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[03/12/1996; High Court (Northern Ireland); First Instance]
K. v. K., Re M.-N.K. and A.K. (Minors), 3 December 1996, High Court of Northern Ireland

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HIGH COURT (FAMILY DIVISION)

3 December 1996

Higgins J.

K v K, Re M-NK and AK

HIGGINS J: This is an application under the Convention on the Civil Aspects of International Child Abduction 1980, as enacted by the Child Abduction Act 1985, for the return to the island of Spetses in Greece of the two daughters aged seven and five years of the applicant and respondent. The purpose of the convention known as the Hague Convention, is to facilitate the prompt return to the country of habitual residence, of children wrongfully removed or retained from their habitual residence. It is regarded as a summary procedure and indeed Article 11 requires the judicial authorities to act expeditiously. The children the subject of this application left the island of Spetses in June 1995. The application for the return of the children was lodged in May 1996. The case came on for hearing over five days in August 1996. At the commencement of the proceedings a list of undertakings signed by the applicant was handed into Court. The undertakings were:-

1. to assist with the airfares home to Greece of his children and his wife;

2. to arrange for suitable accommodation for his children and wife when in Greece;

3. to bring a custody application immediately upon his return to Greece so that the matter of custody of his children could be dealt with as soon as possible upon their return to Greece.

The children are M-N, born on the 13 September 1988 and aged seven years; and A born on the 7 July 1991 aged five years. Their mother the respondent comes from Northern Ireland. The applicant her husband is Greek and lives on the island of Spetses. They met in the mid-I980s when the respondent was on holiday on the island and married in 1988. Both of the children were born in Northern Ireland and they and the respondent made frequent and lengthy visits to Northern Ireland for holidays and to visit relatives. Prior to June 1995 the couple were experiencing difficulties in the marriage. The applicant's evidence that he was unaware of difficulties in the marriage was not credible. The respondent's mother was ill in Northern Ireland. It was agreed between the applicant and the respondent, that the respondent would travel to Northern Ireland with the children and spend the summer there. The applicant paid for the plane fares, and the respondent and the children left on the 26 June 1995, and were due to return at the end of August 1995 in time for the children to attend school. The original application alleged that the children had been wrongfully removed by the respondent, but this was amended to allege that they had been wrongfully retained in this jurisdiction. The applicant is not a fluent English speaker, and gave evidence with the assistance of an interpreter. The respondent is not fluent in Greek, but has learnt some of the language. The applicant and the respondent conversed at home in a mixture of Greek and English and were able to communicate with each other. Whilst the applicant required an interpreter, I was satisfied that his command of English was better than he was prepared to admit. I preferred the evidence of the respondent and her cousin (a retired solicitor) on the applicant's knowledge and understanding of

English. That he had a working knowledge of English was also clear from his demeanour during the hearing and when questions were being asked in English, and was confirmed on one occasion when he corrected the interpreter.

It was the applicant's case that he was unaware of any difficulties in the marriage, and that prior to her departure, the respondent had not discussed any problems with him. He thought she was having problems, because after her father died, she started going out to clubs with friends and returning late at night under the influence of alcohol. But she never discussed her problems with him. About three weeks after she returned to Northern Ireland, the respondent telephoned the applicant and told him, that she and the children would not be returning to Spetses. This was followed by a letter from the respondent, written in English, which on her advice he took to friends for translation. The letter stated:-

"Dear Y.,

I don't know if this is going to be a shock, but I and the girls will not be coming back to Greece.

I am sorry I was not able to tell you before, but I did not have the strength, and if I had to stay any longer I would have gone crazy. I don't know, but I think this is not a great surprise to you, as things have been bad between us for quite a long time; we have not been able to speak to each other properly for a few years now, and when I used to try all you said was 'It will all change when we move to the new house', but Yannis it has not, it has got worse, and I am sorry I can no longer live the rest of my life with you on Spetes.

I am sorry and very sad this had to happen. I didn't plan it to, but we made a mistake. If we are honest with ourselves, from the beginning it was all wrong, but we where 'in love', I was pregnant and it seemed the right thing to do, and that everything would work out, but we were wrong. It is not your fault or even mine, we are just not suited for each other.

Over the years I have changed and I don't like the change in me; and the reason for the change is out of sheer frustration, so I must channel this in a positive direction, which I believe is here in Northern Ireland, and my career in nursing, which as you know, like your job is your passion, as Nursing is mine.

I don't want to fight about the children or say horrible things to each other, but the fact is we will not be coming back, but that does not mean you can't see the children when you want; this will have to be all sorted out.

I don't know what else to say to you, but I am sorry and very sad inside, this had to happen, but I can not give up my life for you or our children. I will take care of our children to the best, and give them the best, as you know I can.

I have written this letter so you can understand, as I feel by telling you on the telephone, it may not come out the way I would like it to. Where do we go from here?

Please try to understand me, and hopefully we can work together amicably for the sake of the children.

Once you have had a few days to think this over, give me a call for a chat.

Take care

C.

If you have a problem understanding this letter, call and see A and A, as I feel they will help you to understand. I know you will want to discuss this in detail, so hopefully we can come to some understanding and arrangement".

There followed a series of telephone calls, during which they discussed the respondent's unhappiness and eventually the applicant came to Northern Ireland in October 1995. On the day after his arrival, the applicant and the respondent had a meeting in the presence of the respondent's cousin, a retired Solicitor. What occurred at that meeting was crucial to the case made by both parties and central to this issue, was the applicant's understanding and command of English. It was the applicant's case, that the marriage was not at an end, and that at the meeting it was agreed that the respondent and the children would return to Spetses at Christmas and that they would resume married life and work on the problems which had arisen. He also alleged that he did not understand the discussion which was conducted largely between the respondent and her cousin and that he mis-understood what was said due to his lack of English. The respondent's case was, at the meeting the applicant understood the respondent was not returning to Greece and agreed that it was better that the children should remain with their mother in Northern Ireland. She stated that she made sure the applicant understood what was being discussed.

