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[26/11/1997; Court of Appeal (England); Appellate Court]
Re S. (Abduction: Acquiescence) [1998] 2 FLR 115

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

26 November 1997

Butler-Sloss, Morritt and Ward LJJ

In the Matter of S.

Andrew McFarlane for the mother

Judith Parker QC for the father

BUTLER-SLOSS LJ: The first point I want to make before giving judgment is that this is a case where there will be an identification direction and it is important that nothing should be said about this child or about either of the parents, as to where they live or any element in respect of the child that could lead to the identification of the child by anybody. Secondly, the decision was given last night since there was an urgency over the confirmation or otherwise of flight arrangements for tomorrow and it was necessary that those arrangements had to be finalised one way or another yesterday evening. Consequently we took the unusual course of giving our decision without giving our reasons and we now give our reasons today.

This is an appeal by a mother of a little boy called M, born on 30 September 1995, and he is therefore now 2, from the order of Sumner J made on 10 November 1997. The father of M sought an order under the Child Abduction and Custody Act 1985 that the mother return M to New South Wales in accordance with the summary procedure under the Hague Convention. The mother raised the defences of consent and acquiescence under Art 13. The judge found against her on both issues and ordered the return of M to New South Wales by Thursday of this week subject to certain undertakings. The mother appeals to this court against the refusal of the judge to find acquiescence by the father in her retention of M and against the order to return M. She no longer alleges consent.

The parents are English in origin. The father is 30 and a carpenter. He went to Australia with his parents in 1987. He returned to England where he met the mother, who is 27. He returned to Australia and assisted the mother to emigrate and they married in Australia in August 1989. The marriage ran into difficulties about a year after M was born, that is to say in late 1996. The father left home briefly and on his return the mother told him the marriage was over and that she wanted to return to England. On 9 December 1996 the mother brought M to England and went to live with her parents in Wales where they have since remained. Her case was that the father agreed to her leaving permanently with M or at least

he acquiesced in her remaining in England and took no steps for over 8 months to get M back. The father's case was that he agreed to the mother going to England with M for a holiday and to meet her family. He did not agree to her leaving permanently and he expected her to return until she telephoned him in mid-January 1997 to tell him she was not going back. On 25 September 1997 the father signed the Hague Convention application.

The evidence of the mother and father was, as is customary, decided by the judge on the affidavits and other documents with no oral evidence. The evidence on some issues was disputed, notably whether the father had ever asked for the return of M, but there were nonetheless many matters which were not contentious. Having considered the evidence for and against consent, which I have not set out since that defence is no longer pursued the judge was satisfied that the father had not consented to the child remaining in England beyond the period of a holiday.

I turn therefore to acquiescence. The matters now relied upon by the mother in support of her case of acquiescence were listed by the judge. He went on to make certain findings of fact adverse to the mother which are criticised by Mr McFarlane who appeared for her both before the judge and before this court. In a Hague Convention case, decided on written evidence with conflicting accounts of events, if the court cannot resolve the conflict in favour of the defendant, in this case the mother, she cannot prove the defence of acquiescence. The burden of proof lies upon her and it is not therefore necessary to investigate whether the judge was justified in making findings of fact other than those crucial to his decision.

In summary the main points relied upon by the mother were that shortly after she telephoned him on 15 January 1997 the father consulted solicitors on 18 January 1997. On 17 January 1997 he instructed estate agents to sell the matrimonial home which had been M's home. He subsequently took it off the market. On 28 January 1997 he arranged for the mother and M's belongings to be shipped to the UK. The judge found that the father had made no request to the mother to return or to return M between 15 January 1997 when she said she was not returning until the Hague Convention application, despite telephone calls and solicitors' letters. Correspondence with solicitors dealt with contact and property matters on the basis throughout, as accepted by the father, that the mother and M remained in the UK. The father saw the second set of solicitors in April 1997 and had some knowledge of the Hague Convention but took no steps under the Hague Convention until September 1997 when he went to his third set of solicitors. The father's affidavit of 27 May 1997 dealt with 2 months' contact a year to M in Australia on the basis that M lived in England. The mother alleged the motivation for the Hague Convention application was because of property and contact difficulties. She also pointed to the father inviting a female friend and her two children at the beginning of April 1997 to share the former matrimonial home with him in April 1997, a friendship which was immediately or shortly thereafter one of cohabitation.

