---

http://www.incadat.com/ ref.: HC/E/UKe 270
[18/04/2000; Court of Appeal (England); Appellate Court]
Re T. (Abduction: Child's Objections to Return) [2000] 2 FCR 159

IN THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

18 April 2000

Simon Brown, Ward and Sedley LJJ

In the Matter of re T.

Counsel: The father in person; Henry Setright for the mother

WARD LJ (giving the first judgment at the invitation of Simon Brown LJ). This appeal has become more and more difficult the longer it was heard. It is an international child abduction case. The children are G who was born in London on 9 January 1989, so she is just eleven years old. Her brother, T, is only six having been born in Spain on 22 July 1993. Both parents are British nationals but they have lived in Spain since shortly before T's birth. Mother is aged 46 but father is approaching his sixtieth birthday. The marriage of these parents has been under strain for some time and the mother commenced related proceedings for divorce and custody in Spain in July 1997. The Spanish court has been seised of the difficulties ever since then and, as I must explain in detail later, there have been a succession of hearings and orders made regarding the residence and visiting rights of the children.

On 3 January 2000 the father wrongfully removed G and T from Spain in breach of the mother's rights of custody and has established a home near his adult children by a former marriage and their families in Suffolk. This move, not the first abduction from Spain, was in flagrant defiance of the Spanish court in whom the father has no confidence. My instinctive reaction is to say that an English court will not tolerate behaviour of that kind: these are children who have been habitually resident in Spain, the Spanish court is seised of the matter and it is the Spanish court and only the Spanish court which should determine the many disputes of fact which form the backcloth to the separation and more importantly to the events which have shaped the children's lives.

That was the view taken by Wall J. He rejected the father's defences under art 13 of the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) (The Hague, 25 October 1980; TS 66 (1986); Cm 33), as set out in Sch 1 to the Child Abduction and Custody Act 1985 that there was a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation. Although it was not in any real dispute that G objected to being returned, he found that she had not attained an age and a degree of maturity at which it was appropriate to take any account of her views which he held were shaped by the father's hostility to the mother. Even if her views were to be taken in to account, he would have

refused to exercise his discretion in order to give effect to the spirit of the Hague Convention which demands the return to the country of habitual residence, especially where, as here, the Spanish courts were fully seised of the problems. Thus on 3 March 2000 Wall J ordered their return to Spain. My first impression on reading his judgment was that that conclusion was hardly a surprise. Now it is no longer as simple as at first it seemed.

Until late in the appeal, attention was focused on G's objections, and scarcely a thought was spared for T. G's position cannot be more eloquently expressed than she herself expressed it in a letter dated 1 February 2000 sent in answer to a letter, which cannot be criticised in any way, sent by her mother the previous day with 'lots and lots of love and lots of hugs and kisses'. This is how G responded:

'MUM,

As you have been phoning Angie nearly every day and didn't ask to speak to us I was wondering when you were going to contact us but when I read your letter I saw that it was the same rubish (sic) that you sent me on my birth day (sic) so you didn't have to bother.

1st I don't have a clue who these people are that are sending their love like John & Tara.

2nd Uncle Brendan hasn't contacted me since we've been in Spain so I don't see wy (sic) he's sending his love now. Grandad hasn't contacted me either since I've been in Spain either so I don't see wy (sic) he's sending his love. I haven't heard from auntie Carol or Andrew for years so, wy (sic) are they taking interest for (sic) us now?

I'm frightened that I'm going to have to live in Spain again and I'm frightened that I'm going to have to live with you. You know how dangerous you are when you get drunk and don't tell me you've stoped (sic) drinking because you were drunk the day we left and I smelled your breth (sic) when you came to court and you'de (sic) been drinking.

If you want to do something for me and [T] stop trying to make us go back to live in that crummy little village in Spain were (sic) all my friends know how you keep getting drunk all the time.

I see you've been sending faxes to the school the same as you did in Berja and Albox to make more trouble for us again. Wy (sic) can't you leave us in peace?

We want to live in England near to Gi, Angie, Jay & Kane and now that we are friends again with Nancy & Gary, Leanne & Chelsea. If you realy (sic) want to see us, wy (sic) don't you come to live in England instead of spoiling our lives?

[G]'

That letter persuaded me to give permission to appeal.

The issues which now arise on this appeal are as follows.

1. Was the judge wrong to take no account of G's objections?

2. If so, was he wrong to exercise his discretion to order her return?

3. Was he wrong to find that the art 13(b) argument 'cannot get off the ground'?

4. If he was wrong to order G's return, what is to happen to T?

None of these questions admit of easy answer.

I must now develop the story.

The father had long service in the parachute regiment until he was invalided out following some injury. He is a tough character. He has an enhanced army pension. He subsequently suffered some other injury for which he has an additional disability allowance. He was previously married and has children and grandchildren.

After leaving school the mother worked in an administrative capacity in television, eventually for Channel 4. Although she had previously been unenthusiastic or ambivalent about having a child, she was surprised and then somewhat overwhelmed by the strength of her maternal feelings after the birth of her daughter. She became very keen to have another child but suffered miscarriages. She blamed her work for that misfortune. She became more and more depressed. She began to abuse alcohol heavily. In that condition, which I have taken from a psychiatric report of Dr Pitcher dated 5 February 1993, she stole some £34,000 from her employer and was given an 18-month suspended prison sentence. By then she was expecting T. Perhaps to make a new start, the family emigrated to Spain.

The marriage had its difficulties. The cause of the deterioration, according to the mother, was the father's aggressive and violent conduct towards her. Its cause, according to him, was the mother's alcoholism. They separated in June 1997. The mother commenced proceedings in the Spanish court and on 25 July 1997 an interim custody order was made in the mother's favour with liberal visiting rights afforded the father. The children's passports were surrendered to the court where they have remained. In January 1998 there was a reconciliation formally recorded by a notary, the effect of which may have been to suspend the custody order. It does not much matter. On about 28 January 1998 the father took the children to Gibraltar without the mother's knowledge or consent. Believing them to have come to England, she commenced proceedings here under the Hague Convention before she learnt where they were. She then made the children wards of court in Gibraltar and on 24 February 1998 Scholfield CJ, having received written and oral evidence from the parties, ordered the father to return the children to the mother. In his judgment he said:

'The documentary evidence I have before me shows that the wife may have abused alcohol in her past but there is no evidence to support the husband's assertions that she is a complete drunk. I am satisfied after reviewing all the material before me that she is perfectly capable of caring properly for her two children . . . I conclude that the reason for the husband's departure from Spain with the children is that he knew he was not going to get his own way with the evidence he could present to the Court and felt he could gain an advantage by taking the children out of the jurisdiction and that he has made up evidence to justify his actions.'

It is a damning judgment on the father. It ought also to have given the mother warning of the consequences of her drinking.

A second custody order had been made in Spain in February 1998 following that abduction but it appears to have lapsed. There was then an incident in July 1998 in which the husband alleges that the mother, the worse for drink, struck him with a baseball bat and threw his briefcase into a swimming pool. He removed the children from her. She obtained, for the third time, a custody order in her favour. The father was arrested for not handing the children over pursuant to that order. In September 1998, again, according to the husband,

under the influence of drink, mother removed G from hospital in the early hours of the morning and the police were involved again. G was interviewed by the Spanish authorities following these incidents which may have been but two of many.