Several affidavits and statements were put in evidence by both parties. As what was said at the meeting on the 19 October 1995 was an important element in the case made by both the applicant and the respondent and because there was an issue about understanding or mis-understanding what was said in a foreign language, I took the exceptional course of allowing oral evidence to be given in support and defence of the application. Cases under the Convention usually proceed on affidavit evidence only.

The applicant was a poor historian. His evidence was at times inconsistent and contradictory. I made every allowance for his limited knowledge of English and for the fact that he gave evidence through an interpreter. My firm conclusion however was, that his evidence on the main issues was unreliable. By contrast the respondent was consistent and clear in her evidence and much to be preferred as a witness. Furthermore, I was satisfied that the evidence of the respondent's cousin (the retired Solicitor) was a true account of the meeting on the 19 October. Therefore my conclusion on the factual matters was as follows.

For some time prior to June 1995 there were difficulties in the marriage. The respondent decided to spend the summer in Northern Ireland with her mother, and to bring her children with her. It was assumed she would return at the end of August. When in Northern Ireland, the respondent decided she could no longer face returning to, and living in Spetses. She concluded that her marriage had broken down and was over, and telephoned the applicant so to inform him. She followed this up with the letter quoted above. I do not think this came as any great surprise to the applicant, though he was reluctant to accept it, and hoped to persuade the respondent to return. There was little evidence about the period between July and October 1995. I am satisfied the applicant was more concerned about his marriage and his wife during that period than the children on the basis that if he could persuade his wife to return the children would come with her. The respondent invited him to come to Northern Ireland, but he said he was too busy. Thus matters drifted for the rest of the summer. As time passed, I consider he began to realise that the respondent was serious in her intent. Eventually he decided to come in October. I was satisfied he was sufficiently aware of the existence of laws to order the return of children taken from Greece before he travelled to Northern Ireland in October and of something called the Hague Convention. He sought to use the threat of the Convention to persuade the respondent to return voluntarily. At the meeting on the 19 October, it was made clear to him that the respondent would not return to Spetses. Whilst he did not want the marriage to end, he recognised that it was in the childrens' best interests that they should remain with their mother and to that end he agreed that they should remain in Northern Ireland. I do not consider he was happy with that decision, but he recognised it as the only sensible one. I am satisfied that once that decision was made that there were discussions about Christmas and Easter. The initial plan was for the applicant to come to Northern Ireland at Christmas. Due to lack of money for suitable rented accommodation this plan fell through. The respondent suggested the children might travel to Spetses as unaccompanied minors. That she was prepared to allow the children to travel to Spetses at Christmas, is strong support for the view that there had been an agreement between the applicant and the respondent in October and that she was content that the applicant understood the marriage was over, and that he had agreed to the children living with their mother in Northern Ireland. I do

not consider that he had any impression that the respondent would return permanently with the children at Christmas, nor any grounds for such a belief or impression. He discussed rented accommodation for the Christmas period with the respondent after the October meeting. This is strong confirmation that no agreement was made whereby the respondent would return permanently to Spetses at Christmas with the children. The plan to send the children at Christmas fell through. When the applicant suggested paying for the respondent and himself to travel to London, he from Greece and she from Belfast, to ensure the children were accompanied on all the plane journeys, the respondent understandably became angry as he had paid little or no maintenance for the children since the separation. It seems his only financial contribution was to buy some presents for the children and to pay for the respondent's occasional use of a Greek credit card.

I am satisfied that the respondent did receive phone calls in December 1995 and January 1996 from a person in Greece purporting to act on the applicant's behalf, and who threatened her with the Hague Convention. I am also satisfied the applicant knew who this person was and he was probably aware of the telephone calls and their nature. The applicant is not a professional person with qualifications, and is limited in intellectual qualities, but he does have a certain guile. In his affidavit he outlined his background and his culture and his views of the importance of family life and children. However he has a simple view of this matter -- my wife should not have walked away from our marriage, these children are my children and I want them back in Spetses. That is only one side of the problem which has arisen. If the children had returned alone (or with their mother) at Christmas, I doubt very much, if he would have allowed them to leave again. He saw the children as one means of persuading his wife to give the marriage another chance. When the plans for Christmas fell through, he felt thwarted and sulked, hence his decision not to speak to the children until they returned to Spetses. During one telephone call, the respondent foolishly said she would return to Spetses. This was a sarcastic remark made in the face of repeated requests for her to return. If the applicant did book tickets as a result of this comment (which I very much doubt) it would indicate a certain level of naivety and lack of sophistication on his part. Thereafter, annoyed at the whole situation, he sought the children' return under the Hague Convention.

The events relating to the plans to send the children to Spetses for Christmas took place in December and the telephone conversations between the applicant and respondent continued into January after which there was a period of non communication. The applicant stated that it was after the New Year that he consulted a lawyer with a view to effecting the return of the children under the Hague Convention. He claimed that he knew nothing about the telephone calls to the respondent by another person. It seems likely that the telephone calls were from someone representing the applicant if not a lawyer. I note that the "baptism certificates" of the children which accompanied the application were extracted from public records on 4 and 11 of January 1995 and the birth and marriage certificate on 29 January. It seems reasonable to infer that he was actively considering or pursuing the Convention application prior to 4 January 1996 and probably in December 1995. In accordance with Greek procedure the applicant made application to the Ministry of Justice in Athens on 6 February 1996. That application alleges that the respondent "abandoned me on 25 June 1995, kidnapped my two daughters and went to live at her homeland". It seems clear that the respondent was at least contemplating her future on Spetses before she left on 25 June. Regrettably but perhaps for understandable reasons she did not discuss her dilemma with the applicant before she left. It was only after her return to Northern Ireland that her views intensified and she finally resolved not to return which decision she communicated without undue delay to the applicant. It was therefore correct for the applicant to abandon the original application that the respondent had wrongfully removed the children though perhaps its wording sets the tone for his views at that time. I reject the suggestion (which was not made directly) that this whole escapade was planned by the respondent in advance. In particular I reject the suggestion that the respondent was aware of possible exceptions available under the Convention prior to the October meeting with her cousin (the retired Solicitor) or that the applicant was "set up" or advantage taken of him by the respondent or her cousin due to his limited command and knowledge of English. Belfast solicitors were instructed on behalf of the applicant on 1 March 1996 and after some problems communicating with the applicant an application was lodged in the Family Division of the High Court in Northern Ireland on 23 May 1996.

