court of Appeal in Re S at 831A-D, but with one important caveat. Waite LJ said at 831:**

**'There is a common thread that runs through all those passages. It can be stated in this way. Acquiescence is primarily to be established by inference drawn from an objective survey of the acts and omissions of the aggrieved parent. This does not mean, however, that any element of subjective analysis is wholly excluded. It is permissible, for example, to inquire into the state of the aggrieved parent's knowledge of his or her rights under the Convention; and the undisputed requirement that the issue must be considered "in all the circumstances" necessarily means that there will be occasions when the court will need to examine private motives and other influences affecting the aggrieved parent which are relevant to the issue of acquiescence but are known to the aggrieved parent alone. Care must be taken by the court, however, not to give undue emphasis to these subjective elements: they remain an inherently less reliable guide than inferences drawn from overt acts and omissions viewed through the eyes of an outside observer. Provided that such care is taken, it remains within the province of the judges to examine the subjective forces at work on the mind of the aggrieved parent and give them such weight as the judge considers necessary in reaching the overall conclusion in the totality of the circumstances that is required of the court in answering the central question: has the aggrieved parent conducted himself in a way that is inconsistent with his later seeking a summary return?'**

**According to Mr Everall, the important caveat is that the sentence 'has the aggrieved party conducted himself in a way that is inconsistent with his later seeking a summary return', is incorrect in law. Mr Everall submits that the issue is: has the parent conducted himself in a way that is inconsistent with the wrongful removal, ie 'has he acquiesced in the wrongful removal', not 'has he acted in a way which is inconsistent with a summary return'.**

**In my judgment, until the House of Lords has given its reasons for allowing the appeal in H v H, I am bound by the dicta of the Court of Appeal in H v H. I am not at liberty to second-guess what reasons the House of Lords may give for allowing the father's appeal. Nevertheless, Waite LJ in H v H was giving a summary of the general effect of three previous decisions of the Court of Appeal. I see no reason why, therefore, I cannot take into account the dicta in decisions of the Court of Appeal prior to H v H. Accordingly, I propose to follow, not only the dicta in H v H but also that in Re S.**

**So far as Mr Everall's caveat is concerned about Re S, I am satisfied on the facts of the instant case that the father's conduct is demonstrably inconsistent, not only with his insistence on his part upon a summary return, but also with his insistence that he had not acquiesced post the removal in B living permanently in England. Mr Karsten conceded that, in deciding the issue of acquiescence, I can look at what the father says were his motives, whether he was given faulty legal advice, and whether he was in a state of turmoil and all the circumstances of the case relevant to this issue.**

**On arrival in England, the mother and B went to live with her parents in Cheshire. She obtained her own accommodation towards the end of September 1996 or by the beginning of October 1996. Although she telephoned the father to tell them of their safe arrival, when she moved into her own accommodation, she did not tell him of her new address or telephone number. On the mother's evidence the father was in a state of some turmoil. When he telephoned and spoke to the mother at her parent's home he at one point told her on several occasions, that he would pay for her flight back to Australia with B. He also told her that he**

**would rent separate accommodation for her in Australia and that he would pay her maintenance for B and for herself if she did return with B.**

**On other occasions, the father told the mother that he was going to come over to England and work. On other occasions, he told her that he would come to England for B's birthday and Christmas of 1996. The mother became concerned that the father might try to snatch B and take him back to Australia. She consulted solicitors in England. On 24 October 1996 she filed a petition for divorce on the grounds of unreasonable behaviour and also, at the same time, filed a statement of arrangements for the children. That document sets out B's names and date of birth, where she was then living. It says that she proposes to live in rented accommodation with B. She says that B attends a local nursery for which her parents pay the fees. Under no 8 of 'Details for contract with children', she says that B has not seen his father since August 1996. Nevertheless, he talks to him weekly on the telephone. She also said, 'B's father may come over for a visit at Christmas'. Further down that page, she says this, in answer to the question 'Will there be any change to these arrangements?': 'I propose that B shall live with me in England and to have such contact with his father as can be arranged'.**

**The divorce petition and the statement of arrangements were sent to the local county court for service. On 28 October 1996 the mother signed a Children Act application for residence, but that was not issued until 13 November 1996 and was apparently not received by the father until early December 1996. On 28 August 1996 the father spoke, as I have said, to his union lawyer. He told him that the agreement referred to the Hague Convention and that he had been told by Mr Campbell that the agreement could not displace the Hague Convention and that he could still institute proceedings.**

