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[06/05/1998; Supreme Court of Ireland; Superior Appellate Court]
R.K. v. J.K. (Child Abduction: Acquiescence) [2000] 2 IR 416 (unreported)

The Supreme Court of Ireland

6 May 1998

Denham, Lynch and Barron JJ

In the matter of the Child Abduction and Enforcement of Custody Orders Act, 1991, and in the matter of RK. v JK

DENHAM J.: This matter comes before the court by way of appeal from the orders and judgment of the President of the High Court made on the 25th and 27th February, 1998, wherein he declared that the defendant had wrongfully removed the minors RK. and C.K. from the jurisdiction of Scotland pursuant to the Hague Convention which has been incorporated into Irish law by the Child Abduction and Enforcement of Custody Orders Act, 1991. He ordered that, having received undertakings on oath from the plaintiff, the minors be returned to the jurisdiction of Scotland within a week. The case was appealed to this court and a stay was placed on the order. In addition, before this court is a motion seeking leave to give further evidence orally or by affidavit in respect of (a) the effect of the order for the return of the children to Scotland on the infants RK. and C.K.; (b) the effect of the conduct of the plaintiff on the infants and the mother; (c) the breaches of the barring orders and the criminal prosecutions of the father arising therefrom, and (d) such further evidence as the court shall see fit.

The defendant is an Irish citizen. She met the plaintiff in Scotland in about June, 1992, the child, RK. was born on the 30th March, 1993. There were difficulties in the relationship between the defendant and the plaintiff and she returned to Ireland in about May, 1993, when RK. was approximately two months old. The defendant alleges abusive behaviour by the plaintiff of her at that time. She stayed with her family. The plaintiff travelled to Ireland. He issued proceedings in the District Court of Ireland for custody of RK.. He was refused custody but obtained an order for supervised access: order of the District Court, the 3rd August, 1993. The defendant and plaintiff resolved their differences. In about October or November, 1993, the defendant returned to Scotland with the infant RK. and she subsequently married the plaintiff on the 30th March, 1994. The second infant C.K. was born on the 3rd September, 1994. Their home was in Aberdeen.

The defendant alleges abusive and obsessive behaviour by the plaintiff to her. Some of this behaviour she describes as having taken place in November, 1995. In August, 1996, she describes behaviour of the plaintiff which she states forced her to leave the family home and go to a woman's refuge. She subsequently brought the children to a refuge. She swore an affidavit of an incident where she left the children at the family centre and went to the flat to get clothes. There was an incident described where she was detained in the flat by the plaintiff and released when a welfare officer arrived. There was further conflict between the

parties and the children were aware of this. On the 22nd August, 1996, the defendant moved back into the family flat. Two days later when the plaintiff was absent she left the flat with the children and travelled to Ireland. She states that she did this because of increasing concerns for her safety and welfare and the safety and welfare of the children. She alleges that the plaintiff is abusive to her and acts unreasonably. The plaintiff alleges that the defendant was drinking to excess.

The plaintiff did not consent to the children leaving the family home. The defendant left Scotland giving no prior notice to the plaintiff and taking the children with her. She left a note which said:-

"I [sic] sorry but things are not working, I need some space and time. I haven't told anyone where I am, so there's no point in asking them. I need the boys with me and you need to work to pay off money matters. I'm sorry but there is no trust and too many questions and too much pressure all the time. I'll be in touch some time. Please try and understand."

The High Court

In the High Court on the hearing of the matter there were two main issues before the President. First, the question of acquiescence by the plaintiff to the removal of the children to Ireland. Secondly, it was submitted that if the children were returned to Scotland they would be exposed to a grave risk of physical or psychological harm and/or be placed in an intolerable position.

Appeal

Counsel for the defendant on this appeal has submitted that the learned trial judge erred in fact and law in holding that there was no acquiescence. Also, it was submitted that the learned trial judge had erred in fact and law in finding that there was no grave risk of physical or psychological harm to the children or that the children would not be placed in an intolerable situation if they were ordered to be returned to Scotland.

In this court, counsel for the defendant also made submissions as to jurisdiction and on the affidavit of laws, submitting that the plaintiff had not proved his custody rights and that thus he had not laid the basis for the child abduction application. However, on further argument this was not pursued rigorously. I am satisfied that the plaintiff had custody rights on the 24th August, 1996, and that these were proved before this court. I am in agreement with the judgment of Lynch J on this issue.

Habitual Residence

The plaintiff, defendant and two children were resident in Scotland on the 24th August, 1996. On that date the defendant, without the consent of the plaintiff who had custody rights, left the jurisdiction of Scotland and moved to Ireland. She did not tell the father she was going or where she was going. He did not know where they were until the 6th October, 1996, although it is clear that he guessed (correctly) that she was in Ireland. On the 24th August, 1996, the plaintiff, defendant and two children were habitually resident in Scotland under the terms of the Hague Convention, which has the force of law in Ireland, s. 6, Child Abduction and Enforcement of Custody Orders Act, 1991. Consequently, the removal of the two children by the defendant was wrongful within the terms of the Hague Convention. Pursuant to the Hague Convention the plaintiff requests that the children be returned promptly to Scotland, the state of their habitual residence.

On this appeal the defendant has raised two defences, submitting that the children should not be returned. On the one hand she submits that the plaintiff acquiesced in the removal of the children within the terms of art. 13(a) of the Hague Convention. In addition, she submits that to return the children to Scotland would create a grave risk that one or both would be exposed to psychological harm or otherwise place the child or children in an intolerable situation, within the terms of art. 13(b) of the Hague Convention. Consequently, this case falls to be determined on two issues, both of which arise under art. 13 of the Hague Convention which states:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:-

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;

or

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

Acquiescence

Counsel on behalf of the defendant submitted that the plaintiff had acquiesced in the removal of the children pursuant to art. 13(a) and that consequently he was not entitled to the relief sought. Reference was made to a number of matters:-

(i) letters,

(ii) the application to the District Court in Ireland for custody,

(iii) the plaintiff's delay in starting the proceedings,

(iv) the plaintiff's application for a divorce in Scotland, and

(v) the plaintiff's references, request for and consideration of a transfer to Ireland in his job.

The time within which it is relevant to consider the defence of acquiescence in this case is from the 24th August, 1996, when the children were wrongfully removed by the defendant, to the 17th October, 1996, when the plaintiff commenced proceedings under the Hague Convention. Thus these five matters have to be considered in that time frame.

(i) Letters

The President of the High Court held that the letters must be read in their general tone, which were written by a man "demonstrating extravagances of grief and love for his wife and family". The President stated:-

"I am satisfied that nothing in these letters amounts to a statement of acceptance by the plaintiff of the fact that his wife had improperly removed the children for their home."

It is against that finding that counsel for the defendant submits that he erred in law and fact. Letters were written by the plaintiff within six weeks of the wrongful removal of the children. The defendant left Scotland on the 24th August, 1996, and the letters in question

were written between the 15th September, 1996, the 26th September, 1996 and the 1st October, 1996.

The first two letters were sent to the defendant's parents' home in Ireland. They are long and hand-written. Counsel for the plaintiff made the case that they were seeking reconciliation and should not be held against the plaintiff. Counsel for the defendant submitted that they indicated that the plaintiff had made a decision not to go to court which was in effect an acquiescence under the Hague Convention, that later he changed his mind but that the change of mind did not enable him to benefit from the Hague Convention.

I have considered carefully the content of these three letters. I refer to some passages which illustrate the general and particular content.

Letter of the 15th September, 1996

This letter from the plaintiff to the defendant was 26 pages in length and hand-written over the 15th and 16th September. At p. 5 he discussed the children and their interests and states:-

"The decision I have made, if you still see it in yourself that we can't be a part of each other's lives. It is the worst decision I have ever made and will again. I've thought long and hard about it and I hate myself for doing it, is that for R and C., I won't contest them, I know my rights darling, it's just that I couldn't bear to see them hurt, and one day that would happen. I know you will say that they don't need me, that you can bring them up without me, I just love you and the boys more than you'll ever know, I really hate myself right now, it's tearing me apart to do this, but they are wonderful boys and I never want to come between the boys and your happiness. Take very good care of them darling as I know you will. Also I don't want to give you any more heartache than I've caused already. I would still want you even without the boys, it's just that day I didn't want you to see how hurt I was."