There was then a major incident early in May. It is common ground that the mother, whether under the influence of drink alone or a combination of drink and the medication she was receiving for depression, was unfit to care for the children and the father removed them. On 7 May 1999 the Spanish court awarded physical custody of the children to the father but legal custody or parental responsibility, 'patria potestad', was to be shared by both parents. It was an interim order and the court directed that the child protection team of the Almeria courts provide further information in a psychological and social report. Thereafter the matter would be reconsidered.

The father then removed himself and the children from the area where they had been living and established a new home some distance away in Albox. This made contact difficult. The husband gave this explanation in his first affidavit sworn in these proceedings:

'We moved house primarily because the children felt ostracised by the local community and at school because of the behaviour of the mother. The mother who refers to her nervous breakdown in her affidavit in fact suffers from persistent states of inebriation from alcoholism when she passes out in the street and at home. [G] has had to call the police on more than one occasion regarding her mother's state. This problem has never gone away and it is the mother's alcoholism, her refusal to deal with it and the consequences of it that cause the children, particularly [G], psychological harm and places them in an intolerable position.'

It seems that the father then applied to vary the visiting rights that had been ordered in May and he also sought permission to take the children to England from 22 December to 1 January for a holiday. These matters came before the Berja court on 21 December 1999. The court refused to sanction the move of the children and ordered:

'The minors [T and G] ... shall return their home . . . and to the school . . . at which they were studying; in the event their father should fail to comply with this order they shall be removed from his physical custody.'

The court also refused to permit father to travel to England for Christmas finding as follows:

'This is again a question of legal custody ("patria potestad") and not only physical custody and therefore the consent of both parents is required. Permitting the children to leave Spain would not only deprive their mother of her visiting rights but there is also a real danger that the children might not return, particularly since (the father) stated during an appearance before the Andalucia Tribunal Superior de Justicia (Appeal Court) that he wishes to "go to England and to let her see what she can do with her proceeding there".'

The effect of that order was plain enough and was well understood by the father. Nevertheless, defying the Spanish court he persuaded a friend to allow the children to pass as hers on her passport and removed them to Suffolk. He sent a fax to the Child Abduction Department of the Lord Chancellor's Office on Sunday, 2 January 2000 stating:

'I wish to notify you that it is my intention to bring my two children named above to the United Kingdom, against the wishes of their mother.'

In his first affidavit he admitted that that was in breach of her rights of custody. Wall J so found without difficulty. Although he has sought to argue against it, I refused him permission to do so.

These proceedings were commenced by the mother on 10 January 2000. Meanwhile the Spanish proceedings continued. The psychological report which had been called for in May was prepared in December and a hearing was fixed for 19 January. The father was not present but his lawyer was. Some oral evidence was taken from the social worker and psychologist who prepared the report. I shall refer to it later. The hearing was adjourned to 27 January. The father knew of it; indeed he told Singer J on 24 January that he had no wish to go to Spain to take part in those proceedings. The Spanish court, therefore, proceeded in his absence though he appears again to have been represented by his lawyer. There was a further hearing on 7 February-perhaps in the divorce proceeding-when the court, applying 'the supremacy of the interest of the minor over any other legitimate interest', a test essentially no different from ours, held:

'It is clear that the mother is suitable to have the care and custody of the children and (the father) has been influencing the children to "damage the image of the mother and affect their feelings towards her", depriving them of a mother figure. In view of the investigations made with the minor children and the visit to the minor [G], there is a doubt as to how to evaluate her wishes, for in this it has been clearly observed that she is heavily influenced by her father and it has to be put into the context of the influence of a father over a daughter who, being 10 years of age, is strongly influenced. Accordingly, even though it may be against the will of the child, (the mother) must have the care and custody of the children, as has previously been stated.'

The father has appealed that order but the mother seeks to enforce it under the provisions of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children (the European Convention), which was signed in Luxembourg on 20 May 1980 (and given effect to in English law by s12 (2) of and Sch 2 to the 1985 Act).

On 11 February Bennett J refused the father's application to refer G to a consultant child psychiatrist but permitted letters from a general practitioner, Dr McIver, to be placed before the court. He also directed that the court welfare officer should prepare an oral report for the court as to the objections, if any, G had to returning to Spain.

The judgment under appeal

Wall J heard the application on 3 March. He held:

'The children at the date of the abduction, which I have found to be unlawful, were plainly habitually resident in Spain; all the evidence of their past life relates to Spain and, in my judgment, applying the principles of the Convention, it is clear to me that, notwithstanding the fact that we are dealing here with an English couple and children who are the children of an English couple, Spain is undoubtedly the appropriate court under the Convention to decide these children's futures. It therefore seems to me that, applying Convention principles in relation to the speedy return of children to the country of their habitual residence for their future to be decided in that jurisdiction (sic). This case is particularly strong because the Spanish court has in the past been fully seised of the matter and has made full orders on full information. (The father's) decision not to attend and participate cannot, in my judgment, derogate from that. The question therefore becomes is this a case which can be brought within any part of Article 13.'

He then dealt with the two limbs of art 13 which were relied upon. He said:

'The first is Article 13(b), which permits me not to order the return of either child if (the father) is able to establish that there is a grave risk that the children's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation. In my judgment, on the facts of this case, that argument cannot get off the ground. The Spanish court has found as a fact that the mother is fully capable of caring for the children. The Spanish court has found that it is in their interest to reside with their mother, and the only arguable reason why the children, and [G] in particular, might be placed in an intolerable position is because [the father] tells me that he is steadfastly against ever returning to Spain. It is well established in this court-and I need not refer to specific authority-that where the intolerable situation . . . arises because of the refusal of the parent raising the argument to return to the jurisdiction to which the child is to go, the argument reduces in weight very substantially indeed. Indeed on the facts of this case in my judgment it becomes quite untenable. On (the father's) argument, [G] will be placed in an intolerable situation because of his wife's alcoholism and incapacity to care for her. His difficulty there of course is that the Spanish court has found to the contrary.'

He then turned to what he regarded as-

'the most difficult and unhappy part of this case is the fact that, on the evidence, [G] appears to have a totally negative view of her mother, a totally positive view of her father and is expressing a wish to remain in England, in her father's care.'

