---

http://www.incadat.com/ ref.: HC/E/UKe 39
[21/10/1997; High Court (England); First Instance]
Re B. (Abduction: Children's Objections) [1998] 1 FLR 667

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

21 October 1997

Stuart-White J

In the Matter of B.

Jeremy Rosenblatt for the father

Tamera Ladak for the mother

STUART-WHITE J: These proceedings under the Child Abduction and Custody Act 1985, and the Hague Convention on the Civil Aspects of International Child Abduction 1980, concern J who is nearly 12 and A who is, I think, 7. They are the children of the marriage of Irish parents and they were born and brought up in Letterkenny, County Donegal. The father by his originating summons dated 15 August 1997 alleges that the mother wrongfully removed the children to England on or about 9 June 1997 and he seeks a peremptory order for their return.

The facts of the case are somewhat unusual and neither my researches nor those of counsel have revealed any reported case in which precisely the same issues arise.

The mother and the father married in July 1985 but their relationship had begun early in the previous year. A child had been born in October 1984 but was brought to England and adopted here. The mother and the father were married in Ireland where both children were subsequently born. They separated in April 1995. The mother alleges that there had been frequent serious domestic violence, usually when the father had been drinking. The father alleges that the mother had begun a relationship with another man and it has not been necessary nor, indeed, upon the evidence available and the time available for the hearing of these proceedings has it been possible to reach a conclusion as to where the precise truth lies about those matters. It may be, and I say no more than that it may be, that there is some truth upon both sides.

On 10 May 1995 the mother took the children to London and went with them to stay at the London home of the man with whom the father has alleged that she had a relationship. She

sought and obtained in London an ex parte interim residence order. The father commenced proceedings under the Hague Convention.

Those proceedings came for final hearing before Connell J on 7 September 1995. At that hearing it apparently was conceded that the removal of the children had been unlawful, or perhaps one should say wrongful. It is not clear what, if any, defence the mother offered to the originating summons on that occasion but whatever the defence may have been it did not succeed and an order was made for her to return the children to Ireland on 5 October 1995.

The judge ordered that in the meantime the father should have contact with the children at a contact centre in London. That was arranged to take place on 9 September 1995. Neither the mother nor the children attended. Instead they left the refuge where they had been living for the last 4 months without the mother telling her solicitors that they were doing so, and without leaving either at the refuge or with her solicitors any forwarding address. Her solicitors were thereafter without instructions from her.

Upon the making of inquiries to ascertain her whereabouts, information was obtained from the mother's sister that the mother and the children had gone to Scotland. The evidence does not reveal whether or not that information was correct. However that may be, the Irish Central Authority made an application to the Scottish Central Authority based on that information and solicitors were appointed, but by then it appeared that the mother and children were in fact in London.

Inquiries were pursued in London with a view to tracing them. Correspondence and attendance notes exhibited to the father's affidavit establish that those inquiries were pursued with some vigour up until mid-December 1995. By that time it was thought that private inquiry agents who had been instructed were near to locating the children. The father thereupon came back to England from Ireland, whither he had returned in September 1995. His journey proved fruitless for on an attendance by the police and by the tipstaff at the address given by the private inquiry agents, the mother and the children were not found, nor was any information as to their whereabouts forthcoming. In the upshot neither the mother nor the children were located.

In fact they had, in November 1995, obtained a housing association house. They were living there and continued, unbeknown to the father, to live there until the end of February 1997. The children had been enrolled in, and were attending, local schools. At the end of February 1997 the mother and the children travelled to Ireland. Her evidence is that she had heard that her mother was ill and depressed and that she went back to Ireland to help to care for her own mother. She was in Ireland with the children, in the same area in which the father lived, and indeed living in what had been the former matrimonial home, which the father had vacated, for rather over 3 months. The mother's evidence is that it had always been her intention to return to England when her own mother was better, but she says that she did not communicate that fact to the father.

The father's evidence is that the mother told him that she was there to stay. The father had moved out of the former matrimonial home which the mother was occupying at the end of 1995 when he commenced another relationship.

Whatever may have been the intention of the mother and whatever may have been the content of any communication between the mother and the father about that intention, she enrolled the children in schools in Ireland and they attended schools there for the period of her stay. Whatever may have been her intention I am satisfied that the father believed that, albeit belatedly, she was obeying the order of the English court. He had contact with the boys for 2 hours each Sunday. The mother had given the father no indication that she was

going to leave again but she did so with the children on, or possibly a day or two after, 9 June 1997.

She left for the father a letter that reads as follows:

'Dear [J],

I am sorry that things did not work out. First of all I did not like the way you treated me and the children and you did not support me good, bad or indifferent. Also the way that you drove your pregnant girlfriend up to the front door. Don't try to get in contact with me. The boys will contact you. I have gone to Glasgow for a few weeks.'

