---

http://www.incadat.com/ ref.: HC/E/UKe 87
[07/07/1992; Court of Appeal (England); Appellate Court]
Re S. (A Minor) (Abduction: Custody Rights) [1993] Fam 242, [1993] 2 WLR 775, [1992] 2 FLR 492, [1993] FCR 12, [1993] Fam Law 212

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

11 July 1992

Glidewell, Balcombe LJJ, Boreham J

In the Matter of S.

Lord Justice Balcombe

This appeal, from an Order of Ewbank, J. made on 17 January 1992 whereby he dismissed an application under the Hague Convention on the Civil Aspects of International Child Abduction for the return to France of a 9-year old girl, raises once again a question under Article 13 of that Convention. The judgment that follows is that of the court and we repeat the direction given during the course of the hearing that nothing should be published which may identify the child concerned.

The child, C.S., was born on 9 August 1982. Her mother is English, aged 48; her father is French aged 46. The father is a petroleum engineer whose work takes him to many parts of the world. The parents met in Indonesia, where the mother was working as a secretary with the United Nations. They married in England in 1979. When the mother became pregnant with C.S., their only child, they were living in Borneo. The mother came back to England for her confinement, and spent a few months in England after C.S.'s birth, but then returned with C.S. to the father in Borneo. In September 1984 the family moved to Paris, France; in September 1985 the family moved to Harstad, Norway. In November 1986 the family moved back to Paris and C.S. spent two months in a French school; in February 1987 C.S. attended a French school; in February 1987 they moved to Stavanger, Norway. From February to June 1987 C.S. attended a French school in Norway; from September 1987 until they left Norway in March 1991 C.S. attended the Stavanger British School. In March 1991 the family returned to Paris as their home where they lived in a flat in the Place des Vosges; there is also a house at Maisons-Laffitte, just outside Paris. Apart from the short time after her birth, and for occasional holidays since, C.S. has never lived in England.

Unfortunately C.S. has long-standing psychological problems. These have manifested themselves in speech difficulties -- stammering and stuttering -- and it was as a result of the advice of a French speech-therapist that C.S. should be educated in her stronger mother tongue (English) that C.S. was moved to the British School in Stavanger. This advice has been confirmed by the reports of the psychologists, both French and English, which were put

in evidence by the mother. These reports shows that C.S. has a high IQ and the mental age of a child of 12; she also suffers from dyslexia, although the problem is not acute.

On the family's return to Paris in March 1991 C.S. was sent to the local school near the flat in the Place des Vosges, and she attended that school until the mother brought her to England on 24 November 1991. A letter from the headmistress of that school, addressed to whom it may concern, was also in evidence, from which it is clear that C.S.'s speech and other problems were very apparent to the headmistress, and that C.S. was also affected by the dissensions between her parents. The marriage had been in difficulty for some years and by the autumn of 1991 the parents were ready for a divorce. On the advice of their lawyers they entered into a voluntary deed of separation, which provided that the mother should live in the Paris flat with C.S., while the father should live in the house at Masons-Laffittes, with an unimpeded right of access to C.S.. The deed made provision for the financial maintenance by the father of the mother and C.S.. The deed was signed on 7 November 1991 and in accordance with its provisions the father moved out of the Paris flat on Saturday 9 November 1991. On the same day he gave the mother a cheque for 6,000 French Francs, maintaining that a third of the moth had already elapsed. Whether or not this was correct, the fact is that the mother had run out of money by 22 November. The father refused to give her more, the mother sold her rings for about 250 pounds, and she then decided to leave France with C.S.. This she did on Sunday 24 November, and she came to England, to the Southampton area where her family lives, to a house forming part of the estate of her deceased mother and which belongs beneficially to her sister and herself. She immediately put C.S. into the local junior school, and that position has continued up to the present time.

On 20 December 1991 the father made an application for the return of C.S. under the Child Abduction and Custody Act 1985, by which the provisions of the Hague Convention are incorporated into our domestic law, and it was that application which came before Ewbank, J. on 15 January 1992 and which resulted in the order from which the father now appeals. Before the judge it was common ground, as it was before us, that the mother's removal of C.S. was wrongful under Article 3 of the Hague Convention, and that prima facie the Court was bound to order the immediate return of C.S. to France under Article 12. The issues before the judge were whether he had a discretion not to order C.S.'s immediate return under Article 13, and, if so, whether he should exercise the discretion in favour of allowing her to stay here. The two grounds under Article 13 upon which the mother relied were:

(i) under paragraph (b), that there was a grave risk that C.S.'s return would expose her to psychological harm. The judge rejected this ground and, although it was raised again by the mother in her respondent's notice on the appeal, as well as an alternative ground under paragraph (b) that C.S.'s return would place her in an intolerable situation, these grounds were expressly abandoned before us by the mother's counsel, Mr. Alla Levy, Q.C. Accordingly we do not consider them further.

