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[03/02/1994; Court of Appeal (England); Appellate Court]
Re S. (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

3 February 1994

Neill, Hoffmann, Waite LJJ

In the Matter of S.

J Munby QC and D Pears for the mother

H Setright for the father

WAITE LJ

This appeal concerns three boys aged 9, 8 and 4. Their parents are British-born immigrants to Australia. Following the breakdown of the marriage, the mother brought the children to England (where their maternal grandmother still lives) without the permission of the father. That is conceded to have been a wrongful removal within the meaning of Art 3 of the Hague Convention. Eight months after the date of removal, the father started proceedings under the Convention for a summary return order under Art 12. The mother sought to establish jurisdiction in the English court to refuse the order on the ground that the father had by his delay in bringing the proceedings acquiesced in the removal for the purposes of Art 13(b); and also, in the case of the eldest boy alone, on the ground that he was objecting to a return to Australia and had reached an age and degree of maturity at which (for the purposes of the same Article) it is appropriate to take account of his views. Both contentions failed. The judge held that he had no jurisdiction to refuse a return order, from which finding the mother now appeals to this court. .

The objects of the Convention are well known. They are to spare children already suffering from the breakdown of their parents' marriage the disruption which inevitably follows when one parent attempts to secure for himself or herself an advantage in future issues of care, residence or forum conveniens by an arbitrary move to (or retention in) another jurisdiction.

The governing Articles for the purposes of this appeal are 12 and 13 which read as follows:

'Article 12

Where a child has been wrongfully removed or retained in terms of Article and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date

of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

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, 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 remove, 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.

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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence. '

The father is 36 and the mother 29. They were both born in England and were married in this country on 5 November 1983. They emigrated to Western Australia in May 1986, by which date the two eldest boys, N and C, had been born on 20 December 1984 and 16 December 1985 respectively. Their son P was born there on 23 June 1989. It is not disputed that they were settled in Australia, and that by virtue of s 63(f)(1) of the Australian Family Law Act 1975 both of the parents were guardians of the children and had their joint custody.

The marriage had run into difficulties by the beginning of 1993. On 17 March 1993 the mother, without warning to the father, removed the children by air to England, where she went with them to live near Ringwood and entered the older boys at a local primary school. Plans were made for P to follow them there in January 1994.

Very shortly after the removal, the father, on 23 March 1993, wrote a letter to the mother at her own mother's address in England, saying that he felt shocked and pained by what had happened, and adding:

'Yesterday I saw a solicitor and was advised that you have broken some international convention by removing children from this country without both parents' consent. I was advised to seek legal aid to [bring] you back. He also told me to seek counseling as I was

weeping and shaking uncontrollably. He told me that no court would favour what you've done, and the longer you take to talk with me, the worse [it] is going to look.

I still love you dearly and I shall never stop loving my dear sons, After nearly 10 years, I deserve better than this hell that both you and your mother are forcing me through.

Please phone me or arrange that I can phone you immediately. This is extremely urgent. For the kids' [sake] I don't want to start trouble. I would also love to talk to the kids but at this time I don't know if I could hold myself together at the sound of their voices. I would like to try. I have the right surely.

If I don't hear from you very soon, verbally and satisfactorily, then action would have to begin, one way or another.'

That letter crossed with one written to the father by the mother explaining her reasons for leaving him. The father was later to depose in an affidavit sworn in these proceedings that he had followed his first letter up with two or three subsequent letters, all asking the mother to return, but he received no reply to them. It is not suggested that they contained any further threats of summary court action.

On 30 March 1993 the mother's English solicitors wrote to the father with service of divorce proceedings, and giving him notice that they would be applying in England for a residence order in respect of the boys. They stated that the mother was quite happy to allow him contact with the children in England, subject to his confirming that they would not be removed from the jurisdiction of the English court.

The father consulted solicitors in Australia on l April 1993. In his affidavit in the child abduction proceedings he has summarized the advice he then received in these terms:

'I was advised by Young and Young that I had some rights under Australian law to have the children returned to my care but they told me at my first meeting that it would be extremely expensive to take such proceedings and they would require the sum of A$5000 on account before they could even obtain legal aid on my behalf. They suggested that I try and come to some arrangement or agreement with the defendant and I wee deterred by the amount of money that they wanted from me before they could act. As I have already said, although I had managed to substantially reduce the debt on my business, it had been a struggle and I would have had to sell up in order to realise my debt and raise the sum of A$ 5000. I am advised by my present solicitor that the advice I received from Young and Young with regard to the very high cost of applying is wholly incorrect as legal aid is available in these proceedings in England without any form of means or merits test. I was certainly not told that all that had to happen was for a request to be made to the central authorities in Australia who in turn would contact the central authorities in England to enable proceedings to be issued on my behalf.'

The father's solicitors wrote to the mother's English solicitors in reply to their letter on 2 April 1993 acknowledging service of the divorce proceedings, and adding:

'To say the least, our client is astounded at your client's conduct in taking the children out of the jurisdiction without his consent. Be that as it may, our client is giving consideration to all options at this stage presently open to him and we propose to communicate with you once we have his further instructions.'