He stated later:-

"Why are we doing this to each other ... you said this would never have happened if I didn't chuck you out that Friday. ... I know I have to change, I know that you darling and the boys mean everything to me ..."

He continued stating:-

"I miss our boys calling me daddy, it tears me apart not being with them too. I know I was very wrong and you had to do this, but we need to talk."

"... it would never ever be the same again ..."

He requested her to contact him. He stated:-

"I never wanted you in the homeless flat, I wanted you with us, as a family, together, I find it hard to explain how I feel, in case it gets chucked back in my face, but now, I should have told you how I felt, it was nothing but love, but I was always scared I would lose you, and now I have. You are a wonderful person, you always will be, you have a heart of gold. God how much I wished I didn't have that problem, you never deserved it, I wish somehow I could make it up to you darling. I would never be like that again. No more problems, I've left them all behind. I love you too much to be like that again. You have to believe me darling."

Further on in the letter he stated:-

"The situation we are in right now has made me changed, no more problems for me. I know I should have realised this a lot earlier, but before the Andy fiasco, we looked happy, you said nice things. I thought I was getting better, you working, doing things during the day. Would that had happened at the beginning. But I lost my control with, well you know, and all through it, I never meant to hurt you, I never, for one second thought it was true. I was only trying to save "your name". All that I seemed to have done was make it worse,"

He described how upset he was at the absence of the children and the defendant. He said he would make things be changed and better. He stated:-

"I won't mess you up again darling. This has all brought to me some horrible truths about me which I didn't like. You would never have to put up with that again. NEVER!!"

He continued to request her to give him a chance.

Letter dated the 26th September, 1996

In the letter dated the 26th September, 1996, the plaintiff again wrote to the defendant and saying that he missed the defendant and the children. He stated that he wanted to be with them, that he was not the person he used to be. He wrote:-

"By now you already know what decision I have come to. It deffinently [sic] wasn't easy. You know how much the boys mean to me. You probably don't think that you don't mean that much to me, but you couldn't be further from the truth. You mean the world to me, I love and care for you so much, that I couldn't hurt you ever again. That is why I can't go to court. Right now I don't care what becomes of me, only you and the boys matter. I couldn't let you go through all the pain it would cause. I keep telling myself it's for the best. It's what you would want and I couldn't let the boys become toys between us. I think you might understand. I am not at ease with myself in this, I would miss them so very very much, but most of all I miss you."

Later he wrote:-

"I was all to blame ... I guess that is one other reason why I won't go to Court."

Regarding the possibility of a transfer to Ireland he wrote:-

"Well, I phoned our head office in Ireland ... in Dublin and spoke to JK., personnel manager. Told him if I had to that I would like to transfer there. He said it wouldn't be a problem as M__ operations director of Scotland is also in charge of Ireland. He said that it would probably be Cork or Dublin. Well, I spoke to R and B. (area manager) and they said it wouldn't be a problem, but needed a date because with 4 managers already left, they would need to find a replacement. They would give me a good reference. JK. seems keen as I told him my salary which is a good grade and I was stadium manager at P__ . It would be a major upheaval, financially as well as emotionally but it would all be worth it if it would make you happier. I will do it though, but to be truthful it would be better (if you gave me the chance) to stay here. You do know that.

Whatever I do, it will only happen if you want it to. This is not a joke or a ploy darling. It is all factual. You can phone JK. (telephone number given) if you need proof."

Later he stated:-

"This thing about Court and why I won't do that, please don't think it's because I don't care and don't love you or the boys, please don't let the boys ever think that darling, please don't let the boys grow up thinking I never loved them. I am doing this because I DO love you and the boys. Please don't let them forget me. You and the boys are very special to me."

His letter was written over a number of days. In the latter half he states:-

"It is now Saturday 28th Sept. 96 a week to go for my birthday. ... I spoke to your solicitor, Mr McDonald, he said he had spoken to you last Wednesday, I asked him to tell you that I loved you and mentioned my transfer.

... I don't know what to do darling, I want to be with you and the boys really badly. You're all I have, I don't want to lose you one bit. ..."

He referred again to financial matters and the transfer:-

"No more wages arrested. Only L65 off my wages at the end of this month. I gave the feelers to my A. Manager about a transfer and he said that if it would help he would do his best.

My only aim is for us to happy in the future. I am sorting our money problems."

Letter of the 1st October, 1996

On the 1st October the plaintiff wrote the third letter, which was to the solicitor for the defendant, in Aberdeen. He stated:-

"In reference to the decision I have come to in respect of J, R and C. [the defendant and two children].

I deeply love J and the boys so very much. I have no doubts that our marriage would work. But if J can't see it in herself to believe me, then I would at no time, go to court because of my strong feelings for J and our boys. I do not wish to hurt them in any way. I am not at ease with myself in this decision, but now and forever, J, and the boys happiness are my priority.

No one knows of this decision, only myself, Mr Anderson, yourself and J I would like my wishes to be respected in that no one hears of the outcome. I will no longer be living in Aberdeen as it holds too many memories. A transfer request to Ireland is as good as granted, which is one option.

Regarding the financial status, J realises that she has left me with financial obligations. Once they are sorted out, J will receive every penny that is available.

I would like it to be known to J, that I will always love her and our boys. That we have had some good times together, and I will never find anyone like her again. To thank her for being my wife and bringing R and C. into this world. I will love them forever.

If possible when I know where I will live, that J can send letters and photos telling me how they are getting on.

Please tell J how deeply sorry I am that it has ended and hopefully will only remember the many good times.

I would do anything to have J and the boys back with me. I know that we can be happy. I love them deeply.

Also I understand that my solicitor has already sent you a letter stating that I would very much [sic] to see the boys and J It has been a month now and I would like to know why my wishes haven't been granted."

The general tone of these letters is one seeking reconciliation. The plaintiff was obviously very disturbed and distressed when he wrote them. His primary aim was to bring the family back together either in Scotland or Ireland. Throughout this crucial time immediately after their wrongful removal that was his primary object. The references to a transfer and to the courts must be considered in that context.

I have considered carefully the letters, portions of which have been set out in this judgment. They were clear evidence which was before the President upon which he could come to the conclusions which he did: thus this court should not interfere with that determination: Hay v O'Grady [1992] 1 IR 210. In fact I have come to the same conclusion as the President. Whereas these were references to a "decision" by the plaintiff this was in the general circumstances of his search for a reconciliation and at a time when he was greatly distressed in the weeks after the defendant wrongly removed the children from their home. In such circumstances I am not satisfied that the letters evidence acquiescence by the plaintiff in the wrongful removal of the children and/or their retention in Ireland.

(ii) Application to the District Court for custody

The plaintiff established that the children were in Ireland on the 6th October, 1996. Whilst he had apparently guessed (rightly) they were in Ireland he received confirmation of this on the 6th October, 1996. On the 7th October, 1996, the plaintiff issued proceedings in the District Court in Ireland for custody of the two children. When this matter came before the District Court on the 8th October, 1996, the plaintiff's solicitor stated that application to the District Court was being made without prejudice to his rights under the Hague Convention. The plaintiff stated he only discovered about the Hague Convention at this stage. Pursuant to the plaintiff's application on the 8th October, 1996, the District Judge did not grant custody to the plaintiff but gave him supervised access.

This application for custody in the District Court by the plaintiff was not his first. When the defendant moved to Ireland in 1993, with the child R the plaintiff sought a custody order for that child then. The District Court at that time ordered supervised access to the plaintiff of the child RK. in the presence of a Health Board official.