Section 4 of the Child Abduction and Custody Act 1985 empowers the High Court in Northern Ireland to hear applications under the Convention. The Convention is set out in Schedule 1, Chapter 1 of which outlines the scope of the Convention in the following terms.

"Article 3

The removal or retention of a child is to be considered wrongful where --

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of sixteen years.

Article 5

For the purposes of this Convention --

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence".

For the purposes of this application, it was conceded rightly in my view, that the applicant enjoyed custody rights in respect of the two children, and that prior to their journey to Northern Ireland they were habitually resident on the island of Spetses, Greece. Rights of custody is a term which is not necessarily synonymous with the single word custody, as we have hitherto understood it in the domestic jurisdiction, when it is used alone. In most cases it will be interpreted in its widest sense possible. What the rights are will depend on the circumstances of the case and the functions exercised by the parties prior to abduction or retention. The complaining parent does not have to be continuing to exercise day to day care and control immediately before the abduction or retention. Otherwise, where a child was on staying access, the actual custodial parent would be defeated. This was not the intention of the Convention. Thus where parents are living together with their children and exercising their parental responsibilities either jointly or separately and one parent takes the children beyond the frontier with the agreement of the other parent and then wrongfully retains them, the other parent does not lose his rights of custody because he was not exercising them immediately before the wrongful retention. It was also clear that the children were habitually resident in Greece.

"Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested state has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the jurisdiction 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;

(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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence".

Article 12 establishes the objectives of the Convention. These are --

1. to ensure the prompt and summary return of children wrongfully removed or retained in another jurisdiction; and

2. to ensure that rights of custody and access under the law of one contracting State are effectively respected in the other contracting states.

The onus is on the applicant to establish in this case, that the children were wrongfully retained in Northern Ireland. It was submitted by the respondent's counsel that the court might consider a prima facie case of wrongful retention had been made out by the applicant, in view of the respondent's evidence that there had been an understanding that she and the children would return at the end of August. It was the respondent's evidence that, in telephone calls before the applicant came to Northern Ireland, he expressed himself happy, that the children would remain with the respondent in Northern Ireland. I do not consider, that the applicant was much exercised about the childrens' residence in the initial stages, after the respondent told him she was not returning to Spetses. I consider that for the first couple of months he was concerned about the return of the respondent, which in itself, would secure the return of the children. The evidence about this period up to the applicant's journey to Northern Ireland in October was not as detailed as the evidence about the events thereafter. I consider that the applicant tolerated the children remaining in Northern Ireland with the respondent during the first few months, even after the end of August. The understanding that they would return in August had been superseded by the events in July, when the respondent indicated she was not returning to Spetses. Shortly after his arrival in Northern Ireland, the applicant declared (according to the respondent whose evidence I accept) words to the effect you must come back with me, or I will use the Hague Convention". This would appear to be the first indication, albeit indirectly that the applicant wished the children to return to Spetses. The applicant's evidence, was that he agreed to the children remaining in Northern Ireland until

Christmas when he considered they and the respondent would be returning permanently to Greece.

The first matter for consideration is whether it has been established that the children have been wrongfully retained within Article 3 of the Hague Convention. Wrongful retention under the Convention is not a continuing state of affairs but requires proof of a specific event, occurring at a specific point on a certain occasion which constitutes the act of wrongful retention. Thus it is said that wrongful retention must be in every case an issue of fact. In this case therefore I would hold that there was wrongful retention when the respondent unilaterally declared to the applicant (either by telephone or in a letter) that she and the children were not returning to Spetses. This was in breach of the applicant's custody rights because the respondent did not intend to return to the island with the two children, in breach of the understanding between them that they would return at the end of August. The respondent, as was recognised, cannot rely on the applicant's agreement to the removal and retention of the children outside Spetses for a limited period, as protecting her under Article 3 or Article 13 of the Convention. Thus it was rightly submitted that the Court could find as it does, wrongful retention under Article 3 of the Convention.

Counsel on behalf of the respondent submitted that where a prima facie case, within Article 12, has been made out, the onus shifts to the respondent to establish grounds which would remove the mandatory nature of the direction contained in Article 12.

In my view, once it has been shown that there has been a removal to or retention, in another contracting State, prima facie in breach of custody rights, then the onus shifts to the other party who opposes the return of children to show good cause under the Convention why they should not be returned. In this application the respondent sought to rely on one of the exceptions contained in Article 13 namely that the applicant acquiesced in the retention of the children in Northern Ireland which, if applicable, removes the mandatory requirement to return the children wrongfully removed or retained in another jurisdiction.

Article 13 states that notwithstanding Article 12 the Court is not bound to order the return of a child if it is established that the complaining parent had consented to or subsequently acquiesced in the removal or retention. The consent and acquiescence exceptions have been the subject of examination in many cases at different levels from the High Court upwards in England and Wales. These have variously concerned the meaning of the word acquiescence, the evidence which may give rise to acquiescence, the proper approach to Article 13 and the nature of and approach to the discretion to which it gives rise.

It would be helpful to set out some of the more salient comments made in these cases.

In Re A (Minors) (Abduction: Acquiescence) CA [1992] 2 FLR 14 Balcombe LJ commencing at p 21 said:-

"It will be seen that the scheme of the Convention is that, where a child has been wrongfully removed or retained under Art 3, then, where the proceedings to recover the child are commenced within a period of less than one year from the date of the wrongful removal or retention, the court of the country to which the child has been taken is under an obligation -- there is no discretion -- to order the immediate return of the child, However, if consent to -- which in the context must mean prior consent -- or subsequent acquiescence in the removal or retention of the child by the other parent is established, then, as it was put in argument, the door unlocked and the court is not then bound to order the return of the child, but has a discretion whether or not to do so. The scheme of the Convention is thus clearly 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. It is in that context that I turn to consider the meaning of 'acquiesced' in Art 13(a).