The father's case on each of these matters was accepted by the judge. The father said he put the house on the market because he did not want to live in the house with memories but he took it off the market after a few days. The father sent the mother and M's belongings to keep the mother happy and to facilitate contact. His first solicitor led him to believe he could not get M back and he wanted to keep friction to the minimum so she might return with M. The judge did not draw conclusions adverse to the father in respect of putting the house on the market or shipping the goods to England.

The most crucial part of the father's evidence related to the legal advice he was given by three sets of solicitors. The first solicitor was seen in January 1997 soon after the father knew the mother was not going to return to him. It seems clear that the first solicitor did not

know about the remedy of the Hague Convention and conducted the correspondence entirely on the basis of contact to M and property matters on the assumption that the mother would remain with M in the UK. This solicitor was found by the judge to have given misleading advice and to have misinformed the father as to his rights.

The second solicitor was seen in April 1997 when the father was dissatisfied with the lack of progress with the first solicitor. According to the father's affidavit of 25 September 1997 the second solicitor told him:

'On 15 April 1997 I consulted another solicitor . . . about contact with M. I was told that I could apply to have M returned to Australia but that if I was successful T could apply to the court for an order which would allow her to return to Wales to live with M. I was not given any information about the Hague Convention and my understanding of the advice I received was that I would be wasting my time and money to even consider trying to get my son back from Wales as my wife would simply go to court in Australia and be given an order allowing her to return to live in Wales with M. By this time I was desperate to see and have contact with my son and I agreed to negotiations being undertaken for such contact.'

The mother replied to that affidavit, in an affidavit of 29 October 1997, in which she referred to the father's affidavit, and pointed out that he was fully aware of his rights to apply for the return of the child, 'if what he said was correct about the events surrounding M's removal from that country'. The father then pointed out in his second affidavit of 29 October 1997:

'Although I ascertained from a newspaper article that the Hague Convention existed in April 1997, the solicitor whom I was consulting at the time made it clear to me that I would not be able to obtain M's return to his habitual residence in Australia using this Convention. In this regard, paras 36 and 37 of the defendant's affidavit are incorrect.'

I now turn back to his first affidavit, in which the father went on to say that he showed his second solicitor:

'. . . in late April/early May . . . an article from a magazine. This article was about getting children back through the Hague Convention and Mr Walters told me I would be wasting my time. I insisted that it was still my belief that T had kidnapped M and my solicitor then said: "I think the only way I can see that you will see him, is if you go to the UK, and see him there".'

In the mother's affidavit of 29 October 1997 she pointed also to that paragraph as showing that he knew what his rights were under the Convention and that he referred in his second affidavit to the Hague Convention but also to what he said the solicitor said to him.

The third solicitor was the author of another article on the Hague Convention, seen by the paternal grandmother at her hairdressers and shown by her to her father. He read the article and went to see the third solicitor, the one who wrote the article, on 10 September 1997 and issued the application a week or two later.

The judge recognised the difficulty about the April 1997 advice. But nonetheless he took the view that it was misleading. He said:

I am satisfied that the father was misinformed about his rights in law in January 1997. The advice in the middle of April 1997 was also misleading. It is true that the mother, if ordered to return M under the Hague Convention, can apply in Australia to be allowed to live in Wales with him. The advice was in part correct but it made no mention of two important

points, namely the summary nature of the procedure and the limited defences that could be raised. There is nothing to suggest that any application would be other than based upon the welfare of the child, rather than the obligation by a defaulting parent to prove a defence.

