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[12/02/1992; Court of Appeal (England); Appellate Court]
Re A. (Minors) (Abduction: Custody Rights) [1992] Fam 106, [1992] 2 WLR 536, [1992] 1 All ER 929

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

12 February 1992

Lord Donaldson of Lymington MR, Balcombe and Stuart-Smith

In the Matter of A.

Lord Meston (instructed by Reynolds Porter Chamberlain) for the mother

Mark Everall (instructed by Collyer-Bristow) for the father

BALCOMBE LJ (giving the first judgment at the invitation of Lord Donaldson MR).

This is an appeal by a mother of two children, P. (who was born on 2 September 1985 and is now aged six and a half) and L. (who was born on 28 February 1987 and is now nearly five), from an order made by Thorpe J in chambers on 20 December 1991 under the Child Abduction and Custody Act 1985, when he directed that the two boys be returned to the State of Victoria, Australia under arrangements to be agreed between the parties or, in default of agreement, specified by the court. The father is the respondent to the appeal.

The father was born in Northern Ireland and is now aged 41. The mother was born in England and is now aged 31. In January 1982 the father, who had been living with the mother, went to Australia to find work and was followed by the mother in April of that year. They resumed their relationship and were married at Frankston in the State of Victoria on 8 January 1983. The two children of the marriage were born on the dates I have already mentioned.

The marriage was going through a difficult period in 1987 and in February or March of 1988 the mother came to England with the two boys to stay with her parents in Kent. The father said that he had originally understood that this was to be for a three month holiday, but he soon realised that the mother intended it to be permanent. He sold their house in Australia and in October 1988 returned to England where he obtained fresh employment and bought a house for the family.

However in 1989 the parties decided to return to Australia. They have given different versions as to how this came about, but the fact is they did return to Australia on 1 September 1989. They bought another house and the father obtained another job; the mother also worked part-time at the weekends to supplement their income.

Unfortunately the reconciliation did not last. They separated on 20 July 1990. The mother moved out into rented accommodation with the two boys--there were good economic reasons for this as she could obtain a rental subsidy; the father remained in the matrimonial home and had the boys to stay with him every weekend. The father now has a new partner with whom he cohabits.

On 11 July 1991 the father was convicted of a drink-driving offence and disqualified for 15 months. Soon afterwards, and as a consequence of this conviction, he resigned from his job. On 15 July 1991 the mother was granted Australian citizenship; the father's application is still pending.

On 22 July 1991 the parties made a joint application for divorce and a decree nisi was pronounced in the Family Court of Australia on 12 August 1991, the court being satisfied that both parties were domiciled in Australia. (In the application the mother referred to her Australian nationality and said that she considered Australia her permanent home.) No order relating to the children was made, but the court declared that it was satisfied that proper arrangements had been made for their welfare. Those arrangements, set out in a form which was signed by both parents, included a statement that the mother and the children resided in a unit located at Mornington in the State of Victoria and that the children were supervised by the mother before and after school and kindergarten and were supervised by the father at weekends. It was further stated that the children currently attended a particular kindergarten and primary school both in Mornington. Both children were progressing extremely well. It was also stated that the father had access to the children at any time by mutual consent of both parents. The decree was made absolute on 13 September 1991.

On 14 to 15 September 1991 the father enjoyed weekend access to his two sons. On 18 September 1991 the mother, in circumstances of some secrecy and with a degree of premeditation, removed the children from the State of Victoria and took them to England to her parents' home in Tonbridge, Kent, where they have been since. She then sent the father a telegram in the following terms:

'Have returned to UK for rest as I felt totally exhausted. Boys were excellent on the flight. S.'

Three days after receipt of this telegram, on 23 September 1991 , the father wrote a long handwritten letter to the mother. Since this appeal depends largely on the terms of that letter I quote it in full:

'Dear S.