The relevant meaning of 'acquiesced' in the Oxford English Dictionary is 'to agree tacitly to, concur in; to accept (the conclusions or arrangements of others)'. The corresponding meaning of

'acquiescence is 'silent or passive assent to, or compliance with, proposals or measures'. Since French and English are both official languages of the Convention, we were referred also to the French version of Art 13(a), where the relevant words are:

'Ou avait consenti ou a acquiesce posterieurement'

and to a French dictionary definition of 'acquiescer', where the relevant meaning is:

'B. Dans un cont, de nature jur. Donner une adhesion tacite ou expresse a unacte.'.

We were also referred to a judgment of Dean J in the High Court of Australia in Orr v Ford (1988-1989) 167 CLR 316, where at pp 337-338 he gave a comprehensive dissertation on the various meanings which 'acquiescence' can have at common law. Since we are here concerned with the meaning of 'acquiesced' in an international convention to which many countries, not only those with a common law background, have adhered, it cannot be right to attempt to construe 'acquiesced' by reference only its possible meaning at common law or equity. Nevertheless, Dean J's first definition appears to me to have general force:

'Strictly used, acquiescence indicates the contemporaneous and informed ('knowing') acceptance or standing by which is treated by equity as 'assent' (ie consent) to what would otherwise be an infringement of rights'.

It was common ground before us that acquiescence can be inferred from inactivity and silence on the part of the parent from whose custody, joint or single, the child has been wrongfully removed. In such a case, it is, in my judgment, inevitable that the court would have to look at all the circumstances of the case, and, in particular, the reasons for the inactivity on the part of the wronged parent and the length of the period over which the inactivity persisted, in order to decide whether it was legitimate to infer acquiescence on his or her part.

However, where, as here, it is said that the father's acquiescence was expressed to the mother by the letter of 23 September 1991, it is argued that this was a once-for-all event, and it is impermissible to consider subsequent events, or what was in the mind of the father at the time that he wrote the letter or thereafter. Indeed, the argument goes so far as to say that, if the mother had received a letter by the following post making it clear that the father had retracted what he said in his letter of 23 September 1991, and was going to use every legitimate step open to him to have the children returned to Australia, nevertheless he had 'acquiesced' in their wrongful removal, and that the door had been unlocked, so as to give the court discretion whether or not to order the return of the children.

In my judgment, this is to give 'acquiesced' far too technical a meaning for the context in which it is used. As I have already said, the main object of the Hague Convention is to require the immediate and automatic return to the State of their habitual residence of children who have been wrongfully removed. To this there are a limited number of exceptions, but it is apparent that the purpose of the exceptions is to preclude the automatic return of the children to the country whence they were removed, only if it can be shown or inferred that this could result in unnecessary harm or distress to the children. In other words, it is to the interest of the children that the exceptions are directed, not (except insofar as these directly affect the interests of the children) the interest of the parents or either of them. In my judgment, this requires the court to look at all the circumstances which may be relevant and not, as is here submitted, to the terms of a single letter.

Added force is given to this view by the English and French dictionary definitions of 'acquiesce' which I have quoted above. 'Accept' and 'adhesion', to my mind, connote a state of affairs which persists over a period. 'Acquiesce' is not, in my judgment, apt to refer to a single expression of agreement taken in isolation from all surrounding circumstances".

In the same case p 28 Lord Donaldson MR said:-

"All this demonstrates the agreed international response to a wrongful removal. The child must go back and the status quo ante be restored without further ado. That said, the Convention does itself enter a caveat, which is contained in Art 13. Before I consider whether it applied in this case, it is, I think important to emphasise what is the consequence if it does apply. It is not that the court will refuse or order the return of the child to its country or jurisdiction of habitual residence. It is not that the court will assume a wardship or similar jurisdiction over the child and consider what order should be made as if the child had never been wrongfully removed or retained. The consequence is only that the court is not longer bound to order the return of the child, but has a judicial discretion whether or not to do so, that discretion being exercised in the context of the approach of the Convention.

In the comparatively rare case in which such a judicial discretion falls to be exercised, there will be two distinct and wholly different issues confronting the court:

(1) In all circumstances, is it more appropriate that a court of the country to which the child has been wrongfully removed or in which it is being wrongfully retained (country B) should reach decisions and make orders with a view to its welfare, or is it more appropriate that this should be done by a court of the country from which it was removed or to which its return has been wrongfully prevented (country A)?

(2) If, but only if, the answer to the first question is that the court of country B is the more appropriate court, should that court give any consideration whatsoever to what further orders should be made, other than for the immediate return of the child to country A and for ensuring its welfare pending the resumption or assumption of jurisdiction by the courts of that country?

In considering the first issue, the court of country B should approach the matter by giving the fullest force to the policy which clearly underlies the Convention and the Act, namely that wrongful removal or retention shall not confer any benefit or advantage on the person (usually a parent) who has committed to wrongful act. It is only if the interests of the child render it appropriate that the courts of country B, rather any country A, shall determine its future, that there can be any exception to an order for its return. This is something quite different from a consideration of whether the best interests of the child will be served by its living in country B, rather than country A. That is not the issue unless Art 13(b) applies. The issue is whether decisions in the best interests of the child shall be taken by one court rather than another. If, as usually should be the case, the courts of country B decide to return the child to the jurisdiction of the courts of country A, the latter courts will be in no way inhibited from giving permission for the child to return to country B or, indeed, becoming settled there and so subject to the jurisdiction of the counts of that country. But that will be a matter for the courts of country A.