It is clear that the plaintiff did not know of the Hague Convention prior to the application for custody in the District Court in October, 1996. The circumstances show the consistency of his approach, on both occasions when the defendant moved to Ireland he sought custody of the child or children in the District Court.

The application for custody in 1996, was made without prejudice to any application under the Hague Convention. Thus the application itself is not a bar to this application under the Hague Convention. However, it is not a procedure which is in general appropriate in that applications under the Hague Convention should be speedy, summary proceedings and supplemental relevant orders should be made within or with those proceedings, if necessary.

(iii) The plaintiff's delay in starting the application

The plaintiff guessed (correctly) that the defendant had moved to Ireland on the 24th August, 1996. However, he did not know of her exact location until the 6th October, 1996. He commenced these proceedings on the 17th October, 1996. Whereas technically the plaintiff could have gone to the Central Authority and asked them to initiate a search for the

children the reality was that the plaintiff did not know of the Hague Convention prior to the 6th October, 1996. While that lack of knowledge in itself need not necessarily be a defence to delay, in all the circumstances of the case there was no delay prior to the plaintiff knowing of the Convention. Certainly the duration of 11 days after he learnt of the Convention is not a delay. Whichever time span one considers, the time from the wrongful removal is the important duration, there was no delay by the plaintiff so as to act to his detriment.

(iv) The plaintiff's application for a divorce

The plaintiff has commenced divorce proceedings in Scotland. Counsel for the defendant argued that this was his decided view in September, 1996. Counsel for the plaintiff submitted that he had not formed that view then. The initial writ before the court seeking divorce (on the ground that the marriage has broken down irretrievably) is dated the 9th February, 1998. The letters make no mention of this option in September, 1996. It is probable that it is a choice made by the plaintiff after 1996.

In that writ the plaintiff also sought custody (a residence order) of the children. The plaintiff had sought an interim residence (custody) order in Scotland. However, an interim residence order was made in Scotland on the 8th April, 1998, for the defendant. The effect of the interim residence order is to allow the children to remain with the defendant in Ireland until the date of the next Child Welfare Court on the 8th May, 1998. Thus the plaintiff's application for divorce and related matters was made long after the time relevant to the issue of any acquiescence in this case. It does not establish any acquiescence by the plaintiff to the wrongful removal of the children.

(v) The plaintiff's reference to his request for and consideration of a transfer to Ireland in his job

The references to a possible transfer to Ireland by the plaintiff in the letters written in the weeks after the children's wrongful removal, relevant portions of which have been set out in this judgment, must be considered in light of the full circumstances of the case, especially his apparent concern to reconcile the family. As such it is neither a specific factor, which of itself proves acquiescence, nor, taking the case in its entirety, is it such a matter as to prove acquiescence by the plaintiff.

It is clear from the facts of the events between the 24th August, 1996 and the 17th October, 1996, when he commenced these proceedings, that the plaintiff was in an emotional state. The letters in their entirety do not establish his acquiescence. Nor does his specific reference to this issue do more than establish his wish to reconcile with his family whether it be in Scotland or Ireland.

Issue

The issue is whether in these circumstances, the letters, the inquiries as to a transfer, the application to the District Court for custody, the delay in seeking the remedy under the Hague Convention and the situation in relation to a divorce, all in the weeks between the 24th August, 1996 and the 17th October, 1996, constitute acquiescence under the Hague Convention.

The law on acquiescence

Acquiescence means acceptance, acceptance of the removal or retention of the child. It is a matter to be decided on the circumstances of each case. The law on acquiescence under the

Hague Convention has been considered previously. In P. v B. (Child Abduction: Undertakings) [1994] 3 IR 507 at p. 517, I stated:-

"In W. v W. (Abduction: Acquiescence) [1993] 2 F.L.R. 211, Waite J stated, at p. 217 in referring to acquiescence:

'The gist of the definition can perhaps be summarised in this way. Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return.'

This was accepted by Morris J in N.K. v JK. [1994] 3 IR 483, as a correct statement of the manner in which a court should determine whether or not there has been acquiescence by a parent in any set of circumstances. With this I agree. The test is objective, not subjective, and made on all the circumstances of the case."

In that case the mother travelled to Ireland where she said she "needed time" and the father understood she would return to Ibiza. There was held to be no long term acceptance of the state of affairs and consequently no acquiescence under the Hague Convention.

In a recent review of the interpretation of the term "acquiescence" in the Hague Convention the House of Lords pointed out that an international convention, expressed in many languages and intended to apply to a wide range of legal systems, cannot be construed differently in different jurisdictions: In re H (Abduction: Acquiescence) [1998] AC 72, Lord Browne-Wilkinson stipulated that the Convention must have the same meaning and effect under the laws of all contracting states and consequently English law concepts have no direct application to the proper construction of art. 13 of the Hague Convention. He summarised the position as to acquiescence at p. 90:-

"To bring these strands together, in my view the applicable principles are as follows. (1) For the purpose of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill LJ. said in In re S. (Minors) (Abduction: Acquiescence) [1994] 1 F.L.R. 819 at p. 838: ... 'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact.' (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. (3) The trial judge, in reaching his decision on the question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

I agree that it is necessary to ensure a common international approach to the interpretation of the terms of the Hague Convention. The concept of acquiescence in the Hague Convention

should not to be interpreted in a formalistic way or by reference to national law. Common sense should be applied to the facts of the case.

The approach of the House of Lords in In re H (Abduction: Acquiescence) [1998] AC 72, is consistent with the interpretation of the term in other jurisdictions. International Child Abduction: Guide to Handling Hague Convention Cases in US Courts by Hon. James D. Garbolino referring to the experience in the United States of America at p. 142 states:-

"Pursuant to article 13, a contracting state is not required to return a child where the petitioner consented to, or subsequently acquiesced in, the child's removal or retention. ... The terms 'consent' and 'acquiescence' should be applied in their usual, common sense meaning."

At p. 143 he states:-

"Where courts have analysed the defence of consent or acquiescence, they have done so in a manner which is consistent with the fact-intensive nature of Convention cases.

Consent or acquiescence to a child remaining away from its habitual residence must evidence an intention to allow the child to remain in the new location for an indefinite period of time. Where consent has been found by the courts, the most weighty factor has been the indefinite time factor with which the child was allowed to remain in the custody of a parent."

Consequently, rather than adopt a formalistic approach, I am satisfied that the matter of interpreting the term "acquiescence" under the Hague Convention should be approached on a strongly factual basis with a common sense interpretation of the term applied. There should not be an analysis by way of applying principles of national law.

Decision on the issue of acquiescence

In view of the facts and circumstances of this case, pursuant to the Hague Convention, I am satisfied that at a time of distress and sorrow the plaintiff was seeking to reconcile his family, either in Scotland or Ireland. He was contrite for his actions and stated his love for the defendant and children, as part of that he indicated a decision not to go court. However, he did not then know of the Hague Convention and as soon as he knew where the children were he sought a custody order in the District Court, without prejudice to his rights under the Hague Convention of which he learned after the 6th October, 1996. His actions taken without actual knowledge of the Hague Convention are relevant.

Precise knowledge of his rights under the Hague Convention are not necessary, acquiescence may exist without precise knowledge. His intent at the time is proved by his letters and actions. These do not show that he acquiesced in the removal of the children. His decision stated in the letters not to go to court was made without knowledge of the Hague Convention, at a time of distress and sorrow in the weeks immediately after the children were wrongfully removed, in an atmosphere of uncertainty, when he was seeking to reconcile the family and when he did not know where they were and was trying to make contact. I do not consider that the letters establish the exception elucidated In re H (Abduction: Acquiescence) [1998] AC 72. Consequently, I am satisfied that the plaintiff did not acquiesce in the wrongful removal of the children and I would dismiss the appeal on this ground.

Grave risk or intolerable situation

The second submission by the defendant was that to return the children to Scotland would create a grave risk that one or other or both of them would be exposed to physical or psychological harm or otherwise place them in an intolerable situation.

