---

http://www.incadat.com/ ref.: HC/E/UKe 169
[19/07/1996; Court of Appeal (England); Appellate Court]
H. v. H. (Abduction: Acquiescence) [1996] 2 FLR 570, [1996] Fam Law 718

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

19 July 1996

Stuart-Smith, Waite, Otton LJJ

In the Matter of H. v. H.

Judith Parker QC and Lewis Marks for the mother

Mark Everall QC, Marcus Scott-Manderson and Sarah Lowe for the father

WAITE LJ: This is a mother's appeal from an order of Sumner J directing the immediate return to Israel under the Hague Convention of three very young children now aged 3, 2 and 16 months. The order incorporated undertakings by the father to start appropriate family proceedings in Israel and pending their determination to provide the mother and children with accommodation and support there. The judge made his order on 5 July 1996, and the appeal hearing took place a week later on 12 July 1996, when the appeal was allowed and the judge's order was discharged. I am now stating my reasons for supporting that decision.

The children's Israeli-born father and British-born mother are both members of the Orthodox Jewish faith, and their marriage, which was arranged between their two families, took place at civil and religious ceremonies celebrated in London in May 1991. Unfortunately it did not prove to be a happy one, but the family were still together in the occupation of accommodation in Bnei Brak in Israel when the mother, without warning to the father, removed the children to England on 9 November 1995. It is now common ground that this removal was made without the father's consent.

The issues for the judge were:

(1) Were the children 'habitually resident' in Israel at the date of their removal, so as to found jurisdiction under Art 3 of the Convention? If so,

(2) Had the father subsequently 'acquiesced' in the removal of the children for the purposes of Art 13(a)?

If the answer to the second issue was no, the court would be bound to make a return order; if the answer was yes, a third question would arise, namely:

(3) Should the court in its discretion make a return order, leaving the issue as to their future care to be determined by the courts of Israel, or allow the children to remain in this country and have their future decided in the family proceedings which the mother has already started in this country?

The judge ruled that the answer to the first issue was yes, and to the second no. The third issue did not therefore arise, but he indicated that if it had done, he would still have granted a return order as a matter of discretion.

The facts

The judge dealt with the case, in accordance with what is now approved practice, on affidavit evidence alone. The facts found by him, or which were undisputed before him, were the following. In September 1991 the parties went to Israel, renting a flat there. They moved back to England in April 1992 for 2 months, and again for a period between August and November of that year during which their first child was born. They then spent a year in Israel, apart from a short break in England in March 1993 to celebrate the Passover. In November 1993 they came back to England for the birth of the second child, remaining until January 1994, when they returned to Israel. Their third child was born there in February 1995, but in the summer of that year they had a long spell (May to September 1995) in England before returning to Israel. The mother removed the children to England in November 1995.

Each parent then invoked the jurisdiction of their local rabbinical court. The mother also obtained orders from the civil court in this country. The sequence of events was as follows:

13 November 1995

Mother obtains order from Edmonton County Court ex parte restraining father until 23 November 1995 from removing the children from England or the mother's care.

23 November 1995

Mother obtains leave from the same court to serve an application on father for a residence order and a permanent injunction against removal of children.

24 November 1995

Order of 13 November 1995 served on father in Israel. He at once consults his rabbinical court (Beth Din) whose rabbi tells him to ignore the English court order (whose return date had already passed by the date of service) and not himself to invoke civil court procedures at that stage.

26 January 1996

Father's Beth Din issues a summons to the mother directing her to attend their court in Bnei Brak on 19 February 1996: 'for the purpose of a Get [Bill of Divorcement] and the ramifications thereof'.

19 February 1996

Mother having failed to attend had a further summons issued against her in the same terms.

28 February 1996

A third summons was issued to the mother in the same terms.

11 March 1996

Father's Beth Din informs the mother that her submission that there should be rabbinical proceedings in England was rejected, and she was served with a fourth summons to attend, this time on 18 March 1996.

15 March 1996

Mother's Beth Din writes to father's Beth Din submitting that the London rabbinical court was the appropriate forum for 'a just judgment for the benefit of the couple'. The submission included a statement that:

'. . . she cannot go to Israel to appear before your court because of the three infants she is forced to look after and has no one to leave them with especially during Passover. She has nowhere to stay in Israel.'

21 March 1996

Father's Beth Din rules against that submission and issues a fifth summons against the mother to appear on 22 April 1996.

22 April 1996

Mother having failed to appear on the latest summons, father's Beth Din makes an order authorising the father to take whatever steps he saw fit. He applies that day to the Israeli Central Authority invoking the Convention.

3 May 1996

Father's originating summons is issued in England seeking a return order under the Convention.

Mid-May 1996 (by a letter mistakenly dated 25 March 1996)

A protest from the mother's Beth Din addressed to the father's Beth Din asks that the latter should request the father to withdraw the proceedings to avoid 'contempt and slander' against the father for taking proceedings in the secular courts.