Well. Where can I start this letter? Yet again you have dealt me a shocking blow. I'm deeply depressed & saddened by not just what you've done but the way you've done it. Words come to mind like selfish, cruel and cowardly but I'm not going to use this letter to attack & criticise. I'm going to use it to get my message across and I want you to have the decency to respond quickly. If you could have had the courage to sit down & talk this through, you may have been surprised by my open mindedness & I would have had the opportunity to say goodbye to my own children. Children that you know love me & enjoy me. How could you have been so callous. What is it going to take to make you trust me? I have never broken my word to you. I have never betrayed you. In the agonys of the last couple of years I've behaved fairly and openly. I thought we were getting on quite well. I did not block anything & I faced all my responsibilities including supporting your car loan & your half of the mortgage for over a year. Now I am six weeks away from the bank repossing [sic] the house and going into debt. Remember if we do sell the house before hand that you'll need to be involved. Anyway, as I said I'm not going to use this letter for negatives. Sally you know how

dearly I love P. & L. and I'm not going to let them become casualities of a tug of war battle. I think you know what you have done is illegal, but I'm not going to fight it. I am going to sacrifice myself rather than them. In return I want your support that you will always let them know who I am & where I am. I want you to make sure that any cards letters or presents are passed on, and I want you to keep me in touch with their progress by letters & photographs. These are reasonable & legitimate requests. When the boys are old enough to read & write I want to communicate with them. I want them to know that they have a father, where he lives and that he loves them and will always be there for them. I also want to see them if I ever come over on business or holiday. Please respond quickly to this letter. Perhaps one day you may be big enough to go visiting to E. & my Mum. They know nothing of how you treated me & would welcome you and the children openly. I know you & your parents will be good to them. Please don't poison them with lies & deceit. Truth lasts forever. Lies only last until they're found out and they're always found out. Our boys will be young men one day & if you're not truthful to them they'll go in search of it themselves when they're ready. I will keep you in touch with my movements & what surburb I'm living in & as soon as I'm earning I will contribute as well as I can. I want you to know that wherever I'm living a room of my house is open for you& of course the boys. Regardless of what has gone before. You may want a holiday one day or you may even want to try Australia again. Please try & trust me S. & please try & find the courage to look inward and stop hating me for things I have never done and making me a person I have never been. Lets not make this a legal battle. We can work it out between us. Just like we did the divorce. You can't give thirteen years of your life and share two beautiful children without impact. Part of me will always be with you. I'm waiting eagerly for your positive reply.

fond regards

R. xx.'

The father, in an affidavit sworn in these proceedings since the date of the hearing before the judge, has stated that when he wrote that letter he was trying to be as positive as he could and not distance the mother any further. He added: 'Given the sudden turn of events I felt helpless, powerless and shell-shocked.'

On the same day as writing that letter and apparently shortly afterwards, the father contacted the local office of the Legal Aid Commission and was referred to the family law section of that commission in Melbourne. He spoke on the telephone to a lawyer, Mr Shackell, and was advised to find out whether the mother intended to remain in England permanently--her telegram referred only to a return 'for rest'.

There was a telephone conversation between the parties on 24 September 1991, the exact terms of which are in dispute. The father says that he told the mother of the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33) (the Hague Convention) and pointed out that what she had done was unlawful. He asked her for a 'statement of intent' as advised by Mr Shackell. He also asserts that he then said that he would do everything in his power legally to have the children returned to Australia. The mother accepts that she received a telephone call from the father on 24 September, that he told her he had taken legal advice, asked her if she had heard of the Hague Convention (which she said she had not), and asked her for a 'statement of intent'. Thus it is apparent that the main point in issue between the mother and the father over this telephone conversation is whether the father told her in this conversation, and before she received the letter of 23 September 1991, that he would do everything in his power legally to have the children returned to Australia.

Upon receipt of the father's letter dated 23 September on 27 September the mother wrote back the same day:

'Dear R.,

Thank you for your letter which I received this morning. I understand and do care that I need to explain to you my reasons. I found the situation intolerable in Australia . . . As you know I have no support in Australia and I felt it was essential for me to come home to have the support of my parents and relatives, which has turned out to be an excellent thing, we are all being well looked after and very happy. You obviously must understand that I plan to stay in the UK indefinitely . . . I really do appreciate that you have at least understood that it is best for the boys to stay with me in the U.K., and also agree that we should not launch ourselves into a nasty court battle -- I feel we are above all that. Of course I will keep you in touch with the boys with photos, calls and of course letters. I must say that I do wish you the best of luck and that if you do visit the U.K. you would be welcome to come and visit the boys at any time. Please keep in touch about the house and any possible prospective buyers. Thanks again for your letter.