The father's subsequent dealings with solicitors in Australia were described in his affidavit evidence as follows:

'By the end of June 1993 I had written countless letters to the defendant and tried every means possible to contact her without success. By the beginning of July 1993 I had considered my position at great length and had come to the conclusion that the marriage had irretrievably broken down but that I wished to be divorced in Australia and not in England. I wanted a clean break between the defendant and myself and if this could be achieved, was even prepared to consider not applying for the immediate return of the children. I was in a very distressed and unhappy state which in turn was proving disastrous for my business. I did not believe that I could raise the deposit of A$ 5000 and hence I was so despondent about securing the return of the children. However, by August 1993 I contacted Young and Young again to ask about the procedure to secure the return of the children under the child abduction legislation. However, despite various attempts to contact him, my solicitor did not get back to me until the end of September 1993. He said that because of various court commitments and other matters which were going on at that stage, he was not able to answer my calls. In the early part of October 1993 I was contacted by Heather Nicholls of Young and Young who I was told was temporarily taking over the conduct of my file. However, by this time I had consulted Formby & Garvey, solicitors of Bunbury, Western Australia on 18 October 1993. This was purely in connection with the return of the children to Australia. Their initial advice was that it would be difficult to obtain an order in respect of the eldest two children as they were British and not Australian. I was advised initially by Mr Formby himself who told me that a law student who had just finished her exams would shortly be joining the practice and she would know more about the abduction legislation than he. When she eventually arrived, she advised me the I could apply to the central authority in Australia who in turn would contact the English central authority and an application would be made on my behalf for an order that the children return to me.'

On that advice, the father invoked the Hague Convention through the central authority in Western Australia, as a result of which the originating summons seeking a return order was issued here on 9 November 1993.

The application came before the court for directions on 23 November 1993, by which date the mother had filed an affidavit raising the two objections already mentioned -- namely the father's alleged acquiescence and the objections of N to a return to Australia. Douglas Brown J made an order, in that latter connection, that a court welfare officer should interview N in London for the purpose of reporting on the questions, first, of whether he has attained an age and degree of maturity at which it is appropriate to take account of his views and, secondly, of whether he objects to being returned to Australia.

The main hearing began before Singer J on 13 December 1993. It was dealt with on the affidavit evidence of the parents, and the oral evidence of the court welfare officer. The following is the judge's summary of the evidence of the court welfare officer, Mr Maines:

'He said that N was not happy with life in Bridgetown (Australia) and that he had referred to frequent quarrels and unhappiness between his parents which he had overheard. He said that he would not wish to go back to Australia. He knew, because he had been told so by his grandmother, that he was to tell the truth.

He talked about his current school and compared it favourably with that which he had left in Australia. He gave, said Mr Maines, a fair account of himself at his own level, but that level was very much that of an 8-year-old in terms of his apparent maturity.

The impression he made on Mr Maines was that he would be an average performer in school. It was clear to Mr Maines that he did not wish to return to the same situation he had left in March 1993, but that he had not given thought to his reaction to the alternative

situation to which he might return, for instance living apart from the father with his mother and his brothers alone either in new house or in their old house and seeing the father as appropriate.

Mr Maines did not think that N had considered how often he might see his father if he lived in England as against Australia.'

A report had been obtained by the father's English solicitors from the Principal of the Bridgetown Primary School which N and C had attended until March 1993 in which N is described as 'not mature for his age'. The judge commented that this seemed to bear out Mr Maines' appraisal.

In his judgment, delivered on 21 December 1493, Singer J dealt first with the question of N's objections. After referring to the authorities of Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 263, sub nom S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492 and B v K (Child Abduction) [1993] FCR 382, he continued:

'Thus it cannot and should not be thought that an 8- or 9-year-old cannot, simply by virtue of his or her age, be capable of attaining a degree of maturing which makes it appropriate to take account of the child's views. However, that having been said, in this case I am far from persuaded that N has attained the degree of maturity.

I reach that conclusion not only because of what his old school, and Mr Maines have said about him, but also because an appropriate degree of maturity would have involved him in contemplating (as I am satisfied that he did not) the variety of circumstances to which he might return before concluding his opposition.

Thus this avenue, which might lead out of the otherwise obligatory return of the children to Australia, is not open to the mother.'

On the remaining issue of acquiescence, the judge, after reciting a number of cases including Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14, Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682 and W v W (Child Abduction: Acquiescence) [1993] 2 FLR 211, directed himself that the correct approach was that stated by Sir Donald Nicholls V-C in Re AZ (at p 691) in these words:

'It seems to me that the underlying objectives of the Convention require courts to be slow to infer acquiescence from conduct which is consistent with the parent whose child has been wrongly removed or retained perforce accepting, as a temporary emergency expedient only, a situation forced on him and which in practical terms he is unable to change at once. The Convention is concerned with children taken from one country to another. The Convention has to be interpreted and applied having regard to the way responsible parents can be expected to behave. A parent whose child is wrongly removed to, or retained in, another country is not to be taken as having lost the benefits the Convention confers by reason of him accepting that the child should stay where he or she is for a matter of days or a week or two. That in one edge of the spectrum.

At the other edge of the spectrum the parent may, again through force of his circumstances, accept that the child should stay where he or she is for an indefinite period, likely to be many months or longer. There is here a question of degree. In answering that question the court will look at all the circumstances and consider 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. That is the concept underlying consent and acquiescence in Art 13. That is the touchstone to be applied.'