While these events were taking place, the father, shortly before Passover (ie at the end of March or very early April 1996) asked the mother to agree that the children should come to spend Passover with him in Israel, promising to return them to her after the festival. She refused that request.

Although the issue of habitual residence was strongly contested before the judge, the judge's finding that the parties, and therefore their children, were habitually resident in Israel at the date of removal is not now challenged on appeal. It is accordingly undisputed in this court that when the mother brought the children to England on 9 November 1995, without either the knowledge or (as was conceded before the judge) the consent of the father, she acted in breach of the father's custody rights under the law of Israel as the country of habitual residence. The consequence is that the removal of the children to England is accepted to have been wrongful within the terms of Art 3.

The law

Article 13 provides:

'Notwithstanding the provisions of [Art 12], 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 . . . 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 phrase 'subsequently acquiesced in the removal or retention' has been elaborated in England by case-law. The governing authorities are Re A (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14, Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682 and Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819. Their general effect, to summarise it shortly, is as follows. In order to establish acquiescence by the aggrieved parent, the abducting parent must be able to point to some conduct on the part of the aggrieved parent which is inconsistent with the summary return of the child to the place of habitual residence. 'Summary return' means in that context an immediate or peremptory return, as distinct from an eventual return following the more detailed investigation and deliberation involved in a settlement of the children's future achieved through a full court hearing on the merits or through negotiation. Such conduct may be active, taking the form of some step by the aggrieved parent which is demonstrably inconsistent with insistence on his or her part upon a summary return; or it may be inactive, in the sense that time is allowed by the aggrieved parent to pass by without any words or actions on his or her part referable to insistence upon summary return. Where the conduct relied on is active, little if any weight is accorded to the subjective motives or reasons of the party so acting. Where the relevant conduct is inactive, some limited inquiry into the state of mind of the aggrieved parent and the subjective reasons for inaction may be appropriate.

Once acquiescence has been established, the court retains a discretion to grant or refuse an order for immediate return under the Convention. Miss Parker QC for the mother relied, without dissent from Mr Everall QC for the father, upon a decision of my own at first instance in W v W (Child Abduction: Acquiescence) [1993] 2 FLR 211, where it was suggested that the factors governing the exercise of such a discretion should be:

(a) the comparative suitability of the forum in the competing jurisdictions to determine the child's future in the substantive proceedings;

(b) the likely outcome (in whichever forum they be heard) of the substantive proceedings;

(c) the consequences of the acquiescence, with particular reference to the extent to which the child may have become settled in the requested State;

(d) the situation which would await the absconding parent and the child if compelled to return to the requesting jurisdiction;

(e) the anticipated emotional effect upon the child of an immediate return order (a factor which is to be treated as significant but not as paramount);

(f) the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused.

The judge's approach

(A) Acquiescence in the wrongful removal

The case was presented to the judge on the mother's behalf as one of active acquiescence. The actions relied on were first the father's active pursuit of his remedies through the Israeli Beth Din, unaccompanied by any request or demand for a peremptory return of the children to that country in the meantime; and secondly his request for the children to spend the Passover with him, accompanied by his undertaking to return them to the mother in England when the festival was over.

The judge rejected that view. He quoted the following passage from the father's statement:

'I was throughout this time desperate to have my children returned to me but believed that the matter was properly handled through the Beth Din in accordance with my religious convictions. I spoke to my wife on several occasions and pleaded with her to return to Israel so that we could discuss matters. She emphatically refused.'

That evidence did not contain any assertion on the father's part of a request by him for the immediate return of the children. The judge appears to have been aware of that, because his judgment continued, immediately after that quotation, with these words:

'Furthermore, it is [the father's] case that he was pressing for the return of the children, not divorce.'

He then went on to accept a plea that had been advanced on the father's behalf that evidence of such pressure for the children's return was afforded by the London Beth Din's reference, in the letter of protest to the Israeli counterpart which I have already quoted, to the father's proceeding in the secular court in England as a step which 'will cause a desecration of the Holy Name and will provoke contempt and slander against the husband'. The judge added the comment:

'That [letter] was, in fact, some 6 weeks before [the father] did raise any such objections.'

In relation to the Passover holiday request, the judge recorded and accepted a submission that this:

'. . . was, as it were, without prejudice; the act of a man desperate to see his children; an act of a man bound, as he saw it, by religious laws to let that take this course.'

The judge, stated his conclusion in these terms:

'. . . I am quite satisfied that there was not either in the activity by the father, in the circumstances that I have explained, nor such steps as he took, nor the request to the wife, any act which I could properly regard as an acquiescence in the state of affairs inconsistent with his wish, shortly thereafter put into effect, to take summary action for the return of the children.'

(B) The discretion

The judge having decided that there had been no acquiescence, did not need to consider discretion, but he gave the following indication of what his view would have been had the discretion arisen:

'Were I to be wrong [about acquiescence] then I have to say I would not be minded to exercise my discretion in favour of the mother. I say that despite being very conscious of the general points made on her behalf. I have sympathy for the views she has expressed; the

unhappiness which she experienced whilst in Israel, whatever the cause may have been and that is disputed; the fact that she is now back in this country; has settled; has the support of her family; that the children are very young; are with her, and that time has passed. All that I take into account.

