---

http://www.incadat.com/ ref.: HC/E/UKe 58
024/10/1991; High Court (England); First Instance]
B. v. K. (Child Abduction) [1993] 1 FCR 382, [1993] Fam Law 17

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

4 October 1991

Johnson J.

In the Matter of B. v. K.

Counsel: CO Renton for the Plaintiff; S Gal for the Defendant

JOHNSON J: This is an application by a father under the Child Abduction and Custody Act of 1985, which brings into effect in English law the provisions of The Hague Convention, signed at The Hague in 1980. It relates to three children -- Laura, David and Christian. Their father is German by birth, but was brought up by his family in England. The mother, I have been told, is herself part German, having a German father and an English mother. She too was brought up in England. The parents married in England on the 25th July, 1981 and lived here until May of 1986, when they moved to live in the Federal Republic of Germany. The parents and the three children remained there until the 1st December, 1990, ie for four-and-a-half years.

On the 1st December, 1990 the mother removed the three children from the Federal Republic of Germany and came to England with the children. Her reasons for doing so are set out in her affidavits, in which she makes serious allegations against the father. I am unable, and do not wish, to make any findings about the validity or otherwise of the mother's complaints, and I put them out of my mind entirely.

At Christmas time the mother sent a Christmas card to the father in which she said, "Dear Michael, We do all love and miss you. Please try to understand me. Please give us six months. We really need this time apart and I know we can work things out. Love from Margaret." The card was then signed by the three children.

In January of 1991, by arrangement between the parents, the toys, clothes and, significantly, the beds of the children were transported from Germany to England. The mother started divorce proceedings in England at the County Court in Bury. In accordance with the English procedure the father signed a document by which he set out his response to the mother's claims. In that document he was asked, "Do you wish to make any application on your own account for custody of the children? Answer: No Question: Do you wish to make

any application on your account for access to the children? Answer: Yes."

In May the father for the first time received advice about the remedies available to him under The Hague Convention, and the originating summons by which he applied for the return of the children was issued by the Lord Chancellor, the central authority for the purpose of The Hague Convention in the United Kingdom, on the 27th August, 1991.

The mother resisted the application broadly on four grounds, with each of which I will deal separately. It is, however, important that I should emphasise that I am considering an application under The Hague Convention, and it is no part of my function to decide where the long-term future of these children lies. Indeed, Article 19 of the Convention provides in terms that a decision under the Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue. In Re F [1991] 1 FLR 1 at page 5, Lord Justice Neill said:

"The general principle is that in the ordinary way any decision relating to the custody of children is best decided in the jurisdiction in which they have normally been resident. This general principle is an application of the wider and basic principle that the child's welfare is the first and paramount consideration. This principle is subject to exceptions and these exceptions will no doubt be worked out in future cases."

The Convention provides by Article 12 that where a child has been "wrongfully removed" then a judge sitting as I sit today "shall order the return of the child forthwith". Article 3 provides that the removal of a child is to be considered wrongful where it is in breach of rights of custody attributed -- in this case to the father -- under the law of Germany if the children were habitually resident there before their removal. It is of course plain that these children were ordinarily resident in Germany before their removal on the 1st December, 1990, and I echo the observation of Lord Justice Neill that, as a general principle, decisions about these children should be made in Germany rather than in England.

The first point taken on behalf of the mother in objection to the return of the children was that their removal had not been in breach of the rights of custody of the father. As one might have expected, German law provides that during the continuance of a marriage children are regarded as being in the joint custody of their parents, and there is a provision that in default of agreement between the parents on any matter affecting the upbringing of the children there may be an application to the court. In this case by the 1st December, 1990 there had been no decision of the German Court and I hold that the children remained in the joint custody of both their parents in accordance with the general law of that state. Moreover, I have been referred to a judgment of the German court in which the following sentence appears: "Joint responsibility for the welfare of a child remains in existence until the decision on parental care". The situation accordingly in Germany is as one would have expected, but I am grateful for the assistance I have received from the experts in German law who have tendered material to me on both sides. I note in passing, however, that some of that material was directed to an issue somewhat different from that which arises under Article 3 of this Convention. It is no part of my function to enquire as to whether the mother's conduct was unlawful or whether it constituted a criminal offence. My function is to determine whether it was in breach of the rights of custody of the father, and I have no hesitation in holding that it was.