To that statement of principle the judge then added the following comments of his own:

'Thus I conclude it is for the mother to establish that the father, in fact, acquiesced. To succeed she has to establish his state of mind. In the more ordinary case she will do so by his actions which may speak volumes. In the less ordinary and more difficult case (of which it will become apparent this is one) she has to do so by reference to his inactivity.

It is, of course, relevant toward such a finding that he has been silent or inactive in circumstances where different conduct might reasonably have been expected, But what is reasonably to be expected must surely depend upon his state of mind rather than the mother's perception of it which may be based upon incomplete or inaccurate appreciation of the relevant circumstances.

Similarly, conduct on his part, to be inconsistent with a summary return to the place of habitual residence, must be conduct judged to be inconsistent in the light of the options in fact available to him, rather than from the perspective, which may be incomplete, of the wrongfully removing parent . . .

In short, either there is acquiescence or there is not, and the wrongfully removing parent's belief that there is acquiescence, whether well or ill-founded, cannot make it so.'

The judge then summarized the events, correspondence and evidence which I have already described. In the course of that, he interposed the following comments on the father's letter of 23 March 1993:

'It is also submitted for the mother that once the father had delivered the ultimatum, namely that if they did not speak soon and satisfactorily then action would have to begin she was entitled, in the absence of any action on his part, to conclude that he did not intend to take any and thus that he acquiesced.

For the reasons that I have already attempted to give I do not accept that it is the mother's state of mind, however reasonably she arrived at it in the absence of actual knowledge of any restraints on the father, which should be in any way determinative of the question whether or not he acquiesced.'

After his review of the evidence, the judge returned to that question in these terms:

'Certainly, as at the date of his first solicitor's letter on 2 April 1993, he was by no means acquiescing, but was said to be considering all options. Inactivity on his part thereafter -- admittedly inactivity over more than 5 months -- unless explained by the father might well give rise to the conclusion that he did, in fact, acquiesce. But the question remains, nevertheless, in my judgment not whether he appeared to, but rather whether he did, in fact, acquiesce.'

The judge concluded by stating his finding on acquiescence as follows:

'Given that I accept his explanation for his inactivity in circumstances where different conduct might have been expected I am unable to find that the mother has satisfied me that the father did, in fact, acquiesce.'

It followed that the judge found himself to be without jurisdiction to consider whether there were any grounds for refusing a return order, and he made an order in the usual form for the return of the children to Australia.

I will deal first with the judge's ruling on N's objections to return. It is common ground that Art 13 requires a two-stage approach to issues of objection. First of all, the judge has to make findings of fact on the two questions: does the child indeed object; and has he or she attained an age and degree of maturity at which it is appropriate to take account of the child's views? Those have come to be called, for convenience, the 'gateway' findings. It is only if both questions are answered 'Yes' that the judge may go on to consider whether, as a matter of discretion, the return order which would otherwise be mandatory under Art 12 ought to be refused.

It is plain from the language he used that the judge did not regard the issue of age and maturity as being concluded by age alone. He saw the age of 9 as one at which some children may, and others may not, have the required degree of maturity. I do not understand him to be criticised for that view: most people would be found, I suspect, to agree with it on the basis of everyday experience. It is equally plain that the judge made a finding that N lacked the degree of maturity which made it appropriate to take account of his views. Mr Munby, for the mother, has criticised that finding on the ground that the judge, in the process of reaching it, took into account matters which it was not permissible for him to consider at the gateway stage. At that preliminary point the court is bound, he submitted, to confine itself to reaching a conclusion purely on the general evidence available as to the child's powers of reasoning and decision-making -- uninfluenced, that is to say, by any of the considerations which would arise if the gateway was passed, and the child's views fell to be examined by the court in the exercise of the discretion which would then arise. The judge accordingly fell into error, he submits, when he adopted as part of his judicial appraisal of the child's maturity the report of the court welfare officer regarding the extent to which N had or had not already developed an awareness of the effect on his future relationship with the father of his being in the one country or the other. That, submits Mr Munby, was a matter going to the rightness of a particular decision, not to the child's general ability to reach a decision.

I am unable to accept that submission. When Art 13 speaks of an age and maturity level at which it is appropriate to take account of a child's views, the inquiry which it envisages is not restricted to a generalized appraisal of the child's capacity to form and express views which bear the hallmark of maturity. It is permissible (and indeed will often be necessary) for the court to make specific inquiry as to whether the child has reached a stage of development at which, when asked the question 'Do you object to a return to your home country?' he or she can be relied on to give an answer which does not depend upon instinct alone, but is influenced by the discernment which a mature child brings to the question's implications for his or her own best interests in the long and the short term. It seems to me to be entirely permissible, therefore, for a child to be questioned (even at the preliminary gateway stage) by a suitably skilled independent person with a view to finding out how far the child is capable of understanding -- and does actually understand -- those implications. The line of questioning adopted by the welfare officer was in my view entirely apt for that purpose, and the judge had every justification for relying on N's answers as part of the evidence taken into account when assessing his maturity.

I would therefore reject the limb of the appeal which relates to N's objections.