**The father specifically says that the union lawyer told him that he might be able to get B back to Australia (ie under the Hague Convention) but that the likely outcome of any contested custody proceedings in Australia was that the mother would retain the care of B and be able to live in whichever country she chose. The father says that at first he thought he could persuade the mother to return and this was the best thing to do in the light of the advice he had been given. He says he was worried about taking any steps which the mother did not like because he was worried about what she might do and that she might harm B or herself. He says that his family and friends all counselled him not to do anything and that she would probably return to Australia in her own time in any event.**

**After the father had received the divorce petition, he consulted a firm of lawyers called Biddulphs. That was in late October or early November 1996. Having received advice, he says that his understanding remained that, even if he did take proceedings for B to be returned to Australia, the mother would be able to apply to the court and the court would, in the end, allow her to live wherever she wished with B. Furthermore he says:**

**'I did not wish to go through all the legal proceedings if I did not have a chance of B living in Australia.'**

**On 5 November 1996 the father's Australian solicitors wrote to the mother. They must have seen the divorce petition. The letter of 5 November 1996 appears in the bundle and it enclosed various documents. That letter told the mother that they, Biddulphs, had been consulted by the father; that the marriage had broken down irretrievably, and that the father had consulted them:**

**'. . . with a view to achieving a prompt and amicable settlement of all matters that must now be resolved between you. Our client has no desire to become involved in protracted and**

**expensive family court proceedings and we therefore trust that all matters can be resolved to the mutual satisfaction of both parties.'**

**The letter then goes on to refer to the matrimonial assets and it sets out what they understand to be the matrimonial assets. The letter states that the father proposes that the mother should transfer her interest in the former matrimonial home to the father and he would indemnify her in relation to the mortgage repayments as well as personal loan and Mastercard repayments. They asked the mother to sign the enclosed forms if that was acceptable to her so that the matter could be placed before the Family Court of Western Australia for its approval and an order made. They also enclosed a transfer in relation to the matrimonial home from joint names to the father's sole name and requested her to sign it. They asked that if the mother did not agree with the father's proposals for property settlement, that they should be advised what her proposals were. They asked for a response within 28 days.**

**There was enclosed with that letter a document headed 'Family Court of Western Australia, Family Act 1975, application for Consent Orders Form 12A'. The mother and the father's names and various details then appear and various matters are set out in the bundle. Then B's name and address and date of birth is given. Then comes what, to my mind, is a crucial passage in this document. It is section F 'Arrangements for the children'. Question 15 is: 'What are proposed arrangements for each child?'**

**Under 'Housing' there is typed 'the child resides with his mother in a brick and tile home. The home has all the modern amenities and the child has a bedroom of his own'. Under 'Supervision' there is typed, 'The mother supervises the child on a full-time basis with the support of her parents'. Under 'Financial support', there is typed: 'The mother supports the child on the income she receives from social security in the UK. The maintenance payable by the husband will be in the form of the husband paying all of the child's travel costs for two trips per year from the UK to Australia for contact'. Further down that page there is a question: 'Who else will live in the child's home?' The answer is: 'The maternal grandparents'.**

**Section H is an affidavit of the applicant, but the document was unsigned by the father. At section K is the affidavit of the respondent, and that is where the mother was requested to sign and the signature and oath should be witnessed by a justice of the peace or some other authorised person. On the next page is the proposed transfer of the wife's interest in the former matrimonial home to the father, which she was requested to sign.**

**In my judgment, the information at section F, on the husband's own evidence, must have come from him because he says that prior to 5 November 1996, he had not received the statement of arrangements. Nevertheless, whether he had received it or not, it is striking that on the face of the statement of arrangements, and on the face of section F, the parties seem to be agreeing that B should not be returned to Australia either immediately or in the foreseeable future, ie permanently. If the father had received the statement of arrangements before 5 November 1996, which I suspect he had because it would have been sent with the petition for divorce, then the father well knew that the mother was reiterating her position that B should stay in England and the father at section F was confirming that. Even if the father received the statement of arrangements after the letter of 5 November 1996 was sent, he must have realised that the letter of 5 November 1996 and its enclosures would confirm in the mother's mind that he was agreeing to B living in England and not returning to Australia other than for contact at some point in the future. As Mr Karsten in his closing submissions put it, the mother and father were ad idem as to where B should live permanently. It must be remembered that the father was making the proposals at section F**