Regards S.'

The judge held that for the purposes of his judgment he should reject the father's claim that he told the mother of his intention to pursue his application under the Hague Convention. His reasons for doing so are given in the following terms :

'Firstly the communication which was written by the wife on 27 September referred only to the letter of the 23rd and not to the telephone conversation of the 24th. If there had been a fundamental inconsistency between the two communications, it seems to me likely, although, of course, not certain, that the wife in her letter of 27 September would have referred to that inconsistency. Secondly there is the consideration that Lord Meston on instructions makes it plain that the wife's parents were listening to this conversation on a telephone extension and that they would be available to support her version of what passed. The third consideration is that the father in two subsequent telephone conversations in October not only concedes but indeed claims that he made no reference to what he was doing in Australia for fear of spoiling the prospects of success by giving advance notice of what was to come. So I proceed on the basis that the telephone communication of the 24th went no further than an inquiry by the father for clarification and a plain statement that the return was intended by her to be permanent.'

That question is the subject of a respondent's notice by the father.

The father went ahead in Australia with his application under the Hague Convention. Although he subsequently spoke to the mother on the telephone about the sale of the former matrimonial home, he deliberately made no mention of his application under the convention, in case she should move from her parent's address and become impossible to locate.

The father's application in Australia led to a request to the Lord Chancellor's a Department on 1 November 1991 and an originating summons was issued on 5 December 1991. That summons, with an affidavit in support, was served on the mother the following day (6 December 1991) and she says that was the first she knew of the father's application.

The principal issue in this appeal is whether the father, by his letter of 23 September 1991 or otherwise, acquiesced in the mother's removal of the children within the meaning of art 13 (a) of the Hague Convention. Since that in turn depends on the meaning of `acquiesced' in the context in which it appears, it is necessary to set out a number of the provisions of the

Hague Convention. The convention is in large part set out in Sch I to the Child Abduction and Custody Act 1985, and the provisions thus set out are incorporated into English domestic law by s 1(2) of the Act. However, for the purposes of this judgment it is relevant to mention two parts of the convention which are not so scheduled. First the preamble, which reads in its English version:

'The States signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access, have resolved to conclude a Convention to this effect . . .'

Then:

Article 1: The objects of the present Convention are -- (a) to secure the prompt return of children wrongfully removed or retained 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 following provisions are contained in Sch I to the 1985 Act:

Article 3

The removal or the retention of a child is to be considered wrongful where -- (a) it is in breach of rights of custody attributed to a person . . . either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law . . .

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the 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. . .

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 . . . 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; 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 . . .

Before the judge it was conceded by the mother, as it has been conceded before us, that the removal of the children to England was a wrongful removal under the 1980 convention and the real area of dispute resolved itself into two issues under art 13. (1) Was there acquiescence by the father? (2) Is there a grave risk that the return of the children to Australia would place them in an intolerable situation ?

It will be seen that the scheme of the convention is that, where a child has been wrongfully removed or retained under art 3, then, where the proceedings to recover the child are commenced within a period of less than one year from the date of the wrongful removal or retention, the court of the country to which the child has been taken is under an obligation -- there is no discretion -- to order the immediate return of the child. However, if consent to -- which in the context must mean prior consent -- or subsequent acquiescence in the removal or retention of the child by the other parent is established, then, as it was put in argument, the door is unlocked and the court is not then bound to order the return of the child but has a discretion whether or not to do so. The scheme of the convention is thus clearly that in normal circumstances it is considered to be in the best interests of children generally that they should be promptly returned to the country whence they have been wrongfully removed, and that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. It is that context that I turn to consider the meaning of `acquiesced' in art 13(a).