The defendant has sworn in her affidavits of violence to her and harassment of her by the plaintiff. She has also sworn of altercations taking place in front of the children when he called her names or excluded her from a place. These events occurred in Scotland in 1996 when the children were very young. Problems relating to the late returning of the children after access and on other occasions at her house in Ireland occurred in 1996 and subsequently and in the presence of the children on occasions.

In the High Court the learned President took no oral evidence from the defendant and limited oral evidence from the plaintiff. There was no oral evidence as to the children's welfare. I am of the view that in general it is better to give both parties, or neither, the opportunity to give oral evidence. Although, of course, situations will occur where it is appropriate to hear oral evidence from one party only.

It is clear that the harassment and conflict is between the parents. The plaintiff loves his children and wishes to be part of their lives.

The President of the High Court found that there was no grave risk of physical or psychological harm to the children nor would they be placed in an intolerable situation if returned to Scotland. Counsel for the defendant submits that in these findings he erred.

There is no evidence that the plaintiff has been violent to the children. The problem relationship is that of the parents. The defendant states that the relationship is abusive and obsessive. There is some independent evidence to support this contention. Independent evidence as to the parental relationship comes from a number of sources. Anne Donaldson, officer in charge of Tillydrone Family Centre, Aberdeen swore an affidavit on the 9th May, 1997 and referred to her report. Jennifer Ritchie swore an affidavit on the 29th May, 1997, and also exhibited a report.

This parental conflict has to be considered. If this case were being heard when it should have been heard, ie at the end of 1996, then the matter would be more apparent. The case has become more complicated and the children have been disadvantaged by the delay in the hearing of this case.

Counsel for the defendant submitted that the circumstances were similar to P.F. v M.F. (Unreported, Supreme Court, 13th January, 1993) which case they submit should be applied. In that case Finlay CJ reviewed the facts on the case which included the fact that the father who was the basic earner had so managed his affairs that on nine occasions the family had to move because of failures to pay the rent, that there was insecurity and instability about the provision of maintenance for the family, that there was insufficient food and ordinary necessities on many occasions in the house. At the same time the father was spending money on luxuries for himself such as a new car and an expensive foreign holiday. In addition there was evidence of violence by the father to the mother and limited evidence of violence by the father of the one of the children. None of the mother's evidence was contradicted. Finlay CJ concluded:-

"... all this evidence, ... raised a probability that if the children were returned to Massachusetts there was a grave risk that that return, even pending the determination of the provisions for their custody and support and maintenance which would be necessary in the courts of that area, would put them again in the intolerable situation which they had suffered in the past."

The facts of that case were different, including the fact that the father did not adduce any evidence, nor were there any undertakings given, nor money for their journey, nor residence provided. Consequently, P.F. v M.F. (Unreported, Supreme Court, 13th January, 1993) was a case of entirely different facts and circumstances and may be distinguished from the case in consideration.

The grave risk contemplated in the Hague Convention is that of a serious risk. In Thomson v Thomson [1994] 3 SCR. 551, La Forest J of the Supreme Court of Canada stated at p. 596:-

"In brief, although the word 'grave' modifies 'risk' and not 'harm', this must be read in conjunction with the clause 'or otherwise place the child in an intolerable situation'. The use of the word 'otherwise' points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of article 13(b) is harm to a degree that also amounts to an intolerable situation."

Thus, whereas any movement of children from one country to another and from one physical home to another is upsetting and may involve some harm, that is not the level of risk anticipated in the Hague Convention.

The grave risk or intolerable situation envisaged may arise because of the relationship, or lack of it, between parents. If the conflict can be abated and undertakings and circumstances created to protect the children prior to the court orders in the requesting country then the policy of the Hague Convention to return children to the country of their habitual residence will be met. Also, the particular children affected by the Hague Convention in a case will have their interest protected.

Motion

Counsel for the defendant has brought a motion to this court to admit further evidence, as stated previously. The further evidence relates to matters arising at this time. These matters arise in part because of the serious delay in the processing of these proceedings.

The delay in this case is not that of the parties or the professionals involved. It is a delay which occurred in the courts and was not the fault of the President of the High Court. As has been indicated previously it is necessary to ensure that these summary proceedings proceed urgently. Only such a process will meet the Hague Convention and protect the children.

In the circumstances of this case I would grant the application on the motion insofar as it relates to matters on affidavit. This will aid this court and the court in Scotland. The information provided is relevant to the issue of undertakings by the plaintiff, to the allegation of grave risk and intolerable position in Scotland for the children, and to practical considerations in relation to the position of the children.

Information arising from the said motion includes the following. In 1996 the District Court ordered that access by the plaintiff be supervised by a Health Board official. Access continued and was supervised. There were incidents of confrontation between the parties and between the plaintiff and the defendant's family. Sometimes the children were not returned on time. The gardai were called upon by the defendant on occasions because of the delayed return of the children. However, in due course there was unsupervised access by the plaintiff to the children. This was stopped as a result of a barring order from the District Court. The plaintiff has not had access to the children since January, 1998.

The interim barring order was made by the District Court Judge on the 7th January, 1998, pursuant to s. 4 of the Domestic Violence Act, 1996, wherein the defendant was the applicant and the plaintiff was the respondent and it states:-

"The application of the above-named [mother] for an interim barring order against the above named [father] pursuant to the provisions of s. 4 of the [Domestic Violence Act, 1996] coming by ex-parte application before the court this day, and the court on the evidence given being of the opinion that there is an immediate risk of significant harm to the [mother] and any dependent person if the order is not made immediately, and the granting of a protection order would not be sufficient to protect the [mother] and any dependent person. NOW THE COURT HEREBY DIRECTS you the [father] to leave the place where the [mother] and any dependent person resides at [named place] in the Court District on being notified of the making of this order AND PROHIBITS YOU FROM ENTERING such place until the 15th January, 1998, without leave of the court.

AND FURTHER PROHIBITS YOU from using or threatening to use violence against the [mother] and any dependent person, molesting or putting in fear the [mother] and any dependent person, attending at or in the vicinity of, or watching or besetting a place where the [mother] and any dependent person resides."

The plaintiff was prosecuted for breaches of the said order. He was found guilty and given one month sentence suspended on condition he leave the area and have no contact with the defendant or the children. The plaintiff appealed this order. The appeal (as is usual in this jurisdiction) was a full rehearing. The appeal was heard on the 31st March, 1998, and the judge found the breaches had occurred and requested the plaintiff to think about his actions. Subsequently the plaintiff apologised and the judge applied the Probation Act. The barring order of the 7th January, 1998, is now an interlocutory order and stands adjourned to the 25th May, 1998.

Undertakings

Undertakings have been sought and given in previous cases in Ireland applying the Hague Convention: P. v B. (Child Abduction: Undertakings) [1994] 3 IR 507; C.K. v C.K. [1994] 1 IR 250; RJ. v M.R. [1994] 1 IR 271. They have also been sought and made in England and Wales: In Re C. (A Minor) (Abduction:) [1989] 1 F.L.R. 403; In Re G. (A Minor) (Abduction) [1989] 2 F.L.R. 475. In Thomson v Thomson [1994] 3 SCR. 551 La Forest J of the Canadian Supreme Court stated at p. 599:-

"Given the preamble's statement that 'the interests of children are of paramount importance', courts of other jurisdictions have deemed themselves entitled to require undertakings of the requesting party provided that such undertakings are made within the spirit of the Convention: see Re: L., supra; C. v C., P. v P. (minors) (Child Abduction), [1992] 1 F.L.R. 155 (Eng. H.C. (Fam Div.)); and Re A. (A minor) (Abduction), supra. Through the use of undertakings, the requirement in Article 12 of the Convention that "the authority concerned shall order the return of the child forthwith" can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the court of the child's habitual residence, and any short-term harm to the child is ameliorated."