But as against that there is, first of all, the whole basis of the Convention; next there is the disadvantage, as I see there would be, to the father now applying for a residence order after this time in this country; finally, and I put rather greater emphasis on this, there is my reluctance to penalise a father in any way who, anxious to obtain the return of his children, feels it necessary for what appears to me to be powerful reasons, to accept, to be guided by and to follow the religious advice which he is given. If in desperation, when that takes a long time because of disputes about where it should be resolved, he perhaps unwisely seeks to see his children in his own country with a promise to bring them back in the end, I would again be reluctant to hold that against him.'

The argument

Miss Parker criticises the judge's finding on acquiescence as having been misdirected in law because of the reliance he placed, in a case where the conduct relied on was active, upon the father's subjective motives for failing to invoke the Convention any earlier than he did; and misdirected, moreover, in his approach to the facts, because (misled by the dating error on its face) he attached erroneous significance to the letter of protest from the London Beth Din. She criticises his provisional findings on discretion on the ground that the judge allowed himself to be influenced by a desire to avoid penalising the father for observance of the rules of his religion, a consideration irrelevant to the survey of all the objective features of the case which the due exercise of the discretion requires.

Mr Everall acknowledges the misfortune which led the judge to misunderstand the place in the time sequence of the protest letter. He submits, however, that there was plenty of other evidence from which the judge would have been justified in drawing the conclusion that he did on the issue of acquiescence. As for discretion, he submits that the judge took nothing into consideration which it was improper to include, and omitted nothing which he ought to have taken into account. The judge's provisional exercise of discretion was therefore unassailable on appeal.

Conclusion

(A) Acquiescence

The judge's finding was in my view ill-founded in both the respects relied on by the mother. This father had acted entirely properly in following to the letter the tenets of his faith and omitting to take summary proceedings until authorised by his Beth Din to do so. That is beside the point, however, when it comes to a consideration of the objective inferences to be drawn from the fact that he took active steps towards a settlement or adjudication of the matrimonial differences through the medium of the Beth Din, and persisted in those steps for many months, without making any overt statement that he was insisting upon the summary (as opposed to the eventual) return of the children. The Passover holiday request, though it might not -- standing alone -- have been sufficient to constitute conduct inconsistent with the children's summary return, provided a cumulative factor which in the particular circumstances of this case tended to support the inference of acquiescence. The judge may not have had the benefit of the close analysis of the sequence of the rabbinical correspondence which was provided in this court, but there can be no disputing that his misappreciation of the true date of the letter of rabbinical protest led him to give it a disproportionate emphasis and a misplaced significance. The judge ought to have found, on

the evidence presented to him, that the father had acquiesced in the wrongful removal of the children.

(B) Discretion

The judge's sympathy for a father whose conduct had been influenced by faith and conscience is thoroughly understandable. It was not, however, a factor which it was relevant or permissible for the judge to take into account when exercising this particular discretion, which depends upon a weighing of the objective considerations already mentioned. It appears, moreover, that although the judge undoubtedly took into account some of the factors mentioned in W v W he failed to address his mind to the important issue as to whether the courts of Israel or of England would provide a more appropriate forum for settling the parties' differences as to the future care of, and contact with, the children. He also failed to consider the likely outcome of the substantive proceedings. That was unfortunate, because in a case where the children are so young and their mother claims that she cannot endure living in Israel, there must be at least a possibility that the court (in either jurisdiction) would regard it as adverse to the best interests of the children to compel her to live in a country where she is deeply unhappy, and would conclude that for the time being they ought to have their primary home in her care in England.

The discretion therefore falls to be exercised in this court. I do not find it necessary to state my conclusions, one by one, as to the various factors which I have mentioned under this head when dealing with the law. It is sufficient, I hope, to say that I have considered them all with a sympathetic appreciation of the difficulties which expense and distance place upon the father as a party to proceedings conducted in England. They nevertheless point in the end, overwhelmingly in my judgment, in favour of allowing the substantive proceedings to continue in this country, where the father will be accorded a hearing no less sympathetic to his claims to serve the welfare of the children through care or contact than he would have received if the dispute had been resolved in a civil court in Israel.

Footnote

It would be a pity if anyone reading this judgment gained the erroneous impression that recourse to the courts, or to the conciliation procedures, of religious authorities carries the automatic stamp of acquiescence by an aggrieved parent in the wrongful abduction of a child from the country of habitual residence. The role in these international cases of priest and mullah, mediator and elder, can often be invaluable in bringing about through parental conciliation the harmony in the lives of children which it is the express purpose of the Convention to achieve. What is important is that the aggrieved parent should make it plain that such recourse is being adopted as a step ancillary to, or in parallel with, the Convention's remedy of summary return, and not in substitution for it.

OTTON LJ: I agree.

STUART-SMITH 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