The relevant meaning of 'acquiesce' in the Oxford English Dictionary (2nd edn, 1989) is: 'To agree tacitly to, concur in; to accept (the conclusions or arrangements of others).' The corresponding meaning of 'acquiescence' is: 'Silent or passive assent to, or compliance with, proposals or measures.' Since French and English are both official languages of the Hague Convention, we were referred also to the French version of art 13(a), where the relevant words are 'ou avait consenti ou a acquiesce posterieurement' and to a French dictionary definition of 'acquiescer', Dictionnaire de la Langue du 19 et du 20 siecle, where the relevant meaning is: 'B. Dans un cont. de naturejur. Donner une adhesion tacite ou expresse a un acte.' We were also referred to a judgment of Deane J in the High Court of Australia in Orr v Ford (1989) 167 CLR 3I6 at 337-338, where 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 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" (i.e. 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, 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 23 September 1991, it is argued that this was a once 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 23 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 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 is 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.

This was the view which commended itself to Thorpe J. He said:

'if only the communication between the mother and the father is examined, then there is seemingly unequivocal acquiescence. But in my judgment it is not sufficient to investigate only the communication between the parents. The whole conduct and reaction of the husband must be investigated in the round. This case starkly illustrates [the] contrast between the father's communication to the mother and his words and actions to others. The four communications between them -- the one letter and the three telephone calls -- undoubtedly, in my judgment, served to lull the mother into a state of reassured security. That the state was insecure in the extreme was demonstrated by his simultaneous launch of proceedings under the Abduction Convention which he thereafter pursued without ambivalence, without delay, and even, it might be said, with a degree of guile in that he took positive steps to conceal from the mother what he was preparing to launch against her. I do not consider that the question of fact whether or not a plaintiff has acquiesced within the meaning of art 13(a) can be determined by looking only to what he states or represents to the defendant. His words a must be judged in the round. His words must be judged together with his actions. It is only too familiar for human beings to say one thing and do another. Here it is manifest that the father has, judged on all relevant facts aside from the letter of 23 September, acted consistently, expeditiously and unambiguously to achieve the return of the children. It seems to me that it would be dangerous to judge an issue of fact such as acquiescence on the communication between the parents alone, particularly on communication written hot after the unlawful removal, when the writer is in a state of emotional turmoil. In this case too there are some slight indications in the letter that the father's emotional turmoil even extended to the suggestion that there might be some room for a resumption of cohabitation despite the dissolution of the marriage.'

In reaching his decision on this issue the judge was purporting to follow the judgments given in this court in the only decision so far reported on art 13(a), Re A (minors: abduction) [1991] 2 FLR 241. That case is clearly distinguishable on its facts, since there was no such

unequivocal statement as was here contained in the father's letter of 23 September 1991. Nevertheless, the approach in that case, both by the judge at first instance and by this court, was to look at all the facts to see if acquiescence had been established. Further, both Fox LJ (at 249) and I (at 250) regarded as relevant the effect of the acquiescence upon the person who had wrongfully removed, or (as there) was wrongfully retaining, the children. Indeed Lord Meston, for the mother, invited us to consider the mother's reaction to the letter of 23 September. He submitted that in reliance on it: (1) she did not move on. This is a euphemism for saying that she did not attempt to hide herself and the children from the father, and Lord Meston fairly conceded that he could not rely on such inactivity on the part of the mother; (2) she settled the children into a local school. So she did, but she would have been bound to do this in any event, since at no time did she consider voluntarily returning to Australia with the children; (3) she arranged a tenancy of a house in the area. Her evidence was that the originating summons was served on her before the tenancy was signed, so that she never became committed.

We were also referred to the judgment of Sir Stephen Brown P in Re Taylor (a minor) (16 January 1992 unreported). This was also concerned with acquiescence under art 13(a) of the Hague Convention, but it turns on its particular facts and in my judgment it affords no help on the issue of principle to which I have referred.

However, I do derive assistance from the reference in the judgment of Deane J in Orr v Ford (1989) 167 CLR 316 to 'acquiescence' requiring informed acceptance of the infringement of rights. Here the father knew that the mother's removal of the boys from Australia was illegal. What he did not know when he wrote the letter of 23 September was the existence of the procedure under the Hague Convention and his ability to secure a summary return of the boys to Australia without the necessity of protracted litigation which it was his avowed intention to avoid.