(ii) That C.S. objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of her views. This was the ground upon which the judge relied in refusing to order C.S.'s return to France.

The mother's affidavit was largely devoted to C.S.'s psychological problems and her learning and language difficulties but it included the following passages:

"On many occasions C.S. has indicated to me that she does not wish to return to France . . . C.S. has expressed extremely strong feelings about returning to France, and she has an age and degree of maturity where it would be appropriate to take account of her views."

There was no independent evidence of C.S.'s views, but the judge was invited to see C.S.. He took the view that it would not be appropriate for him to do this, but he asked the duty Court Welfare Office, Mrs. Varley, to do so. Mrs. Varley had a long interview with C.S. and gave her report orally in evidence to the Court. In view of the importance of this report we set out below the relevant passages form the transcript of Mrs. Varley's evidence:

"I saw C.S., my Lord, in my office on her own and I would say as a preamble that she is a very fluent and sophisticated conversationalist. It was very easy to interview this child, so much so that she would see the drift of my question and pre-empt them with an answer. I would sum up what she said to me in her own words. She said would I tell the judge really, really strongly that she does not want to go back to France. She does not want to go back to France because she feels great in England, was how she put it.

Q. [Mr. Justice Ewbank] She feels great in England?

A. Yes. She had obviously had a miserable experience going to school in France, from her own account. She said she felt awkward and like a fish out of water at a French school. She tried to illustrate that by saying that 'Two won't go into seven'. That was her way of illustrating that, that she felt so out of place. She said that being forced to speak in French, she thought, brought on her stammer which made her feel bad. She illustrated on how going from France to a holiday in England her stammer had almost miraculously gone at the airport, and she sees that as a sign of how much happier she feels speaking English. She felt under pressure, she said, from her father while she lived in France, to I suppose, do some sort of remedial work to catch up in the French school system and so that was a sad experience for her too. She made a very, very emotional plea that she feels more at ease in England and she feels it is more natural for her to speak English and to be be English . . . . .

Q. Did you have any feeling that the view she was expressing, an impassioned plea put into her mouth by her mother or was she expressing her own views?

A. I certainly did not think they were rehearsed, my Lord. She was able to separate, when I led her that way, the feelings of a parent and as a child. She could appreciate that children are influenced by their parents' views, but she seemed to feel quite strongly that she was not.

Q. Did you think that she was mature enough for her feelings to be taken into account by this Court?

A. Well, she is certainly intellectually mature enough to know what the situation is that she is in. Emotionally she is still a child of that age. She is still emotionally very fragile.

Q. But would you give weight to her views?

A. Yes, I would. I think she feels very strongly a dread of going back to France and she feels more comfortable in England."

In the light of the arguments that were presented to us by Miss Patricia Scotland, Q.C. on behalf of the father, it will be convenient to record that the mother, in her evidence, accepted that it would be appropriate for C.S. to spend prolonged periods of staying access with the father in France, and also to set out certain passages from the father's oral evidence:

Q. (In chief) You have heard the oral report of the Court Welfare Officer this morning, have you not?

A. (No audible reply).

Q. Is there anything that you want to say about that, having heard it?

A. No. I am happy to know anyway that C.S. is happy to be in England, this is for sure -- is happy to be at an English school rather than a French school. If she is doing well, I am happy for her.

Q. But is it still you wish ----

MR. JUSTICE EWBANK: I do not quite follow what you mean by that. 'If she is doing well, I am happy for her'. You do not mean you are happy for her to stay here?

A. No. Because I still think that a father/daughter relationship is more important than feeling better at school. . . .

Q. (Mr. Setright) You have already dealt with accommodation. What education would be available to C.S.? Where would she go to school?

A. The French school was chosen because it was conveniently 100 meters from the flat. It was where our daughter had been a couple of months before, four years ago.

Q. The same school that she had been in some years before?

A. That is right. But if she prefers to go to British school, if it is that important, we can always try to find a solution, Paris is a big town and there are possibilities for C.S. to go to a fully or partly English-speaking school.

Q. Have you done any research into that?

A. I have contacted a British school but it is not conveniently located fro the flat in Paris of the house in Maisons-Laffitte.

Q. About how far away is it?

A. I have made some investigation and they would be ready to accept our daughter provided they have an interview with the parents before.

Q. How far away from the Place des Voges is that?

A. I would say it is a good hour and a half's travel one way.

Q. But there are some other English schools which you have not investigated?

A. In Maisons-Laffitte there are schools where there is possibility to follow English even at a small age. There is an Anglican church. There is Brownies. There is quite a small active British community.