The remaining issue -- acquiescence -- can be summarised in this way. It is not suggested (to state the common ground first) that the judge was at fault in basing his conclusion on 'the Re AS test' as propounded by Sir Donald Nicholls V-C (and in very similar language by Butler-

Sloss LJ in the same case). It is also undisputed that the father, having initially threatened summary action in his own and his solicitor's first letters, failed for a long period (6 or 7 months) to take any step towards securing a peremptory order under the Convention for the children's return, Both sides accept that the judge was entitled to treat that (as he clearly did) as conduct amounting prima facie to acquiescence. Nor is it disputed (subject to issues of admissibility and relevance) that the judge was entitled to accept as truthful the evidence' given by the father as to the erroneous advice he received initially in Australia. The issue between Mr Munby for the mother and Mr Setright for the father is whether the judge was entitled to accept the explanation afforded by that evidence as negativing the prima facie inference of acquiescence to which the father's previous inaction had given rise.

Sir Donald Nicholls V-C defined the touchstone in Re AZ as a consideration of 'whether the parent has conducted himself in a way which would be inconsistent with him later seeking a summary order for the child's return'. That consideration is to be undertaken, he said, by looking 'at all the circumstances'. The crux of this appeal lies in the question whether the judge was entitled in law to include in that panorama of circumstance the fact that the father's inaction was attributable to wrong professional advice.

In support of his contention that the judge was not so entitled, Mr Munby submitted:

(1) The question whether an act (or forbearance to act) on the part of the aggrieved parent has amounted to acquiescence is a question to be judged. objectively by the court solely in the light of its inferred effect upon the mind of the removing parent.

(2) Alternatively, the question is to be judged objectively in the light of such inferences as would be drawn by any informed third party coming to the case from outside.

(3) The objectiveness required under either approach precludes any inquiry into the requesting parent's actual state of mind: it is his actions (or inactions) and not his private thoughts or beliefs which matter.

He founded those submissions, in the course of an able and clear argument, upon certain passages in the judgments contained in the authorities which I have already mentioned as cited by the judge. They included the following:

In Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 (the case of a father whose first response to the wrongful removal of his children had been to tell the removing wife 'I'm not going to fight it'), Balcombe LJ (who although dissenting in the result was in agreement as to the principle to be applied) said (at pp 116 and 22 respectively):

'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.'

Stuart-Smith DJ (at pp 119 and 26 respectively) said:

'Acquiescence means acceptance and it may be either active or passive.

If it is active it may be signified by express words of consent or by conduct which is inconsistent with an intention of the party to insist on his rights as consistent only with an acceptance of the status quo. If it is passive it will result from silence and inactivity in circumstances in which the aggrieved part may reasonably be expected to act. It will depend on the circumstances in each case how long a period will elapse before the court will infer from such inactivity whether the aggrieved party had accepted or acquiesced in the removal or retention.

A party cannot be said to acquiesce unless he is aware, at least in general terms, of his rights against the other parent. It is not necessary that he should know the full or precise nature of his legal rights under the Convention: but he must be aware that the other parent's act in removing or retaining the child is unlawful. And if he is aware of the factual situation giving rise to those rights, the court will no doubt readily infer that he was aware of his legal rights, either if he could reasonably be expected to have known of them or taken steps to obtain legal advice.'

When dealing with the facts of the case, Stuart-Smith LJ noted that the judge had taken into account the fact that the aggrieved father had for a time made secret preparations (concealed from the mother) for the launch of an application under the Convention. He said of this:

'In my judgment the judge fell into error in considering what the father was doing, unknown to the mother . . .'

Lord Donaldson MR said (at pp 123 and 29 respectively):

'Consent, if it occurs, precedes the wrongful taking or retention. Acquiescence, if it occurs, follows it. In each case it may be expressed or it may be inferred from conduct, including inaction, in circumstances in which different conduct is to be expected if there were no consent or, as the case may be, acquiescence. Any consent or acquiescence must, of course, be real. Thus a person cannot acquiesce in a wrongful act if he does not know of the act or does not know that it is wrongful. It is only in this context and in the context of a case in which it is said that the consent or acquiescence is to be inferred from conduct which is not to be expected in the absence of such consent or acquiescence, that the knowledge of the allegedly consenting or acquiescing party is relevant, and to use the words of Thorpe J "the whole conduct and reaction of the husband must be investigated in the round".'

Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682 was a wrongful retention case. The aggrieved father, an American citizen resident in Germany, had assented to an interim arrangement under which the child was placed, after removal from Germany by the mother, in the care of an aunt. Some months later (after starting divorce proceedings in California in the meantime), he started convention proceedings for the child's return. Butler-Sloss LJ, in overruling the decision of the judge that there had been no acquiescence, said at p 687:

'Acquiescence has to be conduct inconsistent with the summary return of the child to the place of habitual residence. It does not have to be long-term acceptance of the existing state of affairs.'

After criticizing the judge for having set too high a standard for the degree of knowledge of rights that is required in acquiescence cases, Butler-Sloss LJ continued:

'[The judge] also concentrated overmuch in a subjective approach to the evidence of the father, rather than an overall assessment of the whole situation.'