For these reasons I would uphold the decision of Thorpe J and dismiss this appeal. However, as the other two members of the court take a different view, the appeal will be allowed and the case remitted to the High Court for the exercise of the discretion under art 13(a). It is highly desirable that this should be done without delay. If the boys are to go back to Australia, then the sooner the better.

I can deal quite briefly with the remaining points on this appeal. By his respondent's notice the father contended that the judge was wrong to find as a fact that the father did not tell the mother of his expressed intention (to invoke the Hague Convention) during the telephone conversation of 24 September 1992. Mr Everall, for the father, accepted that there was no possibility of the father coming to England to give oral evidence in this case. In those circumstances in my judgment the judge was correct to hold that, in the light of the mother's letter of 27 September 1991, and on the balance of probabilities, the father did not make clear to her in the telephone conversation of 24 September that he did not mean what he said in his letter of 23 September and that she should not rely on what he said in it about his attitude to the return of the boys.

The judge also rejected a submission on behalf of the mother that there was a grave risk that to return the boys to Australia would place them in an intolerable situation. If the judge had accepted that submission that would have unlocked the door to the exercise of his discretion under art 13(b). The argument relied on to support that submission is set out in the judgment in the following passage :

'The argument there is that on their arrival there is no home and there is no financial support forthcoming from the plaintiff who himself lives on state benefits. That is in contrast

to the security that the mother has achieved since her arrival in this jurisdiction. Here she has the support of her parents. She is in a position to sign a lease immediately for the rent of a suitable home. There is a letter from the school showing that the children have apparently settled in well to a Church of England primary school. Therefore it is said that the situation on their return would be intolerable and pointless.'

The judge rejected this argument:

'I have reached the clear conclusion that the mother has not established a sufficiently grave risk of a sufficiently substantial intolerable situation, The fact is that between July and September of this year the whole family was dependent on state benefits. In this jurisdiction equally the mother and children are dependent on state benefits. On their return they would again be entirely dependent on Australian state benefits. So that can hardly be said in itself to constitute an intolerable situation.'

This submission was revived before us. Nevertheless I am quite clear in my mind that the matters (largely financial) upon which the mother seeks to rely as constituting an intolerable situation in Australia come nowhere near to establishing what the Hague Convention requires by that phrase. In my judgment the judge was entirely right on this point.

STUART-SMITH LJ.

Under the provisions of art 12 of the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33), which has force of Law in the United Kingdom by virtue of s I(2) of the Child Abduction and Custody Act 1985, where a child has been wrongfully removed or retained the court of the state to which it has been removed must order its return, if the application is made within a year of the removal or retention. Article 13 provides two exceptions to this rule, which, if satisfied, afford a discretion to the court to consider whether or not the child shall be returned. The first exception, so far as it relates to this case is where the father 'had consented to or subsequently acquiesced in the removal or retention'. The reference to consent appears to mean consent prior to the removal or retention and is not relevant here. The question is whether he subsequently acquiesced. 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 and 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 party 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.

If the acceptance is active it must be in clear and unequivocal words or conduct and the other party must believe that there has been an acceptance. This distinguishes this case from Re A (minors: abduction) [1991] 2 FLR 241, where the husband's language and behaviour

was ambivalent and the wife did not believe that the father was agreeing to what she had done. Fox LJ said (at 249):

'The judge found that the mother feared the father's determination to get the children back. She also specifically stated that she did not find that the mother was persuaded, by what the father said, into believing that he meant what he said. That, it seems to me, was essentially a matter of fact for the judge who heard the evidence and, in my view, it was a conclusion to which the judge was perfectly entitled to come, upon the facts and evidence before her. If the mother did not believe that the father's protestations were genuine, it seems to me to be quite unreasonable to say that there was any acquiescence upon the father's part. The mother herself placed no reliance upon the father's statements. She did not trust him. The father was making statements in which he himself did not really believe, but felt it necessary to make them in order that his own position should not be prejudiced. Neither party trusted the other nor believed the other.'

