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[06/09/1999; High Court (England); First Instance]
Re D. (Abduction: Discretionary Return) [2000] 1 FLR 24

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

6 September 1999

Wilson J.

In the Matter of re D.

Counsel : Henry Setright for the mother; Claire Jakens for the father

WILSON J: The mother applies under the Child Abduction and Custody Act 1985 for an order for the summary return to France of two children. The first is a boy A, who was born on 9 September 1989 so he becomes 10 years old next Thursday. The second is a girl R, who was born on 4 November 1993 so she is 5 3/4 years old. The defendant to the action is the children's father.

The mother is Philippino by nationality; she lives in France, in a suburb of Paris. The father is French; he lives in Brighton, England. The children have been living with the father since 28 December 1998. This being an application under the 1985 Act, it is not an investigation into whether the welfare of the children would better be served by their returning to live with their mother in Paris or by their remaining in the home of the father in Brighton. It is, in effect, an inquiry into whether it should be the courts of France or of England which should conduct that investigation.

The mother's application is brought under two Conventions, both of which have force of law here in England by virtue of the 1985 Act. First, the Convention on the Civil Aspects of International Child Abduction, signed in the Hague on 25 October 1980. Second, the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children, signed in Luxembourg on 20 May 1980.

Article 16 of the Hague Convention requires the court to determine an application under that Convention before deciding on the merits of rights of custody as between parents or indeed others. That provision is an essential part of the structure of the Convention. Curiously, however, in this country, when we made the Hague Convention and thus Art 16 part of our law, we provided, in s 9(b) of the 1985 Act, that a decision on the merits of custody for the purposes of Art 16 should include a decision as to whether to recognise and enforce a foreign decision pursuant to the European Convention. I would be interested to learn the reason for that provision. I give it the respect of presuming that it has significant

intellectual justification. But this judgment will show that, on a practical level, it can be inconvenient for a court to be required to grapple with perhaps complex issues raised under the Hague Convention before turning to any claim brought under the European Convention. As a judicial practitioner, I would have preferred to have been invested with a discretion in that regard.

Central to the mother's case under the European Convention, and to the forefront of her case under the Hague Convention, is an order of the district court in Nanterre, just outside Paris, given on 13 May 1996. By that order, which is still in force, the children are to reside with the mother and to spend half their holidays with the father. Under that order the children resided with the mother in France until 28 December 1998. They were habitually resident in France on 28 December 1998.

So what are the issues raised by the father under the two Conventions? Central to his case under the Hague Convention, and to the forefront of his case under the European Convention, is an allegation that on 28 December 1998 the mother consented to the children coming to live with him in England. The mother's case, on the contrary, is that she consented simply to their coming to stay with him for a few days of holiday.

It is now generally accepted, following the decision in Re C (Abduction: Consent) [1996] 1 FLR 414. that consent is a matter for a defendant to establish under Art 13 of the Hague Convention. It is not something the absence of which the plaintiff has to prove in order to establish that any removal was wrongful for the purposes of Art 3. Another effect of that decision is that, where a defendant establishes consent, the application of the plaintiff does not necessarily fail. The proof by the defendant of consent gives rise only to a discretion in the court as to whether to order the return of the children.

I am clear that the main defence of the father under the Hague Convention is that of consent. Miss Jakens, his counsel, also sought initially to establish three other defences which are made available under Art 13. First, within Art 13(a), she alleged that the mother had subsequently acquiesced in the father's removal of the children to England. I have to say that, in my view, what Miss Jakens relies on as acts of acquiescence are more easily interpreted as evidence of the mother's earlier consent.

Secondly, within Art 13(b), Miss Jakens alleged that there was a grave risk that the return of the children to France would expose them to physical or psychological harm or otherwise place them in an intolerable situation. As I will explain, there is evidence which gives rise to concern about life for the children in the home of the mother. Whichever court is called upon to investigate the merits of the issue as to where the children should live will have carefully to analyse that evidence. But, by the end of the hearing, Miss Jakens was unable to do more than make a token invocation of Art 13(b). The evidence was simply not strong enough to enable her to clear the tall hurdle raised by that Article.