Whatever doubts there may have been about that advice in mid-April 1997, within 2 weeks the position was clear. Having been referred to the Hague Convention, Mr Walters said it was a waste of his time and that the only way the father could see M was if he went to the UK. I am satisfied that that advice was, as with the earlier advice, misleading. I am satisfied that the father acted upon it. He did not know better . . . His actions and the correspondence reflect the advice that he was given and it was not correct.'

That I think is dealing with the first advice and then he went back to his second solicitor for more advice:

'It is also what motivated him to change solicitors yet again in September 1997.'

To this court Mr McFarlane has submitted that the father was misled in January 1997 but by April 1997 he knew of the Hague Convention procedure and was given pragmatic advice by the second solicitor as to the reality of the position. This was a mother who had throughout had the care of a child then well under 2. The advice was that, despite a successful return of the child to Australia through the Convention procedure, nonetheless the mother was likely to keep the care of the child and be permitted to return to Wales. So it was a waste of time.

A further matter raised by Mr McFarlane was the need for oral evidence and cross-examination of the father to investigate the legal advice given to the father, since professional privilege must have been waived and we are all dependent on his recollection which may not be accurate and may be self- serving. Neither article on the Hague Convention had been produced nor any solicitor and client correspondence for the relevant period April/May 1997. The judge ought to have adjourned for oral evidence to be called.

Miss Parker QC for the father argued that the advice was not clear and gave a misleading impression of the way the case might proceed in the Australian court. The second solicitor in telling the father that it was a waste of time misrepresented the position and gave the father no choice but to accept that M remained in Wales. She accepted however that the judge was in error in relying upon the defences relevant to the Convention procedure rather than the likely arguments in the domestic proceedings (that refers to the passage I read from the judge which clearly was wrong in that that was not the advice that was being given by the solicitor. He was giving advice about what would happen in Australia and not about the defences to the Convention.)

Counsel representing the father before the judge had objected to the calling of oral evidence.

Mr McFarlane submitted that, despite the lack of oral evidence, it was clear that the father, furnished with the pragmatic legal advice reinforced by the article on the Convention and a further visit to the solicitor, had the relevant information upon which he could decide what to do. Although up to that point it might have been reasonable to concentrate on the correspondence on attempting to settle the issues of contact and the disposition of the former matrimonial home, once the father knew that he could ask the English court to send the child back to Australia, his draft affidavit sent to the mother's solicitors on 27 May 1997 was explicable only upon the basis that he was acquiescing in the child remaining in the UK with the mother. He said:

'On 16 April 1997 a letter was sent to the wife's solicitors in the UK detailing my proposal for contact.'

Then at para 26:

'It is my proposal to see my son for one month each year commencing 1997 and 2 months each year thereafter.'

At para 28:

'It is my proposal that during contact with my son I would take time off from my employment.'

Paragraph 31:

'I am prepared to solely meet the costs of air flights to Wales to pick the child up, or arrange for his collection to bring him back to Australia and then take him back or arrange for him to be taken back to England.'

In addition to that there was a careful and lengthy affidavit from the father's solicitors setting out the plans in respect of contact and the arrangements were intended to run for a number of years. They were long- term arrangements that took the contact beyond the year 1999. The judge was wrong to find after April 1997 that he did not acquiesce in the mother's retention of M in the UK. He required, so Mr McFarlane submitted, too high a standard and too detailed knowledge of the Convention when it was sufficient for the father to have general knowledge of the position in order to be able to form his subjective intention.

