http://www.incadat.com/ ref.: HC/E/UKe 61
[29/07/1996; High Court (England); First Instance]
Re R. (Abduction: Hague and European Conventions) [1997] 1 FLR 663

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

16 August 1996

Russell, Aldous, Ward LJJ

In the Matter of R.

Marie Claire Sparrow for the paternal grandparents

Simon Gill for the mother

WARD LJ: This is an appeal against the orders made by Hale J on 29 July 1996 when on hearing an application under the Child Abduction and Custody Act 1985 she ordered, first, that the application under the Hague Convention for the return of the child, A, to Switzerland should be dismissed and then, secondly, refused to register for enforcement in England under the European Convention an order of the Chamber of Tutelage, dated 21 November 1995, placing A with her paternal grandparents and affording her mother defined visitation rights in Switzerland.

The background to this case can be quite shortly stated. A was born on 10 February 1986 and so she is a child of 10 1/2 years of age. Her parents are Swiss. They married in Switzerland in 1985, lived in Switzerland and divorced there in 1991. Parental authority and custody were awarded to the mother in the divorce proceedings in Switzerland with contact being given to the father. A made her life with her mother and an elder half-brother Y. Life was not entirely happy because there appear to have been protracted and persistent disputes between the parents, particularly with regard to money matters. This high level of intransigence between the parents seems to have taken its toll upon the mother and concern grew late in 1994 and into 1995 about the effect these difficulties were having on her caring for A. They resulted in the Swiss courts being approached in January 1995 when the Tutelary Court nominated the Tutor General as guardian of A for the purpose of giving help and advice to the mother and to organise and monitor the right of access which father enjoyed.

In a later letter to the Swiss Central Authority to explain the reasons for her appointment, the Tutor General referred to a report from the Department for the Protection of Youth, saying:

'. . . this report refers to the tension between the parents which ".. are extreme and very disturbing for the daughter"; ". . . the placement of [A] and her half-brother with their mother has shown itself to be problematic (children handed over to third parties, left to their own devices, etc); and this in conjunction with the personal difficulties of [the mother]"; finally, ". . . this situation raises concern that [A] is growing up in conditions which are unstable and give rise to insecurity".'

By October 1995, the matter had deteriorated so far that A was apparently then refusing to obey her mother and was not regularly attending school. The mother was making suicide threats. The school were increasingly concerned because A did not really know where she was going to get her next meal. A boyfriend had come into the life of the mother who now lived with him in a bedsitter which was of course cramped accommodation. The position reported by the welfare assistant on 31 October 1995 was this:

'In fact, [the mother] has no job now, no known place of residence and, as she was able to indicate to us, the new marriage she anticipates represents the only solution to her problems. Amid such confusion, she is once again unable to really listen to her daughter. The actual well-being of the latter is poorly felt by [the mother], who keeps feeding the conflict with her ex-husband and the grandparents with various grievances and repeated crises and maintains a most worrying climate of aggression and insecurity.'

Matters therefore came to a head some time towards the end of October or early in November 1995 when the mother came to the sad conclusion that she could simply no longer cope with caring for this little girl and, probably at A's own suggestion, made arrangements for the paternal grandparents to care for her. That practical arrangement was sanctioned by the Swiss court who took interim steps on 1 November 1995 and then on 21 November 1995 made the order which the grandparents now seek to enforce. That order was to the effect that A be placed with the paternal grandparents, subject to the mother's visitation rights.

Even then matters did not improve as might have been hoped. The mother's contact was suspended in December 1995, partly based upon fears that the child would not be well looked after and partly based upon a fear, since realised, that the mother was intending to settle in this country with her new partner. Contact was, however, resumed on 1 March 1996. The mother married that new partner who is an Englishman who had been working as a chauffeur to a Swiss lawyer. The child did not attend that wedding, though it is unclear whether that was because of a decision taken by her or obstruction by the grandparents. Be that as it may, contact took place fortnightly. On the occasion of the second visit after its resumption at the end of March 1996, the mother, the new husband and A all came to the West Country of England and have remained here ever since. In those circumstances the grandparents launched their proceedings under the 1985 Act, seeking the return of A to Switzerland; alternatively seeking the due enforcement of the Swiss order of 21 November 1995.

The issue thus joined is concentrated, first, upon the effect of the Hague Convention because the European Convention does not apply if there are pending proceedings under the former. The spirit of the Hague Convention is, of course, now well established. If there has been a wrongful removal of a child across international borders, and it is found by the Swiss court that there has been, and it is conceded by the mother that there has been, then the spirit of the Convention requires that the child is summarily returned to the country which is the country of habitual residence because there the court is best able to take proper decisions as to the future of the child.