Thirdly and finally, within the second paragraph of Art 13, Miss Jakens sought to establish that the children, in particular A, objected to being returned to France and had attained an age and degree of maturity at which it was appropriate to take account of their, and in particular his, views. On 21 July 1999, because that defence had been raised, this court ordered that A be seen privately by a court welfare officer on the morning of the hearing on 20 August 1999. Mrs Russell, the court welfare officer, duly saw A. She found his command of English reasonably good; but she saw him both on his own and also in the presence of a French-speaking interpreter. Afterwards Mrs Russell gave evidence as to what A had said and how she had appraised him. I will summarise her evidence later. It suffices to say that, as a result of that evidence, Miss Jakens accepted that she could no longer assert either that

A objected to being returned to France or indeed that he had the necessary age and degree of maturity.

Against the order sought under the European Convention, Miss Jaken's defence is brought under Art 10(1)(b):

'(1) Recognition and enforcement may also be refused on any of the following grounds:

. . .

(b) if it is found that by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the child after ail improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child; . . .'

Again, as the language of the Article shows, proof of the matters required at (b) gives rise only to a discretion as to whether to order a return.

The history of the matter is that the father is 52 years old and the mother is 34. They were married in the Philippines in June 1989. The mother was by then pregnant. They decided to have the baby in France. In September 1989, just before A was born, they came to live in France. They settled in Meudon, which lies just outside Paris. Until then the mother had always lived in the Philippines so her first language was and remains Tagalog. But her decade of life in France has led her now to have a reasonable command of French. She has some, but limited, command of the English language.

Unfortunately the marriage was an unhappy one. In about 1994 the mother, taking the two children with her, left the father. In June 1995 the father left France and moved to live in Scotland.

Proceedings for divorce and the resolution of allied issues were launched in the district court in Nanterre. Interim orders was made in October 1995. The final order was made, as I have said, on 13 May 1996. On that date the court seems to have had to resolve a live issue as to where the children should live. The father was apparently contending that the children should live with him in Scotland, where, as he said, he had appropriate accommodation and had entered the children into appropriate schools. But the court preferred the mother's case. So it granted residence of the children to the mother. It directed that the children should spend one half of their school holidays, including one half of their half-term holidays, with the father; and it made an order for periodical payments to be made by the father to the mother for the benefit of the children, an order with which, it appears, the father has not complied. The court also pronounced a divorce between the parents.

On 4 November 1996 the mother wrote to the father. It is the first of eight documents which I regard as of particular relevance to the issue of consent; and I say so even though, obviously, this letter was written more than 2 years before the handover of the children in December 1998. The letter said:

'We are very happy to hear your news. The children are really sad that you left. [A] and [R] often ask when we are going to see you again, and are impatient to be with you. [R] often cries and looks out of the window, and [A] is silent but odd. Otherwise everything is all right. Always lots of problems, and we may be evicted from this flat. I have a hearing on 14 November about my flat, and at the moment there is nothing to eat and it is really difficult. I cannot repay any of my debts . . . I understand your flat is very nice. Do you think the

children could come and stay with you for good in December? Tell me what I should do next, and what I need to do to organise all this . . .'

The children did not go to live with the father then. Nor indeed, between 1996 and 1998, did the father take up all the holiday contact allowed to him under the order of May 1996. He says that he could not afford the travel costs associated with all the contact that had been granted. But the children did come to stay with him at Christmas and for one half of their summer holidays. In due course he moved from Scotland to Brighton; from then onwards, they came to stay with him there.

In 1998 the mother fell in love with Mr B. He was living in a three bedroom flat in a suburb of Paris, together with his four children by two marriages. In the summer of 1998 the mother, with A and R, moved into his flat. It is clear that things were not at all easy for her or the two children from then onwards.

In September 1998 the mother telephoned the father -- he says that she did so twice, she admits having done so only once -- and said that she could not continue to cope with caring for the children. Then, on 17 September 1998, she wrote the letter to the father which I regard as the second of the relevant documents. She wrote it in English. So its language is far from fluent but its sense is clear:

'I would like you to take the children home as soon as possible. I am sure that I cannot afford them growing old to have a nice and happy life. So I will let you for life. I will never disturb you about your new life. I am happy that you have found a new happy life with somebody, and [A] and [R] accept with your new house wife they are happy with you, both so. I think it is better to leave you our kids, and about me I will write if there is interesting subject. If not, tell the kids that I died. Its urgent. Call me quickly, please, for the safety of [R] and [A].'