I now return to the point upon which I disagree with Balcombe LJ. The issue is whether the father 'consented to or acquiesced in' the wrongful removal of the children. Each case must be considered on its own special facts, and the facts of this case are certainly unusual.

In context, the difference between 'consent' and 'acquiescence' is simply one of timing. Consent, if it occurs, precedes the wrongful taking or retention. Acquiescence, if it occurs, follows it. In each case, it may be expressed or it may be inferred from conduct, including inaction, in circumstances in which different conduct is to be expected if there were no consent, or as the case may be, acquiescence. Any consent or acquiescence must, of course, be real. Thus, a person cannot acquiesce in a wrongful act if he does not know of the act or does not know that it is wrongful. It is only in this context, and in the context of a case in which it is said that the consent or acquiescence is to be inferred from conduct which is not to be expected in the absence of such consent or acquiescence, that the knowledge of the allegedly consenting or acquiescing party is relevant and, to use the words of Thorpe J, 'the whole conduct and reaction of the husband must be investigated in the round'. Such consideration do not arise in this case, because the father's letter of 23 September 1991 is incapable of any construction other than a clearly expressed acquiescence and, unlike the case of Re A and Another (Minors: Abduction) [1991] 2 FLR 241, was so construed and believed by the mother. In agreement with Thorpe J, I consider it clear that this was not affected by anything said in the

telephone conversation of 24 September 1991. The father cannot be heard to say that he had an intention not to acquiesce which he kept secret from the mother, any more than in other circumstances it would be open to the mother to say, and perhaps to prove, that the father had at one time had an intention to acquiesce which was kept secret from her".

In Re AZ (a minor) [1993] 1 FLR 682 at p 687 Butler Sloss LJ said:

"Both the Master of the Rolls and Stuart-Smith LJ refer to the necessity for knowledge of the facts and that the act is wrongful. They did not take the further step of the necessity of knowledge of rights under the Hague Convention. In my judgment the judge misdirected herself in stating that 'acquiescence has to be done in the knowledge of rights that have been breached and rights that can be enforced'. That statement goes too far. If a father knows that his son has been retained in another country against his wishes and he wants him back and has the capacity to and is able to seek legal advice as to what proceedings he might be able to take, the factual situation has arisen upon which he may objectively be considered to have sufficient knowledge either to consent or to acquiesce in the situation which has occurred".

Later at p 687G she said:

"Active acquiescence, which I believe this to be, has to be clear but it does not have to be an acceptance of an unchangeable state of affairs. I see nothing incompatible with acquiescence to the continuance of a wrongful retention and an application to the Californian court for joint custody and care and control to himself which would take place at a later date. This father recognised the good care being taken of his son by the aunt and there was no urgency in his mind in changing the existing arrangements until either a court order or, as it turned out, a change of heart. Acquiescence has to be conduct inconsistent with the summary return of the child to the place of habitual residence. It does not have to be a long-term acceptance of the existing state of affairs".

In the same case Sir Donald Nicholls VC said at p 691A:

". . . to or retained in another contracting State. If the person who had care of the child consented to the removal or retention he cannot afterwards, when he changes his mind, seek an order for the summary return of the child pursuant to the Convention. Likewise if he acquiesces. It seems to me that the underlying objectives of the Convention require courts to be slow to infer acquiescence from conduct which is consistent with the parent whose child has been wrongly removed or retained perforce accepting, as a temporary emergency expedient only, a situation forced on him and which in practical terms he is unable to change at once. The Convention is concerned with children taken from one country to another. The Convention has to be interpreted and applied having regard to the way responsible parents can be expected to behave. A parents whose child is wrongly removed to, or retained in, another country is not to be taken as having lost the benefits the Convention confers by reason of him accepting that the child should stay where he or she is for a matter of days or a week or two. That is one edge of the spectrum.

At the other edge of the spectrum the parent may, again through force of his circumstances, accept that the child should stay where he or she is for an indefinite period, likely to be many months or longer. There is here a question of degree. In answering that question the court will look at all the circumstances and consider whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return. That is the concept underlying consent and acquiescence in Art 13. That is the touchstone to be applied.

I am not able to accept that, in applying this test, there cannot be acquiescence unless the parent knew, at least in general terms, of his rights under the Convention. Whether he knew or not is one of the circumstances to be taken into account. The weight or importance to be attached to that circumstance will depend on all the other circumstances of the particular case".

In Re S (minors) (Abduction: Acquiesence) (CA) [1994] 1 FLR 819Waite LJ reviewed the various authorities and said at p 828:

"In Re A (Minors) (Abduction: Custody Rights) [1992] 2 FLR 14 (the case of a father whose first response to the wrongful removal of his children had been to tell the removing wife 'I'm not going to fight it'), Balcombe LJ (who although dissenting in the result was in agreement as to the principle to be applied) said (at pp 16 and 22 respectively):

'It was common ground before us that acquiescence can be inferred from inactivity and silence on the part of the parent from whose custody, joint or single, the child has been wrongfully removed. In such a case, it is, in my judgment, inevitable that the court would have to look at all the circumstances of the case, and in particular the reasons for the inactivity on the part of the wronged parent and the length of the period over which the inactivity persisted, in order to decide whether it was legitimate to infer acquiescence on his or her part.'

Stuart-Smith LJ (at pp 19 and 26 respectively) said:

'Acquiescence means acceptance and it may be either active or passive.

If it is active it may be signified by express words of consent or by conduct which is inconsistent with an intention of the party to insist on his rights and consistent only with an acceptance of the status quo. If it is passive it will result from silence and inactivity in circumstances in which the aggrieved party may reasonably be expected to act. It will depend on the circumstances in each case how long a period will elapse before the court will infer from such inactivity whether the aggrieved party had accepted or acquiesced in the removal or retention.

A party cannot be said to acquiesce unless he is aware, at least in general terms, of his rights against the other parent. It is not necessary that he should know the full or precise nature of his legal rights under the Convention: but he must be aware that the other parent's act in removing or retaining the child is unlawful. And if he is aware of the factual situation giving rise to those rights, the court will no doubt readily infer that he was aware of his legal rights, either if he could reasonably be expected to have known of them or taken steps to obtain legal advice.'