There are remarks in the judgment of Sir Michaei Kerr to similar effect at p 689:

'First, I think [the judge] approached the question of his acquiescence by placing too much emphasis on what she considered to be his subjective state of mind instead of concentrating on his conduct, viewed objectively, and on the effect which, to his knowledge, it conveyed to [the aunt].'

The third judgment in that case is that of Sir Donald Nicholls V-C containing the passage already quoted.

Reference was also made to a decision of my own at first instance, W v W (Child Abduction: Acquiescence) [1993] 2 FLR 211. That was a case of wrongful retention by a mother who refused to return with the child to Australia after a holiday in England. The father's inactivity for 10 months after learning of the mother's decision was held to have amounted in the circumstances to conduct inconsistent with his later seeking a summary order, and therefore to acquiescence. Having referred to the authorities already mentioned and summarized their effect, I continued (at p 217):

'When it is viewed from that perspective, I regard the present case as a very plain instance of a parent's acquiescence through inactivity. It is apparent from the recent letter which the father himself exhibits from his own Australia solicitors summarizing the instructions they were given (or not given) by him, that they were never asked directly by the father whether any immediate legal steps could be taken to enforce the boy's early return to Australia. If the father's evidence (already quoted) purports to say anything to the contrary, I reject it. Even if, which I do not accept, the legal advice given to him after he had first learned of the mother's retention of the child in England had been in any respect inaccurate or incomplete, that would not help him. His conduct has to be viewed objectively from outside. For something like 10 months after learning of the wife's decision not to return the boy to Australia, he took no step towards having him brought back and for much of that period his address was unknown, even to his own solicitor. That was conduct wholly inconsistent with his later seeking summary order under the Convention.'

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

Against that background of authority, I turn to deal with Mr Munby's submissions.

His first submission (that the issue of acquiescence falls to be tested by reference to the actions of the aggrieved parent when viewed exclusively from the standpoint of the removing

parent) has the attraction of equating acquiescence in this area of the law with familiar principles of equity and common law in other areas. The wording of Art 13 makes it plain, however, that acquiescence is to be used, in the context of the Convention, in a broad and non-technical sense, where it is (as Lord Donaldson MR pointed out) used as synonymous with the equally non-technical expression 'consent' (the difference between the two terms being purely temporal). I would accordingly reject the first submission. The concept of acquiescence is not to be restricted by confining it exclusively to those cases where it can be shown to arise solely from circumstances known to the removing parent.

I would accept as a general principle Mr Munby's second submission (that the question is to be judged objectively in the light of such inferences as would be drawn by any informed third party coming to the case from outside). But that is only the starting-point. For the reasons already stated there are bound to be cases in which it is proper for the court to embark, with suitable caution, on an inquiry into subjective elements known only to the aggrieved parent. It follows that I reject Mr Munby's third submission -- to the effect that any inquiry into the aggrieved parent's actual state of mind in wholly precluded.

Singer J was in my judgment fully justified in having regard, in the present case, to the fact that erroneous advice was given to the aggrieved parent concerning his rights under the Convention as a circumstance relevant to the question of whether or not he had acquiesced in the wrongful removal. It involved an element of subjective inquiry, but the judge approached that inquiry with care and caution, and I do not think he can fairly be said to have given it a disproportionate emphasis. The judge asked himself the correct question: was the father's delay in exercising his remedy consistent or inconsistent with his later seeking a summary return order? It was for him to decide, when answering that question, what weight was to be given to the advice which the father received. I can find no fault in the judge's reasoning which led him to the conclusion that faulty professional advice provided an explanation for the father's inaction -- notwithstanding that such inactivity represented conduct from which acquiescence might in other circumstances have been properly inferred.

It remains to mention one further submission by Mr Munby. This was that the judge sought to draw an invalid distinction in law between cases of 'active' and 'passive' acquiescence. There are certainly passages in the judgment, when the judge was dealing with the authorities, in which he drew attention to that distinction. There is no basis, in my judgment, however, for Mr Munby's suggestion that the judge had fallen into the error of treating the test for determining whether there had been 'passive' acquiescence as different from that for determining whether there had been 'active' acquiescence. There can be no doubt that when he came to express his conclusions he applied the right test.

For these reasons the judge's conclusion under the head of acquiescence cannot be faulted. I would for my part dismiss the appeal.

HOFFMANN LJ:

This appeal concerns two of the exceptions in Art l3 of the Hague Convention to the court's duty under Art 12 to 'order the return of the child forthwith'. The first is the opposition of the child to being returned. On this question I agree with Waite LJ and have nothing to add. The second exception is that the applicant 'had consented to or subsequently acquiesced in the removal or retention'. The question which arises in this appeal is what form this purpose is meant by acquiescence.

The term 'acquiescence' is used in different languages in an international convention. It cannot be construed according to any technical doctrines of English law. The general idea is easy enough to follow. It reflects a very general principle of fairness which must exist in

every system of law; that a party should not be allowed to 'blow hot and cold' or in Scottish terminology, 'approbate and reprobate'. But the cases show that this deceptively simple concept may not be all that easy to apply in practice.

In my judgment the reason for the difficulty is that 'acquiescence' in the Convention was not intended to mean something capable of being defined by a single set of necessary and sufficient conditions which must be present in every case. Common sense suggests that acquiescence may take different forms and that something which forms an essential part of acquiescence in one form may not be necessary for acquiescence in another form. In my view the word denotes a cluster of related concepts rather than a single one.

