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http://www.incadat.com/ ref.: HC/E/UKe 171
[12/04/1995; High Court (England); First Instance]
R. v. R. (Residence Order: Child Abduction) [1995] Fam 209, [1995] 3 WLR 425

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

5, 11, 12 April 1995

Staurt-White J

In the Matter of R. v. R.

D Peter Hunt for the mother

Mark Everall QC as amicus curiae

The father did not appear

STUART-WHITE J: This divorce suit comes before me for directions pursuant to an order of Singer J in the following terms:

'THE COURT OF ITS OWN MOTION DIRECTS THAT this suit should be listed before a Judge of the [Family] Division in London for directions to be given if any, and if so what steps should be taken in relation to the respondent Father's assertions as to the children's wrongful removal from Spain and his contention that they should be returned to Spain.'

The circumstances in which Singer J's order was made were these. The petitioner and the respondent, whom I shall call the mother and the father, were married in 1980. The father is Spanish and lives and works in Tenerife. The mother is English. There are three children aged 11, 7 and 4, who were born and lived the whole of their lives in Tenerife within, of course, the jurisdiction of the Spanish court.

On 5 February 1992 a separation order was made by a court in Tenerife providing, among other provisions, that there should be custody to the mother and contact to the father. Clause 2 of that order in translation reads as follows:

'The children . . . who are minors, will remain in the care and control of their mother, although the father may visit them as often as he thinks fit before 10 o'clock at night. Furthermore the mother will inform the father if the children are going to be out all day. The spouses agree that the father may take the children out for the whole day on his day off from 10 in the morning until 8 in the evening, giving their mother one day's notice.'

Clause 5 reads:

'Bearing in mind that [the mother] has British nationality, the spouses state that the father will be informed of any departure by the children from this country and he will authorize it, depending on what is best for the children at any given time.'

The mother brought the children to England. She says that it was on 21 April 1994. The father says that it was on 22 April. She brought them without the father's consent or knowledge. She says that on arrival in England she communicated to him the address at which she was staying with the children.

On 21 June 1994 the mother filed a divorce petition in the Scarborough County Court, based on the behaviour of the father. That petition included a prayer for a residence order in respect of all three children. The father was served with the divorce papers and he wrote a long letter to the county court in Spanish. I have seen an agreed translation of that. In that letter he made a number of comments to which I shall refer in a moment.

He also made a number of handwritten comments in English upon the copy petition and the statement of arrangements for the children, which he returned to the court. He also returned the acknowledgement of service unsigned and with nothing written on it save that in answer to the question, 'Have you received a copy of the statement of arrangements for the children?' he wrote that arrangements had already been made and referred to the order of the Tenerife court.

It was clear from the letter, which was a long one, and from his comments on the documents, all of which he sent to the court in an envelope postmarked in Tenerife on 18 July 1994, that whilst he admitted the truth of some of the allegations in the petition and did not contest the granting of a decree, he did wish to make representations about the residence of and contact with the children, and he also asserted that the children had been unlawfully removed from Tenerife without his consent and in breach of the court order.

When the matter came before the district judge for consideration of the giving of a certificate under the special procedure, the district judge was naturally concerned about the situation relating to the children. He therefore consulted Judge Fricker QC, who was the local circuit judge and, having so consulted, the district judge granted a special procedure certificate on 30 August 1994. He gave notice that a decree nisi would be pronounced on 30 September 1994. It is not altogether clear whether a decree was in fact pronounced on that or any other day, no copy of the decree being in the court file.

On 30 August 1994 the district judge had also considered the arrangements for the children pursuant to s 41 of the Matrimonial Causes Act 1973. Having so considered those arrangements, he certified that the court may need to exercise its powers in respect of them. There are in the file two documents each dated 30 August, one certifying that there were no exceptional circumstances which made it desirable that the court should give a direction under s 41(2), and the other giving such a direction, namely a direction that the decree should not be made absolute until the court ordered otherwise. It appears that one or other of these documents must have misstated the district judge's decision but which it is is not entirely clear.