The second point raised on behalf of the mother is that the children were removed from Germany on the 1st December, 1990 with the consent of the father. It is accepted by Counsel on behalf of the mother that the father did not know, still less did he consent to the removal of the children on that day. What is submitted is that the father was aware of the

unhappiness of the mother in their relationship and that if a reconciliation which was being attempted should break down it was her intention to separate from him.

It is also the case that at a time prior to the 1st December the father had, at the mother's request, signed documents which enabled one of the children to be issued with a travel document enabling that child to be removed from Germany. The father says, and I see no reason to disbelieve him, that his understanding was that that travel document was to be used for the possible purpose of the children travelling to England, where they still had family, for a holiday, and it was not within his contemplation that the children would be removed permanently from Germany. Indeed it seems to me inherently unlikely that the father gave his consent to the children being removed in the way that happened on the 1st December because the mother states in her affidavit that she was told by a representative of the British Consulate in Dusseldorf that she was free to leave Germany with the children. If that be true, it seems to me unlikely that such a conversation would have taken place had the mother felt that the father knew and was consenting to her proposed action. Accordingly I hold that the father did not consent to the removal of these children from Germany on the 1st December, 1990, and that the removal was in breach of his joint rights of custody conferred upon both parents under the law of the Federal Republic of Germany, in which both children were habitually resident. Accordingly the removal of those children was, in my judgment, wrongful, and it is my duty to order their return to Germany forthwith, subject to the provisions of Article 13 of the Convention.

It is to be observed that, as has been held by the English Court of Appeal, Article 12 requires the return of the children to the state from whence they were removed and not to the custody of the other parent.

The third objection made by the mother is based on Article 13 which, for present purposes, reads as follows:

"The requested state is not bound to order the return of the child if the person which opposes his return establishes that 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."

I have been referred to the judgment of Mrs Justice Bracewell in Re N [1991] 1 FLR 413 and, in particular, to that passage of her judgment at pages 418 H to 419 D, with which I respectfully and wholly agree.

In practice it is my experience that this part of this article is seldom effective to prevent the return of children under Article 12 because experience shows that the parent in the position of this mother always elects to return with the children in the event that the court orders their return. I emphasise again that the form of the court order made under Article 12 requires the return of the children to the state from which they were removed and not to any individual or the other parent.

Accordingly I was surprised to be told by the very experienced welfare officer of this court, Mr Israel, that this mother had told him that were the court to order the return to Germany of her children she would not accompany them. I find that proposition startling having regard to the very strong impression I have from other sources, and including the general body of Mr Israel's report, that this mother is a caring and committed mother. However, during the short adjournment Miss Gal, on behalf of the mother, took further instructions and I am now assured that if I order the return of these children the mother will return with them. That would be very much against her wish, but I am satisfied that she would go back

to Germany with them.

Accordingly it seems to me that there would be no risk to the children of their being exposed to physical or psychological harm if I ordered their return to Germany, because they would go back in the company of their mother and would be with her until the German court otherwise ordered. Similarly I am not satisfied that an order for the return of the children would, at least on these grounds, place the children in an intolerable situation, again because the mother would return with them. Accordingly I am not satisfied that the mother has established this response under Article 13.

The fourth point raised by the mother is based on another aspect of Article 13. This provides that the judicial authority, ie this court, may -- and I emphasise the discretionary nature of the provision -- may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. It is important here, just as it is important in relation to Article 12, to bear constantly in mind that the objection of the child that is relevant to Article 13 is objection to return to the state from whence it was removed rather than an objection to return to the other parent. These children undoubtedly had an unhappy time in the period before the break up of their parents' marriage, and I must endeavour to distinguish in the written material which I have, and in the oral report which I had from Mr Israel, the court welfare officer, between the objection of the children to returning to their father and their objection, if any, to returning to Germany. It is the latter which is material for my present purpose; the former is immaterial.