The defence of acquiescence is to be found in Art 13 of the Hague Convention and is an exception to the general requirement under the Convention embodied in Art 12 that 'the authority concerned shall order the return of the child forthwith'. The relevant part of Art 13 reads as follows:

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

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

The English approach to this part of Art 13 is now summarised in the speech of Lord Browne-Wilkinson in Re H (Abduction: Acquiescence) [1998] AC 72, [1997] 1 FLR 872. At 87G-88D and 882A-E respectively he said:

'What then does Art 13 mean by "acquiescence"? In my view, Art 13 is looking to the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted? This is the approach adopted by Neill LJ in Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819 and by Millett LJ in Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716. In my judgment it accords with the ordinary meaning of the word "acquiescence" in this context. In ordinary litigation between two parties it is the facts known to both parties which are relevant. But in ordinary speech a person would not be said to have consented or acquiesced if that was not in fact his state of mind whether communicated or not.

. . .

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

Then at 90D-G and 884E respectively Lord Browne-Wilkinson summarised it:

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

(1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in Re S (Minors) "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact".

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

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

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

I should say that although Mr McFarlane sought to argue to us, as he had to the court below, that the exception set out at 91 and 885 respectively of Lord Browne-Wilkinson's speech applied in this case, I have not thought it necessary to pursue that because I am satisfied on the broad approach that acquiescence has taken place.

On the facts of that case, that is to say Re H, an Orthodox Jew in Israel required by his religious beliefs to go first to the Beth Din for permission from them before invoking the summary remedy under the Hague Convention, it was not necessary for the court to explore the degree of knowledge of the wronged parent. In the present case however, the extent of the father's knowledge of his rights is in my view crucial to the consideration of acquiescence and whether he formed the subjective intention to agree to the child remaining in the UK.

In earlier decisions of this court the lack of knowledge and misleading legal advice have been considered relevant factors to which the court should have regard, see Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 and Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819. In Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682 this court held that it is not necessary, in order for the defence under Art 13 to succeed, to show that the applicant had specific knowledge of the Hague Convention. Knowledge of the facts and that the act of removal or retention is wrongful will normally usually be necessary. But to expect the applicant necessarily to have knowledge of the rights which can be enforced under the

Convention is to set too high a standard. The degree of knowledge as a relevant factor will, of course, depend on the facts of each case.

In the light of the incorrect legal advice given to the father in January 1997, it would be difficult to treat the attempts to seek agreement on contact and the sending of the belongings to the mother as evidence supporting acquiescence. To that extent I agree with the judge. I part company with the judge however on his assessment of the advice given in April/May 1997. I am satisfied from the father's account of what was said to him that first he was given the gist of the Hague Convention which included the advice that he might be successful in having the child returned to Australia but it would be a Pyrrhic victory since he was unlikely to retain the child in Australia after a hearing in the Australian Family Court. Miss Parker asked us to take into account the evidence of the father in the October 1997 affidavit to which I have already referred. That evidence was in response to the argument in the mother's affidavit that he had been given the information about the Hague Convention in April 1997. The subsequent affidavit, designed to answer that point, conflicts with the earlier affidavit sworn in support of his application and does not to my mind ring true. In may judgment, the judge set too high a standard of requirement of knowledge of rights in his assessment of the April/May 1997 legal advice and did not recognise that the father was given adequate and, in my view, realistic advice, as to the long-term outcome of the proposed litigation over the child. Once the father was given the relevant advice in April/May 1997 and did acquiesce in the retention of M by the mother, as I believe he did, his subsequent change of heart for whatever reason in September 1997 is irrelevant, since acquiescence had already taken place. Acquiescence is not a continuing state of affairs and, once given, cannot be withdrawn, see Re A above.

It is significant, in my view, on the issue of acquiescence, that the judge found that the father did not ask for M to be returned even after April 1997 until he issued the Convention application. Further, it has never been suggested in any of the documents before us that the father has asked or will ask to take over the care of M himself. The emphasis in this case has been throughout on arrangements for contact. The realistic advice of the second solicitor set out the likely eventual outcome of the litigation and that the child was likely to return to live in the UK. That advice must have had a crucial effect upon a father, not seeking custody or residence, but seeking the best access/contact arrangements he could achieve.

The setting up of a new family unit with the girlfriend and her children at the beginning of April 1997 coincided with the advice of the second solicitor. Realistically, by the new relationship, the father was recognising there was no future possibility of reconciliation or preservation of the marriage. He was also recognising that M would not return to live with him in that house other than for periods of contact.