Q. So far as C.S.'s future is concerned, what language or languages had you and your wife felt that she should speak?

A. It is important that she has both British and French, so it is important that she keeps both languages.

Q. Despite the stuttering difficulty, does she speak French?

A. Yes . . . .

Q. In your view, and of course it is only your view, knowing C.S. and knowing your wife and knowing the living circumstances in France, do you think it would be very distressing and difficult for C.S. to come back to France now?

A. I would have said no but I was probably somewhat shaken by the lady's report this morning.

Q. If she came back, is there anything you think you could do to reassure her?

A. My daughter?

Q. Yes.

A. For sure I will tell her that she can count on me, that I love her. If she wants to do something, if she wants to live in Place des Vosges she can live in Place des Vosges. If she wants to life in Maisons-Laffitte, she can live in Maison-Laffitte. I mean, this is the only daughter we have. We live for our children and I do not want to do something which can hurt her and. . "

Subsequently the father gave evidence which seems to indicate that he had not previously appreciated that C.S.'s problems were attributable to her having to speak French and attend a French school. However, when the direct question was put to him, he answered in the following passage:

Q. But you being a concerned father, as you have made plain to this Court, so far as C.S. being at a French school in Paris is concerned, you have seen the report from that school.

A. True

Q. In that report it shows or indicates that C.S. was not very happy?

A. I am ready to try to find a better school. What I would say, I think big city centres are not the proper place to raise children."

We were also told that, in his final submissions to Ewbank, J., Mr. Setright offered the following undertakings on behalf of the father, if C.S. were returned to France:

1) The father would allow the mother to remain in the flat in the Place des Vosges separate and apart from him and to have care and control of C.S..

2) C.S. would go to an English-speaking school.

3) The financial arrangements in the deed of separation would continue.

The reasons for the judge's decision are contained in the following passage from his judgment. After recording the effect of Mrs. Varley's evidence, and mentioning Dr Hales' assessment of C.S.'s mental age as being about 12, he said:

"Accordingly, I have to decide whether the age and maturity of C.S. makes it appropriate that I should take account of her views. To some extent, of course, I have to see what those views are and what they entail. It seems to me that the view she has put forward, looking at the whole circumstances of her life, is a mature and rational view which seems to be based on genuine and cogent reasons. I would go further and say that I think it is probably in her best interests. I am not entitled under the Hague Convention to consider the best interests of the child in the ordinary way, but in deciding whether the views are mature, if they coincide

with what seems to me to be the best interests of the child, I am entitled to take them into account in assessing her maturity. In my view the view she has formed is an intelligent and sensible decision. Accordingly, I am in a position where I may refuse to order the return on that ground. Since my own preliminary assessment of the case is that, at any rate, at this stage C.S. should remain in England with her mother, I refuse to make the order under the Hague Convention."

The arguments which were addressed to us fell under three distinct heads, although they were not so conveniently separated in the submissions of counsel:

1) The construction of Article 13 so far as it relates to the child's objection to being returned. For convenience, future references in this judgment to Article 13 are to be taken as referring only that part of the Article unless the context otherwise requires.

2) The establishment of the facts necessary to "open the door" under Article 13.

3) The factors relevant to the exercise of the discretion under Article 13 once the door is opened.

Before we turn to consider these arguments it will be convenient to set out the relevant provisions of Article 13 as set out in Schedule 1 to the Child Abduction and Custody act 1985:

"Article 13

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

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

1. The construction of Article 13

a. It will be seen that the part of Article 13 which relates to the child's objections to being returned is completely separate from paragraph (b), and we can see no reason to interpret this part of the Article, as we were invited to do by Miss Scotland, as importing a requirement to establish a grave risk that the return of the child would expose her to psychological harm, or otherwise place her in an intolerable situation. Further, there is no warrant for importing such a gloss on the words of Article 13 as did Bracewell, Jr. in Re R. (A Minor: Abduction) [1992] 1 F.L.R. 105, at p. 107:

"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 reeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."

Unfortunately Bracewell, J., was not referred to in the earlier decision of Sir Stephen Brown, P. in Re Moncrief (Minors) on 25 June 1990 (unreported) in which he rightly considered this part of Article 13 by reference to its literal words and without giving them any such additional gloss as did Bracewell, Jr. in Re R.

b) As was also made clear by the President in Re Moncrief (supra), the return to which the child objects is that which would otherwise be ordered under Article 12, viz. an immediate return to the country from which it was wrongfully removed, so that the courts of that country may resolve the merits of any dispute as to where and with whom it should live; see in particular Article 19. There is nothing in the provisions of Article 13 to make it appropriate to consider whether the child objects to returning in any circumstances. Thus, to take the circumstances of the present case, it may be that C.S. would not object to returning to France for staying access with her father if it were established that her home and schooling are in England, but that would not be the return which would be ordered under Article 12.