I find that the mother in returning to Ireland was indeed motivated principally by what she perceived as a need to be with her own mother, who she believed to be unwell, but that she had not made up her mind at first whether to remain permanently and would have been likely to remain permanently if, as she put it, 'things had worked out'.

The father, upon her leaving, again commenced Hague Convention proceedings. The originating summons, as I indicated, was issued on 15 August 1997. There was a series of ex parte orders sought and obtained before judges and deputy judges of the Family Division, in August and September 1997, for the purpose once again of locating the mother and the children, and ultimately those orders resulted in their being located and the originating summons was served, it seems, on 29 September 1997. (The affidavit of the process-server plainly contains a mistake as to the date of service.)

The first inter partes hearing of these proceedings took place on 3 October 1997 when directions were given by Johnson J, including leave for the parties to give oral evidence and leave for the children to be interviewed by a court welfare officer for the purpose of ascertaining their wishes and feelings regarding living in Eire.

That interview was duly conducted by the senior court welfare officer, Mr Mellor. The result of it I shall recount shortly.

Before the father can succeed in his application for a peremptory return of the children pursuant to Art 12 of the Convention, he must establish that the children were habitually resident in Ireland immediately before their removal in June 1997. It is common ground that if they were so habitually resident at that time the removal was wrongful within the meaning of Art 12 and, of course, of Art 3.

What then at the material time was the place of habitual residence of the children? In determining the place of habitual residence it is important first to remember that the question is one of fact. In Re J (A Minor) [1990] 2 AC 562, sub nom C v S (A Minor) [1990] 2 FLR 442, Lord Brandon of Oakwood said this, at 578F-G and 454A-B respectively:

'The first point is that the expression "habitually resident" as used in Art 3 of the Convention is nowhere defined. It follows I think that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case.'

This point was emphasised, if emphasis was needed, in Re M (Abduction: Habitual Residence) [1996] 1 FLR 887, in which both Sir John Balcombe and Millett LJ pointed out,

at 895, that the concept of habitual residence is not, as is domicile, an artificial legal construct.

It is common ground between the parties in this case and well settled that habitual residence refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration. Those of course are the words of Balcombe LJ in Re M (Minors) (Residence Order: Jurisdiction) [1993] 1 FLR 495, 499, citing in turn R v Barnet Borough Council ex parte Nilish Shah [1983] AC 309, 343.

The element of volition in the case of a child is that of the persons who have parental responsibility (see Re M (Minors) (Residence Order: Jurisdiction) at 500C). In the instant case it is not in dispute that the persons with parental responsibility were under Irish law, as of course they would be under English law, the mother and the father. It is further well settled that it is not possible for one parent with parental responsibility unilaterally to change the habitual residence of the child by removing him from, or, as I hold, by retaining him in, another country wrongfully and in breach of another's rights. There is ample authority for this proposition including another passage in the judgment of Millett LJ in Re M (Abduction: Habitual Residence) at 896B.

The case for the mother advanced by Miss Ladak on the mother's behalf, is that at some time between December 1995 when attempts to enforce Connell J's order ceased, and February 1997 when the mother returned to Ireland, the father must be taken to have assented to, or, as Miss Ladak put it, acquiesced in, the change in the children's residence which the mother by her actions, including her defiance of the order of the High Court, had wrought.

I do not go so far as to say that in cases more extreme than this one such a thing can never happen. In argument there was canvassed the hypothetical case of a parent abducting a young baby and after being ordered to return it failing to do so and going successfully to ground, perhaps with a new name and identity, for many years. One can imagine in such a case a powerful and perhaps even successful argument being adduced that it would be an affront to common sense to hold that habitual residence of a child perhaps of 10 to 12 years of age, was other than in the country in which he had spent virtually the whole of his life, but this is not such a case.

These children had lived the greater part of their lives in Ireland. No doubt they did by February 1997 feel settled in England, but that was as a result of their being unlawfully retained here by the mother in breach of the court order. Moreover, in the circumstances of this case I find that the father did not assent either actively, or passively by inaction, after December 1995 to their change of residence. Accordingly they were, as I hold, habitually resident in Ireland throughout and were so resident immediately before their removal in June 1997. In those circumstances it is unnecessary to decide whether their residence in Ireland between the end of February and June 1997 was of a duration and character itself to constitute habitual residence, even if there had hitherto been habitual residence in England. Thus the father is entitled to a peremptory order for return of the children unless the mother can establish one of the defences comprised in Art 13 of the Convention.