There are, however, provisions in Art 13 which give the court limited powers to refuse to return the child on grounds of acquiescence or grave risk that the child would be exposed to harm or otherwise placed in an intolerable position if return were ordered. But Art 13 goes on in these terms:

'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.'

The mother in this case has sought to resist the application for return, basing her objections both to the grave risk of harm and to the declared wishes of the child not to be returned to this country. The judge, Hale J, dealt first with the question of the child's wishes. She correctly addressed herself in accordance with the law established by this court in Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242, sub nom S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492. Balcombe LJ said at 250D and 499E respectively:

'. . . there is no warrant for importing such a gloss on the words of Art 13, as did Bracewell J in Re R (A Minor: Abduction) [1992] 1 FLR 105 at pp 107-108:

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

Accordingly the task for the court is to give the words their literal meaning without attributing that gloss to them. The second important point to be drawn from Balcombe LJ's judgment in Re S at 250H and 500B respectively is this:

'The questions whether:

(i) a child objects to being returned; and

(ii) has attained an age and degree of maturity at which it is appropriate to take account of its views; are questions of fact which are peculiarly within the province of the trial judge.'

It is also important to observe that the child's views are to be views expressing: 'objection to being returned' and it is therefore to that that the inquiry must be addressed rather than the issue of whether or not the child wishes to continue to live with the parent who has wrongfully removed him or her. Those two matters may of course be very closely linked with each other.

The judge having correctly addressed herself to the proper principles to apply, considered first whether there was objection taken by A to returning to Switzerland. The views of the child had been ascertained by the qualified social worker, a member of the local panel of guardians ad litem who are experienced, as the social worker is, in representing children in care proceedings in this country. The social worker visited the family on three occasions. It was on the first that she was able to gauge the views of A, both in discussion when other members of the family were present but more importantly also when she and the child had the opportunity in the privacy of her bedroom to take some sounding about how she felt and what she felt.

The social worker concluded as follows:

'A was sunny and happy on the first occasion I met her. She was relaxed and understood my role of helping the judge understand what she hoped for. She was quite clear that she was happy in England with her mother and [B -- the new husband] and that she did not wish to return to Switzerland. She said that she would like to see her father regularly but gestured that this would be difficult as things stand . . . It was clear even at this first meeting that she did not want to discuss anything to do with any positives or negatives of her life in Switzerland and became very unhappy when I suggested she do so. She scowled and muttered, "I'm not going back there".'

The social worker gave evidence to the court and was questioned both by counsel and by the judge herself. In answer to the judge's questions the social worker said this:

'. . . it was when I started to talk of her returning that she became so distressed. You could also interpret it that it was just too painful to talk about an experience that she was away from now, but her comment about "I'm not going back there" was very surly.'

She also made reference to a drawing done by the child in which the grandparents were featured at some remove from her mother, her stepfather, her real father and others much closer to her. The judge was impressed by the social worker. She found that she had taken a great deal of time and trouble with her inquiries to establish an understanding with A. She accepted that whatever the cause, her distress and tension were evident and the gauge of her strong wish to remain in the care of her mother. She had clearly indicated by her surly responses her attitude to return to Switzerland. The judge therefore found that A had in fact expressed an objection to return to Switzerland. The judge then asked the next appropriate question: 'Has she reached an age and maturity at which those wishes are to be taken into account?' She concluded that the evidence of the social worker was again reliable. She had found that A was an intelligent child. She had settled well in her English school where she was regarded as of grammar school potential. She was also a mature child and had become so because of her experience and awareness of adult issues but she was not inappropriately adult. The judge therefore came to a conclusion that A was of an age and maturity where it was appropriate to take those views into account. Those were matters of fact for her to find. There is no room in my judgment for finding that those essential matters of fact were in any way wrongly reached by the judge so as to be plainly wrong and her findings in that regard are, in my judgment, to be supported.

That left the judge with the task of deciding as an exercise of judicial discretion whether or not to give weight to those wishes or to overrule them. She began that balancing exercise by saying that one of the countervailing factors to be weighed in the balance against what the girl had said was undoubtedly the policy of the Hague Convention itself which she described in these terms:

'This is that children who have been wrongfully removed from the country where they are habitually resident should generally be returned there as soon as possible so that their futures can be decided there. This is a particularly powerful factor in a case like this, where the child is Swiss and has lived in Switzerland all her life, where both her parents and their relatives are Swiss and where the Swiss courts have already assumed jurisdiction over her future.'

It seems to me that that is a perfectly proper and correct direction as to the weight to be given to this important factor. It is important that the spirit of the Convention be honoured and, in my judgment, the judge has directed herself impeccably. It is submitted to us that she failed to give proper weight to the fact not only that these are Swiss parties, that this is a Swiss child, that she has been uprooted from the country in which she has grown for 10

years and that she should be removed urgently before the roots are established here. It is pointed out that in this particular case the Swiss court has undertaken its proper task of appointing the Tutor General as A's guardian and accordingly the Swiss court has maintained a constant surveillance of her progress during the operation of the grandparents' care of A. It is submitted forcefully that the Swiss court is therefore uniquely placed to consider where the child's future lies and that this court should be slow indeed to interfere.