The district judge at the suggestion of Judge Fricker further ordered that the file be referred to the Official Solicitor to ascertain whether he wished to intervene on behalf of the children. The Official Solicitor had reservations about acting for the children in view of his administrative duties in relation to the central authority but indicated that he would be

prepared to act as amicus in respect of some aspects of the matter including those which fall for consideration today.

The matter then came before Judge Fricker on 19 October 1994 at Sheffield and he made these orders: first, that the divorce proceedings should be transferred to the High Court; secondly, that Singer J, who was currently sitting on the north-eastern circuit, should be invited to consider how the matter should proceed and thirdly, that the Official Solicitor should be requested to act as amicus. On 22 November 1994 Singer J sitting at Newcastle gave the direction, the terms of which I have recited at the start of this judgment.

On the same day he signed a note which he directed should be placed in the divorce file. I think that it would be helpful to read paras 9 and 10 of that note. They are as follows:

'The father in this case has not instituted proceedings under the Child Abduction and Custody Act 1985. He may not wish to do so if he knows about their availability, or he may not know about their availability. Should the English court ignore those considerations, and make Children Act orders in proceedings which would automatically be stayed if indeed the father instituted a [Hague Convention] application? Or should the approach of the English Court be to take active steps (and if so, presumably through the Official Solicitor as representing the Central Authority for England and Wales) to alert the parent abroad to his rights and to put him in touch with his own Central Authority? It must be remembered that in many cases (though not in this) the foreign-based parent may be unaware of the whereabouts of the children and, for all the English Court knows, may be attempting actively to ascertain those whereabouts. This question gives rise to what in my view is an issue of principle. I have therefore directed that this suit should be listed before a Judge of the [Family] Division in London for directions to be given if any and if so what steps should be taken in relation to the respondent father's assertion as to the children's wrongful removal from Spain and his contention that they should be returned to Spain. I can see no reason why a copy of that Order should not be served on the father by sending it to him in Spain, and suggest that similarly he should be notified of the date of that hearing.'

It is in pursuance of Singer J's directions, as I say, that the matter comes before me.

The mother is represented by counsel, Mr Hunt. Mr Everall QC appears as amicus, instructed by the Official Solicitor. The father has not appeared and has not been represented. It rather looks, though this has not been confirmed, as if he has not been served with a copy of Singer J's order or notified of the date of this hearing despite the indication in Singer J's note that there was no reason why these things should not occur. However, for reasons which will become apparent, it has in my view been appropriate to continue with this hearing despite the fact that the father has not been served with notice of it.

Mr Everall on behalf of the Official Solicitor has posed for my consideration a number of questions. The principal questions, though not quite in the order in which he posed them, are as follows: first, may circumstances arise in which a court should regard itself as having received notice of a wrongful removal or retention within the meaning of art 16 of the Convention on the Civil Aspects of International Child Abduction (as set out in Sch 1 to the Child Abduction and Custody Act 1985) notwithstanding that no application under the convention has been made and no communication has been received from the central authority of another state? Mr Everall's submission is that the court may so regard itself and should do so in the circumstances which have arisen in this case.

I interpose to say that, where in the course of this judgment I refer to wrongful removal, it is to be assumed that I refer as well mutatis mutandis to wrongful retention. The second question: in such circumstances, should the court refrain from deciding on the merits of

rights of custody notwithstanding that the procedure under r 6.11 of the Family Proceedings Rules 1991, SI 1991/1247, has not been and could not in the circumstances be invoked? Mr Everall submits that the court should so refrain until such time as it is able to hold that no application under the convention has been lodged within a reasonable time following the receipt of notice of wrongful removal.

Thirdly, and most importantly, Mr Everall asks me to rule on this: where a court receives notice of a wrongful removal in the sense posited in the first question, and no convention application has been made, should the court take any, and if so what, steps to secure that the parent in the state from which the child has been wrongfully removed is able to receive information as to his rights under the convention? Mr Everall submits that the court should take such steps and has suggested what those steps should be. Furthermore, he seeks directions in this case to give effect to his submissions.