Counsel for the defendant submitted that the undertakings would not be enforceable in Scotland. I am not satisfied that this is the case but consider that the Scottish courts, both in implementing the Hague Convention and in exercise of the comity of nations, would take the same view of undertakings as do other Convention countries.

On the 25th February, 1998, the President of the High Court, having delivered judgment, the plaintiff undertook on oath:-

(1) to make available to the [defendant] within seven days from the date hereof sufficient funds to enable the [defendant] and the minors RK. and C.K. to fly to Edinburgh or Glasgow and on to Aberdeen

(2) to vacate the apartment at [the family home in Aberdeen] and not to attend at or near the property pending determination of the issues between the parties by the Scottish courts

(3) (a) to make available forthwith a key to the apartment and to put the [defendant's] solicitors in possession of the said key

(b) not to communicate with the [defendant] or the said minors pending determination by the Scottish courts

(4) to abide by whatever order the Scottish courts may make

(5) to pay the [defendant] L150 sterling per week in respect of maintenance until the Scottish courts determine the correct amount.

The court has been informed that L400 sterling and the key to the family home in Aberdeen have been forwarded to the defendant's solicitors.

Counsel for the defendant also submitted that the family history was such that the probability was that the plaintiff would not abide by the undertakings. I have considered these submissions carefully. The circumstances must be considered as a whole - not taking a specific element in isolation. The letters indicate his state of mind. The President, who had the benefit of oral evidence, said of the plaintiff:

"I have had the opportunity of hearing the plaintiff cross-examined on his affidavit and I have formed the view of the type of person the plaintiff is. I am of the view that the plaintiff is extremely able as is borne out by the fact that he has held a responsible position at work. Moreover he is obviously very well educated and has a keen understanding of the facts and the legal issues involved in this case. However I have no doubt that he has demonstrated by his general conduct that he is of an unstable character. The frequency with which he telephoned his wife, the length and tone of his correspondence, the fact that he has fought with numerous persons and bodies with whom he has come into contact and the manner in which he has pressurised his wife on numerous occasions indicate to me that care must be taken if an order is made in this case. On the other hand I do not think that the plaintiff would have any intention of harming either of the children and that many of his worst characteristics have been brought to the surface by the circumstances of the case and the hostility that it has generated."

There was evidence including oral evidence upon which the learned President could arrive at this finding. I have had the benefit of the additional evidence in relation to the barring order and the breach thereof. That must be viewed in all the circumstances of the case, including the excessive delay. On a full review of the facts I am in agreement with the President on his conclusion.

Conclusion

The children were born in Scotland. The parties are their father and mother. The first child was legitimated and the second is legitimate. The family were habitually resident in Scotland

prior to and on the 24th August, 1996. Each parent had rights of custody. There were incidents of parental conflict. On the 24th August, 1996, the defendant wrongfully removed the two infants from Scotland to Ireland. The plaintiff requested the return of the children to Scotland pursuant to the Hague Convention on the 17th October, 1996. The plaintiff's request for the return to Scotland of the children was delayed in the Irish courts through no fault of the parties. The defendant raised two defences to the return of the children. First, she submitted that the plaintiff acquiesced in the wrongful removal. I would dismiss this appeal for the reasons stated. Secondly, she submitted that the children would suffer grave risk or an intolerable situation if returned to Scotland. The facts established by the defendant do not show that the children will suffer grave risk from the plaintiff. He is a loving parent. The conflict is between the parties and is a matter for the divorce court in Scotland. It also affects the children.

The conflict in the family is between the parents; and has occurred in both jurisdictions. It will have to be resolved, insofar as it can, in a court of law. The divorce application of the plaintiff is pending in Scotland. The habitual residence of the children is Scotland, which is the jurisdiction within which the determination of the issues of custody and access lie to be determined. Thus all the family issues fall to be decided in Scotland. The sooner this is done the better.

The current situation of the family is relevant to determining the move to Scotland. These circumstances include: the undertakings of the plaintiff, the fact that the court in Scotland has awarded the defendant interim custody (residence) of the children, the fact that the plaintiff's application for divorce and matters related to the children is listed before the court in Scotland on the 8th May, 1998. The circumstances do not establish an intolerable situation for the children in Scotland.

Counsel are requested to confirm that the plaintiff gave the undertakings to the President of the High Court as recited in the order of the 25th February, 1998, and as set out in this judgment. On that confirmation I would dismiss the appeal and confirm the order of the High Court.

The children are to be returned to Scotland by the 31st May, 1998, in the care of the defendant unless there is an order to the contrary in Scotland. This means that the defendant can either return them for the hearing in Scotland of the 8th May, 1998, or she can attend that hearing, seek any appropriate orders and make necessary arrangements.

This decision is made pursuant to the Hague Convention. The issues of the welfare of the children, their custody and access, are not before the Court. Those issues are for determination in Scotland.

Copies of the judgments of this Court should be forwarded to the Central Authority, the court in Scotland being the Sherrifdom of Grampian Highland and Islands of Aberdeen before the 8th May, 1998 and to the Reporter to the Children's Panel in Scotland.

LYNCH J.: This is an appeal by the defendant (the wife) against an order of the President of the High Court made on the 25th February, 1998, directing the return of the minors named in the title hereof to the jurisdiction of the courts of Scotland pursuant to the Child Abduction and Enforcement of Custody Orders Act, 1991, and the Convention on the Civil Aspects of International Child Abduction (the Hague Convention) as set out in the first schedule to the said Act of 1991.

The facts

The plaintiff (the husband) and the defendant cohabited in Aberdeen in Scotland in the early 1990s. The defendant is Irish and the plaintiff is Scottish. On the 30th March, 1993, the first named minor RK. was born to the plaintiff and the defendant in Scotland. Thereafter owing to disagreements between the plaintiff and the defendant, the defendant returned to her own family in Ireland where she remained for some eight months after which she went back again to Aberdeen and resumed cohabitation with the plaintiff. The plaintiff and the defendant married in Aberdeen on the 30th March, 1994, and the second named minor C.K. was born to them on the 3rd September, 1994.

Later on further differences arose between the plaintiff and the defendant and ultimately on or about the 24th August, 1996, the defendant took the two children to Ireland without the knowledge or consent of the plaintiff. Strongly suspecting that the defendant had taken the two children to her own mother's house in Ireland the plaintiff travelled to Ireland in early September, 1996, but did not find them in the defendant's mother's home and was assured that they were not there and that their whereabouts were not known to that household. Ultimately the defendant did return to her mother's house with the two children but the plaintiff did not find out for certain that they were there until the 6th October, 1996. On or about that date also the plaintiff consulted an Irish solicitor and for the first time learned of the existence of the Hague Convention. The plaintiff then consulted the Central Authority in Scotland on the 17th October, 1996, and these proceedings were commenced in this State by a special summons issued on the 6th November, 1996.

Unfortunately and through no fault of either party, there has been great delay in the hearing of this case and when this delay came to the notice of the President of the High Court he arranged to hear the case himself forthwith and he then gave his reserved judgment with the utmost expedition on the 25th February, 1998. The appeal to this court was also expedited and the matter was argued before this court on the 21st, the 22nd and the 24th April, 1998, and I now give my judgment in the matter conscious that it is almost eighteen months since the issue of the special summons and fully twenty months since the removal of the children from Scotland to Ireland. Child abduction cases should be given priority over all other family law cases subject only to other matters of great emergency.

The grounds of appeal

The first ground of appeal is as follows:-

"(1) The trial judge erred in fact and in law in finding that there was wrongful removal of the infants RK. and C.K. from their habitual residence in Scotland."