The multifaceted nature of the general principle may be demonstrated by considering the various rules in which it is reflected in English domestic law. It forms the basis of estoppel, promissory estoppel, waiver, election, laches, acquiescence (in its technical equitable meaning) and no doubt some other rules as well. Each of these species of the principle has developed its own rules. In some cases knowledge of one's rights is required and in others it is not. Some require conduct unequivocally inconsistent with adopting an alternative course and others are less strict. Some look at the matter from the point of view of the party faced with the choice and some from the point of view of the other party. Some require the other party to have acted to his detriment and some do not. The fact that English law has found it necessary to make all these discriminations suggests that one cannot fairly apply the general principle to the wide variety of cases which may arise under the Hague Convention by adopting a single set of criteria.

The convention provides a special summary remedy in cases of child abduction. A parent of an abducted child is therefore faced with a choice. He may invoke the Convention. Or he may prefer to litigate the matter in the jurisdiction to which the child has been taken, In accordance with its ordinary domestic and conflict rules. Or he may postpone taking any form of legal action. In the meanwhile he may try to persuade the abductor to bring the child back. He may just think about what to do next. Finally, he may be content to leave the child where it is.

The cases show that acquiescence is not confined to this last choice. It will include conduct which shows that the applicant has elected to pursue some other remedy or course of action rather than seek summary return under the Convention. As Butler-Sloss LJ put it in Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682 at p 887:

'Acquiescence has to be conduct inconsistent with the summary return of the child to the place of habitual residence. It does not have to be a long-term acceptance of the existing state of affairs.'

There is here an analogy with the English domestic rule concerning election between remedies. As Lord Diplock explained in Kammin's Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850 at p 883:

'This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did.`

For the purposes of this doctrine, inconsistency is judged on a purely objective basis and there is no requirement of knowledge that alternative remedies were available or that the act

in question would amount to an election. Nor is it necessary that the other party should have acted in reliance upon the election.

The fact that the parent of an abducted child has a choice of remedies therefore makes it unsurprising that judges interpreting the Convention should have construed the concept of acquiescence to include something which resembles the doctrine of election in English domestic law. This does not mean that they have simply transposed domestic rules. But the rules of election have been evolved in English law because they were thought a reasonable application of the general principle about not blowing hot and cold in the particular context of inconsistent remedies. In general terms, if not in detail, one would therefore expect something similar to be reflected in the similar context of the Convention.

Thus Re AZ (A Minor), to which I have already referred, concerned the child of an American serviceman habitually resident in Germany. The mother, who was English, brought the child to England for a visit to her family. There in October 1991 she formed a relationship with another man and decided to stay. The child was looked after by her aunt.

The mother's family got in touch with the father and asked him to come to England to sort things out. His duties prevented him from coming at once and so he asked the aunt to continue looking after the child. The aunt applied in December 1991 to the Oxford County Court for a residence order and a prohibited steps order which would prevent the father from taking the child back to Germany. The father, served with the application, filed an answer in which he consented to the aunt's proposals for the child. He gave her a power of attorney effective for a year which authorized her to deal with the child's welfare and education.

At about the same time, the father commenced divorce proceedings in California in which he asked for care and control of the child. But he did not indicate to the aunt that he would oppose her application for a residence order until 26 March 1992, when he said that he wanted to take the child back to Germany. On 13 May 1992 he issued his summons under the Hague Convention.

Booth J held that the father had not acquiesced in the child's retention in England. She said that his intention was to leave the child with the aunt until he could make the necessary arrangements to have him cared for in Germany. This intention was evidenced by the application for care and control in the Californian divorce proceedings. Furthermore, the father did not know that he had a right to summary return under the Hague Convention.

In reversing the judge, Butler-Sloss LJ said that acquiescence did not require that the father should have known of the Convention. It was sufficient that he knew that the child had been wrongfully removed or retained. His conduct amounted to 'a clear decision to leave [the child] with the aunt for the time being'. This was sufficient acquiescence to debar him from resorting to the summary remedy. It did not have to be 'acceptance of an unchangeable state of affairs' and was therefore not inconsistent with the application for care and control in California.

Sir Michael Kerr said that the judge had erred in the emphasis she put upon the father's state of mind instead of 'his conduct, viewed objectively, and on the effect which, to his knowledge, it conveyed to the aunt'. His outward conduct was 'in all respects only consistent with the boy remaining in the care of the aunt for the time being'. She also gave too much weight to his lack of knowledge of the Hague Convention. Sir Donald Nicholls V-C said that the touchstone to be applied was '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'.

All this is very like the language of election. The primary question is whether the conduct is objectively inconsistent with an intention to pursue the convention remedy and little if any weight is given to whether the applicant knew the nature of the remedies between which he was entitled to choose or the reasons for his conduct. On the other hand, the cases emphasize that the inconsistency must be clear and unequivocal. Ambiguous conduct cannot amount to this form of acquiescence.