She alleges first that there would be a grave risk that the return of the children would expose them to physical or psychological harm, or otherwise place them in an intolerable situation. If the children are returned the mother would go with them, they would not have to live in the same household as the father, and the question of whether they should even have to see him would be a matter, in the case of any dispute, for the Irish court. The mother's family

live in Ireland. It is not asserted that the 3-month stay in Ireland earlier this year caused them any harm or was intolerable for them. The mother in my judgment comes nowhere near to establishing a defence under this limb of Art 13.

Finally the mother relies on that part of Art 13 which provides:

'The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.'

It was of course with this aspect of the matter in mind that Johnson J made the provision for the children to be interviewed by a court welfare officer.

Mr Mellor gave oral evidence before me of an interview which he had conducted with the children on the day on which he gave evidence, namely yesterday. His evidence was, as of course one would expect of Mr Mellor, both careful and convincing. The interview with the children took about an hour. It was for the most part a joint interview with both children, but Mr Mellor saw each of them alone, briefly, at the end of the interview. He found them both to be cheerful, slightly but not excessively anxious, and they quickly relaxed as the interview got underway.

He told me that they each functioned at an age-appropriate level. Both of them were readily able to articulate their thoughts and feelings. He was of the view that the memories which they said they recollected were vivid, that they appeared to be spontaneous and they seemed to be accurate. Neither child gave any indication to Mr Mellor of having been programmed, as he put it, or of speaking to a script. Mr Mellor explained his role to them and he was satisfied that each child understood what his role was.

He continued:

'Both expressed a preference for remaining in London. They maintained this consistently and expressed it firmly. They described a full and active social life based around the Roman Catholic Church at which they were altar boys, something of which each of them was proud, and based also around the Cubs and Scouts, and they talked freely about their friends. Both talked in positive terms about the schools that they attended. They had each been at the [inaudible] School but J had moved on to the [inaudible] Pastor High School. J said that he had settled there and he would not want to change. Indeed he was concerned that if he went back to Ireland he might be put back a year.'

The evidence includes (I interpose to say) reports from the schools which indicate that the children are doing well, and a report from the parish priest which confirms what the children had said to Mr Mellor about their social activities.

Mr Mellor inquired of the children if they missed anything about Ireland. J said that he missed his family and it became clear on further questioning that by his family he meant his mother's relatives. A also said that he missed his family and he equally said that he missed being able to play outside. Both of them, of course, could do so, and said that they could do so, in safety in Donegal but not in Sydenham where they currently live. They said that they had some happy and some unhappy memories of Ireland, and when describing these it was noticeable to Mr Mellor that the father was not mentioned in the context of any happy times.

On being asked to describe their father, A described his appearance and J described his occupation. Neither of them at first said anything about him as a person, but being

specifically asked about that they begun to tell Mr Mellor how he used to hit their mum and had hit A on one occasion, namely the occasion of A's first communion.

They said that when they first left (that would, of course, have been in 1995) they thought that their dad was going to kill their mum and he was drunk at the time. There was a fight and their mum had marks and scars which she had to cover up with make-up. They recalled a number of occasions on which their father had said, 'These kids aren't my kids'. That was said when he was angry, following which he would go off to the public house and get drunk.

Their view was to why their father wanted them back in Ireland was that it was, as they put it, 'To make mum look a fool'. They were reluctant to see their father.

They did say that they would be pleased to go on holiday to Ireland, and that they would love to see their wider family, but they were reluctant to see their father and were adamant that they should not be made to go and stay with him. They thought that if they were ordered to go it was likely that their mother would go with them.

Mr Mellor repeated that their cognitive and physical and emotional development were appropriate to their years and repeated again that they were throughout expressing a clear wish to remain in England and not go back to Ireland.

Now, in considering this aspect of the case I have derived great assistance from Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242, sub nom S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492. That case concerned a 9-year-old child who at an interview with a welfare officer had expressed a desire not to be returned to France, the country of her habitual residence, from which she had been wrongfully removed by her mother. She gave valid reasons for her wish and Ewbank J declined to order her return. In dismissing the mother's appeal, the Court of Appeal in a judgment of the court delivered by Balcombe LJ, after stating the facts and reading from Ewbank J's judgment, turned first to the construction of the relevant part of Art 13.

At 250C-G and 499D-500A respectively he said this:

'(a) It will be seen that the part of Art 13 which relates to the child's objections to being returned is completely separate from para (b) and we can see no reason to interpret this part of the Article, as we were invited to do by Miss Scotland, as importing a requirement to establish a grave risk that the return of he child would expose her to psychological harm, or otherwise place her in an intolerable situation. Further, there is no warrant for importing such a gloss in the words of Art 13, as did Bracewell J in Re R (A Minor) (Abduction) [1992] 1 FLR 105, at pp 107-108:

"The wording of the Article is so phrased that I am satisfied that before the court can consider exercising discretion there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."