She then wrote a postscript:

'Your kids need you at this time or never. Help them tomorrow.'

The father telephoned immediately upon receipt of the letter. But the mother told him that the crisis during which she had written the letter had passed. She told him that she was no longer proposing that he should have the children. The father says that a week thereafter she telephoned yet again and said that she was now bringing the children to him as soon as possible. In her affidavit the mother does not deal with that allegation. It is clear that the mother's English solicitors have had considerable difficulty in obtaining clear instructions from her so I do not feel that I should draw inferences from her failure to deal with allegations as boldly as I would in an ordinary case. Whatever may or may not have been said at the end of September 1998, the children remained living with the mother in Paris until 28 December 1998.

The father also avers that, in December 1998, before Christmas, the mother telephoned again, crying and saying that she could not cope with the children. It was then (says the father) that they arranged that the children would be handed over by her to him at a hotel outside the Gare du Nord on 28 December 1998. The mother denies that assertion and says that, over the telephone in December 1998, they agreed the point and date of the handover in order that the children should have their normal new year holiday with the father in England for a few days prior to their start of school again in Paris.

So the history arrives at the handover of the children on 28 December 1998. The father's

case is that, upon meeting him, the mother said that she was giving him the children for a trial period; that he said that that was unacceptable; that there was then an altercation between the parents in front of the children; and that ultimately the mother agreed that the children should go to him, not for a trial period, but permanently.

The mother's case is that there was no such discussion or altercation at all. It was a normal handover of the children (so she says) for a few days. She says that she had brought one suitcase of belongings to cover the children's essential needs for a few days' holiday. The father has not been able to deal with that allegation, but he seems to accept that, on 28 December 1998, only a few belongings of the children were handed over to him.

So there is that big issue between the parents in relation to the events of that day. I have not heard oral evidence, nor is it the practice to hear oral evidence in this type of litigation. But what is agreed is that the mother signed a document on that date. It is the third of the eight relevant documents. It is a document written in English, and it had been typed by the father and presented to the mother for her to sign at the hotel. It says:

'I, [the mother], . . . confirm that I have requested my former husband, [the father], of . . . England, to take our two children, [A] . . . and [R] . . . from France to England, to live with him there and have given my consent for him to do so.'

She signed and dated that document. I will return to it in due course. I should note, however, that the parties are agreed that in the summer of 1998 the father had found difficulty in bringing the children past French customs at the Gare du Nord. The father says that the purpose of this note was in order to obviate any further such difficulty with French customs. He also says, and the mother agrees, that he told her that the purpose of this document was to ease the path of the children through customs. The mother says that, told of its purpose in that way, she simply signed it without even attempting to read it.

The mother says that she expected the children to be returned to France in the first days of January 1999, ready for their return to school on 3 or 4 January. She says that on 2 January 1999, when the children had not been returned, she telephoned the father; that the father then said that A wished to stay in England a little longer; and that such were the circumstances in which, reluctantly, she agreed that the children should remain in England until the end of the forthcoming school term, ie the end of March 1999. The father entirely denies that that conversation took place.

The father says that on 9 January 1999 the mother telephoned him and agreed again that the children should live with him, but said that she would like to visit them and take them away on holiday. The father says that he saw his solicitor in Brighton on that same day and informed her of the content of that call. Both sides, for different reasons, say that it is significant that the father was taking legal advice in England within 12 days of the removal of the children from France.

On 17 January 1999 the father wrote a letter to the mother, which I regard as the fourth of the relevant documents. In it he said:

'I would be grateful if you would send all the children's belongings in good state, including the toys. If you need an invitation letter [to enter England], please let me know the precise dates. In the event you cannot go, I will endeavour to go a weekend by car or by van so as to take all the children's belongings and mine, and there are still a few left. Thank you for your co-operation. See you soon maybe, . . .'