I turn therefore to the first of the questions. Article 16 of the convention reads as follows:

'After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.'

Mr Everall has properly drawn my attention to the explanatory report by Professor Elisa Perez-Vera produced in conjunction with the convention. Paragraph 121 of the report contains an explanation of art 16, and though it is a little long I think it is appropriate that I should read it:

'This article, so as to promote the realization of the Convention's objects regarding the return of the child, seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge. To this end, the competent authorities in this State are forbidden to adjudicate on the matter when they have been informed that the child in question has been, in terms of the Convention, wrongfully removed or retained. This prohibition will disappear when it is shown that, according to the Convention, it is not appropriate to return the child, or where a reasonable period of time has elapsed without an application under the Convention having been lodged. The two sets of circumstances which can put an end to the duty contained in the article are very different, both in the reasons behind them and in their consequences. In fact, it is perfectly logical to provide that this obligation will cease as soon as it is established that the conditions for a child's return have not been met, either because the parties have come to an amicable arrangement or because it is appropriate to consider on the exceptions provided for in articles 13 and 20. Moreover, in such cases, the decision on the merits of the custody rights will finally dispose of the case. On the other hand, since the "notice" which may justify the prohibition against deciding upon the merits of the case must derive either from an application for the return of the child which is submitted directly by the applicant, or from an official communication from the Central Authority of the same State, it is difficult to see how cases in which the notice is not followed by an application would not be contained within the first hypothesis. Moreover, if such situations do exist, the ambiguity in the phrase "reasonable time" could lead to decisions being taken before the period of one year, contained in article 12, first paragraph, has expired; in such a case, this decision would coexist alongside the duty to return the child, in accordance with the Convention, thus giving rise to a problem which is dealt with in article 17.'

The language of this paragraph of the report, as Mr Everall with some moderation has put it, is somewhat opaque. But the final three sentences, beginning with the words 'On the other hand', certainly appear to suggest that notice within art 16 can only be received by way of an application under the convention or an official communication from the foreign state. However, whilst no doubt the report is a permissible, useful and indeed authoritative aid to the construction of the convention if the language of the convention is unclear, on this point it seems to me that the language of the convention is perfectly clear - indeed distinctly clearer than that of the report.

There is nothing in the words of the article or, so far as I have been able to discover, elsewhere in the convention to restrict the word 'notice' to notice from any particular source or in any particular form. Moreover, the final words of the article itself make it apparent that it contemplates that notice may be received before the lodging of an application under the convention. If the parties to the convention and its draftsmen had intended to restrict the meaning of the word 'notice' in the way suggested in the explanatory report, I can see no reason why they should not have said so. There is, so far as I am aware, no English authority directly on the point but my attention has been drawn to an Australian case, Re Barraclough's marriage (1987) 11 Fam LR 773 at 780, in which Kay J said the following:

'What I suspect Art 16 means and it may have had some application to this case if I am correct in my interpretation, is that where a court is asked to determine rights of custody and it is brought to the attention of the court that the facts surrounding the proceedings might bring the matter within the Convention, the court either has to deal with a convention application then and there, or alternatively wait a reasonable time before it can proceed.'

That passage appears to give some support to the construction for which Mr Everall argues.

Mr Hunt on behalf of the mother makes no submissions on this particular point. I hold that a court which becomes aware, expressly or by necessary inference, that there has been a wrongful removal or retention of a child within the meaning of art 3 of the convention, receives notice of that wrongful removal or retention within art 16.

I turn then to the second question. Article 16 is one of the articles set out in Sch 1 to the 1985 Act and therefore it has by reason of s 1(2) of that Act the force of law in the United Kingdom. Thus courts in the United Kingdom must give effect to it. Rule 6.11 of the 1991 rules provides a mechanism whereby a court before which proceedings relating to the merits of rights of custody are pending is to be informed of any existing proceedings under the convention. The rule also requires that a stay be placed on the domestic proceedings until the convention proceedings have been dismissed. However, the rules are silent as to the procedure to be followed or the order that is to be made where the court receives notice of a wrongful removal in the absence of convention proceedings.