The basis of this ground of appeal was that as the parents were not married to each other at the time of the birth of RK. the plaintiff had no parental rights in relation to him. In fact this court was supplied with a copy of the Law Reform (Parent and Child) (Scotland) Act, 1986, emanating from the Central Authority in Scotland. Pursuant to art. 14 of the Hague Convention we are entitled to consider and construe this Scottish Act ourselves. Having done so it is clear beyond doubt that the plaintiff has and had at all material times parental rights in respect of RK. and, a fortiori, in respect of C.K. These rights were being exercised by the plaintiff jointly with the defendant at the time of the removal of the children by the defendant and therefore the removal was wrongful unless the plaintiff consented prior to the removal.

The second ground of appeal is as follows:-

"(2) The trial judge erred in fact and in law in finding that there was no consent by the plaintiff to their removal from Scotland."

It was conceded on the hearing of the appeal that the plaintiff did not consent to the removal of the children to Ireland and accordingly, this ground of appeal was not pursued.

The third ground of appeal was one of the two main grounds relied upon before this Court and is as follows:-

"(3) The trial judge erred in fact and in law in finding that there was no acquiescence by the plaintiff in their removal."

This ground as indeed also did ground number (2) related to the provisions in art. 13(a) of the Hague Convention and if acquiescence were established it would have the effect of giving the courts in this State a discretion as to whether or not to order the return of the children whereas if none of the provisions in art. 13(a) or (b) are established then an order for the return of the children would be mandatory to be made pursuant to art. 12 subject always of course to the further exceptions in art. 20 which do not arise in this case.

One of the submissions relied on in support of ground number (3) was that the plaintiff was guilty of such delay in commencing his proceedings after the removal of the children that acquiescence should be inferred. Having regard to the chronology of events already outlined in this judgment we were of the opinion that there is no substance in this submission and we did not require to hear counsel for the plaintiff in reply to it.

The main submission in support of ground number (3) of appeal related to the terms of two long, rambling manuscript letters dated the 15th September and the 26th September, 1996, written to the defendant and a shorter manuscript letter written to the defendant's solicitors by the plaintiff dated the 1st October, 1996. The two September manuscript letters between them ran to some 42 pages and are highly emotional, rambling and repetitious and the manuscript letter to the defendant's solicitors is also highly emotional. It was submitted that these letters should be read as constituting an acquiescence by the plaintiff to the removal to Ireland of the children by the defendant.

The letters were written before the plaintiff had found out for certain that his children were in Ireland and were addressed to the defendant's mother's home in Ireland. The plaintiff did not find his children in the defendant's mother's home until the 6th October, 1996, and before he had ever heard of the Hague Convention. It is true that some of the cases cited to us would support a finding of acquiescence based on some of the passages in these letters if read on their own but I prefer the law as propounded in the minority judgment of Balcombe LJ. in the case of In re A. (Abduction: Custody Rights) [1992] 2 DPP 536, to the law propounded by the majority in that case namely Stuart - Smith LJ. and Lord Donaldson M.R. I quote from the judgment of Balcombe LJ. commencing at p. 544 para. B and continuing to p. 545 para. B of the report.

"We were also referred to a judgment of Deane J in the High Court of Australia in Orr v Ford (1989) 167 CLR. 316, where at pp. 337 - 338, he gave a comprehensive dissertation on the various meanings which 'acquiescence' can have at common law. Since we are here concerned with the meaning of 'acquiesced' in an international convention to which many countries, not only those with a common law background, have adhered, it cannot be right to attempt to construe 'acquiesced' by reference only to its possible meaning at common law or equity. Nevertheless, Deane J's first definition, at p. 337, appears to me to have general force:

'Strictly used, acquiescence indicates the contemporaneous and informed (knowing) acceptance or standing by which is treated by equity as 'assent' (ie consent) to what would otherwise be an infringement of rights.'

It was common ground before us that acquiescence can be inferred from inactivity and silence on the part of the parent from whose custody, joint or single, the child has been wrongfully removed. In such a case it is in my judgment inevitable that the court would have to look at all the circumstances of the case, and in particular the reasons for the inactivity on the part of the wronged parent and the length of the period over which the inactivity persisted, in order to decide whether it was legitimate to infer acquiescence on his or her part.

However where as here, it is said that the father's acquiescence was expressed to the mother by the letter of 23rd September, 1991, it is argued that this was a once and for all event, and it is impermissible to consider subsequent events, or what was in the mind of the father at the time that he wrote the letter or thereafter. Indeed the argument goes so far as to say that, if the mother had received a letter by the following post making it clear that the father had retracted what he said in his letter of 23rd September, and was going to use every legitimate step open to him to have the children returned to Australia, nevertheless he had 'acquiesced' in their wrongful removal, and that the door had been unlocked, so as to give the court discretion whether or not to order the return of the children.

In my judgment this is to give 'acquiesced' far too technical a meaning for the context in which it is used. As I have already said, the main object of the Hague Convention is to require the immediate and automatic return to the state of their habitual residence of children who have been wrongfully removed. To this there are a limited number of exceptions, but it is apparent that the purpose of the exceptions is to preclude the automatic return of the children to the country whence they were removed, only if it can be shown or inferred that this could result in unnecessary harm or distress to the children. In other words, it is to the interests of the children that the exceptions are directed, not (except in so far as these directly affect the interests of the children) the interests of the parents or either of them. In my judgment this requires the court to look at all the circumstances which may be relevant and not, as is here submitted, to the terms of a single letter.

Added force is given to this view by the English and French dictionary definitions of 'acquiesce' which I have quoted above. 'Accept' and 'adhesion' to my mind connote a state of affairs which persists over a period. 'Acquiesce' is not, in my judgment, apt to refer to a single expression of agreement taken in isolation from all surrounding circumstances."

It is clear that this judgment of Balcombe LJ. was preferred by the House of Lords in their judgment in the case of In re H. (Abduction: Acquiescence) [1998] AC 72, where Lord Browne-Wilkinson referred to the judgment of Balcombe LJ. as "a powerful dissenting judgment" at p. 85 of the report. I quote from the speech of Lord Browne-Wilkinson with whom the other four Law Lords agreed at p. 88 and p. 90 as follows:-

"In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside worlds' perception of his intentions.

Is acquiescence a question of fact or law

Once it is established that the question of acquiescence depends upon the subjective intentions of the wronged parent, it is clear that the question is a pure question of fact to be determined by the trial judge on the, perhaps limited, material before him.

In the process of this fact finding operation, the judge, as a matter of ordinary judicial common sense, is likely to attach more weight to the express words or conduct of the

wronged parent than to his subsequent evidence as to his state of mind. In reaching conclusions of fact, judges always, and rightly, pay more attention to outward conduct than to possibly self-serving evidence of undisclosed intentions. But in so doing the judge is finding the actual facts. He can infer the actual subjective intention from the outward and visible acts of the wronged parents. That is quite a different matter from imputing to the wronged parent an intention which he did not, in fact, possess.

Although each case will depend on its own circumstances, I would suggest judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child. The Convention places weight on the desirability of negotiating a voluntary return of the child: see article 7 (c) and article 10. I disagree with the footnote to the judgment of Waite LJ. if it is intended to provide guidance to judges in their fact finding role. Attempts to produce a resolution of problems by negotiation or through religious or other advisors do not, to my mind, normally connote an intention to accept the status quo if those attempts fail. It is for the judge, in all the circumstances of the case, to attach such weight as he thinks fit to such factors in reaching his finding as to the state of mind of the wronged parent. This was the approach adopted by the French Cour de Cassation in the case, X. v X. to which I have referred.

Finally, it should always be borne in mind that under article 13 the burden of proving that the wronged parent has consented to or acquiesced in the abduction is on the abducting parent who is resisting the summary return of the child. This placing of the burden of proof on the abducting parent is designed to ensure that the underlying purpose of the Convention is carried out, viz., the child is to be summarily returned to its country of habitual residence unless the abductor can prove that the other parent has in effect consented to the removal of the child."

At p. 90 he continues:-

"Summary

To bring these strands together, in my view the applicable principles are as follows:

(1) For the purposes of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill LJ. said in In re S. (Minors)(Abduction: Acquiescence) [1994] 1 F.L.R. 819, 838, 'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact.'