2. The establishment of the facts necessary to "open the door" under Article 13,

a) The questions whether

(i) a child objects to being returned; and

(ii) has atained an age and degree of maturity at which it is appropraite to take account of its views;

are questions of fact which are peculiarly within the province of the trial judge. Miss Scotland submitted that the child's views should not be sought, either by the court welfare officer or the judge, until the evidence of the parents has been completed. We know of no justification for this submission. She also asked us to lay down guidelines for the procedure to be adopted in ascertaining the child's views and degree of maturity. We do not think it is desirable that we should do so. These cases under the Hague Convention come before the very experienced judges of the Family Division, and they can be relied on, in those cases where it may be necessary to ascertain these facts, to devise an appropriate procedure, always bearing in mind that the Convention is primarily designed to secure a speedy return of the child to the country from which it had been abducted.

b) It will usually be necessary for the judge to find out why the child objects to being returned. If they only reason is because it wants to remain with the abducting parent, who is also asserting the he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion.

c) Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. Nor should we. In this connection it is material to note that Article 12 of the U.N. Convention on the Rights of the Child (which has been ratified by both France and the United Kingdom and had come into force in both countries before Ewbank, J's judgment in the present case) provides as follows:

"Article 13

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provide the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

d) In our judgment no criticism can be made of the decision of Ewbank, J. to ascertain C.S.'s views, nor of the procedure which he adopted for that purpose. There was evidence which entitled him to find that C.S. objected to being returned to France and that she had attained an age and degree of maturity at which it was appropraite to take account of her views. Those are findings with which this court should not interfere.

3. The exercise of the discretion under Article 13.

a) The scheme of the Hague Convention is 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. That discretion must be exercised in the context of the approach of the Convention - see In re A (Abduction: Custody Rights) [1992] 2 W.L.R. 536 per Lord Donaldson of Lymington, M.R. at p. 550.

b) Thus if the court should come to the conclusion that the child's views have been influenced by some other person, e.g. the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention. Thus in the case of Layfield in the Family Court of Australia on 6 December 1991, Bell, J. ordered and eleven-year old girl to be returned to the United Kingdom because he found that, although she was of an age and degree of maturity for her wishes to be taken into account, he believed that those wishes were not to remain in Australia per se, but to remain with her mother who wrongfully removed the girl from the United Kingdom to Australia. On the other hand, where the court finds that the child or children have valid reasons for their objections to being returned, then it may refuse to order the return. This in Re Moncrief (supra) the court refused to order the return of three children aged 11, 9 and 8 to America. In the course of his judgment the President said:

"I am, however, concerned for the children. I find that they do object to being returned and that each of them has attained an age and a degree of maturity at which it is appropraite to take account of their views. I feel that I must take account of their views. Their views are not however determinative of the position and I have to consider how far they should affect me.

I feel that I should give effect to their objection in this case in the light of the fact that they give valid reasons, in my judgment, for objecting to going back to America into the care of their father, because of his former conduct. I consider that he has materially admitted this. I do not therefore propose to order their return. That is the sole extent of the order that I make. I do not determine custody rights or access rights or any other rights as between the parties. But in the light of the children's objections to being returned, I decline to order the return under the terms of the Convention and the provisions of the Child Abduction and Custody Act 1985."

A similar result was reached in the Canadian case of Wilson v Challis where on 19 March 1992 His Honour Judge Foran sitting in the Ontario Court (Provincial Division) East Region and following the decision in Re Moncreif (supra) refused to order the return of an eleven-year old boy to his father in England for what appeared to be good and valid reasons.

c) In the present case C.S. objected strongly to being returned to France. Her reasons, as given to Mrs. Varley, had substance and were not merely a desire to remain in England with her mother. This court cannot interfere with the judge's exercise of his discretion unless he took into account some irrelevant fact, left out of account some relevant factor, or was plainly wrong -- see G. v G. [1985] 1 W.L.R. 647. It could not seriously be suggested that Ewbank, J. took into account any irrelevant factor. However, he did not, in the course of his judgment, mention the father's undertaking that, if C.S. were returned to France she would attend an English-speaking school. Since this undertaking has been offered by Mr. Setright on behalf of the father in the course of his final submissions to the judge, it is impossible that the judge was unaware of it. It might have been preferable if he had made reference to it in his judgment, but we are quite unable to say that he failed to take it into account. The judge may well have found it surprising that the father was unaware of C.S.'s distress at attending a French school until he heard Mrs. Varley's evidence, and he may have considered the father's proposals to send C.S. to an English-speaking school in Paris somewhat imprecise and by no means fully considered. In these circumstances we are quite unable to say that his decision to return C.S. to France, even having regard to the father's undertakings, was plainly wrong.

Nothing which we have said in this judgment should detract from the view, which has been frequently expressed and which we repeat, that it is only in exceptional cases under the Hague Convention that the court should refuse to order the immediate return of a child who has been wrongfully removed. This is an exceptional case and accordingly we dismiss this appeal.

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