The father says that, later on the same day, the mother telephoned the children and said that she never wanted to see them again. The mother seems entirely to deny having said any such thing. But on 26 January 1999 the father's solicitors wrote to the mother and she accepts that she duly received their letter. It is the fifth of the relevant documents:

'We are acting for [the father]. He instructs us that you telephoned the children on Sunday, 17 January, and told them you did not want to see them again. This has made them extremely upset. [A] has been crying and [R] wakes in the night crying. Our client is happy to have the children living with him, and they are happy there. He is happy for you to speak to them on the telephone, but not if your telephone conversations upset them. He hopes you will remain in contact with the children and will see them in the future. If at the moment you feel you will be unable to see the children in the future, please do not communicate it to them as they find it upsetting, and you may find you later change your mind. If you have solicitors, please show them this letter and ask them if they would like to discuss the matter with ourselves.'

The mother made no reply to the solicitors. She says, however, that, when she received the letter, she telephoned the father, who assured her that, as he had said before, the children would be returning to France at the end of March 1999.

On 8 February 1999 the mother wrote the letter to the children which is the sixth of the relevant documents.

I quote:

'I really hoped you would be happy with your daddy, even though we are far apart now. I really want you to feel good about it, and I don't want you to be unhappy, my darlings. I hope that what you say is true. I want your happiness to be truly . . . [illegible] . . . to listen to what you feel in the bottom of your heart. Its so important. If there is anything wrong, say so. Don't be afraid to say it . . . [A], [R], God knows how much I miss you, but perhaps this is my fate with my beloved children. I love you so much that I am incapable of forcing you to stay with me, for you are not as happy as I believe. But if one day you would like to be with me again, you are always welcome, my loves . . . I send you a big hug and hope that we will see each other soon.'

There was an extensive postscript to this letter. In it the mother said:

'In fact perhaps I won't be able to come over. I haven't much money and there are a lot of official things to see to here, as I have to have a visa to come over. Its complicated. If daddy would bring you here, so that we could meet again for a little while, that would be lovely . . .

[A], [R], I really miss you a lot. I hope that one day we shall be together again. I love you, my darlings. If you want to ring me, that's fine, my darlings. I love you always. Be happy.

Your Mummy, who hopes to see you again.'

There was a telephone call from the mother to the father in March 1999. The mother says that in that call the father reassured her that the children were coming back to France at the end of that school term. The father denies that he said any such thing. He says that the mother spoke in that conversation of having a holiday with the children in France over Easter, and also that she would soon be visiting them in England. At all events that conversation seems to have made the father nervous that the mother might, whether temporarily or permanently, seek to remove the children from England and/or from his

care. So, on 26 March 1999, he issued proceedings under the Children Act 1989. On 26 March, ex parte, he obtained a temporary order against the removal by the mother of the children from England and Wales or from his care. That order was not served upon the mother. The father says that he told her of the order by telephone on the day when it was made and that she said that he could keep the children. The mother totally denies being apprised of the proceedings or of any order made therein.

On about 10 April 1999 the mother came, unannounced, to Brighton. Mr B came with her. They stayed in bed-and-breakfast accommodation. The father says, and the mother seems to accept, that the mother brought with her a quantity of toys, clothes and bedding for the children. Contact took place over about 2 days; and both parents seem to have made a big effort to give the children a good time. The mother says that, during that spell in Brighton in April 1999, there was still no mention by the father to her that he had taken legal proceedings.

There was a further telephone call between them on about 4 May 1999. The father says that in that call the mother spoke again of the children going to stay with her in France. Certainly she seems to have said something about the children going back to France, whether temporarily or permanently. For that was the point when, so it appears, the father, with his solicitors, decided to serve the English proceedings upon the mother, including the prohibited steps order which had been extended for a further period. So the order, the application, and various other court documents were sent to the mother in France under cover of a letter by the father's solicitors dated 11 May 1999. They also sent a separate letter to her on the same day. That second letter is the seventh relevant document. I quote:

'As you know, [A] and [R] are now living with [the father]. He tells me that you agreed to this, and have on several previous occasions asked him if he would care for the children. [The father] also tells us that [A] and [R] are well and happy, they are doing well at school, and have new friends. [The father] thinks it best for the children that they stay living with him. He hopes that you will continue to write and telephone them often and that you will come and visit them in England. In due course he would like to bring the children to see you in France. We have advised [the father] that he should not bring the children to France until the matter has been formally resolved by the courts, and he has legal documents stating that the children should live with him. The order we obtained . . . states that you may not take the children away from [the father]'s care and control, nor out of England and Wales. The order was granted on 23 April 1999 but the further hearing is to be on 20 May 1999, and you or your representative should appear at court so that the court may hear what you wish to say.'