However, in my judgment the lack of a rule to regulate procedure does not absolve the court from what I conceive to be a statutory duty to comply with art 16 and to give effect to its provisions. I therefore hold that, unless the court finds that no application under the convention has been lodged within a reasonable time of its receiving notice of the wrongful removal, it should refrain from deciding the merits of rights of custody. As I shall explain in a moment, this means that it should refrain from making a residence order or, it seems, an interim residence order.

In order to discover the definition of the expression 'deciding on the merits of rights of custody', it is necessary to turn to ss 9 and 27 of and paras 1 to 4 of Sch 3 to the 1985 Act and also to art 5 of the convention. It is unnecessary for the purposes of this judgment that I should set out the whole of this rather laborious process. It is sufficient to say that the

expression 'deciding on the merits of rights in custody' includes the making of a residence order and, it seems, the making of an interim residence order but not the making of any other s 8 order under the Children Act 1989.

I turn then to the third of Mr Everall's questions, which occasions, it seems to me, greater difficulty and raises matters both of principle and of policy. It is of course the question which prompted Singer J to give the direction which he gave on 22 November 1994. The court is likely in the absence of a convention application to become aware, either expressly or by necessary inference, of a wrongful removal in one of two main sets of circumstances. The first is where the parent who has come to this country with the child makes an application to the court for an order under the 1989 Act either within or outwith the context of matrimonial proceedings. The other, which was the situation in the instant case, is where the parent institutes matrimonial proceedings, obtains a decree nisi and the district judge enters upon consideration of the arrangements for the children under s 41 of the 1973 Act and r 2.39 of the 1991 rules.

The combined effect of that section and that rule is to require the court to consider, inter alia, whether it requires, or is likely to require, to exercise any of its powers under the 1989 Act, including of course its powers under s 10(2) to make s 8 orders of its own motion; and, if it forms the view that it does require or may require to exercise such a power, it must go on to consider whether the parties or either of them should file further evidence relating to the arrangements for the children, whether a welfare report should be prepared and whether the parties or any of them should attend before the court.

It is in the context of these possible situations that I consider Mr Everall's third question. I begin with the preamble to the convention and arts 1 and 2 thereof. The preamble is as follows:

'The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

Article 1

The objects of the present Convention are -- (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.'

I turn next to art 7. The opening words of that article are:

'Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention . . .'

The article then goes on to set out a number of specific duties imposed upon central authorities.

It is to be noted, however, that the opening words of the article which I have read, whilst addressed to central authorities, refer to co-operation between competent authorities, which of course include courts. Accordingly, it is apparent that art 7 requires the courts, which are the judicial authorities of contracting states, to co-operate to secure the prompt return of children and to achieve the other objects of the convention.

Moreover, the courts of this country have consistently held that in all circumstances it is in the interests of children, first, that parents or others should not abduct them from one jurisdiction to another and, secondly, that any decision relating to their custody is best made in the jurisdiction in which they have hitherto normally been resident. These words are, of course, taken from the words of Balcombe LJ in G v G (Minors) (Abduction) [1991] 2 FLR 506 at 514. The passage reads:

'For my part, I am not prepared to assume that Parliament, in passing the Child Abduction and Custody Act 1985, accepted that it was substituting a test which did not put the child's welfare as the first and paramount consideration. In my judgment, the philosophy behind this Act, and indeed behind the Convention which it adopted, is that in normal circumstances it is in the interests of children that parents or others should not abduct them from one jurisdiction to another, but that any decision relating to the custody of children is best decided in the jurisdiction in which they have hitherto normally been resident.'