There, too, the submission found favour with the judge who said:

'This is a powerful point and in many cases would persuade the court that it should exercise its discretion in favour of return.'

Again the judge approached the question correctly. She considered, however, the material which had been received from the Swiss authorities and she correctly analysed that their intervention had come about in the context of conflict between the parents, the mother's financial difficulties, for which the father acknowledged some responsibility, as well as the mother's difficult and fragile situation at the end of 1995. She concluded that those difficulties had been attended to in this country. She said:

'The independent evidence of [the social worker] is that there are no such concerns in A's situation at the moment. Her present situation is not ideal because the accommodation is temporary and there are other matters which will require proper investigation in due course, but the immediate position is, as reported by [the social worker], that she [A] appears to be thriving and happy.'

The judge then correctly looked to the reason for the child's objections, taking particular care to investigate whether they had been influenced by the abducting parent or the step-parent and to what extent they genuinely reflected what the girl wished for herself. The judge was satisfied that the social worker had had ample opportunity to explore that and she was satisfied that the wishes were a natural reflection of real feelings untainted by any adverse pressure exerted by the adults who surrounded her.

The objection is taken that the mere presence of the parents was itself a form of pressure. In my judgment the judge correctly warned herself of the dangers and did not misdirect herself. It is submitted that the wishes were not fully explored because the social worker has a limited command of French and the child herself an even more limited command of English. It is submitted that it would have been proper to have had an interpreter. Those were matters born in mind by the judge and she concluded that the social worker was well able to conduct the interview to her satisfaction, the social worker's satisfaction, and therefore to the satisfaction of the judge.

Accordingly, the judge concluded:

'The balance of these factors indicates that her views and objections should be taken into account and that she should not be summarily returned to Switzerland without the fuller inquiry which cannot take place in Hague Convention proceedings.'

That was a decision reached after balancing the factors properly put in the scales and I have seen or heard nothing from Mrs Sparrow to make me inclined to the view that the judge was plainly wrong which is the steep hurdle Mrs Sparrow has to surmount to succeed on an appeal against an exercise of discretion. The judge then turned to the second issue which was whether or not the Swiss order should be registered under the European Convention. The objection can be taken to registration under Art 10(1)(b) of the Convention:

'if it is found that, by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child; . . .'

One must also read Art 15(1) which provides:

'Before reaching a decision under paragraph (1)(b) of Article 10, the authority concerned in the State addressed:

(a) shall ascertain the child's views unless this is impracticable having regard in particular to his age and understanding; and

(b) may request that any appropriate enquiries be carried out.'

The essential task under Art 10(1)(b) is, therefore, to establish what the circumstances were at the time of the original decision and then to ascertain whether or not there had been any change in those circumstances including the passage of time, but not including the mere change in residence of the child after improper removal. That task was properly undertaken by the judge. She defined the position prevailing as at 21 November 1995 by this summary:

'Up until the beginning of 1995 it appeared that the mother was managing well enough but by November 1995 she could not provide a proper home for her children. She was without both financial and emotional support. This was not doing her relationship with her daughter any good at all. Placement with the grandparents was an obvious solution, albeit one which the child saw as temporary.'

She then found that there had been these changes:

'The main change is that the mother has remarried. This has transformed the situation. She has found someone who can and does support her both emotionally and financially. It is, of course, a relatively new and untested relationship and it is the mother's third marriage. But the evidence is that A likes her stepfather and he has certainly behaved very responsibly towards his new family so far, apart perhaps from facilitating their removal from Switzerland in breach of a court order. He found a job very soon after they came to England and his family is obviously helping them. Hence, the circumstances which led to the court deciding and the mother agreeing that the family group of mother and children should be separated and other arrangements made no longer exists. This is far more than simply a change in residence as the result of the wrongful removal.'

I can see no error in that approach at all. The words of Art 10(1)(b) require that comparative exercise to be undertaken. A change in the residence of the child may not be taken into account if it is the sole change that has taken place. But if it is not the sole change and there are other factors then a change of circumstances may be coupled with those other changes. Here the other changes seem to me to be manifest and obvious. This was a mother who was in deep depression, given the intractable difficulties over contact and her straitened financial circumstances. Her handing over the care of her children was always regarded as a short-term expedient as is recorded in the judgment of 21 November 1995:

'Whereas the Tutelage Chamber, before the Delegate Judge on 10 November 1995, heard [mother] indicate she in no way opposed the withdrawal of custody and the provisional placement of [A] with her paternal grandparents and that she would request reinstatement of her daughter's custody when she was sure of her financial position and had secure employment which would give her a regular, fixed and also decent income in addition to

more spacious accommodation in order to be able to care for [A] under good conditions. She confirmed she had a large number of financial problems which concerned her greatly which did not allow her to care for her daughter as she would have liked since she did not have the necessary means.'