In his written evidence the father had referred to threats made by G in Spain to commit suicide. He also produced a letter from a family friend to whom G is alleged to have said that she would rather die than go back to Spain. The father therefore referred her to Dr McIver, a general practitioner who in turn referred her to the local child and family psychiatric clinic where she was seen by a Mr Middlecoat, an experienced psychiatric nurse and psycho-therapist who works under the supervision of Dr Delany, the consultant child psychiatrist. Dr McIver wrote two letters on 10 February to which the judge did not refer in his judgment although they were apparently before him. He did refer to Dr McIver's letter of 17 February in which he wrote:

'Mr Middlecoat stated that he felt [G] was not clinically depressed but he did feel she was vulnerable because of all that has happened to her. This includes discussion with you and her mother and having to act as "little parent" to [T]. Mr Middlecoat expressed some concern that you had said you did not feel you could return to Spain if the court ruled that [G] must. He felt this put her under a considerable amount of pressure and that she might then become depressed or react adversely to distress. She had expressed to him her feeling that matters were entirely beyond her control and could not influence them in any way. He did feel that if the situation arose, your presence in Spain would take at least some weight off [G]'s shoulders. He felt that [G] had been overwhelmed by adult debate, by courts and legal process. He felt she needed to be protected from the adverse affects of these and that some buffering mechanism was necessary. He noticed, as I did, her flattened effect, which he ascribes to conflict which is going on around her. She had expressed to him the wish that she could wake up from this as if from a bad nightmare, which of course is impossible. I am relieved the conclusion is that she is not in immediate danger of self-harm but has sounded a note of caution about the future. I am very grateful to the court for accepting my earlier letter. I very much hope the court will listen to [G] and take her feeling into account.'

The judge also referred to a further letter of 25 February recording a telephone

conversation with Dr Delany who-

'Asked me to state how keen [G] was to stay in England and how clear and unambiguous she was in expressing this wish. She was profoundly distressed at the prospect of departing under the proposed care arrangements. I would ask that the court should kindly take this into consideration.'

The judge then dealt with the court welfare officer's views. She had had a long conversation with G. The judge recorded her evidence as follows:

'She assessed her [G] as having a level of maturity commensurate with her chronological age. (The court welfare officer) reported her as thoughtful about what she had said and that her views did not appear to be rehearsed and appeared to be her own. She had spoken very positively about her relationship with her father . . . However, she could not find anything positive to say about her mother despite prompts (from the court welfare officer) about the past . . . She talked about her mother's drinking and the effect that had had on [G] . . . She referred to broken promises from her mother, about giving up drinking. She did not want to see her . . . She enjoyed school in Spain but she wanted an English education and said that, although she was bi-lingual, she did not write English well; so she wanted to be able to study English. She spoke very positively about the school in England and indeed there is a note from the school saying that she has settled well. When asked what she missed from Spain, she said there was not anything. She had friends in Spain and she would quite like to go back for a visit, but was happy in England. When cross examined, [the court welfare officer] accepted that she was not in a position to contradict the views taken in the Spanish psychological report; nothing she noticed would cause her to have a contrary view to that report, although at the same time did not give [the court welfare officer] the impression that she had been overtly influenced. She did not agree with the suggestion in the English reports that [G] was overwhelmed by the adult debates; her view was that [G] was fed up with it but was quite able to articulate what she wanted.'

The judge summarised her evidence in this way:

'It was part of the consistency between her chronological age and her emotional development that she did not see things in absolutely black and white terms. She did not have the degree of maturity to be able to appreciate that things were not entirely black and white and indeed the very force with which she had taken sides was an indication that her level of maturity was that consistent with an 11 year old rather than with a child of more mature years who would be able to understand the pros and cons in a much more balanced way.'

The judge then posed the question:

'Should I, under Article 13, decline to return [G] and as a consequence [T] because, under that Article she objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of her views.'

I have added the emphasis and shall comment about it when I deal with T.

The judge made the point that he had read the documentation carefully but he concluded:

'I have to say I feel strongly that [G] herself has been placed under very substantial pressure by her father. Her father . . . filed a second affidavit . . . which is effectively a diatribe against his wife and her capacity, or lack of it as a mother . . . Although he tried to assure me that he

had never run their mother down in the children's presence or to the children, I find that submission impossible to accept. It is very plain to me that [G], although she may well have had unhappy experiences in her mother's care, has wholly absorbed her father's negative views and is repeating them and, although she may feel them genuinely, I am equally satisfied that the additional pressure which has been placed on her is her knowledge that, under no circumstances, will her father return to Spain, as he said. That makes it impossible, in my view, for her to exercise any independent judgment. In these circumstances I have to say that I do not think, sympathetic as I am to [G], that she is of an age and maturity where it is appropriate for me to take account of her wishes to the extent that I decline to order her return to Spain. But even if I am wrong about that and even if, contrary to my view, she is of an age and maturity for her views to be taken account of, I have to look at the policy of the Convention and what has happened here.'

He referred to this being the second abduction by the father in blatant disregard and disobedience to an order of the Spanish court. He referred to S v S (child abduction) [1993] 1 FCR 12; sub nom Re S (a minor) (abduction: custody rights) [1993] Fam 242. He held:

'. . . it would (in the trite phrase) drive a coach and horses through the Convention and be quite contrary to the policy of the Convention if I were to decline to return [G] to Spain . . . Here objectively the Spanish court has found that there is no basis for [G]'s fears. She has been plainly influenced by her father, not least by his expressed refusal to return to Spain. In those circumstances it seems to me it would be quite wrong for me to exercise my discretion to allow her to remain here.'

I gave permission to appeal, limiting the appeal to the art 13 defences. Article 13 provides:

'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-(a) ... (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 a degree of maturity at which it is appropriate to take account of its views.'

The child's objections: the proper approach to the question

S v S (child abduction) [1993] 1 FCR 12, [1993] Fam 242 is the leading authority and the following principles can be derived from the judgment of the court given by Balcombe LJ.

1. The part of art 13 which relates to the child's objections to being returned is completely separate from para (b) and there is no reason to interpret this part of the article as importing a requirement to establish a grave risk that the return of the child would expose her to harm, or otherwise place her in an intolerable situation.

2. The questions whether: (i) a child objects to being returned; and (ii) has attained an age and a degree of maturity at which it is appropriate to take account of its views, are questions of fact which are peculiarly within the province of the trial judge.

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

4. Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. (As a matter of fact, the child in S, whose objections prevailed, was only nine years old.)

5. If the court should come to the conclusion that the child's views have been influenced by some other person, for example the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views.

6. On the other hand, where the court finds that the child has valid reasons for her objection to being returned, then it may refuse to order the return.

7. Nevertheless it is only in exceptional cases under the Hague Convention that the court should refuse to order the immediate return of a child who has been wrongfully removed.

As to the difficult problem of deciding whether a child is mature enough, Waite LJ helpfully said in Re S (minors) (abduction: acquiescence) [1994] 2 FCR 945 at 954:

'When Article 13 speaks of an age and maturity level at which it is appropriate to take account of a child's views, the inquiry which it envisages is not restricted to a generalized appraisal of the child's capacity to form and express views which bear the hallmark of maturity. It is permissible (and indeed will often be necessary) for the court to make specific inquiry as to whether the child has reached a stage of development at which, when asked the question "Do you object to a return to your home country?" he or she can be relied on to give an answer which does not depend upon instinct alone, but is influenced by the discernment which a mature child brings to the question's implications for his or her own best interests in the long and the short-term.'

Thus it seems to me that the matters to establish are as follows.

1. Whether the child objects to being returned to the country of habitual residence, bearing in mind that there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated. Hence there is a need to ascertain why the child objects.

