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http://www.incadat.com/ ref.: HC/E/UKe 168
[25/11/1997; High Court (England); First Instance]
Re H.B. (Abduction: Children's Objections) (No. 2) [1998] 1 FLR 564

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

25 November 1997

Hale J

Nicholas Carden for the mother

Joanna Hall for the daughter

Michael Nicholls, Official Solicitor, as amicus curiae

HALE J: On 17 October 1996 in proceedings under the Hague Convention, I made orders for the return of two children to Denmark. A was then aged 13 and C was then aged 11 1/2. They had been living in Denmark since 1989 when their parents separated. Their mother is Danish and their father is English. They had married in 1982 and before their separation the family had lived in this country.

Following an episode when the mother left the children with her sister in Sweden while she went away on holiday, the father made them wards of court. In 1990 it was ordered that they should remain wards of court, the mother should have care and control and she was given leave to take them to Denmark to live. The father was to have staying access during the school holidays.

Problems arose with the access, the mother stating that she feared that the children would not be returned. None took place from 1993 until 1996. In 1996 the father approached the Danish authorities who made inquiries. A psychologist interviewed the children to ascertain their views. It was decided that the children should come here in the summer and the dates of 21 June until 10 August 1996 were arranged.

The mother had been experiencing problems with A and he had been living in the equivalent of a children's home. She agreed with the father that he should come here early. He arrived at the end of April 1996. C arrived on 23 June 1996. While the children were here the father advised the mother that the children would not be returning on the agreed date. Soon after 10 August 1996 the mother instituted the Hague Convention proceedings. These culminated in my order of 17 October 1996.

The case was not without difficulty. Both children had voiced objections to returning. I considered, however, that those objections did not outweigh the policy of the Convention. C's objections had far less validity than A's, but in my view it was important not to treat the two children differently. My judgment is reported as Re HB (Abduction: Children's Objections) [1997] 1 FLR 392 and it has not subsequently been criticised.

Ironically, A duly returned to Denmark in accordance with my order. C, however, refused to board the plane. I was asked for further directions. On 4 November 1996 I set a new deadline for C's return and asked the court welfare officer, Mrs Raleigh, for her help in securing this. A new booking was made for C. However, Mrs Raleigh saw C on 11 November 1996 and took the view that it would be impossible for her to return by air as an unaccompanied minor.

Very little happened after this until May 1997 when the mother indicated that she was now able to come to England to fetch C. She therefore applied for further directions. However, C then consulted a solicitor who is well known and experienced in representing children in proceedings under the Children Act 1989. She applied to become a party to the proceedings for the purpose of applying for leave to appeal against my order.

On 17 June 1997 Bracewell J granted that application. It took almost 2 months for the application to be made to the Court of Appeal and 2 months after that for it to be dealt with. Once it came before Thorpe LJ matters proceeded apace. On 9 October 1997 he directed that C's application be heard inter partes. On 16 October 1997 it was granted.

C was given leave to adduce further evidence and Mrs Raleigh was asked to provide a further report. Her report is dated 16 October 1997. It makes worrying reading. C's attitude towards her mother had hardened during the year which had elapsed since the first hearing. She described living with her mother as 'living with the enemy'. She stated that she wanted to punish her mother for trying to cut her off from her father. She seemed to the welfare officer to be 'much more burdened and sad' about the legal contest.

The appeal was heard on 20 October 1997. The mother attended and was prepared to take C home with her there and then. Judgment was reserved. On 5 November 1997 the appeal was allowed on the basis that there had been a fundamental change in the circumstances since my original decision. (See Re HB (Abduction: Children's Objections) [1998] 1 FLR 422.) The Hague Convention proceedings were not, however, dismissed. Instead they were remitted to me. The proviso in Art 13 of the Convention having been established, it is for me once again to exercise the court's discretion whether or not to order C's return.

Thorpe LJ acknowledged that it might be said that the question was 'almost academic' in the circumstances. He pointed to the exceptionally difficult questions with which the court would have to grapple if a return were not ordered. One of these is whether the future of C, and indeed A, should be determined on its merits in the courts of this country or in Denmark, where they were both undoubtedly habitually resident until 1996. More serious still, however, are the grave concerns for the welfare of both these children if something is not done to remedy the present situation.

One feature of that situation, which the Court of Appeal found especially troubling, was C's status as a litigant in the proceedings. The father was legally aided in the proceedings before me, but now that C has her own legal representation he is acting in person. Butler-Sloss LJ, who is the most senior judge specialising in family law in this country, said:

'She is running not only own case but what she perceives to be her father's case, he having left the running of the litigation to her.'

Her Ladyship expressed her worry that:

'. . . the father had left C to fight the battles and does not seem to have the understanding or sensitivity to perceive the unsuitability of the present arrangements in the litigation.'

He has maintained that attitude before me, stating that this is not his battle, but a battle between the children and their mother. However, at the same time he persists in making complaints against the mother, both on his own and the children's behalf, which make it quite clear, not only that it is very much his battle, but also that he has done nothing to soften and may, perhaps, have done much to harden C's attitude over the past year.