The same point was emphasised in Re M (Abduction: Non-Convention Country) [1995] 1 FLR 89. A passage in the judgment of Waite LJ is particularly relevant to a consideration of the extent to which the court should act of its own motion and without necessarily waiting for the issue of proceedings where there appears to have been a wrongful removal of a child from a foreign jurisdiction to that of England and Wales. He said (at 98):

'The fact that there is jurisdiction to grant a peremptory return order in child abduction cases where the Convention does not apply, is itself based upon nothing else but an appreciation of the general demands of the best interests of all children. It assumes that in the absence of special circumstances, it will best serve the immediate welfare of the abducted child to have its long-term interests judged in the land from which it was abducted. When that principle is taken with the general principle of comity which applies between civilised countries, and especially between partners in the European Union, an element of trust is bound to become involved. Judges in one country are entitled, and bound, to assume that the courts and welfare services of the other country will all take the same serious view of a failure to honour undertakings given to a court (of any jurisdiction), failure to maintain financially, failure to afford contact, and so on. It is to be assumed that the courts in every country will not hesitate to intervene to enforce whatever orders, or to direct whatever inquiries, are called for in the children's best interests. In that process every judge is bound to take into full and careful account what his or her colleague has already ordered in antecedent proceedings in another jurisdiction.'

Mr Everall has advanced a number of other submissions in addition to the general point with regard to the desirability of discouraging abduction and dealing with matters relating to children in the jurisdiction in which they were, until wrongfully removed, normally resident. He says that it is not in the interests of the child that there should be a temptation to re-abduct. He points out that in the father's letter to the court in this case the father adverted to the possibility that he might do just that. Mr Everall submits that it should be made clear to both parents that decisions concerning the child should be taken by judicial

process and not unilaterally. He next submits that the court should always draw to the attention of a litigant in person factors potentially favourable to his case. As an illustration he submits that if, in the instant case, the father had attended the s 41 hearing, of which of course he had notice and which he was entitled to attend, it is unthinkable that the district judge would have failed to point out to him that he might have rights under the convention and to suggest that he obtained legal advice. Should he, Mr Everall asks rhetorically, be kept in the dark because he did not choose to travel from Tenerife to attend but instead set out the factual matters upon which he relies in a full and detailed letter to the court?

On a more general point, Mr Everall submits that in cases relating to children the court is bound to take all necessary steps to arrive at an appropriate result in the paramount interests of the welfare of the child and that the court should avail itself of all necessary material to ensure that it will make properly informed decisions in the best interests of the child (see Oxfordshire CC v M [1994] 2 All ER 269 at 278, 281, [1994] Fam 151 at 161, 164 per Sir Stephen Brown P and Steyn LJ). These are in my judgment all very powerful points.

Mr Hunt on behalf of the mother does not directly, as I understand his argument, dispute any of them. He advances arguments on a somewhat different front. He submits, first, that for the court to do what Mr Everall submits it should do would be to take a novel course and one in respect of which no words in either the convention or the 1985 Act either confer authority or impose a duty. He goes so far as to question the power of the court to take this course. As to that I am satisfied, on the authority of Oxfordshire CC v M, if for no other reason, that the court does have this power and that it should exercise it if it is in the interests of the child and consistent with the objectives of the convention and the relevant legislation to do so.

Mr Hunt goes on to argue that the court's duty on being confronted with an apparent wrongful removal is to consider, first, its jurisdiction to deal with the matter of which it is seised and, if it concludes that it has jurisdiction under Pt I of the Family Law Act 1986, to go on to consider, still within the framework of that Act, questions of forum conveniens and the power to impose a stay pursuant to s 2A(4)(b) or s 5 of the Act. There is, he submits, no need to go beyond these provisions and stir up a possible application for summary return of the child under the convention.

Mr Everall, rightly in my judgment, submits that this is to confuse questions of jurisdiction and forum conveniens, which are the subject matter of the 1986 Act, with the wrongful removal of children, which is the subject of the 1985 Act and the convention. The return of an abducted child may indeed facilitate the bringing of proceedings in the state of that child's habitual residence but it is not a necessary precondition for such proceedings, nor is a decision as to the proper forum necessarily determinative of the question whether or not the abducted child should be returned.

It seems to me that questions of jurisdiction and forum are not strictly relevant to the question upon which I am invited to rule and consequently it is unnecessary to accept Mr Hunt's invitation to embark on a review of the authorities in relation to whether, in relation to questions of forum, the welfare of the child is the paramount or merely an important consideration.