There are, however, other forms of acquiescence which suggest different analogies. These may be 'standing by', acquiescence in its equitable meaning or possibly even laches, These do not require an unequivocal act but do place greater emphasis upon the applicant's knowledge of the remedy and the reasons for his conduct. The courts have recognized the differences between the various forms of acquiescence by distinguishing between 'active' and 'passive, acquiescence. Active acquiescence in the unequivocal conduct which I have compared to election while passive acquiescence is a failure to act in circumstances in which action was to be expected. The distinction is made most clearly in the judgment of Stuart-Smith LJ in Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] FLR 14. In that case the mother abducted the children to England from the matrimonial home in Australia. A few days later the father wrote her a letter in which he said:

'I think you know that what you have done is illegal but I'm not going to fight it. I am going to sacrifice myself rather than them.'

In fact he was simultaneously preparing to take proceedings under the Convention and Thorpe J held that his conduct viewed 'in the round' did not amount to acquiescence. This court, by a majority, said that the letter was an unequivocal and irrevocable decision not to pursue the Convention remedy. For the purposes of this kind of acquiescence, which Stuart-Smith LJ characterised as 'active', it was not relevant to consider the father's motives for writing the letter and his inconsistent conduct in Australia of which the mother knew nothing. In cases of active acquiescence the words or conduct of the applicant must have been 'clear and unequivocal' and the other party must believe that there has been an acceptance of the position. On the other hand, in cases of passive acquiescence, constituted by 'silence and inactivity in circumstances in which the aggrieved party may be expected to act', the court does, as Lord Donaldson of Lymington MR said, investigate the applicant's conduct in the round. It considers what the applicant knew of the choices open to him and the reasons for his silence or inactivity.

In this case the mother relied upon two matters for saying that the father's conduct amounted to active acquiescence. First, the letter which he wrote on 23 March 1993, saying that he had been advised that his wife had 'broken some international convention' and ending: 'If I don't hear from you very soon, verbally and satisfactorily, then action would have to begin one way or the other', followed by a failure to institute proceedings until November 1993. Secondly, on the father's evidence, the numerous letters which he wrote to his wife trying to persuade her to return voluntarily with the children. Singer J held that neither amounted to conduct unequivocally inconsistent with the pursuit of the summary remedy under the Convention. I agree. The failure to give immediate effect to the threat in the letter of 23 March 1993 could have had many explanations and was not inconsistent with a decision to delay rather than abandon resort to the Convention. One must remember that although the Convention confers a summary remedy in the sense that the child must be returned without investigation of the merits, it is expressly made available for a year after the abduction. It is therefore difficult to infer from mere delay short of that period an unequivocal decision to abandon reliance on the Convention. Likewise, the husband's attempt to persuade his wife to return the children voluntarily was not inconsistent with

resort to law when the attempt failed. The father was not blowing hot and cold: he was blowing warmly and then blowing hotter.

The judge, in my view rightly, treated the mother's case as one of passive acquiescence. In those circumstances, he said that he was entitled to take into account all the circumstances which explained the father's inaction. He accepted his explanation that he had been badly advised as to the cost of bringing Convention proceedings and did not realise either that he could approach the Australian central authority for assistance or that he would be entitled to legal aid in England. Against this background (which was, of course, unknown to the mother) the judge said that acquiescence could not be inferred.

Mr Munby, who appeared for the mother, attacked the distinction between active and passive acquiescence as wrong in principle and unworkable in practice. Acquiescence, he said, was a single concept which could be established by different kinds of evidence. Sometimes this would consist of acts, sometimes omissions and usually both. But the criteria for deciding whether the evidence established acquiescence were always the same and if the father's knowledge of the details of the Convention and his conduct unknown to the mother were irrelevant in Re AZ (A Minor) (Abduction: Acquiescence) [1993] FLR 682, they should be equally irrelevant here. The judge, he said, erred in law by examining what the evidence showed about the father's state of mind. He should have confined himself to the way things looked from the point of view of the mother.

As I have already indicated, I reject the submission that acquiescence is a single concept. I accept that the labels 'active' and 'passive' may one day have to be reconsidered in a case in which, in the light of something which has gone before, an omission is on the facts a plain and unequivocal choice not to pursue the Convention remedy. It may also be that some future case will show that two categories are not sufficient. But for the purposes of the present case they serve well enough.

I think that where the conduct relied upon is inactivity, it would be unjust not to take into account the reasons, whether they were known to the other part or not. Suppose, for example, that shortly after the abduction the applicant suffers an incapacitating illness of which the abductor knows nothing. I do not accept that his resulting inaction could fairly be described as acquiescence. Equally, I do not think that a party can be said to have acquiesced by doing nothing if he reasonably thought, on the basis of the advice he had been given, that there was in practice nothing which he could do. I do not think that this amounts, as Mr Munby contended that the judge had done, to examining whether the applicant had subjectively acquiesced. If a person knowing all the objective facts and looking at the matter in the round would infer from the applicant's inactivity that he had acquiesced, it does not matter that he had actually intended all the time to pursue the summary remedy. But the advice which the applicant received and his knowledge of his rights are objective facts and I think that the judge was entitled to take them into account. It follows that did not misdirect himself and his conclusion that there was no acquiescence cannot in my judgment be disturbed.

I therefore agree that the appeal should be dismissed.