Although the letter was sent in English, rather than in French, there was at the end of it a strong invitation to the mother to take legal advice.

The mother received those letters and their enclosures on 17 May 1999. She wrote to the President of the Principal Registry, Family Division, by letter dated 19 May 1999. In fact that letter did not reach the court on 20 May 1999, when a further interim prohibited steps order was made. But the mother's letter to the President is the eighth and final relevant document. In it she said:

'I received on 17 May 1999 a letter from Dean Wilson . . . informing me of a hearing which was to be heard on 20 May 1999, on the application of my former husband, [the father] and concerning the care of my children, [A] and [R]. I find the delay leaves me too short a time to enable me to defend myself . . .

On the contrary to the affidavit of my ex husband, I have to tell you that I only temporarily

entrusted the care of my children to the latter, and that it was well understood by both of us, by an oral agreement that it was only a temporary situation . . .

There was a judgment made on 13 May 1996 in the court of Nanterre which gives me custody of the children . . . As for the stay agreed between us that my children would return to their mother later, at the end of the current school year, I protest that my ex husband, whom I trusted, has profited by this by getting the children with him and trying to get, by surprising and cheating, what he could not get by law. In the face of this bad faith, I am asking the court to uphold the first judgment that was made in the divorce, the immediate restitution to me of my children and their return to France at [the father]'s expense . . .'

Then, on 17 June 1999, the mother issued the present proceedings. It is worth noting that the mother had known ever since 28 December 1998 where the children were living. It took her almost 6 months to issue proceedings to secure their return.

Between 30 July 1999 and 3 August 1999 the mother came again to Brighton, this time not with Mr B. She had further contact with the children. Again the parents made a commendable effort to make the visit a success. The father even allowed the mother to stay in his flat and indeed vacated his bed so that she, with the children, could sleep there.

Does the father establish, on the balance of probabilities, that the mother consented to the removal of the children to England, ie so that they might live here, if not permanently, at least indefinitely, on 28 December 1998? Mr Setright, counsel for the mother, reminds me that proof of consent has to be clear and cogent. He accepts the presence in the evidence of ambiguities in the mother's stance as to whether the children should come to live with the father, both prior to, after, and arguably even at the time of their removal. But, so he says, the father's case is insufficiently clear or cogent.

Paradoxically the principal document upon which the father relies, namely the written consent dated 28 December 1998, is the document that gives me the most difficulty. I will explain what I mean by that. On a balance of probabilities, however, I conclude that the mother did consent to the removal. Back in November 1996 the mother had, by letter, asked the father to take the children to live with him. In September 1998 she had written a desperate letter to him, demanding that he should take the children to live with him at once. The mother says that that letter was written from the depths of despair and that the difficulty in her relationship with Mr B which precipitated it was soon resolved. But it is rare to find two clear demands by a mother in less than 2 years that a father should take her young children from her. Obviously the letters also raise worrying concerns about the stability of the children's household at the time when they were written.

Then, on 17 January 1999, the father, as I have observed, wrote to the mother asking for the children's belongings to be sent to him. That is consistent with his having understood that she had, on 28 December 1998, agreed that the children should live with him. The terminology of that letter is in no way consonant with his having agreed, as the mother alleges that at that time he had, to return the children to her at the end of March 1999.

Then, on 26 January 1999, the father's solicitors, in the letter which I have read, recorded the mother as having on 17 January 1999 told the children that she did not want to see them again. It seems to me that the facts that, within 9 days, the father by his solicitors was making that allegation and that there was no response to it confirm that she had said so to the children; and that that is consistent with her having consented to their removal some days earlier.

Mr Setright reminds me that the mother is not an educated woman. But she reacted swiftly enough to the service upon her of the court papers in May 1999; and the allegations in the solicitor's letter of 26 January 1999 were so obviously serious and, if untrue, were so provocative that I would have expected the mother to have challenged them, unless they were true.