Unfortunately, Bracewell J was not referred to the earlier decision of Sir Stephen Brown P, in Re M (Minors) (unreported) 25 July 1990, in which he rightly considered this part of Art 13 by reference to its literal words, and without giving them any such additional gloss, as did Bracewell J . . .

(b) As was also made clear by the President, in Re M (above), the return to which the child objects is that which would otherwise be ordered under Art 12, viz, an immediate return to the country from which it was wrongfully removed so that the courts of that country may

resolve the merits of any dispute as to where and with whom it should live: see, in particular Art 19. There is nothing in the provisions of Art 13 to make it appropriate to consider whether the child objects to returning in any circumstances. Thus to take the circumstances of the present case it may be that "C" would not to object to returning to France and staying access with her father if it were established that her home and schooling are in England, but that would not be the return which would be ordered under Art 12.'

In a passage dealing with the establishment of the facts necessary to open the door to the exercise of discretion under this part of Art 13, Balcombe LJ said, at 251D-G and 500F-501A respectively:

'(c) Article 13 does not seek to lay down any age below which a child is to be considered as not having obtained sufficient maturity for its views to be taken into account, nor should we. In this connection it is material to note that Art 12 of the UN Convention on the Rights of the Child 1989 (which has been ratified by both France and the UK but has come into force in both countries before Ewbank J's judgment in the present case) provides as follows:

"(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law."

(d) In our judgment no criticism can be made of the decision by Ewbank J, to ascertain "C"'s views, nor of the procedure which he adopted for that purpose. There was evidence which entitled him to find that "C" objected to being returned to France and that she had attained an age and degree of maturity at which it was appropriate to take account of her views. Those are findings with which this court should not interfere.'

On the basis of the evidence that I have heard I find that each of these children has obtained an age and degree of maturity at which it is appropriate to take account of his views, and that within the meaning of Art 13 as explained in Re S each does object to being returned to Ireland, other than for the purpose of holidays from time to time. Thus I hold that I do have a discretion to refuse to order a return.

The most difficult aspect of this case is that which relates to the way in which I should exercise such a discretion. Balcombe LJ dealt with that as well in Re S and at 253 and 502 respectively in the concluding words of the judgment he said this:

'Nothing which we have said in this judgment should detract from the view which has frequently been expressed and which we repeat, that it is only in exceptional cases under the Hague Convention that the court should refuse to order the immediate return of a child who has been wrongfully removed. This is an exceptional case and accordingly we dismiss this appeal.'

He had earlier said at 252 and 501 respectively:

'Thus if the court should come to the conclusion that the child's views have been influenced by some other person, for example the abducting parent, or that the objection to return is because of a wish to remain with the abducted parent, then it is probable that little or no

weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention.'

I must of course bear those matters very carefully in mind when considering the exercise of my discretion in this case.

Miss Ladak concedes, in my view rightly, that one of the factors to be taken into account in the exercise of my discretion is the fact that this mother has wrongfully abducted the children from the country of their habitual residence, not once but twice, and has for some 18 months deliberately evaded and indeed defied the order of the High Court to return them. It must indeed be a very exceptional case in which such conduct and such defiance does not result in an order being made adverse to the interests and the wishes of the party who has been at fault. But I must bear in mind that though the mother has been, as I find, very grievously at fault, the children have not. I am entitled to take into account not only their reasonable objections, as stated to Mr Mellor, but also their general welfare. I am wholly unable to find that the welfare of the children would in the unusual circumstances of the case, where they have indeed become well and firmly established in England during the last 2 1/2 years since April 1995, be advanced by a return to Ireland.

Whilst of course it would be presumptuous and wrong to attempt to forecast how an Irish court, if seized of the matter would decide it, such a court would no doubt have the welfare of the children as its paramount consideration and it is, to say no more, perfectly possible that such a court would give leave to the mother to remove the children permanently from the Irish jurisdiction and bring them back to England, and would make provision for contact with the father.

If I refuse a return of the children the father may in proceedings in this country, perhaps even in those already commenced some time ago by the mother if those have not been finally disposed of, seek an order for contact if he so desires.

I have had to weigh up all those matters in deciding how to exercise may discretion and the balance is a find one. It is of course made particularly difficult by the behaviour of this mother which can in no circumstances be, and is not, condoned. But having weighed it all up I have concluded not only that I do have a discretion to refuse the father's application but that I should, in the very unusual circumstances of this case, do so.

Accordingly the originating summons is dismissed.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]