NEILL LJ

The objects of the Convention on the Civil Aspects of International Child Abduction 1980 are set out in Art 1 (Editors' note: Article 1 is not embodied by the UK in the Child Abduction and Custody Act 1985, but is nevertheless sometimes referred to by the English courts: see, for example, Re H; Re S (Abduction: Custody Rights) [1991] 2 AC 476 at p 494, [1991] 2 FLR 252 at p 266 per Lord Brandon) which provides:

'The objects of the present Convention are --

(a) to secure the prompt return of children wrongfully removed to or retains in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'

The major part of the Convention is set out in Sch 1 to the Child Abduction and Custody Act 1985.

In these proceedings the mother relies on two provisions in Art 13 of the Convention in support of her argument that the court is not bound by Art 12 to order the return of the three children to Australia.

First, it is argued that the court should find that the eldest of the three boys objects to being returned to Australia and that he has attained an age and degree of maturity at which it would be appropriate to take account of his views. If such a finding were made, it is further argued, the court would be entitled to and should refuse to order the return of any of the three children. On this aspect of the case I am content to say that I agree entirely with the judgment of Waite LJ and have nothing to add.

I do propose, however, to add some words of my own directed to the second argument advanced on behalf of the mother. This argument is to the effect that the court is not bound to order the return of the children because subsequent to their removal from Australia the father had acquiesced in their removal to England or their retention here.

I should start by setting out the relevant part of Art 13. It is in these terms:

'Notwithstanding the provisions of the preceding Article, the judicial . . . authority of the requested State is not bound to order the return of the child if the person . . . which opposes its return establishes that --

(a) the person . . . 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;

From the wording of Art 13 and from the authorities to which Waite LJ has referred it is plain:

(1) that as the words 'subsequently acquiesced in' appear in an international convention one cannot have regard to any technical rules of English domestic law or to any special meanings which may be given to 'acquiescence' when, for example, principles of equity are applied in English courts;

(2) that it is legitimate to have regard to other official languages of the Convention, if to do so is of assistance;

(3) that as the words 'subsequently acquiesced in' follow the words 'consented to' acquiescence includes, though it is not limited to, consent given after the time of removal or retention. As Lord Donaldson MR put the matter in Re A (Minors) (Abduction: Custody Rights) [1992] Fam 306 at p 123C, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 at p 29E:

'Consent, if it occurs, precedes the wrongful taking or retention. Acquiescence, if it occurs, follows it . . .';

(4) that it is for the party opposing the child's return to establish that the other party had consented to or subsequently acquiesced in the removal or retention.

It follows therefore that though in other contexts the word 'acquiescence' may suggest approval which is silent or tacit rather than expressed, in the Convention the phrase 'acquiesced in' includes both conduct which involves the taking of active steps as well as conduct which amounts to complete inactivity. The conduct to be examined may cover a wide spectrum. Accordingly, provided the terms 'active acquiescence' and 'passive acquiescence' are not allowed to become rigid categories or substituted for the general term 'acquiesced' in the Convention I see no objection to their use. Indeed they are of value as demonstrating that acquiescence may take a number of different forms.

Where the parent opposing the return raises the issue of consent or acquiescence the court will scrutinize the conduct of the applicant to see whether that conduct is consistent with the claim for a summary order. The court will look at all the circumstances.

The conduct of the applicant must be looked at objectively. However, with one exception to which I shall come later, the court should admit evidence to explain conduct which otherwise might indicate acquiescence. Thus, for example, a long period of silence or a failure to reply to a communication from the other parent where an answer would be expected may be capable of explanation. The applicant might have been ill or in some other way disabled from taking any action.

It was strongly argued on behalf of the mother that it was necessary to look at the conduct of the applicant parent through the eyes of someone in the position of the other parent. As I understand the convention, however, 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. It is to be remembered that the jurisdiction of the requested State is based on the premise that the original removal or retention of the child was wrongful. The proof of consent or acquiescence does not extinguish the jurisdiction to order the return of the child; it merely debars the applicant from obtaining a summary order under Art 12 as of right. It follows therefore that the court should make its own assessment of the applicant's conduct, and the impact of that conduct on the wrongdoer is of relevance only to the extent that the wrongdoer cannot establish that the applicant acquiesced if he or she did not believe that the applicant had done so: see Re A and Another (Minors: Abduction) [1991] 2 FLR 241 at p 249 per Fox LJ; Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106 at p 120B, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 at p 26D per Stuart-Smith LJ.

It is also clear, however, that where the applicant has made some unambiguous communication to the other parent which, looked at objectively, constitutes acquiescence in the removal or retention the applicant is not allowed to withdraw that communication or to rely on some unexpressed reservation. Thus in Re A (Minors) (Abduction: Custody Rights) the majority of the Court of Appeal held that once there is acquiescence then, in the words of Lord Donaldson at p 123G, 'the condition set out in Art 13 is satisfied'. But the reason why the applicant is not entitled to withdraw or add some explanation is because, looked at objectively, the communication is unequivocal and is sufficient and conclusive evidence of acquiescence.

I turn to the facts of the present case. I am satisfied that looking at the judgment of Singer J as a whole he applied the right test to the facts before him, I can see no sufficient reason to interfere with his decision. Accordingly I too would dismiss the appeal .

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