In my judgment, the language of the letter of 23 September 1991 was clear and unambiguous and amounted to an acceptance of what the mother had done and a statement that he did not intend to take proceedings in relation to it. He recognised that her action was unlawful and by 24 September at the latest he was aware of his rights under the Hague Convention. If, before the letter had arrived the father had told the mother on the telephone that he was going to pursue those rights and that she was to ignore the letter when it arrived, he could not in my view have been said to have acquiesced because he would have withdrawn his acceptance before it was known to the mother. But the judge, rightly in my opinion, did not accept his evidence to this effect. In fact, the mother was quite unaware that he had changed his mind until she was served with the application on 6 December 1991, over two months after receipt of the letter of 23 September. Nevertheless the judge did not accept that this 'seemingly unequivocal acquiescence', as he put it, was enough. He said:

' . . . it is not sufficient to investigate only the communication between the parents. The whole conduct and reaction of the husband must be investigated in the round. This case starkly illustrates [the] contrast between the father's communication to the mother and his words and actions to others. The four communications between them -- the one letter and the three telephone calls -- undoubtedly, in my judgment, served to lull the mother into a state of reassured security. That the state was insecure in the extreme was demonstrated by his simultaneous launch of proceedings under the Abduction Convention which he thereafter pursued without ambivalence, without delay, and even, it might be said, with a degree of guile in that he took against her.'

In my judgment the judge fell into error in considering what the father was doing, unknown to the mother. It is not open to a parent who in clear terms says to the other that he accepts what has been done to come to the court and say that it was all a sham to deceive the other parent, because he did not mean what he said and his actions in consulting his lawyers show that to be so. In this case it appears to be common ground between the parties that the letter was bona fide and the father meant what he said in it; but he subsequently changed his mind, though he did not tell the mother till 6 December. The change of mind cannot alter the fact that he had acquiesced. Acquiescence is not a continuing state of affairs. The question is whether at some time prior to the issue of proceedings the plaintiff had acquiesced. If the acceptance is quickly withdrawn, that is no doubt a relevant matter for the judge to consider when exercising his discretion; but it does not affect the acceptance.

The judge also said that it would be dangerous to judge an issue of fact such as acquiescence on communications between parents alone, particularly on communications written hot after the unlawful removal when the writer is in a state of emotional turmoil. If the express

acceptance relied upon is in truth confused, equivocal and unclear, such as may be the case if it is written by a parent in a state of emotional turmoil, then of course it does not amount to an acceptance in clear and unambiguous terms. But that is not the case here. There is much force in Lord Meston's submission that the letter shows no evidence of emotional turmoil. The separation of the parties had taken place months before and the letter itself was written three days after the father received news of the unlawful removal. It is expressed in careful, restrained and considered terms.

For these reasons I would hold that the father had acquiesced in the wrongful removal of the children and he did not purport to revoke or withdraw such acquiescence until service of the proceedings on 6 December 1991. I would therefore allow the appeal. The matter must be remitted to the Family Division so that a judge of that division can consider, as a matter of discretion, whether the children should be returned to Australia.

The second exception possible under art 13 is where there is a grave risk that the child's return would expose him or her to physical 'or psychological harm or otherwise place the child in an intolerable situation. I have had the advantage of reading the judgment of Balcombe LJ and on this aspect of his judgment I agree with what he has said and have nothing to add.

LORD DONALDSON OF LYMINGTON MR.

I have had the advantage of reading the judgment of Balcombe LJ and agree with it in all respects save one. This is whether on the facts of this case the father, being one of the persons 'having the care of the person of the child . . . subsequently acquiesced in the removal . . .' within the meaning of the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33). I have no doubt that he did. Let me say at once that I unreservedly accept the vital importance of protecting children from the harmful effects of their being wrongfully removed from their country of habitual residence, usually clandestinely and often in circumstances calculated to cause them harm. This is the mischief which the Child Abduction and Custody Act 1985 and the convention, which is scheduled to the Act, set out to address. They do so by providing for automatic return in accordance with art 12 if the issue arises within 12 months of the wrongful removal or retention and, also later, in that case subject to it not having been demonstrated that the child is by then settled in its new environment.