Then, on 8 February 1999, the mother wrote to the children in the terms which I have read. By that letter she seems clearly to accept that the children were living with the father. In para 20 of her affidavit she deals with the circumstances in which she wrote that letter. She says:

'My letter dated 8 February 1999 . . . was sent to my children shortly after the above conversation with the defendant . . .'

I interpolate that the 'above conversation' is a reference to the alleged conversation in which the father assured the mother that he would return the children in March 1999. I continue:

'. . . I was extremely upset that my children were distressed, and appeared to be unhappy in England. The letter was sent to reassure them that I was thinking of them. My letter is clumsily written, as I find it extremely difficult to express myself in either French or English. I did not mention my objections to them remaining in England, as I knew that [A] was very well aware that he was coming back to France soon, and I did not wish to involve them in a matter over which they had no control. Nor did I wish to transmit my own anxieties and discontent about their imposed stay in England.'

I am sorry to say that I find the terms of the mother's letter of 8 February entirely inconsistent with her suggestion that the father had agreed that the children would be returning to her at the end of March 1999; entirely inconsistent with her assertion, in the passage which I have just read, that A was very well aware that he and his sister were returning to her care at the end of March 1999; and indeed entirely inconsistent with her assertion there that she knew that A knew that they would be returning at the end of March 1999. It seems to me also that the mother's sending or, more probably, bringing toys, clothes and bedding over for the children in England is consistent with her having consented. The significance of the letter to the President in May 1999 is obviously that she there averred the agreement to have been that the children would be returned to her care at the end of the summer term 1999. The assertion is quite inconsistent with any agreement that the children should be returned at the end of March 1999 and quite inconsistent with what she now says, namely that the agreement in December 1998 was simply that the children should come to England for a few days of holiday.

It will be noted that, so far, I have omitted analysis of the crucial day, 28 December 1998.

In her report to me of what A had said to her, the welfare officer said that he remembered being taken by the mother to the hotel in Paris. He remembered the mother being cross and telling him to choose; and he remembered that he himself had not said anything. I should say at once that the welfare officer counselled me to be very wary of placing too much reliance upon what A had said in that respect, and reminded me that he had been talking to her after having spent, in effect, almost 8 months in the exclusive company of the father. But, giving appropriately slight weight to what A said, it does confirm the father's version of events at the hotel significantly more than it would confirm the mother's version of those events.

What then should I make of the signed letter of consent? The father's case is, as he explained

to the mother, that the purpose of the letter was for presentation to the customs in Paris. There are two problems about that assertion. The first is, as it seems to me, that the French customs officers would not be in any way interested in the full circumstances of the arrangement between the parents of the children as to the length of time for which they would be living in England. It is obvious to me that, for the purposes of crossing customs, all the father needed would be a simple written permission by the mother that they should go with him to England. Why then did the document prepared by the father go to the unnecessary lengths of stating that the mother had agreed that the children were going to live with him in England? The second problem is an even simpler one. Why was the letter written in English rather than in French? I do not think that the letter was written for the purposes of the French customs at all. I think that it was for use in possible later court proceedings in England.

So I must look very carefully at whether, as Mr Setright suggests, the letter was part of a trap which the father cunningly and premeditatedly set for the mother on 28 December 1998. The mother was uneducated. Her command of English, particularly written English, is poor. This was a document which, so it appears, the father had typed out even before he left England. Certainly the document is of no probative value in support of the father's case of consent. The question is whether the document succeeds in destroying the father's case of consent. I conclude that it does not destroy it. Just because this document was presented to the mother on a pretext, it does not follow that she did not consent to the removal of the children from France to live in England. Nor does the fact that the document was presented to her on a pretext necessarily lead to the conclusion that it was a trap. The fact is that the mother had had a long history of changing her mind about where the children should live; and I have no doubt that, as a concerned parent, this father regarded her caprice in that respect as very undesirable. She had written the letter in 1996 and then changed her mind. She had written the desperate letter in September 1998 and then suddenly changed her mind. I believe that the father was correct in saying that there was that telephone call prior to Christmas, in which for the third time the mother had said that the children should come to live with him. So, when he went to Paris, he expected, I believe, to receive the children into his permanent care. I believe that he took that letter for the mother to sign so that if, having given him the children on a permanent basis, she were yet again to change her mind, there would be evidence of what had been agreed.