I agree with Miss Parker and with the judge that for the purpose of deciding acquiescence, delay as such is not relevant if within the 12-month period, although, in my view, the reasons for delay may be an indication as to the subjective state of mind of the applicant.

I am satisfied that although the judge carefully and correctly directed himself as to the law, he was in error in its application to the facts disclosed in the April/May 1997 legal advice and the inferences to be drawn as to the father's state of mind at that time. Having found that the judge was in error on that crucial point, this court, in a case such as the present in the absence of oral evidence, is in as good a position as the judge to come to a conclusion on the facts and decide on the issue of acquiescence.

It is not necessary to consider further the question of oral evidence, but I would not myself have been disposed to disagree with the decision of the judge not to allow it. There is a clear

line of authority to the effect that this is a summary procedure and it is not the practice to allow oral evidence to be adduced although there is always a discretion to do so, see Re E (A Minor) (Abduction) [1989] 1 FLR 135; Re F (A Minor) (Child Abduction) [1992] 1 FLR 548.

Looking at the case in the round as we are enjoined to do in these cases where, in the fact-finding operation, pieces of evidence have to be put together rather like a jigsaw, the shock and upset found by the judge to be present in the mind of the father in January 1997 must by the time of these new arrangements in April 1997 have given way to the setting up of a new life without both his wife and his son. After the legal advice in April/May 1997 I agree with Mr McFarlane that the failure to ask for the return of M, the draft affidavit and the careful and detailed contact proposals stretching beyond the year 2000 to take place both in England and in Australia with no suggestion that M should live anywhere other than with his mother in Wales are explicable only on the basis that he was at that time agreeing to the retention of the child by the mother.

Although I am satisfied that the Art 13 defence of acquiescence has been made out, there remains the requirement in Art 13 to consider whether nevertheless to send the child back to the State of habitual residence. The first question is whether that decision should be made by this court or should we remit the issue of the exercise of discretion to a High Court judge.

This is a case where the child has been in this country for nearly 12 months and the delay which is due to the father has extended the period the child has spent here. I cannot see what additional evidence of importance to the exercise of discretion can be produced within a time-limit appropriate to the Convention timetable of speedy summary procedure. There may be further attempts on either side for oral evidence, or for additional written evidence. Any additional evidence would be likely to delay the further hearing of this case to well into the New Year, an unacceptable delay in the case of a child of 2 years and 2 months and agonising for the parents. In the absence of further evidence to be adduced there appears no good reason why this court could not make the decision itself and deal expeditiously with this case as we have sought to do so far.

In an Art 13 case, the court is not required to return the child if the person which opposes the return establishes that the applicant has subsequently acquiesced in the retention of the child. Waite LJ helpfully set out guidelines in his first instance judgment in W v W (Child Abduction: Acquiescence) [1993] 2 FLR 211, 219 where he said:

'I interpret my duty in the present case as follows. All relevant factors must be examined. They include the welfare of the child, which is to be treated as important but not necessarily paramount (see Scott LJ in Re A (Minors) (Abduction: Acquiescence) [1993] 1 FLR 396 at 406). An appropriate balance must then be struck between the need to fulfil the purpose and philosophy of the Convention through the return of the child on the one hand and any countervailing factors pointing on the other hand to the child being kept in England.

Six matters appear to me to be relevant to that consideration. They are:

(1) choice of forum;

(2) possible outcome of any family proceedings initiated in whatever forum is chosen;

(3) the consequences of the acquiescence that has occurred in this case;

(4) the situation in Australia that would await the mother and child if a return order were to be made;

(5) the anticipated emotional effect on the child of a peremptory return order;

(6) the extent to which the purpose and philosophy of the Convention would be at risk of frustration if a return order were to be refused in the particular circumstances of this present case.