2. The age and degree of maturity of the child. Is the child more mature or less mature than or as mature as her chronological age? By way of example only, I note that in Re R (minors: child abduction) (14 October 1994, unreported) Ewbank J's decision that boys aged seven and a half and six were mature enough was upheld by Balcombe LJ and Sir Ralph Gibson, Millett LJ dissenting (see [1995] 2 FCR 609). I would not wish to venture any definition of maturity. Clearly the child has to know what has happened to her and to understand that there is a range of choice. A child may be mature enough for it to be appropriate for her views to be taken into account even though she may not have gained that level of maturity that she is fully emancipated from parental dependence and can claim autonomy of decision-making. The child's 'right' -and I use the word loosely-is, consistently with art 12 of the United Nations Convention on The Rights of a Child 1989 (New York, 20 November 1989; TS 44 (1998); Cm 1976), to have the opportunity to express her views and to be heard, not a right to self-determination. Article 12, which is often judged to be one of the most important in that convention, assures to children capable of forming their own views-

'the right to express those views freely in all matters affecting (them), the views of the child being given due weight in accordance with the age and maturity of the child.'

The sentiments in both conventions are the same and they give strong support to the idea that the purpose of the exception to the general rule of immediate return is to defer to the wishes of the child for Convention purposes, even if the child's wishes may not prevail if welfare were the paramount consideration. Thus once the child is judged to be of an age and maturity for it to be appropriate for the court to take account of her views then the art 13 defence is established and the court moves to the separate exercise of discretion as it is required to be conducted under the Hague Convention. Each case will, of course, depend upon its own facts.

3. So a discrete finding as to age and maturity is necessary in order to judge the next question which is whether it is appropriate to take account of child's views. That requires an ascertainment of the strength and validity of those views which will call for an examination of the following matters, among others.

(a) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is her views which have to be judged appropriate.

(b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?

(c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?

(d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?

The approach of Court of Appeal to the judgment below

If one is being pedantic, then whilst the question whether the child objects to being returned, is truly a matter of fact, as is the establishment of her age, it is more by an exercise of judgment, rather than by finding a fact, that the court proceeds to establish the degree of maturity at which it is appropriate to take account of the child's views. If and in so far as this is an appeal against a value judgment, then the court will be slow to interfere unless it was satisfied that the judge was plainly wrong.

The limitations on an appellate court's ability to review findings of fact are equally severe, and are well-established. A passage from the speech of Lord Bridge of Harwich in Whitehouse v Jordan [1981] 1 All ER 267 at 286, [1981] 1 WLR 246 at 269-270 is a good statement of our power:

'I recognise that this is a question of pure fact and that in the realm of fact, as the authorities repeatedly emphasise, the advantages which the judge derives from seeing and hearing the witnesses must always be respected by an appellate court. At the same time the importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'

Here the judge had the advantage of hearing the court welfare officer, but the other evidence before him was documentary and we are in as good a position as he was to assess it. That

said, however, it should never be forgotten that the United Kingdom takes its obligations under the conventions so seriously that it is only the 16 High Court judges of the Family Division who have the jurisdiction to try these abduction cases and consequently the views of a wise and experienced judge, as Wall J certainly is, should never be lightly overruled. With that reminder firmly in mind, I turn to a close review of the evidence.

The evidence

It will be convenient to review the evidence chronologically. From the documents placed before us, some of which were not before the judge, the following picture emerges.

1. On 29 July 1998 G made a declaration to the Spanish court. She referred to the incident when her mother threw her father's briefcase and papers into the swimming pool. I note that she does not mention her mother attacking her father with a baseball bat, which is an embellishment of the occasion in the account of it he gave us. She spoke of her mother becoming aggressive when under the influence of drink. She said that although she was not afraid of her mother, she was apprehensive at being left alone with her because she drank.

2. On 26 September 1998 G made a statement to the Guardia Civil that her mother was drunk. This report was not before Wall J.

3. A clinical report dated 1 December 1998 was among his papers but the judge did not refer to it in his judgment. It records that G attended the clinic in October 1997 'to evaluate her psychological state to see if the separation of the parents could have affected her'. She was subjected to a personality test and interview and 'it was concluded that the girl was intelligent, adaptable and able to cope with the problems between her parents'. On that occasion she commented in the presence of her mother that she wished to remain with mother. She returned to the clinic in November 1998 at the request of the court. She was interviewed alone and said that she preferred living with her father because her mother was drinking frequently and becoming angry. She seems to have complained that her mother was increasingly resorting to alcohol so that she had decided she would be better off with her father. The report continued:

'From everything [G] referred to I understand she is under a lot of pressure from her mother, but is quite clear about not wanting to live with her, because according to what she says she does not feel safe and she is mistreated (insults and beatings) considering that she has got problems. The personality is evaluated again and one appreciates a change in the form of relating to others, having matured, as she is no longer as submissive and introverted but more open and expansive which is why she has been able to talk about the problems which exist in her home at present. Because of all the aforementioned I consider [G] to be capable of taking the decision of going to live with her father but I lack objective information to validate what the girl is saying, although there are no reasons to doubt her.' (My emphasis.)

She was at that stage just short of her tenth birthday. On the face of it was a credible and rational account of her experiences. For reasons I shall give, I too have no reason to doubt her.

4. On 30 December 1998 she told the judge, in the absence of her parents, that she loved them equally but preferred staying with her father and visiting her mother because of the problems her mother was having with alcohol. She complained that:

'Her mother, when she drinks, becomes violent and that sometimes she hits her, and that

normally she drinks wine both in the mornings as well as in the evenings and that normally when they come from visiting her father her mother does not give them supper, and also leaves her brother sleeping on the sofa without taking him to bed. That often there is no food in the fridge, and that even now in winter her mother does not turn on any heater ... and that this problem has kept on since she was 4 years old.'

This was before Wall J.

5. On 10 February 1999 G again appeared before a judge in the presence of the public prosecutor. She denied that her father forced her to say that her mother drinks. Her mother said that if she continued saying that her mother drinks then all she would accomplish would be that she and her brother would be sent to an orphanage because her father was too old to care for her. Her mother also threatened to take her to England which caused her to cry thinking she would not see her father again. The statement concluded:

'She is tired of having to make so many declarations and repeating the same things to different people, that she does not want her declaration to be known, because her mother becomes angry when she finds out about them, that to sum up what she wants is to stay with her father.'

This was before Wall J.

6. On 24 April 1999 she wrote two letters, not placed before the judge. In the first she wrote in Spanish to 'Senora Fiscal' speaking again of her fear of being placed in a children's home. She said that her father had asked her to write the letter. The father did not deny that he did so but explained that he was being invited by the authorities to get G to put her complaint in writing. On the same day she wrote to Social Services International in London saying:

'When my mother is drunk she often falls onto the ground and cannot move. I'm frightened that this will happen when I cannot help her. I whant (sic) to live with my brother and father but the judge will not change the visiting. I love my mum but she cannot stop getting drunk and this is ruining our lives. Please do all you can to help ... My dad has asked me to write this letter but says I must only write what is completely true and that I don't have to write anything at all if I don't want to. I am posting this myself.'