Accordingly, as I have said, I find consent established by the father. It seems to me that in those circumstances there is no need for me to consider acquiescence. In my view acquiescence is to be regarded as an alternative to consent under Art 13 in that, if the plaintiff consented, there is no room for the concept of acquiescence. Even if it is not an alternative, a finding of acquiescence would add nothing to the forensic stage which has now been reached.

It is convenient here to make reference to what A said to the welfare officer on 20 August 1999. The welfare officer told me that A seemed at ease with her and that she did not feel that the father had specifically prepared A for her interview with him. She said that he told her that he missed his mother; and that he did not know whether he liked England. Later, however, he said that he did want to be an English boy. The welfare officer thought that that was unsurprising in that he had been in an English school for two terms. At one point the welfare officer asked him: 'Do you want to go back to France?' At that point A shrugged his shoulders. He said: 'If I live with mummy, I would miss daddy. If I live with daddy, I would miss mummy.' Later, through the interpreter, he told her that it would be 'OK to go back to France'. The welfare officer felt that it was a consistent theme in the boy's thinking that the father would be cross with him if he were to return to live with the mother in France. She felt that France had no anxieties for the boy. She also had the impression that A was without

any serious sense of conflict and that he was happy in England and was being well cared for by the father. So it is clear why that interview, in effect, destroyed the father's defence based upon the children's alleged objections to returning to France.

It is clear that A senses the father's strong feelings that he and R should live with him. It is inevitable that A should have sensed them. It is equally clear that the father had not put A under any pressure as to what to say to the welfare officer; indeed he had hardly explained to him what the exercise was. That seems to me to be very much to the father's credit. It is clear to me that, like any well-adjusted boy, loving both his parents, A feels torn between his loyalty, to each of them. I hope that there have been no, and will be no, recriminations visited by the father upon A for having spoken so honestly, and I think so fairly, to the welfare officer.

Under the Hague Convention, the father's proof of consent opens the door for me to exercise a discretion as to whether to order the children to return to France. My perception of where their welfare lies is important. But their welfare is not my paramount consideration.

Mr Setright says that, where a defendant establishes other defences allowed by Art 13, so that where, for example, the children object to a return to the foreign country or where there is a grave risk that a return would expose them to harm or place them in an intolerable situation, it is more likely that those same grave impediments to a return will dictate the result of the discretionary exercise which follows, namely that the children should not be returned; whereas, says Mr Setright, where the defence established is consent, or presumably also acquiescence, such grave impediments would not be present to influence the discretionary exercise. Miss Jakens, on the other hand, might say that the spirit of the Convention is always an important factor in the discretionary exercise; that the spirit of the Convention is that wrongfully abducted children should be returned to the country of their habitual residence, and that, where there has been consent to the removal, then, in effect, the abduction is not wrongful, with the result, that the spirit of the Convention a less potent a factor in favour of return than in other cases under Art 13.

As I observed to Miss Jakens in the course of the argument, had this been a conventional interim inquiry into where the children should reside pending a full investigation, being an inquiry in which the welfare of the children was the paramount consideration, I might well have considered that their welfare lay in leaving them in the interim in Brighton with their father. True, he has only a one-bedroom flat, but the welfare officer got the impression that A was well looked after; the mother, who has seen the children on two occasions in 1999, does not contend other than that they have been well looked after; and the reports from the schools where the children have attended since January 1999 are not just ordinarily good but exceptionally glowing.

Furthermore, there are concerns about life for the children with the mother in the three-bedroom flat of Mr B and his four children. What was the level of conflict that lay behind that letter which the mother wrote on 17 September 1998? And does not her conduct between 1996 and 1998 at least raise question marks about the consistency of her parenting of the children? The father says that, since coming to live with him, the children have given him horrifying accounts of rough punishments meted out to them by Mr B, and of their having to share a room with two of Mr B's children, both of whom, so A and R have allegedly said, are disturbed. They have told the father, so he says, that the 8-year-old boy wets his bed and that the 7-year-old girl soils her bed and sometimes smears excrement on the walls of their bedroom.