**in the context of proposing that the mother should divest herself of all interest in the matrimonial home in Australia, the father was proposing a clean break financially on the basis that the mother and hence B would be living permanently in England and would have no financial links in Australia with him. Not surprisingly, on receipt of that letter and its enclosures, the mother pressed on with her residence application, if only to formalise what both parties wanted for B.**

**When the father gave evidence, he was asked about section F. He told me that he was being guided by Biddulphs. He hoped, he told me, that when the mother saw that document and there would be no money for B's maintenance, she would realise that she would be better off in Australia where there was a home and maintenance available for the mother as well as apparently a part-time job as a waitress. He told his solicitor that this would put pressure on the mother and that the pressure would consist of no maintenance for B if she stayed in the UK. He told me in evidence that he told Biddulphs that he wanted B back in Australia. He went on to tell me that if indeed he had told that to Biddulphs, he did not know why the contents of section F were as they are.**

**When he was cross-examined about section F by Mr Karsten, he told me that most of the information at section F Biddulphs must have 'presumed'. He did not give them that information. Mr Karsten asked him whether, if the mother had agreed to the financial proposals and sent back the document duly completed and signed, he would have signed it. The father said if the mother had signed it, it would have surprised him immensely. He said that would not have been the end of the matter. If she had signed it, he would have had to consider whether he should sign it. He accepted that it was a package deal and reiterated that if it had been sent back signed by the mother, he would have been shocked. He finally said he would not have signed it if the mother had signed it. I reject that evidence. The tenor and purpose of the letter and the enclosures is to the effect that, if it was agreeable to the mother and she signed and returned the document, so would the father. I find that if the mother had indeed signed and returned that document, the father would have done so, and it is very unlikely that any application would have been made to this court under the Hague Convention.**

**The father complains that Biddulphs did not advise him about the Hague Convention and its remedy for a swift return of B to Australia. Nevertheless, he accepts it was referred to by Biddulphs. He accepts that his understanding was that, even if he did take proceedings for B to be returned to Australia, the court in Australia would allow her and B to live outside Australia. I am very wary of accepting his evidence, particularly in the light of my findings about the father's lack of truthfulness in relation to the issue of consent, to the effect that he was not advised fully about the Hague Convention. But even if he had been, the father asserts that he did not wish to go through 'all the legal proceedings' if he did not have a chance of the court deciding on the substantive hearing of the merits that B should live in Australia. I consider that the father's evidence that he was not fully advised by Biddulphs about the Hague Convention, even if the, which I doubt, is a red herring. If the mother had returned the forms duly signed by herself and the necessary persons, the father would have signed and no proceedings of any description under the Hague Convention or on the merits would have been launched, save to obtain the approval of and an order from the Family Court of Western Australia. The father says:**

**'As a result of what I had been told I believed that there was no point in attempting to secure the return of B.'**

**In my judgment, the truth is that he believed there was no point in attempting to secure B's return because he had agreed to B staying in England.**

**The father says that he was in a state of turmoil. The mother's evidence is to the effect that in September and October 1996 he was saying different things at different times. He told me in evidence that because of his state, he felt that he should not work on the rigs at sea because his lack of concentration might have endangered himself and/or his fellow employees. But I reject his evidence that he was in such a state of turmoil that he could not or did not give coherent instructions to Biddulphs to enable them to write the letter of 5 November 1996, and complete the forms enclosed therewith.**

**Mr Everall says that the correct test in law was that, before I can find acquiescence, I have to find that the only inference that could be drawn from the father's behaviour was that he was fully accepting the removal. If his submissions are correct in law, then on all the circumstances of the case, including in looking at the evidence as to the father's alleged motives, I do draw that inference.**

**Issue 4**

**So far as the law is concerned, Mr Everall was content to accept, with one proviso, that the law was accurately stated by Waite LJ in H v H [1996] 2 FLR 570, 574G. Waite LJ said:**

**'Once acquiescence has been established, the court retains a discretion to grant or refuse an order for immediate return under the Convention. Miss Parker QC for the mother relied, without dissent from Mr Everall QC for the father, upon a decision of my own at first instance in W v W (Child Abduction: Acquiescence) [1993] 2 FLR 211, where it was suggested that the factors governing the exercise of such a discretion should be:**

**(a) the comparative suitability of the forum in the competing jurisdictions to determine the child's future in the substantive proceedings;**

**(b) the likely outcome (in whichever forum they be heard) of the substantive proceedings;**

**(c) the consequences of the acquiescence, with particular reference to the extent to which the child may have become settled in the requested State;**