All this demonstrates the agreed international response to a wrongful removal. The child must go back and the status quo ante be restored without further ado. That said, the convention does itself enter a caveat which is contained in art 13. Before I consider whether it applies in this case, it is I think important to emphasise what is the consequence if it does apply. It is not that the court will refuse to order the return of the child to its country or jurisdiction of habitual residence. It is not that the court will assume a wardship or similar jurisdiction over the child and consider what order should be made as if the child had never been wrongfully removed or retained. The consequence is only that the court is no longer bound to order the return of the child, but has a judicial discretion whether or not to do so, that discretion being exercised in the context of the approach of the convention.

In the comparatively rare case in which such a judicial discretion falls to be exercised, there will be two distinct and wholly different issues confronting the court. (1) In all the circumstances is it more appropriate that a court of the country to which the child has been wrongfully removed or in which it is being wrongfully retained (country B) should reach decisions and make orders with a view to its welfare or is it more appropriate that this should be done by a court of the country from which it was removed or to which its return

has been wrongfully prevented (country A)? (2) If, but only if, the answer to the first question is that the court of country B is the more appropriate court, should that court give any consideration whatsoever to what further orders should be made other than for the immediate return of the child to country A and for ensuring its welfare pending the resumption or assumption of jurisdiction by the courts of that country?

In considering the first issue, the court of country B should approach the matter by giving the fullest force to the policy which clearly underlies the convention and the Act, namely that wrongful removal or retention shall not confer any B benefit or advantage on the person (usually a parent) who has committed the wrongful act. It is only if the interests of the child render it appropriate that the courts of country B rather than country A shall determine its future that there can be any exception to an order for its return. This is something quite different from a consideration of whether the best interests of the child will be served by its living in country B rather than country A. That is not the issue unless para (b) of art 13 applies. The issue is whether decisions in the best interests of the child shall be taken by one court rather than another. If, as usually should be the case, the courts of country B decide to return the child to the jurisdiction of the courts of country A, the latter courts will be in no way inhibited from giving permission for the child to return to country B or indeed becoming settled there and so subject to the jurisdiction of the courts of that country. But that will be a matter for the courts of country A.

I now turn to the point upon which I disagree with Balcombe LJ. The issue is whether the father `consented to or acquiesced' in the wrongful removal of the children. Each case must be considered on its own special facts and the facts of this case are certainly unusual.

In context the difference between 'consent' and 'acquiescence' is simply one of a timing. 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.' Such considerations do not arise in this case because the father's letter of 23 September 1991 is incapable of any construction other than a clearly expressed acquiescence and, unlike Re A (minors: abduction) [1991] 2 FLR 241, was so construed and believed by the mother. In agreement with Thorpe J, I consider it clear that this was not affected by anything said in the telephone conversation of 24 September 1991. The father cannot be heard to say that he had an intention not to acquiesce which he kept secret from the mother, any more than in other circumstances it would be open to the mother to say, and perhaps to prove, that the father had at one time had an intention to acquiesce which was kept secret from her. On the evidence I think that we are bound to hold that the father acquiesced by writing the letter of 23 September 1991.

The question has been raised of whether an acquiescence can be withdrawn. I think that it cannot, in the sense that once there is acquiescence the condition set out in art 13 is satisfied. On the other hand an apparent acquiescence followed immediately by a withdrawal may lead the court to question whether the apparent acquiescence was real or whether it was the product of emotional turmoil which could not reasonably be interpreted as real acquiescence. That apart, the only relevance of the time which elapses between acquiescence

and a purported withdrawal of the acquiescence is in the context of the exercise of a discretion whether to return the child to the jurisdiction of the courts of country A in order to enable those courts to make decisions as to its future. In this case this period lasted from 27 September until 6 December 1991 when the proceedings were served upon the mother.

I would set aside the order of Thorpe J and remit the case to the High Court for consideration, under the discretion which arises under art 13 of the convention, of whether the children should or should not be returned to the jurisdiction of the Australian courts. It is only if he decides not to do so, that he will be called upon to consider how to exercise a wardship jurisdiction.

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