(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

(3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.

(4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

As stated both by Balcombe LJ. and the House of Lords in the passages quoted by me above the Hague Convention is an international treaty applying to states with different legal systems and it is desirable that it should be construed identically in all states who have adopted the Convention. For my part I am content to adopt the judgment of Balcombe LJ. as approved by the House of Lords in In re H. (Abduction: Acquiescence) [1998] AC 72, as correctly stating the meaning of "acquiesced" in art. 13(a) of the Hague convention so far as this State is concerned.

The learned President found as a fact that there was no acquiescence by the plaintiff. On the evidence before him including the oral cross-examination of the plaintiff on his affidavits the learned President was entitled to reach that conclusion and it is moreover a conclusion with which I find myself in complete agreement although not having had the benefit of hearing and seeing the plaintiff orally cross-examined and relying therefore only on the transcripts in relation to that aspect of the plaintiff's evidence. Ground number (3) in the notice of appeal therefore fails.

The remaining grounds of appeal relate to findings by the learned President that there was not a grave risk that the children would be placed in an intolerable situation or that they would be exposed to physical or psychological harm if they were made to return to Scotland. These matters arise by virtue of art. 13(b) of the Hague Convention. There clearly was evidence on which the learned President was entitled to make those findings and I would not interfere with them.

Indeed the arguments and submissions on these grounds of appeal related to matters more relevant to questions of custody and access as between the plaintiff and the defendant rather than intolerable situations for or physical or psychological harm to the children. The appropriate courts to deal with matters of custody of and access to the children are the courts of the place of the habitual residence of the children prior to their wrongful removal from such place which in this case is Scotland.

I would therefore dismiss this appeal and would uphold the order of the learned President of the High Court including the undertakings required of the plaintiff.

As regards the time table and other circumstances for the implementation of the order for the return of the children to Scotland, I agree with the provisions ordered in the judgment of the President of the Court, Denham J I also agree with that judgment in general and with the judgment about to be delivered by Barron J

BARRON J.: The parties have two children, RK. who was born in Scotland on the 30th March, 1993, and C.K. who was also born in Scotland on the 3rd September, 1994. The relationship between the parties both before and after their marriage has not been smooth. They met originally in Scotland in June, 1992. However, within two months of the birth of RK. the defendant left the plaintiff with her son and returned to her parents home in County Wexford. Towards the end of that year the defendant returned to Scotland and resumed her relationship with the plaintiff. They married on the 30th March, 1994, and remained together from then until the end of August, 1996, living in council accommodation in Aberdeen.

At the end of that month, the defendant left the family home with the two children of the marriage and without telling the plaintiff where she was going. Her reason was that she believed that the marriage was over. The plaintiff did not accept this although after the defendant had left he indicated that he intended to commence divorce proceedings, which nevertheless because of injuries sustained by the defendant in an accident were not

commenced until February of this year. Both parents love their children and the break-up involved a family centre run by the Social Work Department of Aberdeen.

When the plaintiff realised that the defendant and his children had left home, he assumed that they had gone to the defendant's parents in County Wexford. He went there in early September. On inquiry they told him that they were unaware of her then whereabouts. He wrote letters to the defendant to that address dated the 15th and 26th September, 1996, and to her solicitor in Scotland on the 1st October, 1996, respectively. He finally established that the defendant and his children were staying with her parents on the 6th October, 1996, when proceedings took place in the District Court. On this date, he discovered for the first time that he might be entitled to obtain the return of his children to Scotland pursuant to the provisions of the Hague Convention. He then instructed his solicitor in Scotland, who had not previously advised him of such rights, to take the necessary steps leading to the present proceedings.

These proceedings are a contrast to his letters of this period. They are long letters proclaiming his love for the defendant and his children in which he indicated that he would not bring the defendant to court.

The proceedings in the District Court on the 7th October, 1996, started a long trail of acrimony and allegations and counter-allegations. There is no need to refer again to specifics. These are fully set out in the judgment of Denham J These are matters for the tribunal which will deal with the issues of custody, access and maintenance. The function of this Court is to deal speedily and summarily with such issues as may be raised pursuant to the provisions of the Convention.

The first questions relate to habitual residence and wrongful removal or retention. Counsel for the defendant submitted that as the plaintiff had failed to establish that under Scottish law he had rights sufficient to maintain these proceedings, two consequences followed:

(1) The removal of the children from Scotland was not wrongful; and removal and retention being mutually exclusive no question of wrongful retention could arise:

She relied upon In re H. (Minors) (Abduction: Custody Rights) [1991] 2 AC 476.

(2) Scotland immediately ceased to be the country of the children's habitual residence:

She relied upon C. v S. (A Minor) [1990] 2 F.L.R. 442.

In the course of the hearing it subsequently became clear that the plaintiff did have the necessary rights to rely upon the provisions of the Convention. Consequently counsel did accept that the plaintiff had such rights and has accepted that there was a wrongful removal and that the country of habitual residence was Scotland.

Since I would not in any event have acceded to such submissions I feel it necessary to indicate my reasons. First, I would have been slow in the absence of evidence to the contrary to accept that a legitimate father did not have custodial rights in any Convention state. Secondly, I do not accept that removal and retention are mutually exclusive and that each occurs on a fixed date. Removal is the original crossing of the national boundary. Once that has happened, a child cannot be said to be in the state of removal in the new state. It is in the state of retention, something which occurs also when a consent to the removal comes to an end and the child is not returned. The argument that removal and retention are mutually exclusive which is based on the stated need to have a fixed date for the commencement of

retention is dependent upon common law rules of construction: see In re H. (Minors) (Abduction: Custody Rights) [1991] 2 AC 476 at p. 499.

Removal and retention are always referred to side by side in the Convention which suggests that they are intended to be read together. I can see no difficulty in interpreting an international Convention in the light of what must have been intended, a view apparently accepted by Lord Browne-Wilkinson in In re H. (Abduction: Acquiescence) [1998] AC 72. In so doing, there is no difficulty in construing retention where appropriate as the commencement of the retention. Nor do I accept that a lawful removal could at the same time create an immediate change of habitual residence. I would doubt that such inclusion would be within the intention of the Convention. In our own law, a domicile of choice can be immediately lost by leaving the country of choice having abandoned the intention to reside there permanently, though a domicile of origin is not lost so easily. In so saying I do not intend to indicate that the rules of this jurisdiction in relation to domicile should have any bearing per se on questions relating to habitual residence. The potential rights of the natural father in C. v S. (A Minor) [1990] 2 F.L.R. 442 should have been sufficient to prevent a change in the habitual residence.

In the result, this case falls to be decided upon the basis that the habitual residence of the children was Scotland and that they were wrongfully removed therefrom at the end of August, 1996, and have since been wrongfully retained in this jurisdiction.

The defendant relies upon two defences which are contained in art. 13 of the Convention:

(1) acquiescence;

(2) grave risk.

In considering the meaning of acquiescence I would start with the passage approved by Denham J in P. v B. (Child Abduction: Undertakings) [1994] 3 IR 507 from the judgment of Waite J in W. v W. (Child Abduction: Acquiescence) [1993] 2 F.L.R. 211 where he said at p. 217:-

"Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy and the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return."

In In re A. (Abduction: Custody Rights) [1992] 2 DPP 536, the parties who lived in Australia had two sons who at the time of their removal were aged four and six respectively. A decree of divorce was pronounced in September, 1991, and immediately afterwards the mother wrongfully removed the two children to England. In the same month the father wrote to her expressing his sorrow at what she had done and explaining that though she had acted illegally he loved the boys too much to fight for their return. The majority of the court regarded the sentiments expressed in this letter as being an acquiescence of what had occurred. Balcombe LJ. dissented. He said at p. 544:-

"In my judgment this is to give 'acquiescence' far too technical a meaning for the context in which it is used. As I have already said, the main object of the Hague Convention is to require the immediate and automatic return to the state of their habitual residence of

children who have been wrongfully removed. To this there are a limited number of exceptions, but it is apparent that the purpose of the exceptions is to preclude the automatic return of the children to the country whence they were removed, only if it can be shown or inferred that this could result in unnecessary harm or distress to the children. In other words, it is to the interests of the children that the exceptions are directed, not (except insofar as these directly affect the interests of the children) the interests of the parents or either of them. In my judgement, this requires the court to look at all the circumstances which may be relevant and not, as is here submitted, to the terms of a single letter.