7. On 3 May, which is the occasion the mother admits becoming incapable, G appeared before first corporal of the guardia stating she was afraid to return home for fear of reprisal from her mother for writing asking for more contact with her father. She complained that often in the evenings mother did not give them food, that she had to give her brother his bottle but she added that these events only happened when her mother was drunk and that when she was well she treated them correctly. She said she remembered her mother hitting her brother T but that was a long time ago in February. This report was before Wall J. It strikes me as a fair and balanced account with no hint of exaggeration.

8. On 15 June 1999 she wrote to the fiscal repeating the complaint of her mother's drunkenness. The father had a hand in writing this letter. It was not placed before the judge.

9. On 13 September 1999 she appeared before the assistant to the judicial secretary repeating her wish to live with her father. The judge did not see this letter.

10. In December she was seen by a psychologist and social worker for the purpose of preparing the psychological report. The judge recited their conclusions which were:

'The interviews with the social workers have shown that his (father's) opinion of his wife is very negative. He considers her "an incurable alcoholic". His opinion is projected onto the children, causing them to believe that their mother is unable to solve her problems or look after them properly as a result of this, they think less of their mother and this may have a negative effect on the normal development of the children. On the other hand, the father has emotional ties with the children, especially with [G] who idolises him. This appears to be influencing her desire to live with him, leading her to believe that his values are the only ones which count and to blame all the problems that have occurred in the family on her mother. All of this has affected [G] in particular, since she is heavily influenced by the father. This prevents her from forming her own opinion about the family's problems but also hinders any form of dialogue between [G] and her mother, which is of vital importance to ensure the girl's normal psychological and social development. For this reason we recommend that the girl receives psychological support that will mediate between mother and daughter in order to bring the two closer together. The mother, for her part, is conscious of her problem and has been receiving treatment at Prosalud since May. Her prognosis, as indicated in the enclosed report, is good. For the reasons stated above, we believe she is able to assume responsibility of her family and social life and to take physical custody of the children. Finally given the complex family situation and for the reasons stated above, we recommend that there should be a follow-up of the case by social services as a means of monitoring and supporting the maternal family unit.'

Wall J said:

'The psychological report, as I have indicated, is in the papers and, in the light of the summary which I have read, I only propose to make brief references to it.'

11. He did not, therefore, expressly refer to the account of their examination of G. She said that her father had told her that her mother had suffered from her drink problem for a long time but that she had only seen it during the nine months she and her brother lived alone with their mother in Berja. During this time-

'it was OK in the mornings, she would get our breakfast and clothes ready, but when they returned from school in the afternoons their mother had been drinking and couldn't look after them.'

She stated that this was one of the reasons why she did not have many friends because everyone in the town knew about her mother's problems.

The clinic conducted a psychological test with the following important result:

'The results of the test showed the basic structure of her personality relaxed, well-adjusted, extrovert. Significant factors or features of her personality: open, affectionate, and sociable. Emotionally stable, calm and mature. Faces reality, responsible, persevering, natural, romantic, frank. Socially gauche, relaxed, calm, not frustrated.' (My emphasis.)

12. On 23 December 1999, that is two days after the court had ordered the father to return to their old home in Berja, G spoke to the judge in Albrox declaring that-

'My father has informed me of the order by the judge of Berja saying that we have to return to school there and that if this is not carried out, they would take from him the care and custody of my brother and me, and I have been told that if that happens, we would be sent to some kind of centre, or much worse to our mother. Which I do not wish to do under any circumstances, because of her problem with alcohol and because I have seen that she has

gone back to drinking, which I saw last Sunday when she got drunk while we were with her. She was already drinking when we arrived in the morning. That we are very happy in the school in Albrox where I have many and good friends but that if the court of Berja does not leave us in peace both my brother and I (he has told me) preferred returning definitively to England.'

So much for Spain. Since her arrival in England the relevant events are as follows.

1. G's letters to her mother: I referred at the beginning of this judgment to her letter of 1 February. She wrote more recently on 23 March. Whereas the impression given by her first letter was, as the judge described it, 'very sad', this one strikes me as being rather rude. She wrote:

'Dad says he has had a letter from your lawyer and you want me and [T] to go and stay with you at Carol's for a week end. No way. I don't want to see you even for a second until you stop trying to force us to go back to Spain. [T] knows your trying to take us away and he dosen't (sic) want to see you because of that. Why don't you ask us what we want instead of getting your lawyer to force us to see you. I suppose you will get the police to force us to see you like you did in Spain. Stop ruining our life we've had enough of that in Spain. We are happy in our new life here and if you like Spain so much, why don't you go back there and leave us alone. I'm sending this letter to your lawyer because the letter I sent to Carol's didn't get to you.'

Whether or not father prompted the letter, he certainly inappropriately referred to solicitors' correspondence addressed to him to his daughter and he has served to inflame her intransigence.

2. The medical evidence is important. The judge surprisingly failed to deal with Dr McIver's letters of 10 February addressed to the solicitors who were then acting for the father. It is necessary to quote from them fully. The first reads, with emphasis added by me:

'I was asked by [G]'s father to see her because he was concerned about her. She had expressed to him great concern about possibly returning to live in Spain. She had made friends in England, was attending school and wished to remain here. (The father) had given me much background information beforehand. On the evening of Wednesday 9 February 200 I spent approximately 30 minutes with [G] on her own while (the father) and [T] were in a waiting room. My impression is of an extremely unhappy child whose life is being manipulated in a way that is causing her great unhappiness and bodes ill for the future. She described to me some of her experiences in Spain, involvement with the legal profession, psychologists and councillors. She appeared mature beyond her years with a considerable understanding of the adult way of life. She expressed love for her mother but was vehemently opposed to be reunited under the present circumstances, expressing fears of retribution for the way she had been forced to act while in the custody of her mother. Her father told me that she had discussed suicide with him in Spain. Without dwelling on this I ascertained that she really did not care whether she lived or died. She has no hope for the future and this caused me very great concern indeed. Some of this child's description of her life should be categorised as emotional child abuse. I would very much hope that any decisions that may be taken concerning her future would also take into account her current medical condition as well as her future health and welfare. Without this consideration there is a very bleak future for her indeed. I had spoken briefly to [T] and will interviewing (sic) him at greater length and will be referring him for a paediatric psychiatric opinion in view of the turmoil he has experienced in his life so far. One issue of great concern for [G] is that she will be forced to return as a result of [T]'s young age or alternatively that they will be

separated for ever. In my clinical opinion she requires urgent psychiatric assessment and assistance and I am setting this up as a matter of urgency with an appointment to see Dr Owen Delany ...' (My emphasis.)

The supplementary report of the same date reads:

'It is my clinical opinion as general practitioner that a psychiatrist's report will be necessary because I fear there is a grave risk that both [T and G] will suffer psychological damage if they are forced against their will to return to Spain. I spent thirty minutes with [G] on her own and formed the view that despite her age she exhibits a maturity and understanding of the issues which is disturbing for me to see in someone so young. [G] fears sanctions because of the evidence that she has given at legal proceedings in Spain and feels that no one will listen to her or come to her help if the disasters that she fears do occur. [G] was forthright in her views that she really has nothing to look forward to in life if she is returned to Spain against her will to her mother's care. I touched on her further thoughts in view of the mention of suicidal tendency from her father. I was greatly concerned to hear her say that she did not really care whether she lived or died as she had no future.' (My emphasis.)