When dealing with the facts of the case, Stuart-Smith LJ noted that the judge had taken into account the fact that the aggrieved father had for a time made secret preparations (concealed from the mother) for the launch of an application under the Convention. He said of this:

'In my judgment the judge fell into error in considering what the father was doing, unknown to the mother . . .'

Lord Donaldson MR said (at pp 23 and 29 respectively):

'Consent, if it occurs, precedes the wrongful taking or retention. Acquiescence, if it occurs, follows it. In each case it may be expressed or it may be inferred from conduct, including inaction, in circumstances in which different conduct is to be expected if there were no consent or, as the case may be, acquiescence. Any consent or acquiescence must, of course, be real. Thus a person cannot acquiesce in a wrongful act if he does not know of the act or does not know that it is wrongful. It is only in this context and in the context of a case in which it is said that the consent or acquiescence is to be inferred from conduct which is not to be expected in the absence of such consent or acquiescence, that the knowledge of the allegedly consenting or acquiescing party is relevant, and to use the words of Thorpe J "the whole conduct and reaction of the husband must be investigated in the round.'

Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682 was a wrongful retention case. The aggrieved father, an American citizen resident in Germany, had assented to an interim arrangement under which the child was placed, after removal from Germany, had assented to an interim arrangement under which the child was placed, after removal from Germany by the mother, in the care of an aunt. Some months later (after starting divorce proceedings in California in the meantime), he started Convention proceedings for the child's return. Butler-Sloss LJ, in overruling

the decision of the judge that there had been no acquiescence, said at p 687:

'Acquiescence has to be conduct inconsistent with the summary return of the child to the place of habitual residence. It does not have to be long-term acceptance of the existing state of affairs.'

After criticising the judge for having set too high a standard for the degree of knowledge of rights that is required in acquiescence cases, Butler-Sloss LJ continued:

'[The judge] also concentrated overmuch in a subjective approach to the evidence of the father, rather than an overall assessment of the whole situation.'

There are remarks in the judgment of Sir Michael Kerr to similar effect at p 689:

'First, I think [the judge] approached the question of his acquiescence by placing too much emphasis on what she considered to be his subjective state of mind instead of concentrating on his conduct, viewed objectively, and on the effect which, to his knowledge, it conveyed to [the aunt]'

The third judgment in that case is that of Sir Donald Nicholls VC containing the passage already quoted.

Reference was also made to a decision of my own at first instance, W v W (Child Abduction: Acquiescence) [1993] 2 FLR 211. That was a case of wrongful retention by a mother who refused to return with the child to Australia after a holiday in England. The father's inactivity for 10 months after learning of the mother's decision was held to have amounted in the circumstances to conduct inconsistent with his later seeking a summary order, and therefore to acquiescence. Having referred to the authorities already mentioned and summarised their effect, I continued (at p 217):

'When it is viewed from that perspective, I regard the present case as a very plain instance of a parent's acquiescence through inactivity. It is apparent from the recent letter which the father himself exhibits from his own Australian solicitors summarising the instructions they were given (or not given by him, that they were never asked directly by the father whether any immediate legal steps could be taken to enforce the boy's early return to Australia. If the father's evidence (already quoted) purports to say anything to the contrary, I reject it. Even if, which I do not accept, the legal advice given to him after he had first learned of the mother's retention of the child in England had been in any respect inaccurate or incomplete, that would not help him. His conduct has to be viewed objectively from outside. For something like 10 months after learning of the wife's decision not to return the boy to Australia, he took no step towards having him brought back and for much of that period his address was unknown, even to his own solicitor. That was conduct wholly inconsistent with his later seeking a summary order under the Convention.'

There is a common thread that runs through all those passages. It can be stated in this way. Acquiescence is primarily to be established by inference drawn from an objective survey of the acts and omissions of the aggrieved parent. This does not mean, however, that any element of subjective analysis is wholly excluded. It is permissible, for example, to inquire into the state of the aggrieved parent's knowledge of his or her rights under the Convention; and the undisputed requirement that the issue must be considered 'in all the circumstances' necessarily means that there will be occasions when the court will need to examine private motives and other influences affecting the aggrieved parent which are relevant to the issue of acquiescence but are known to the aggrieved parent alone. Care must be taken by the court, however, not to give undue emphasis to these subjective elements: they remain an inherently less reliable guide than inferences drawn from over acts and omissions viewed through the eyes of an outside observer. Provided that such care is taken, it remains within the province of the judges to examine the subjective forces at work on the mind of the aggrieved parent and give them such weight as the judge considers necessary in reaching the overall conclusion in the totality of the circumstances that is required of the court in answering the central question: has the aggrieved parent conducted himself in a way that is inconsistent with his later seeking a summary return?

. . .

The wording of Art 13 makes it plain, however, that acquiescence is to be used, in the context of the Convention, in a broad and non-technical sense, where it is (as Lord Donaldson MR pointed out) used as synonymous with the equally non-technical expression 'consent' (the difference between the two terms being purely temporal). I would accordingly reject the first submission. The concept of acquiescence is not to be restricted by confining it exclusively to those cases where it can be shown to arise solely from circumstances known to the removing parent.

I would accept as a general principle Mr Munby's second submission (that the question is to be judged objectively in the light of such inferences as would be drawn by an informed third party coming to the case from outside). But that is only the starting-point. For the reasons already stated there are bound to be cases in which it is proper for the court to embark, with suitable caution, on an inquiry into subjective elements known only to the aggrieved parent. It follows that I reject Mr Munby's third submission -- to the effect that any inquiry into the aggrieved parent's actual state of mind is wholly precluded."

In the same case Hoffman LJ (as he then was) at p 832E said:

"The term 'acquiescence' is used in different languages in an international convention. It cannot be construed according to any technical doctrines of England law. The general idea is easy enough to follow. It reflects a very general principle of fairness which must exist in every system of law; that a party should not be allowed to 'blow hot and cold' or in Scottish terminology, 'approbate and reprobate'. But the cases show that this deceptively simple concept may not be all that easy to apply in practice.