Added force is given to this view by the English and French dictionary definitions of 'acquiesce' which I have quoted above. 'Accept' and 'adhesion' to my mind connote a state of affairs which persists over a period. 'Acquiesce' is not, in my judgment, apt to refer to a single expression of agreement taken in isolation from all surrounding circumstances."

I agree. In my view, acquiescence in the context of the Convention means an acceptance of the changed circumstances arising from the wrongful removal and/or the wrongful retention, as the case may be, by a parent in such circumstances that it is reasonable that he or she should be bound by it. It must be such that it would be inconsistent for the parent who has acquiesced to seek later to rely upon the rights given to such parent under the Convention to have the child or children returned summarily. The acceptance may be by words or conduct.

It is important that the meaning to be given to the Convention is one acceptable in the legal systems of the several contracting states. In In re H. (Abduction: Acquiescence) [1998] AC 72, Browne-Wilkinson said at p. 87:-

"In my view these English law concepts have no direct application to the proper construction of article 13 of the Convention. An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states. I would therefore reject any construction of article 13 which reflects purely English law rules as to the meaning of the word 'acquiescence'. I would also deplore attempts to introduce special rules of law applicable in England alone (such as the distinction between active and passive acquiescence) which are not to be found in the Convention itself or in the general law of all developed nations."

He then continued that in his opinion acquiescence was a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions. He referred to cases in France and two in the United States of America which took the same view.

The finding is a matter for the trial court on the evidence before it. The court must take into account all the circumstances. Matters which might militate against the court holding that there had been acquiescence would be his or her lack of knowledge of the intentions of the other parent; whether it was an immediate and emotional answer to what had occurred; whether he or she had had time for adequate reflection; whether it was in the interest of the child or children concerned; and whether he or she was aware of the Hague Convention or of its terms.

But as against that one parent may not go back on words or actions which clearly leave the other parent to believe that he or she does not intend to assert the right to the summary return of the child and are inconsistent with such return.

I would agree that the following passage from the judgment of Lord Browne-Wilkinson at p. 89 where he said:-

"My Lords, in my judgment these exceptional circumstances can only arise where the words or actions of the wronged party show clearly and unequivocally that the wronged parent is not insisting on the summary return of the child: they must be wholly inconsistent with a request for the summary return of the child. Such clear and unequivocal conduct is not normally to be found in passing remarks or letters written by a parent who has recently suffered the trauma of the removal of his children. Still less is it to be found in a request for access showing the wronged parent's desire to preserve contact with the child, in negotiations for the voluntary return of the child, or in the parent pursuing the dictates of his religious beliefs."

The exceptional circumstances to which he was referring were those where a trial judge would be satisfied that the wronged parent did not, in fact, acquiesce but his outward behaviour demonstrated the contrary, and he placed In re A.Z. (A Minor) (Abduction: Acquiescence) [1993] 1 F.L.R. 682 in this category.

A common thread is emerging from the cases. Whether there has been acquiescence depends upon the answer to the question, did the wronged parent really intend to accept what had occurred This gives rise to a consideration of all the relevant factors. If the answer is no, that is the end of the matter unless there is apparently a clear and unequivocal acceptance wholly inconsistent with seeking a summary return of the child.

In the instant case, the plaintiff did not know positively where the defendant and his children were when he wrote his letters. They were clearly written in a highly emotional state. When he discovered the existence of the Convention he immediately took steps to have his children returned to Scotland. In my view, these facts, taken together as they must be, do not establish the acceptance of a new and changed state of affairs. I would agree with the learned trial judge that there was no acquiescence.

The so called grave risk defence is contained in the following words of article 13:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, ... (who) opposes its return establishes that -

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

In my view the words "intolerable situation" relate to both physical or psychological harm to which the children must not be exposed as well as to other cases where they might be harmed.

Prima facie the basis of this defence must spring from the circumstances which prompted the wrongful removal and/or retention. The facts to support such contention must therefore in general relate to what occurred beforehand within the jurisdiction of the requesting State. Events subsequent to the removal and/or retention would be material only is so far as they tend either to aggravate any original intolerable situation or to create one and also would normally relate to matters which had occurred since in the requesting state.

In my opinion the following passage from Friedrick v Friedrick (1996) 78F 3d 1060, sets out the basis upon which the defence of grave risk might succeed. The passage is as follows:-

"Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."

In the instant case, the evidence does not establish the defence of grave risk of harm, nor would returning the children to Scotland place them in an intolerable situation. There was nothing in the behaviour of the plaintiff prior to the removal and there has been nothing since which would suggest any risk of physical harm to the children. The circumstances in August, 1996, would have exposed the children to such risk of psychological harm albeit small which is an inherent danger in all cases of marital breakdown. What has occurred since is no more than the emotional reaction towards the defendant which would have been expected given his character as found by the learned President but has unfortunately prolonged the inherent risk of psychological harm to the children arising from the attitude of the parents to one another. Nevertheless, situations similar to that which existed immediately prior to the removal of the children from Scotland, regardless of whether it was the fault of either parent or of both, should be prevented, if possible. For this reason, a practice has grown up to require undertakings to ensure that the courts of the requesting state can exercise their jurisdiction on the return of the children with as little trauma to them as possible.

In P. v B. (Child Abduction: Undertakings) [1994] 3 IR 507, Denham J said at p. 521:-

"I am satisfied that undertakings may be given by a party to proceedings under the Act of 1991 and accepted by the Court. They are entirely consistent with the Act of 1991 and the Hague Convention, they are for the welfare of the child during the transition from one jurisdiction to another. Undertakings may be of particular relevance to very young children."

In Thomson v Thomson [1994] 3 SCR. 551 La Forest J said at p. 599:-

"Through the use of undertakings, the requirement in Article 12 of the Convention that 'the authority concerned shall order the return of the child forthwith' can be complied with, the wrongful actions of the removing party are not condoned, the long term best interests of the child are left for a determination by the court of the child's habitual residence, and any short term harm to the child is ameliorated."

This is a case where such undertakings should be taken. I do not accept as has been submitted on behalf of the defendant that the plaintiff will ignore them. I would approve the form of undertakings required by the learned President and by Denham J

Like too many similar cases there was an inordinate delay in this case. Blame for it does not however lie with the parties or the President. Even October, 1996, to the hearing in May, 1997, was excessive, but to have continued until February, 1998, is not acceptable. In the first place, the procedure is a summary one. Matters which relate to custody, access or maintenance are matters for the courts of the requesting state. What the delay does is to heighten the emotional aspects of the case with corresponding harm both to the parents and to the children. It encourages both parties to seek evidence which is not relevant to the proceedings under the Convention. While a psychological assessment of the children may be for their benefit in a general sense or perhaps may indicate how best to cope with the insecurity of the delay, such evidence is a matter for the courts of the requesting state and

will have little bearing on the issues to be decided by this court. What must be avoided is anything which smacks of a custody hearing in the jurisdiction of the requesting state.

Delay is further harmful in that arrangements which should be temporary may be regarded as permanent. That has happened in the present case. The defendant has obtained employment which she regards as permanent, while the plaintiff has not obtained employment because of his need to be in this jurisdiction. The family is to that extent victim of the delay. I can only reiterate that there is need for procedures to enable a speedy disposal of similar cases. Once it is realised that generally the relevant evidence in relation to risk of harm to the children already exists at the date of the removal and/or retention this should make a speedy resolution of such cases all that much easier.

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