The court welfare officer spoke to both Laura and to David. He is a welfare officer of considerable experience in dealing with cases such as this and in ascertaining the wishes of children. I am aware that when seen by the welfare officer in September this year the children had been in the care of their mother since the 1st December, 1990, and had not seen their father since that time. Accordingly not only must the court be alert to the possibility that the children have been consciously or, I would add, unconsciously indoctrinated by their mother and have developed a wish to please her rather than their father, but so too must the welfare officer. I am satisfied from what I have read in Mr Israel's report and from what I heard from him this morning that he too was alert to that issue.

In his report he describes both Laura and David. Laura is nearly nine and David is seven. They are both sensible and intelligent children and, having regard to what I know of them, I hold that they have attained an age and degree of maturity at which it is appropriate for me to take account of their views. Moreover in distinguishing between the views of the children about a future with their father as distinct from a future in Germany, or at least a return to Germany, it seems to me that both children do plainly and sincerely object to being returned to Germany. I have borne in mind that at the time that Mr Israel wrote his report, and indeed gave his oral report this morning, he was of the view that this mother, albeit surprisingly, had declared herself as unwilling to return to Germany with the children should the court order their return. I hold that both Laura and David do object to being returned to Germany and have attained an age and degree of maturity at which it is appropriate for me to take account of their views.

Accordingly it falls to me to exercise the discretion vested in me by Article 13, and I remind myself once again of the observations of Mrs Justice Bracewell and Lord Justice Neill. It certainly was in my judgment wholly wrong of the mother to remove the children from the country which had been their home for four-and-a-half years, but it seems to me that in the situation in which the children now are, rather than in the situation in which the children should have been had the mother acted responsibly towards them on the 1st December,

1990, it would be wrong for the children -- Laura and David -- to be returned to Germany.

I have found that a difficult judgment to make because it seems to me that in contrast to the mother the father has acted lawfully throughout. An observer of this case might be forgiven for thinking that it was yet another example of a law-breaker, putting it colloquially, "getting away with it". It is the fact that having dealt with a good many of these cases under The Hague Convention this is the first time that I have exercised a discretion not to order the return of children. I am very much alive to the policy considerations which underpin this Convention and the two judgments to which I have previously referred.

In relation to this fourth objection made by the mother, I have of course considered only Laura and David. Christian is not, in my judgment, of an age and degree of maturity in which I should take account of his views, so that it seems to me that this basis of objection by the mother, which I have upheld in relation to Laura and David, cannot be upheld in relation to Christian, so that I find myself, at least initially, in the position where I would not order the return of Laura and David to Germany but that I would find there to be no sustainable objection to the return of Christian. However, it is plain that these children have always lived together, and I accept the statement in his oral report this morning from Mr Israel that Christian would be devastated to be separated from Laura and David. Accordingly, whilst I have rejected the mother's case on the other part of Article 13, namely that the children would suffer psychological or physical harm or be placed in an intolerable situation, I have no difficulty in holding that Christian would be exposed to psychological harm and would be placed in an intolerable situation if he were returned to Germany and Laura and David were not. Accordingly it falls to me to exercise the discretion conferred on me by the opening words of Article 13, and by that circuitous route I conclude that Christian too shall not be returned to Germany.

There is before me only an application under The Hague Convention. Were the children to have been made wards of court and were I to have been asked to order the return of the children under the inherent jurisdiction of the English court, then I would have sought to follow the dictum of Lord Justice Balcombe that in such cases one should follow the principles established by The Hague Convention and I would not have ordered the return of these children.

Turning to the practical results of my judgment, the future of these children remains to be determined. It may be that their future lies with their mother, perhaps in England or perhaps in Germany, or perhaps their future lies with their father. Those are matters that remain undecided. However, it seems to me that because of the international aspect of this case which has given rise to the present application, it would be appropriate for the custody proceedings in the County Court at Bury to be transferred to the High Court and, in particular, to the Manchester District Registry, for them to be heard by a judge of the Family Division and not to be released for hearing by a circuit judge under Section 9 of the Supreme Court Act without a specific direction from Mr Justice Douglas Brown, who is the Family Division liaison judge for the Northern Circuit.

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

For questions about this website please contact : The Permanent Bureau of the Hague Conference on Private International Law