The mother vehemently denies that either of those children is emotionally disturbed, and in

particular that the girl smears excrement on the walls. But it is significant that, after an embarrassed hesitation, A specifically confirmed that fact to the welfare officer. I have no doubt that it will be very important to conduct a full investigation, at the level both of a social worker investigating on the ground and of a judge investigating in a court forum, into the circumstances of the lives of the children in that flat. The big question in this discretionary exercise is: in all the circumstances, which court should that be? Mr Setright says that, if there are significant doubts about the circumstances of a home in Paris, doubts about the appropriateness of a Frenchman, Mr B, as a stepfather figure and doubts about the emotional stability of that man's children, they are doubts which the French court is far better placed to resolve than is this court. Then, adds Mr Setright, the French courts are already seised of these issues. There is no doubt that the fact of proceedings in a foreign country can be a potent feature of a discretionary decision under the Hague Convention, as well as a central feature of a decision under the European Convention. So Mr Setright relies heavily on the fact that there is an extant order made by my colleague Madame Orsini in the district court in Nanterre. Proceedings took place before her in 1995 and again in 1996. On the latter occasion she had to resolve a disputed issue as to where the residence of the children should be. That court, says Mr Setright, is obviously the more convenient court for the mother to use; and how can the father, a Frenchman, dispute its appropriateness for himself?

To these points Mr Setright adds other telling ones. These children lived in France throughout their lives until December 1998. Their first language is French. Their father is, of course, a French speaker. The mother speaks French much better than she speaks English. The family had no connection with England until, in about 1997, the father came from Scotland to live here. And, in the light of the interview with A, there is no difficulty about the children accepting an order that they should go back to France.

In my view there is another very important factor upon which Mr Setright touched. If this court refuses to make an order for the children's return, these two States, England and France, will have made orders inconsistent with that of each other. The result would be that A and R could not go back to France even for a visit, because, were they to do so, the father would fear, and reasonably fear, that they would be retained there permanently. So, even if, as may be the case, it proves to be in the long-term interests of the children to make their home with their father in England, it must surely be in their interests to be able to return to their homeland and to the mother's home for holidays in France.

I have come to the conclusion that, taken in combination, these arguments are so powerful that, notwithstanding the mother's consent to the removal of the children in December 1998 and notwithstanding their apparent settlement in the home of the father in Brighton over the last 8 months, the only proper exercise of the discretion would be in favour of a return to France. Accordingly, under the Hague Convention, I direct their return. With counsel, I will discuss the date for their return shortly. No doubt the fact that A has a birthday next Thursday will figure in the discussion.

The mother concedes that the father must have the fullest opportunity to apply urgently to the district court in Nanterre for variation of the residence order made in 1996 and for permission to bring them back to live with him in England. The mother also concedes that, if he wants to care for them in France until the district court makes the long-term decision, he should be allowed to take them back to France himself and to care for them there himself for the few days until he is able to apply to the district court for a ruling as to where the children should make their home in the interim.

This decision renders it unnecessary for me to address the mother's application for an order

for return under the European Convention. It suffices to say, however, that I am clear that I would have made an order for return under that Convention and would have been able to justify my conclusion in a significantly shorter judgment than has proved necessary in the case of the application under the Hague Convention. The father's defence would have required consideration of no more than the words of Art 10(1)(b) of the European Convention. Mr Setright wisely conceded that if, contrary to his case, the mother had consented to the children's removal from France, the removal would not have been 'improper' within the meaning of that Article. But the effect would have been only that the change in the residence of the children might, along with the subsequent passage of 8 months, be weighed in the balance as a change in the circumstances. The question would still have remained whether, by reason of a change in the circumstance, the effects of the decision of the district court in Nanterre dated 13 May 1996 were manifestly no longer in accordance with the welfare of the children. My opinion is that the word 'manifestly' would have posed an insuperable difficulty even for Miss Jakens. I would also have declined her invitation to use my power under Art 15(1)(b) of the European Convention to request that further inquiries be made of the circumstances of one or other or both of the homes before reaching my decision.

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