Mr Hunt rightly submits that it is very probable that the court will not at the time that it receives notice that there has, on the basis of the facts known to it at the time, been a wrongful removal, be in possession of sufficient information to decide whether a convention application would be likely to succeed. However, this does not in my judgment absolve the court from the duty of endeavouring to discover whether such an application is to be made

and ensuring, so far as it can, that both of the child's parents are aware of the rights and remedies available to them. Mr Hunt further points to the delay which adoption of the course proposed by Mr Everall would cause and rightly submits that delay is, in common sense as well as by statute, inimical to the interests of the child. However, delay which has a purpose may sometimes be necessary (see C v Solihull Metropolitan BC [1993] 1 FLR 290 and Hounslow London BC v A [1993] 1 WLR 291, [1993] 1 FLR 702).

Such delay as would be occasioned by the foreign-based parent's learning of his rights would be unlikely, it seems to me, to be great and would have as its purpose the advantage to which I have referred. Indeed in some cases delay in the final resolution of issues relating to the child might sometimes be reduced rather than increased, particularly in cases where by reason of art 16 the English court regards itself as barred from making a decision on rights of custody until a reasonable time has elapsed since notice of wrongful removal.

Mr Hunt next draws my attention to the problems which may arise where there are grounds for believing that the foreign-based parent has acquiesced in a wrongful removal. I agree with him that it is doubtful whether it could be in the interests of the child for a parent to be stirred into making an application which would be overwhelmingly likely to fail and I also agree that it would be likely to fail if the court on the facts known to it found clear evidence of acquiescence. I stress the words 'clear evidence'. A distinction is to be drawn between positive acceptance of a situation and inactivity. There may be a variety of reasons for inactivity and the court should be slow to find acquiescence without taking steps to possess itself of all available information relating to those reasons.

After considering all the competing arguments I hold that where a court which becomes seised of a matter relating to a child, in which it appears as a fact or by necessary inference that there has been a wrongful removal from a state which is a party to the convention, it is the duty of that court to consider taking steps to secure that the parent in that state is enabled to be informed of his or her rights under the convention. I further hold that it should take such steps unless it is clear that there has been acquiescence, in the sense of positive acceptance of the situation, in such wrongful removal. The same should apply, of course, as I have said, mutatis mutandis to cases of wrongful retention. I say nothing about the position where there has been an apparently wrongful removal from a non-convention state. That may fall for consideration on another occasion.

I next turn to the application of these various rulings to the facts of the instant case, and deal first with the effect of art 16. It is, it seems to me, for the court that is seised of the matter to decide whether or not a reasonable time has elapsed since the receipt of notice of wrongful removal. As Professor Perez-Vera pointed out in the explanatory report to which I have referred and the passage which I have read, the convention gives no indication as to how a reasonable time is to be determined. Often this will give rise to no difficulty since notice may well be received at or about the same time that the court is invited to make a residence order. In the instant case the situation is not quite so straightforward, since notice was received not later than 30 August 1994, when the matter first came before the district judge. Very possibly notice should be regarded as having been received on receipt of the father's letter and the divorce documents, which bear the county court date stamp of 25 July 1994. Thus seven or more probably eight months had passed since the receipt of that notice. No application under the convention has been received. This may or may not be because the father is unaware of his rights but there is no reason to suppose that he is other than an adult of full capacity, capable of taking advice or otherwise informing himself as to his legal position.

In any event, contrary on this point to the submission of Mr Everall, I believe that the question of what is a reasonable time should in this context be considered objectively. It is not easy otherwise to make sense of art 16, which may have to be applied in circumstances in which the court is without any knowledge of the absent parent's current circumstances. I hold that, on the facts of the instant case, a convention application has not been lodged within a reasonable time after receipt of notice of wrongful removal. It follows that there is no longer any bar created by art 16 to the granting of a residence order or an interim residence order, though of course there may well be other reasons why such an order would not be appropriate. That is a matter for the court to which any application for such an order may be made, as is the question whether the bar, if such bar exists, against making any decree absolute should now be lifted.