In my judgment the reason for the difficulty is that 'acquiescence' in the Convention was not intended to mean something capable of being defined by a single set of necessary and sufficient conditions which must be present in every case. Common sense suggests that acquiescence may take different forms and that something which forms an essential part of acquiescence in one form may not be necessary for acquiescence in another form. In my view the word denotes a cluster of related concepts rather than a single one.

The multifaceted nature of the general principle may be demonstrated by considering the various rules in which it is reflected in English domestic law. It forms the basis of estoppel, promissory estoppel, waiver, election, laches, acquiescence (in its technical equitable meaning) and no doubt some other rules as well. Each of these species of the principle has developed its own rules. In some cases knowledge of one's rights is require and in other it is not. Some require conduct unequivocally inconsistent with adopting an alternative course and other are less strict. Some look at the matter from the point of view of the party faced with the choice and some from the point of view of the other party. Some require the other party to have acted to his detriment and some do not. The fact that English law has found it necessary to make all these discriminations suggests that one cannot fairly apply the general principle to the wide variety of cases which may arise under the Hague Convention by adopting a single set of criteria.

The Convention provides a special summary remedy in cases of child abduction. A parent of an abduced child is therefore faced with a choice. He may invoke the Convention. Or he may prefer to litigate the matter in the jurisdiction to which the child has been taken, in accordance with its ordinary domestic and conflict rules. Or he may postpone taking any form of legal action. In the meanwhile he may try to persuade the abductor to bring the child back. He may just think about what to do next. Finally, he may be content to leave the child where it is.

The cases show that acquiescence is not confined to this last choice. It will include conduct which shows that the applicant has elected to pursue some other remedy or course of action rather than seek summary return under the Convention. As Butler-Sloss LJ put it in Re AZ (A Minor) (Abduction Acquiescence) [1993] 1 FLR 682 at p 687:

'Acquiescence has to be conduct inconsistent with the summary return of the child to the place of habitual residence. It does not have to be a long-term acceptance of the existing state of affairs'.

There is here an analogy with the English domestic rule concerning election between remedies. As Lord Diplock explained in Kammin's Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850 at p 883:

'This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did'.

For the purposes of this doctrine, inconsistency is judged on a purely objective basis and there is no requirement of knowledge that alternative remedies were available or that the act in question would amount to an election. Nor is it necessary that the other party should have acted in reliance upon the election.

The fact that the parent of an abducted child has a choice of remedies therefore makes it unsurprising that judges interpreting the Convention should have construed the concept of acquiescence to include something which resembles the doctrine of election in English domestic law. This does not mean that they have simply transposed domestic rules. But the rules of election have been evolved in English law because they were thought a reasonable application of the general principle about not blowing hot and cold in the particular context of inconsistent remedies. In general terms, if not in detail, one would therefore expect something similar to be reflected in the similar context of the Convention".

From these and other decisions it is possible to discern a number of principles applicable to cases of wrongful detention in which the acquiesence (or consent) exception is invoked.

1. Acquiesence means acceptance of a state of affairs. It can be active or passive. Active acquiesence is unequivocal conduct whereas passive acquiesence is a failure to act in circumstances in which action would reasonably be expected, sometimes referred to as standing by. It includes consent given after the time of retention. It may be a matter of degree, lying somewhere between one end of a spectrum in which a parent does not accept the situation which has developed, to the other end of the spectrum where a parent may accept that a child should in its best interests stay where it is even for a indefinite period of perhaps months. It is not a continuing state of affairs nor a long term acceptance of an existing state of affairs nor does it have to be acceptance of an unchangeable state of affairs and may consist of one deed or word. The general idea of acquiesence is fairness -- a party should not be allowed to "blow hot and cold". The difference between consent and acquiesence so far as the Convention is concerned, is one of timing.

2. Acquiesence is primarily to be established by inference drawn from an objective survey of the acts and omissions of the complaining parent. It is a question of fact usually inferred from conduct, but which may be evidenced by statements made by the party concerned. It should concentrate on the conduct of the complaining parent viewed objectively. However, this approach does not mean that in an appropriate case a subjective analysis should be entirely excluded. The whole conduct of the complaining parent including his words and his reaction should be considered in the round. The mere fact that a complaining party has delayed taking proceedings even for a period of months may not in itself constitute acquiesence.

3. Acquiesence or acceptance of a state of affairs (like consent) must be shown to exist in clear and unequivocal words or conduct. The evidence in support of it must be clear and compelling. The Convention requires acquiesence to be "established" that is, it requires proof on the balance of probabilities and the evidence to be so requires to be cogent. Once it is shown that there has been a removal or retention which is prima facie in breach of custody rights and consent or acquiesence is in issue the onus then shifts to the party who opposes return, to establish consent or acquiesence on the balance of probabilities.

4. Unlike consent which must be prior to removal or retention to qualify under Article 13, acquiesence must be subsequent to any wrongful removal or retention. A complaining parent cannot be said to acquiesce unless he is aware of his rights against the other parent. He need not know the precise nature of his rights under the Convention, but he should be aware that the acts of the other parent in removing or retaining the child are wrongful. It is sufficient if he is aware of the factual situation which gives rise to his rights against the other parent as the Court will usually infer from that knowledge, that he was aware of his legal rights even if he is unaware of the Convention or its terms. In other words acquiesence does not require knowledge on the part of the complaining parent that the act of the other parent is wrongful within the scope of the Hague Convention. In some forms of acquiesence, for example "standing by", a greater emphasis may be placed on the applicant's knowledge of his rights and remedies and the reason for his inaction.