Children of course have the right to a voice in proceedings concerning them, especially where their own views form such a crucial component in the issues before the court. But a voice is very different from the right to participate in the proceedings, instructing one's own lawyer as if one were a fully adult person. Her solicitor had formed the view that she was sufficiently mature to participate in the litigation without the intervention of a next friend or guardian ad litem. It is entirely understandable that he should have come to that conclusion. Nevertheless, the report of Mrs Raleigh casts grave doubt upon it. She states:

'I consider C to have a fluency and verbal reasoning ability appropriate for her age. However, she is not mature enough to be other than anecdotal in her taking up of a position. She is not capable of comparative analysis of her own life history or current circumstances. She is strongly influenced in her perception of right and wrong by very strong judgmental and monolithic feelings typical of a child of her age.

Furthermore, it is a usual feature of litigation that parties to it are expected to obey the court's orders and may, as a last resort, suffer sanctions if they do not. On the fact of it C appears to be having it both ways. In the circumstances it is obviously preferable that the child should participate through a guardian ad litem, whether an independent person who can take a more objective view of her interests or, as is the usual practice in this court, the Official Solicitor. He will, of course, take full account of her views and place them before the court. He will not, however, accept her instructions as to how the case should be conducted.

Unfortunately, the Official Solicitor is unable to act on behalf of children in Hague Convention proceedings because of his role as the Central Authority for such proceedings in England and Wales. He is, however, able to assist the court as an amicus curiae. I am most grateful to Mr Nicholls for attending the hearing at short notice in order to perform that role. One reason for adjourning this hearing from last week to today was to enable him to study the papers in case there were any further observations he wished to make.

It is against that background that I have to carry out the unenviable task imposed upon me by the Court of Appeal. Mr Carden, on behalf of the mother, submits that it is only in exceptional cases that the objections of the child should override the fundamental policy of the Convention, that issues concerning children should be decided in their home country. There is no doubt that the children were settled in Denmark before these most unfortunate events.

He further points out that there must be real reservations about the sincerity of C's expressed views. She had not been in all respects honest in what she has said. She has, as the Court of Appeal pointed out, swung from not being entirely sure that she wanted to visit her father when she saw the Danish psychologist in February 1996, through voicing certain complaints to Mrs Raleigh in October 1996, to the entrenched and psychologically damaging position which she is adopting now. Mr Carden goes on to cite the observations of Mrs

Raleigh which I have quoted above, and urges that it is very much not in C's interests to get her own way in this matter.

The decision which I made last year in relation to C reflected all those considerations. Although it was not suggested in the Court of Appeal that the decision was wrong at the time, both the father and Miss Hall, on C's behalf, have voiced criticisms of the mother, not only in her approach to this litigation but also in her care of the children. The father, in particular, speaks of the 'abuse' which he says that C has suffered at the hands of her mother and stepfather. He makes the further point that although A has returned to Denmark, he has not returned to live with his mother. After only a day there, he got into trouble once more and entered the children's home again. Since then he has moved to a foster home in the country. The father is concerned that the same fate should not overcome his daughter.

These matters have not yet been properly tested in the courts. There are several matters of fact in dispute between the parties. These are issues which would be better explored in the course of a substantive investigation of where the best interests of these children do indeed lie, rather than in summary proceedings such as these under the Hague Convention.

The Court of Appeal did not mince its words about either parent. The mother's inactivity from November 1996 to May 1997 amounted, in the view of Thorpe LJ, to the virtual abandonment of these proceedings. It would not be surprising if C felt deeply let down by her mother. Equally, the father is so concerned about his own battles with the mother over contact, not only in the past but also over the last year in relation to A, that it is hard for him to see what harm is happening to C. If the children were objecting to contact with him, it is unlikely, to say the least, that he would regard it as solely a battle between the children and himself in which the mother was in no way involved.

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

For all those reasons, it seems to me inevitable that the Hague Convention proceedings must be dismissed. The question now is how best to carry forward the inquiry into what is indeed in the best interests of C and possibly also A. The Court of Appeal has pointed out that that may include an issue about the proper forum. They have urged this court to be in communication with the court in Denmark over the future of C and, if possible, A.

It is worth bearing in mind that these children are still wards of court. There are already proceedings on foot here. There are no proceedings on foot in Denmark. Such evidence as we have of Danish law suggests that it is not possible for parents to continue to share parental responsibility after a divorce unless both agree. It appears that in Danish law the mother is regarded as having sole custody of both children and, therefore, the right to determine where they will live. It may be, of course, that this could be changed by proceedings in Denmark. In certain circumstances, the Danish courts might recognise a variation of the original wardship order made in this court. It appears, however, that questions of access are normally dealt with by the administrative authorities of the county rather than in the courts.

There has been some confusion in this case because the documents concerning the investigation in early 1996 refer to the Bornholm County Court. It seems to me, therefore, that early inquiries must be made of the authorities in Denmark to ascertain the true position and, if possible, their views of the best way of carrying forward this difficult case in the interests of these two children.

I would be prepared to make those inquiries myself, but a further consideration is that once the Hague Convention proceedings are dismissed, the Official Solicitor can represent the children. Mr Nicholls has already signified the Official Solicitor's willingness to do so. This is particularly important because the father is acting in person and the mother's automatic legal aid comes to an end when the Hague Convention proceedings are concluded.

It seems to me that the Official Solicitor can make inquiries on the court's behalf with the authorities in Denmark, but those inquiries must be completed as quickly as possible. They should not prejudice the setting in train of a wider inquiry into C's welfare and how best to re-establish the relationship with her mother which has so sadly broken down.

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