The judge did refer to the letter of 17 February in which the doctor gave an oral report of Mr Middlecoat's opinion which is now set out in his written report dated 21 February which has been placed before us. He considered that-

'For an 11 year old child, [G] is clearly carrying an inappropriate level of responsibility for her own and her brother's future.'

He was very critical, and rightly so, of the father telling the children he would not be returning to Spain with them for that had 'effectively increased her sense of helplessness about the whole situation'. He concluded:

'At the time of this interview, [G] was not clinically depressed, although she was greatly affected by the ongoing court proceedings and the uncertainty over her future. She did not express any wish to hurt or harm herself, but did describe the present situation as being like a nightmare that she would like to wake up from. [G] is completely overwhelmed by the ongoing court process and her fear that both she and [T] will be returned to live with their mother in Spain ... [G] remains at a moderate to high risk of becoming more depressed until she is able to be an 11 year old girl again, with appropriate worries such as homework, school, exams etc.'

3. The judge had the advantage of hearing from the court welfare officer. When she said she would not express any contrary view to that contained in the psychological report, I do not know whether she was only referred to G's being under her father's influence or whether her attention was specifically directed to the psychological profile which, incidentally does not seem to me to differ much from her own views about the child's maturity.

The father sought to place before us a report from Dr Delany, the consultant psychiatrist, but he did not see G and his report derives entirely from what Mr Middlecoat told him. It does not add much which is original.

4. The father also introduced a letter dated 8 March 200 from the headmaster of G's school. It reads:

'[G] is a mature girl who seems quite capable of expressing her views and preferences. She seems to have a clear grasp of her present situation and appears able enough to give a

considered opinion of what she would like to happen in the future.' (My emphasis.)

The conclusions to draw from this evidence

1. It has never been in issue that G objects to returning to Spain. It is an objection to returning to 'that crummy little village in Spain where all my friends know how you keep getting drunk all the time'. It is, of course, also an objection to returning to her mother's care because she cannot trust her mother to remain free from drink and because she fears for the upheaval to their domestic life when she is in drink.

2. This is an eleven-year-old child found by the Spanish psychologists to have been mature when aged nearly ten in December 1998 and again when aged nearly eleven in December 1999. The tenor of Dr McIver's report is that she is, if anything, mature beyond her years given the burdens she has had to carry. The court welfare officer found her to be mature. The headmaster of her school judged her in the same light. It seems to me, therefore, that the conclusion is irresistible that this child is not just of average maturity for her age, but mature beyond her years given the burdens she has had to carry.

3(a). This girl clearly perceives her mother to have a drink problem. She does not trust her. She fears for herself and for her brother if they return. She feels humiliated in the eyes of her friends at the local school who have knowledge of her mother's shortcomings and the scandal of police intervention.

3(b). As to whether or not these complaints about her mother's behaviour and her fears for the future are rooted in reality, I conclude that there is a solid sub-stratum of truth and I shall explain shortly why I am of that view.

3(c). I have no doubt that her views have been coloured and sharpened by her father's hostility. He has taken her to the authorities in Spain, and caused her to write of her complaints to the authorities there and to the mother's solicitors here. Nevertheless the consistency of her approach, the expressions of love for her mother and the heartfelt cry of her letter of 1 February convince me that her views are genuine and not simply, nor even mainly, the product of her father's obsession.

3(d). The note of despair in her conversation with Dr McIver who had half an hour alone with her and the anger of her most recent letter to her mother satisfy me that her fears and anxieties will not evaporate upon her return to Spain. The Spanish psychological report itself recognised that she needed psychological support in order to bring mother and daughter closer together. Since then her hostility has increased.

Looking at the whole of this evidence, including the considerable body of information about G's complaints to the Spanish authorities which Wall J did not have the advantage of seeing, I come to the clear conclusion that this is a girl of an age and maturity which compels this court to take account of her views.

The mother's conduct

In her second affidavit sworn in answer to the father's first affidavit referring to her 'persistent states of inebriation from alcoholism when she passes out in the street and at home', the mother said:

'I deny the assertion that I am a chronic alcoholic ... I admit that I have had an occasional isolated problem relating to alcohol, but this is always a symptom of depression which has

been brought on the defendant. I have never passed out in the streets or at my home and the children have not seen me in a state of inebriation from alcohol save on one occasion when I had a breakdown in May.'

This, on all the evidence, including her own, is a less than frank statement. Prosalud, an officially accredited centre for the treatment and prevention of alcoholism reported on 20 December 1999 that-

'At present she has been dried out ... She realises that she was abusing alcohol ... She is able to take charge of her emotional and family life.'

Interviewed by the psychologist for the psychological report prepared for the December 1999 hearing she said tellingly:

'Her drink problem began five years ago ... (as) an unconscious response to "a situation in which you can't see any way out of what's happening". She said she did not have a drink problem at the daily level and could drink in moderation for long periods of time.'

To me the saddest but most revealing aspect of that report is this:

'She feels responsible for the situation she put her children in and said that she now wants to "show [G] that she can solve her problem", that she is not a weak woman, that she worked and fought for her living in London and that she has the mental strength to resolve her problem.'

That is a very frank admission of her predicament and of her need to put things right between her and her daughter. It gives credence to the gist of what G has been saying consistently for a very long time. It destroys the notion that G's problems are the creation of her father's hostility.

The art 13 defence based on G's objections to returning to Spain

I am totally satisfied that this defence is made out and the judge was wrong to conclude otherwise.

The exercise of discretion

That there is a discretion is plain from the article itself which provides that notwithstanding the provisions of art 12 which require in mandatory terms that the child wrongfully abducted be returned, the court 'may also refuse to order the return' if there is a valid objection by the child. In Re R (minors: child abduction) [1995] 2 FCR 609 at 627 Millett LJ said, and this seems to be with the agreement of Sir Ralph Gibson:

'It is to be observed that, if a child is not of an age and degree of maturity which makes it appropriate to take his views into account, he must be returned despite his objections and without any further inquiry whether his return is in his best interests. If, on the other hand, he is of sufficient age and maturity for his views to be taken into account, the Convention clearly envisages that he will not be returned against his wishes unless there are countervailing factors which requires his wishes to be overridden.' (Millett LJ's emphasis.)

I am inclined to agree with that observation and it may not be necessary to express a definitive conclusion about it. In this case the only factors which are to be placed in the balance against return are as follows.

1. The spirit and purpose of the Hague Convention which is to leave it to the courts of habitual residence to resolve the parental dispute. As the forum conveniens, the claim for Spain to resolve the children's future is overwhelming.