It is to be noted that art 17 provides that the sole fact that a decision relating to custody has been given in the requested state shall not be a ground for refusing a return of the child, though the reasons for that decision may be taken into account. Moreover, if a convention application were to be made, r 6.11 of the 1991 rules would give rise to a stay on any then current proceedings relating to the children.

Notwithstanding my ruling on art 16, it is appropriate that I should deal here and now with the question of notification to the father of his rights. The delay that has occurred since August does not seem to me to be conclusive of the question of whether I should take steps to secure that he be enabled to obtain such information. That delay, so far as the English courts are concerned, has resulted from the proper process of judicial deliberation leading up to the making of Singer J's order on 22 November 1994 and the delay, unfortunately inherent, in awaiting a hearing date since then.

The matter has now attained a considerable degree of urgency for if the father does have rights under the convention the nature of those rights will, by reason of art 12, materially alter for the worse on the anniversary of the children having been brought to England, namely in about ten days' time. Delay on the part of the father, whilst it may ultimately be relevant to the question of acquiescence, is not of itself a bar to a successful application under the convention. Indeed, art 12 provides that, even when more than a year has elapsed between the wrongful removal and the commencement of proceedings, the court is still obliged to order a return unless it is shown by the defendant that the child is now settled in its new environment. As I have indicated, that period of a year has not yet quite elapsed.

I need next to consider whether there is clear evidence of acquiescence and to do so in the light of a number of authorities which have been cited to me, namely Re A and anor (Minors) (Abduction: Acquiesence) [1992] 1 All ER 929, [1992] Fam 106, Re AZ (A Minor) (Abduction: Acquiesence) [1993] 1 FLR 682 and W v W (Child Abduction: Acquiesence) [1993] 2 FLR 211. There is in this case no evidence of positive acceptance by the father of the situation. There has of course been inactivity following the flurry of activity in July 1994. At that time it is clear that the father was very far from acquiescing in what had occurred. It may be that on the evidence adduced at the hearing of the convention application, if one were to be made, it would be found that there has been acquiescence. On the facts at present known and on the authorities which I have considered, this is very far from clear.

Accordingly, it seems to me that this case does fall within the category of cases in which the absent parent should be enabled to receive information as to his rights. As to the way in which this may most conveniently be brought about, it seems to me that, in accordance with the spirit of art 7, the English central authority should be requested to inform the central authority of the state from which the child has been removed in brief terms of the circumstances of the case. Secondly, since there are ex hypothesi likely to be in existence

English proceedings to which the foreign-based parent is a party, the appropriate way for the court to communicate with him would be by means of directions given within those proceedings to the effect that that parent, if he wishes to seek the return of a child to the jurisdiction from which it has been removed, should without delay seek legal advice as to his rights, if any, under the convention and should communicate with the central authority of his state of residence, of which he should be given the name and address.

I shall in just a moment seek counsel's assistance as to the precise form of order appropriate to this case. In any event once the order has been made, as it will be in this case, it seems to me -- again, subject to any submissions which may be made on this point because we have not so far canvassed it - proper to transfer the suit back to the Scarborough County Court. One final matter remains for consideration.

Family proceedings courts are, in general, unlikely to have much familiarity with the convention or with the principles relating to international child abduction. It seems to me that, where a case in which there is an international element of this kind comes before a family proceedings court, it would be sensible for that court to transfer the case to the county court. The county court, if the matter appears clear-cut, should deal with it in the way proposed in this judgment. In cases of difficulty, and particularly where there appear to be reasons why it would not be appropriate to take steps to see that the parent resident in the state from which the child has been removed is informed of his or her rights, it would be wise to transfer the matter to the High Court. Subject to submissions as to the two matters on which I invite submissions, that concludes the judgment.

Directions (i) that the Official Solicitor transmit brief details of the case to the Spanish central authority and (ii) that the father be advised to seek advice on his rights (if any) under the Hague Convention and to contact the Spanish central authority. Proceedings transferred to the county court.

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