It is important always to remember in child cases that guidelines are helpful but are not exhaustive and as Waite LJ said, 'all relevant factors must be examined'.

Taking the six matters set out by Waite LJ, in my view the choice of forum is evenly balanced and it is an important factor to have in mind that the purpose of the Convention is to provide for the state of habitual residence to decide the future welfare of the abducted or wrongly retained child. Equally Art 13 provides, if one of the defences is established, the opportunity for the court where the child has been taken to consider the immediate welfare of the child and to exercise its discretion to order the return or to allow the child to remain. We cannot, of course, be certain as to the outcome of any case to be heard in another jurisdiction. But both Ward LJ and I have some slight knowledge of the Australian family law and of their Family Court. My understanding is that their family law bears a considerable resemblance to ours. I would venture therefore an opinion on the likely outcome of the proceedings if heard in the Australian Family Court. With a child of just over 2 who has spent his entire life with his mother and where up to now the father has not sought a custody order, it is improbable that the mother would not continue to have the primary care of the child. Further since, unlike the father, her family did not emigrate to Australia and she has to our knowledge no family or long-established friends in Australia, she would seem to me to have a strong case for seeking the leave of the Australian court to return with the child to her family, home and friends in Wales. She has no means of support in Australia, no home other than that provided short term by the father by way of undertaking. Everything points to a return to the UK for her and the child's permanent home. I can confidently predict that if this was an Australian mother wishing to return to Australia with her young child leaving behind an English father, the mother would obtain the leave of the English court to remove the child permanently from the jurisdiction on an application under s 13(1)(b) of the Children Act 1989. The consequences of the acquiescence is that the application by the father was made nearly 9 months after the mother said she would not return and the child has lived in this country for half his short life. Taking this and the anticipated emotional effect upon the child of a peremptory return together, I cannot see that it will do any good for the child or the mother who has to care for the child to be uprooted, go to Australia, wait for a hearing and then eventually return here. This is especially so when one considers the next factor, the situation in Australia to which I have already referred. The mother and child cannot go back to the former matrimonial home. That is occupied by the girlfriend and her children. She will have to live in rented accommodation and on social benefit. I do not believe that in this case the important philosophy of the Convention that should in general be rigidly adhered to will be at risk of frustration if this mother and child on the facts of this case do not go back to Australia for a decision by a court of that jurisdiction. The judge also indicated that if he had found acquiescence he would not have ordered the return of the child. His main reason was the length of time that the mother had been here with M.

I would therefore exercise the discretion of this court to refuse to return the child to Australia. That is not to say however that in the English domestic family proceedings which will now follow, the Australian dimension is not to be taken as very significant. This child was born in Australia and his Australian background and roots are very important and must be cherished. He is very young at this moment to go anywhere without his mother, but the time will soon come when he must spend a significant portion of his holidays, subject to

finding the airfare, in Australia with his father and his paternal family. He is entitled to a genuine relationship with his father which the mother has a duty to foster at all times by giving the child a good image of his father, for example, a photograph of him and the other members of the paternal family, talking about the good things in Australia and how much he will enjoy going to stay with his father. It now behoves the mother, who is allowed to keep the child in the UK and bring him up here, to recognise the importance of the Australian links and to be generous in the contact arrangements to be made. I hope that she will recognise the wisdom of this generosity. If she does not, the English court will have the power to make orders to encourage the recognition of the importance for M of his Australian family. He is entitled to his Australian family as well as to his family in Wales and proper recognition must be given both by his mother and by the maternal family to the importance to the welfare of M of the Australian dimension.

In view of the international element of this case and the sensitivity of it, it would seem to me that any disputed application in relation to contact about M should be heard by a High Court judge and I would suggest that an application is made to transfer any child applications to the High Court. Whether it be to the High Court in Swansea or the Principal Registry is a matter for the parties.

I would allow the appeal and dismiss the application under the Hague Convention

MORRITT LJ: I agree.

WARD LJ: I also agree.

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