2. The abducting parent should not be permitted to create the situation which makes it possible to raise an art 13 defence. That is not this case. The father's decision not to return to Spain has undoubtedly compounded G's unhappiness and he is rightly censured for this. It may have strengthened G's resolve, but even without it the foundation for her objection remains firm.

In the last analysis, the balance is between allowing the girl her art 13 defence or enforcing the spirit of the Hague Convention despite the art 13 defence. In my judgment, the demands of comity, convenience and even the welfare of the child in having her future decided in the court of her habitual residence, do not override the respect which should be paid to her wishes in this particular case. Looking at her case in isolation and without reference to T's, I would not order her return.

The claim for the return of T

There is no authority binding upon us to which we have been referred by Mr Setright, a great expert in these matters, or which I have been able to discover in the course of my research under pressure of time. This is the state of the law so far as I have been able to discover it.

In B v K (child abduction) [1993] 1 FCR 382, decided by Johnson J in October 1991, three children were removed from Germany. The judge held that a girl nearly nine and a boy aged seven had attained an age and a degree of maturity at which it was appropriate for him to take account of their views. In the exercise of his discretion he concluded it would be wrong for the two older children to be returned to Germany even though the abducting parent was 'getting away with it'. With regard to the youngest child he said (at 387-388):

'The youngest child, is not, in my judgment, of an age and degree of maturity in which I should take account of his views, so that it seems to me that this basis of objection by the mother, which I have upheld in relation to the two elder children, cannot be upheld in relation to the youngest child, so I find myself, at least initially, in the position where I would not order the return of the two elder children to Germany but that I would find there to be no sustainable objection to the return of the youngest child. However, it is plain that these children have always lived together, and I accept the statement in his oral report this morning from [the court welfare officer] that the youngest child would be devastated to be separated from the two elder children. Accordingly, whilst I have rejected the mother's case on the other part of Article 13, namely that the children would suffer psychological or physical harm or be placed in an intolerable situation, I have no difficulty in holding that the youngest child would be exposed to psychological harm and would be placed in an intolerable situation if he were returned to Germany and the elder two children were not. Accordingly, it falls to me exercise the discretion conferred on me by the opening words of Article 13, and by that circuitous route I conclude that the youngest child too shall not be returned to Germany.'

In The Ontario Court v M and M [1997] 2 FCR 573 Hollis J in June 1996 was satisfied that he should take into account the objections of a girl not quite ten years old to returning to Ontario. He held (at 584) that-

'In the absence of any medical evidence I do not think it right to find a grave risk of exposing the children to psychological harm by returning them, despite the persuasive comments of the senior court welfare officer, but I do find a grave risk if returned, of placing [the elder girl] in an intolerable situation. It is not submitted that the two children should be treated differently and, if need be, split apart from one another. Therefore, in the exercise of my discretion, and relying upon [the girl's] varied objections to returning to Ontario, and a grave risk of such a return placing her in an intolerable situation, I decline to order the return of the children to Ontario.'

The other child was two and a half years old.

Next is the quite extraordinary case of Re HB (abduction: children's objections to return) [1997] 3 FCR 235 decided by Hale J in October 1996. The children were a boy aged 13 and a girl aged 11 who had come from Denmark to visit their father. The judge concluded that the views of both children should be taken into account. She was thus required to exercise her discretion whether or not to return. The judge said (at 243-244):

'The policy of the Convention is, in my view, particularly important in cases where children come to another country for visits. It is obviously in the best interests of children whose parents live in separate countries that the parent with whom they live should feel able to send them on visits secure in the knowledge that the children will be returned at the end without difficulty. Otherwise, parents may be tempted not to allow the children to come, and that will be detrimental to the children. In the case of [the younger girl] I do not think that the real strength of her objections, the reasons for them and the evidence of relationships at home are enough to set against that policy. Furthermore, there is no question in my mind that the girl's visit was always intended as a short-term holiday visit. The case of [the older boy] is more difficult. He is older, he is more mature, he has stronger and, to my mind, quite rational objections. The evidence is that the mother herself is in doubt about what to do for the best. So what about treating the children separately? Mr. McDowall, on behalf of the father, argues that if the girl is ordered to return but the boy is not, the girl will suffer psychological harm from being separated from her brother. Their relationship was described by the court welfare officer as "significant, intimate, relaxed".'

Reference was made to B v K (child abduction) [1993] 1 FCR 382 and the judge continued (at 244):

'In this case I do not think that that will be sufficient to amount to a grave risk of psychological harm or will otherwise place the girl in an intolerable position. She would be going back to a primary carer whom she loves. More to the point, therefore, is the conclusion that there is no good ground to refuse to return the girl a further reason for returning the boy as well? I have found this a very difficult decision, but I have reluctantly come to the conclusion that it is and that the boy should be returned.'

The case had a most unusual outcome. When the children were taken to the airport by their father, it was ironically the boy who was willing to board the plane and return to Denmark but the girl adamantly refused to do so. The girl was then allowed to intervene and appealed to the Court of Appeal who remitted the case back to Hale J (see [1998] 1 FCR 399). Given the passage of time Hale J eventually dismissed the Hague Convention proceedings and dealt with the matter in wardship (see Re HB (abduction: children's objections) (No 2) [1999] 1 FCR 331).

The Court of Appeal has twice had to consider the matter where there were other children of half-blood to the children, the subject of the application. The first is Re C (abduction)

(grave risk of psychological harm) [1999] 2 FCR 507 involving a boy aged nine and a half and a girl aged eight removed from California by their mother. After the parents had separated the mother entered into a new relationship and had a baby daughter who was a year old. Their problem was that the new baby's father had a criminal record which would prevent his re-entry to the United States of America. Connell J held there was a grave risk of psychological harm should the two children be returned. The mother's case was that she was faced with the terrible dilemma of having to choose between sending the children back without her, which she said would subject them to harm, or splitting her new family. In allowing the appeal, I said (at 519):

'. . . 2. That the family might be split was a matter which was or ought to have been known to them and it was a factor which, if they had given full and frank disclosure of their position, ought to have been revealed to the Californian court and to the father at the time they sought permission for their purported holiday ... They should not have embarked upon an "Xmas visit" from which the family could not return intact. By their own actions they created the adverse conditions upon which they now seek to rely.'

I was applying the approach laid down in Re C (a minor) (abduction) [1989] FCR 197; sub nom C v C (minor: abduction: rights of custody abroad) [1989] 2 All ER 465, where Butler-Sloss LJ spoke of the parent who created a psychological situation and then sought to rely upon it not being permitted to drive a coach and four through the Hague Convention. I added (at 517):

'There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'

Having decided that the mother had no art 13(b) defence, there was in fact no discretion to exercise. Article 12 bit. We had to order the return of the children forthwith and did so with what, I hope, was a rallying cry to the judges of the Family Division vigorously to uphold the purpose of the Hague Convention, which is to send the children back and not to usurp the function of the court of habitual residence.