That was her view when she made the arrangements for the grandparents to take control. The Swiss court had been alerted by a letter dated 31 October 1995 to the possible remarriage and the welfare authorities reported to the court in these terms:

'In fact, [the mother] has no job now, no known place of residence and, as she was able to indicate to us, the new marriage she anticipates represents the only solution to her problems.'

So the court were aware of an impending marriage. The English court was well placed to establish whether the marriage which had taken place had beneficial effects. The judge found there was a supportive new husband. He was supporting her emotionally and financially. The stability which she craved had now been afforded to her. The restoration of her well-being had the consequent beneficial effect on her ability to give due and proper care to her daughter's welfare untrammelled by the worries of financial difficulty. In every respect therefore there had been an improvement of the kind which the Swiss court had put her on notice was required if she were to seek to resume care of the child. In my judgment there was ample evidence to justify the finding that there were sufficient changes to bring Art 10(1) into operation. The question then was whether or not the changes had the effect that the original decision was manifestly no longer in accordance with the welfare of the child. It would be manifest, if it was plain and obvious to the eye or to the mind, that these changes had taken place and had materially transformed the position compared with the time when care was given to the grandparents. The evidence before the judge was that A was thriving and happy, getting on well at school, had her necessary ophthalmic needs attended to so that she had been discharged from the care of the consultant who had seen her. She maintained proper affection for her father to whom she was writing and it was obvious to the judge that to return her to Switzerland thereby separating her once more from her mother, who cannot return to Switzerland without fear of arrest and to place her again in the care of her grandparents, was a matter so distressing to the child that she could not cope with that possibility.

The judge came to the conclusion that it was manifest that the child's welfare demanded she stay where she is. She had the benefit both of the report from the Swiss authorities and a full report from the social worker. She had not asked specifically that the social worker report on those general matters affecting welfare, but the social worker had, perhaps out of habit, approached her inquiries with reference to the checklist factors which bear upon welfare as determined by the Children Act 1989. She reported that in her opinion:

'It may be that the least harmful outcome for A is to have her care settled and no longer to be the subject of litigation.'

She found:

'There are no signs in A's current situation that her care by the adults responsible for her is anything less than competent.'

She reported on the child's wishes in the terms I have already read. She stated:

'Whatever the cause [of her unwillingness to explain why she did not wish to return to Switzerland] her distress and tension were evident and are a gauge of her strong wish to remain in the care of her mother . . . She cried and said she was fed up with questions.'

Of her needs the social worker reported that A looked:

'. . . healthy, happy (apart from when discussing these proceedings) and well nurtured.'

The school report was that she was:

'. . . always clean and smartly turned out and seems well cared for and well supported. Her school described her . . . "as a socially well adjusted child" relating to her classmates and making very good academic progress within the restraints imposed by studying in a different language.'

She reported:

'From my observations and from those of adults in the family and school staff A has a close and apparently happy relationship with her mother. They are affectionate and very responsive to each other and share a sense of humour and fun.

A has struck up a close relationship quickly [with her stepfather] and is very enthusiastic about him.'

She concluded:

'There is nothing I have seen and heard of her present care that has given rise to [the concerns which were the worries of the Swiss authorities].'

Based upon those passages the judge was fully entitled, in my judgment, to conclude that it is now manifest that the child's welfare is better served leaving her here than by giving effect to the Swiss order made in November 1995.

Consequently, and by way of conclusion, in this case the judge has at all times correctly addressed the principles which were to be applied to govern her decision. She correctly put in the scales the matters that ought to have been put in the scales. She gave due and proper weight to them as was appropriate. The balance to be struck was a matter which was for her discretion. Some judges may not have concluded as she did, but I, for my part, cannot see that she was plainly wrong and there is no room, in my judgment, for an argument that she has exceeded the generous ambit within which reasonable disagreement is possible. It follows therefore that, in my judgment, the appeal should be dismissed, but I add this postscript. Nothing in this case should be taken to be in any sense a dilution of the importance that the courts of this country give to upholding the spirit both of the Hague and the European Convention. Child abduction across international frontiers remains a sore which results in great harm to children and these courts will continue to honour fully and properly the spirit and detail of each of these Conventions. In my judgment the judge did so in this case, even though her conclusion is that the child remains here.

I would therefore dismiss the appeal.

ALDOUS LJ: I agree.

RUSSELL LJ: I also agree.

[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