5. In any consideration of acquiesence, the primary question is whether the conduct of the complaining parent, viewed objectively in the round, is inconsistent with that parent later seeking to pursue the Convention remedy for a summary return of the child to the place of habitual residence. It does not have to be long term acceptance of the existing state of affairs, rather, was it acquiesence of the state of affairs as opposed to seeking summary return. It is relevant whether the party opposing the return believed or understood that the complaining parent had acquiesced in the retention or removal and acted upon that belief or understanding.

6. Once a parent has consented or acquiesced then the conditions set out in Article 13 have been satisfied. Therefore if consent or acquiesence in that sense has occurred a person cannot afterwards change his mind and seek the summary return of a child. In other words once consent or acquiesence has occurred it cannot be withdrawn either deliberately or inferentially.

7. If acquiesence or consent is established, this "unlocks the door" for the domestic tribunal to consider whether, in the exercise of its discretion, the child should be returned. Article 13 states that the judicial authority is not bound to order the return of a child. Thus it is discretionary and once this discretion arises it is for the Court to conduct the balancing exercise between what the Convention would otherwise require, namely summary return and the present interests of the children. The authorities suggest that only where it can be clearly shown that the interests of the children require they should not be returned, should the Court refuse to order their return. The purpose of the exceptions is to prevent the summary return of a child where such would result in harm or distress to the child or otherwise not be in the child's best interests for good as opposed to specious reasons. Thus it is said that it is to the interests of children that the exceptions are directed and not the interests of parents.

I turn now to consider whether in the light of the principles expressed the applicant has acquiesced in the retention of these children in Northern Ireland. This requires firstly identification of any specific time or point at which he may have so acquiesced. Two points of time seem to have been identified. One and the first in time is when he received the information that the respondent did not intend to return to Spetses with the children. The other is the meeting which took place on the 19 October 1995. So far as the former is concerned no argument was pressed on the Court in support of it, perhaps recognising that the applicant living in Spetses, with a boat repair business to carry on in the height of the summer season, was ill placed to do something immediately about the developments. I note that he did not seek an order from a Greek Court for custody or care and control of the children, nor has he since, though he has given an undertaking so to do if the children are returned to Spetses. As I have indicated earlier, I consider that he tolerated the situation for the first few months. Where the conduct of a parent over a particular period of time is consistent with him accepting as a temporary expedient, a situation forced upon him without notice and which he is, perhaps due to distance or some other reason, unable to change at once, a Court should be slow to infer acquiescence or consent. Nevertheless evidence of such acceptance may where appropriate be considered along with other evidence to determine whether or not the complaining parent has acted in a manner inconsistent with summary return of the children.

The crux of the case however was the meeting on the 19 October. I have expressed my findings in

relation to that meeting. However at a later stage the applicant resolved to seek the return of his children to Spetses. Did he acquiesce in their retention in Northern Ireland at the meeting of the 19 October, and did he do so in clear and compelling terms. Looking at that issue in the light of all the other circumstances as I must, I find it established that he did and that his conduct and words on that occasion and indeed thereafter in the short term, were inconsistent with him seeking any summary return of the children to Greece. His subsequent decision to seek their return for whatever reason (and probably because of the combination of circumstances which prevented them travelling alone or accompanied to Greece) cannot resurrect his right to seek their summary return once he has acquiesced in the children remaining in Northern Ireland. Indeed his conduct even on his own case up to Christmas amounted to a clear decision to leave the children with the respondent in Northern Ireland for the time being and by itself would be sufficient acquiescence to prevent the applicant from relying on the summary procedure under the Convention. Acquiesence does not have to be acceptance of an unchangeable state of affairs to qualify as an exception under Article 13.

I now have to consider whether in the exercise of my discretion I should nevertheless direct the return of the children to Spetses. This requires balancing the scheme of the Convention and the interests of the children. In exercising this discretion I consider the Court is entitled to take into account the history of events, and in particular the applicant's attitude (as found by the Court) between July 1995 and the initiation of his application to this Court through the Ministry of Justice in Athens in February 1996. These children are young. They are attending school in Northern Ireland and in the case of one of them, a school she has previously attended which the applicant is now aware of and has visited. The children are settled in a home here in Northern Ireland. Their mother comes from Northern Ireland and has family here and is now in employment. She has stated and I accept that she does not intend to return to Spetses and there is therefore no prospect of a reconciliation between the parties in the absence of an intention (undeclared) of the applicant coming to live in Northern Ireland. On the issue relating to the question of acquiescence generally I have considered the brief cohabitation and intercourse between the parties whilst the applicant was in Northern Ireland. The respondent still has feelings for her husband. I considered he pestered her for physical contact, probably in the hope of changing her mind about her decision not to return to Spetses. She relented in the hope that he might demonstrate his willingness to change his attitude towards her. Unfortunately it was not to be, as her testimony indicated. I do not consider this incident to be of any further or other significance.

Finally these children are young and require to be with their mother. I recognise they are part Greek. But I consider it is not contrary to their needs that they make their home in Northern Ireland with their mother. I am conscious that my decision will be hard for the applicant to understand and bear, as he will be separated from his children by several thousand miles and I have great sympathy with him in that regard. However, I find the evidence clear and compelling that on the 19 October 1995, the applicant acquiesced in the retention of the children in Northern Ireland and the evidence on that issue is in my view overwhelming. Suffice to say I am so satisfied on the balance of probabilities. Significantly the applicant conveyed that acquiescence to the respondent who acted upon it in what she considered to be the children's best interests. For those reasons and in all the circumstances I have come to the conclusion that the children's best interests are served by them remaining in this jurisdiction with their mother. Consequently I refuse the application for the summary return of the children to Greece. It would be open to the applicant to pursue a claim in Northern Ireland for a Residence Order (under The Children (Northern Ireland) Order 1995) and for leave to remove the children back to Greece, but I refuse to order their summary return.

At the commencement of the proceedings the applicant applied that the children be made Wards of Court in exercise of the Court's inherent jurisdiction. I accede to that request and appoint the respondent and applicant as guardians and grant care and control of the children to the respondent on condition that they reside in Northern Ireland and be not removed from this jurisdiction without the leave of the Court.

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