**(d) the situation which would await the absconding parent and the child if compelled to returned to the requesting jurisdiction;**

**(e) the anticipated emotional effect upon the child of an immediate return order (a factor which is to be treated as significant but not as paramount);**

**(f) the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused.'**

**Mr Everall submitted that Waite LJ did not give sufficient weight to the Convention factor and that the court should order B's return unless the other factors outweighed it. He referred me to Re A (Minors) (Abduction: Custody Rights) (No 2) [1993] Fam 1, 12B, sub nom Re A (Minors) (Abduction: Acquiescence) (No 2) [1993] 1 FLR 396, 404D where Sir Stephen Brown P was quoting a passage from the judgment at first instance of Booth J, namely:**

**'In my judgment the interests of the children are now to be taken into account and to be considered in relation to all the circumstances of the case including in relation to the general desirability that children wrongfully removed from their place of habitual residence should be returned. It is clearly for the mother in this case to establish to the court that the interests of the children lie in their remaining in England, and that their future can appropriately be**

**determined here so that it would be proper to allow those matters to prevail over the purpose and philosophy of the Convention.'**

**Sir Stephen Brown continued:**

**'In my judgment the judge was fully entitled to take into account the matters which she there expressed. She carried out the balancing exercise. She took into account the overall purpose and philosophy of the Convention.'**

**I note from H v H at 571 that that authority was cited to the Court of Appeal. If the Court of Appeal had thought that there was any difference in substance or emphasis between what Waite LJ said in W v W (see H v H at 574) and Re A, I am sure it would have said so. I reject Mr Everall's submission that Waite LJ in the passage at H v H that I have quoted did not give sufficient weight to the Convention factor.**

**Taking then the factors set out by Waite LJ, as to (a) there is no, or no significant difference between Australia and England to determine B's future in the substantive proceedings. As to (b), I find that the likely outcome of the substantive proceedings, whether here or in Australia, is that the mother will succeed in persuading the court that it was in the best interests of B for him to live with the mother in England. The mother was, and will continue to be, B's primary carer. B is only 3 years old. The father will pursue his career and, although the mother might obtain some part-time work as she had when in Western Australia, the burden of caring for B would fall on her. The court would also have regard, in my judgment, to the fact that in August 1996 the father had agreed to B living with the mother in England, and must then have considered that that was in B's best interests. The same applies to the father's proposals at section F. On the other hand, the father could legitimately argue that B was Australian with an Australian father, and that if he lived in England, contact could not be as close or as frequent than if he lived in Australia, and hence there was a risk that the bond between father and B would weaken. There is, of course, that risk. But in my judgment, the mother has, or would keep alive very much in B's mind that the father very much loved B and would encourage as much indirect contact as possible, and as much direct contact in England and Australia as was financially and practicably feasible. She has consistently said that good contact is in B's interests, and indeed the father has seen B on about five occasions since he came here in January 1997.**

**As to (c), namely the consequences of consent or acquiescence, with particular reference to the extent to which the child may have become settled in England, Mr Karsten submitted that B had lived in England since 9 or 10 June 1996 save for 8 days in August 1996. However, I must have regard to the consequences of consent and/or acquiescence, ie the extent to which B has become settled in England after 28 August 1996. But in deciding that issue, it is pertinent, in my judgment, to take into account that he would settle in England after 28 August 1996 much more quickly as a result of him having spent 3 months in England between June and August 1996. Since he has spent 3 months of his short life with the mother in England with the grandparents, the people and surroundings would have been familiar to him when he came to England on 28 August 1996. He returned to the same nursery school which he had attended in June, July and August 1996. It is, in my judgment, legitimate to infer that B may now feel well settled in Cheshire.**

**As to (d), the situation in Australia if the mother and B were to be returned to Australia is that they would be housed either in the former matrimonial home or elsewhere. If the father was unable to pay maintenance in Australia, the social security system would support the mother and B, at least until the Family Court of Western Australia could decide whether or not the father was able to support the mother and B.**

**As to (e), Mr Karsten conceded that he could not develop this to any significant degree. But nevertheless, if B now feels settled here, to uproot him and send him back to Australia may cause upset and distress. If he was then uprooted again and returns to live here with the mother, as would be the likely outcome, he will suffer further upset and distress.**

**As to (f), in the light of my findings as to consent and acquiescence, and the emphatic nature of the consent and acquiescence by the father, it does not seem to me that the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused.**

**Accordingly, under Art 13(a), I exercise my discretion and refuse to order B's return to Australia. The father's application will be dismissed.**

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