Next case is another Re C, this time Re C(B) (child abduction: risk of harm) [1999] 3 FCR 510. An English mother wrongfully removed her child, B, a boy aged six from Cyprus and returned to this country bringing with her 14 and a half year old daughter, A, a child by a previous relationship. On B's father's application under the Hague Convention for B's return, A adamantly refused to go back to Cyprus. The children were said to be very close. The mother set up an art 13(b) defence. Butler-Sloss LJ said (at 512-513):

'The mother's reliance is based upon grave risk that B's return would expose him either to psychological harm or otherwise place him in an intolerable situation. Both those situations are based upon the result of her flight from Cyprus to England. A is at the centre of the problem and of the mother's defence, although, in any event, the mother does not want to live in or go back to Cyprus . . . The mother's case is therefore that A will not go back ... The mother is in an impossible position and cannot leave her behind. But if she did leave her behind and go with B to Cyprus she would be consumed with guilt; the children would be separated and either way B would be placed in a situation which comes within art 13(b).'

That defence succeeded in the court below but the appeal was allowed. Butler-Sloss LJ observed (at 516, 519):

'The circumstances of this case provide a good example of how easily problems which arise in many child abduction cases caused by the actions of the abducting parent can be demonstrated by that parent to come within art 13(b) and thereby frustrate a return under art 12 . . . The Re C (a minor) (abduction) decision ([1989] FCR 197, [1989] 2 All ER 465) gives powerful support to the submissions of Mr Setright that too much weight had been given by the judge to the self-induced dilemma of this mother ... The position of A is a relevant factor in the case to which the court has to have regard. But the mother had the opportunity to consider the implications of returning to England with both children. On the facts of this case I do not consider that the consequences of that return on A should deflect the court from concentrating upon the right of B to have his future decided in the state of his habitual residence.' (My emphasis.)

Thorpe LJ added (at 520):

'In many cases a balanced analysis of the assertion that an order for return would expose the child to the risk of grave psychological harm leads to the conclusion that the respondent is in reality relying upon her own wrongdoing in order to build up the statutory defence. In testing the validity of an art 13(b) defence trial judges should usefully ask themselves what were the intolerable features of the child's family life immediately prior to the wrongful abduction? If the answer be scant or non-existent then the circumstances in which an art 13 (b) defence would be upheld are difficult to hypothesise. In my opinion art 13(b) is given its proper construction if ordinarily confined to meet the case where the mother's motivation for flight is to remove the child from a family situation which is damaging the child's development.'

An application of these authorities

I confess I do not find it easy to extract a great deal of certain principle from these cases. We have hardly had the benefit of full argument. The matter was only addressed by Mr Setright because I asked about T's position. The matter does not much feature in his skeleton arguments either here or below. The father is in person and was quite unable to assist. It was quite clear to us that neither parent had confronted the possibility of splitting the children. I earlier emphasised how the judge posed the question asking whether he should decline to return G and as a consequence T because of her objection. It reads as if he assumed that the question of their respective returns stood or fell together. That is hardly a surprising assumption to make. There does appear to be something odd about refusing to return an elder child who is old enough to articulate an objection to return because of fears expressed for herself and for her younger sibling because of what had happened to them without also inferring that if the younger was of an age and maturity where he had voice and vote, he would echo the objection and vote with his elder sister. That said, I recognise that we must now to proceed upon a basis that T is too young and immature for his views to be taken into account and that, accordingly, a defence under art 13(b) must be established with regard to him. If it is not, he must be returned. There would then be no discretion to order otherwise. I am also prepared to accept that in that event the fact of his return may be a factor to bring into balance in exercising a discretion whether or not, despite G's objections, she should go back.

The art 13(b) defence with regard to T

So sharp has been the focus on G that very little evidence has been directed to T. The material information is limited to this, as it seems to me.

1. The psychological assessment conducted in December 1999 says:

'During the interview with the child he was inhibited and shy, and was not very expressive and was sad. Drawing of a human figure showed immaturity in the co-ordination of his visual and motor skills, as he produced a drawing that was difficult to execute; this may indicate emotional problems and learning problems at school. He wants to stay with his father, but is not able to say why, "he thinks his father takes better care".'

2. Dr McIver wrote on 10 February:

'I spoke briefly to [T] and will be interviewing him at greater length and will be referring him for a paediatric psychiatric opinion in view of the turmoil that he has experience in his life so far. One issue of great concern for [G] is that she will be forced to return as a result of [T]'s young age or alternatively that they will be separated for ever.'

(There is no psychiatric opinion because Bennett J refused to permit the child to be referred.) In his second letter he linked the children, saying:

'I fear there is a grave risk that both [T and G] will suffer psychological damage if they are forced against their will to return to Spain. '

3. Mr Middlecoat reported:

'For an 11 year old child, [G] is clearly carrying an inappropriate level of responsibility for her own and her brother's future.'

4. G's own explanation of life with mother contains statements of how she (G) had to look after her brother due to her mother's incapacity through drink to do so. Hence the description is given of G as 'little mother' to T.

Wall J considered art 13(b) on the basis that both children would be returned and held, not surprisingly, that in the light of the findings of the Spanish court that mother could cope, a finding of grave risk of psychological or physical harm 'did not get off the ground'. He did not postulate T being sent back alone.

In both cases which have come to the Court of Appeal, the abducting parent was not able to run the defence because that would be to take advantage of her own wrong. That, however, is not this case, and the distinction is important. The father is not saying that T will suffer because he (the father) will not return to Spain and that T will suffer through missing him, though undoubtedly he will. The harm T will suffer or the intolerable situation in which he will be placed arises from the fact that his sister will not go with him. The father has not by his wrongful removal of the children created the situation which leads to her refusal to return. Her refusal is founded on her mother's conduct and the exercise by her of her 'right' to object. Her perception is that neither herself nor T should be expected to return to 'a family situation that is damaging to the child's development', adapting Thorpe LJ's words in Re C(B) (child abduction: risk of harm) [1999] 3 FCR 510.

As Butler-Sloss LJ implicitly acknowledged in that case, each case depends upon its own facts and circumstances. This case can easily be distinguished from that because the children are of full blood, not half-blood and the father's refusal to return does not create the intolerable situation for T.

Thus the question resolves into whether or not this court can find that, even though T would

not be at grave risk of exposure to physical or psychological harm because the Spanish court have found upon the merits that, whatever the mother's past failings, she is currently capable of discharging her responsibilities properly, nevertheless there is a grave risk that to return T without his sister would place him in an intolerable situation.

That requires no less stringent a test than the rest of art 13(b). The evidence before us undoubtedly is limited but it is nevertheless in my judgment sufficiently clear and compelling to cross the high threshold and to drive me to the conclusion that we would be placing T in an intolerable situation if we were to send him back alone. He and his sister have lived through difficult days together. He has been dependant upon his sister. At times she has been his 'little mother'. To separate them would produce an intolerable situation for him. In the quite exceptional circumstances of this case I find that the art 13(b) defence is established.

The exercise of discretion

The main arguments for his return would be to give effect to the spirit of the Hague Convention, and to acknowledge that the Spanish court is best in a position to decide his future. They are the important considerations of comity and convenience. These are very powerful factors but in my judgment they cannot prevail against the intolerability of T's situation.

The exercise of discretion must be taken in the round and I accept that it may be appropriate therefore to ask whether G's objections should be overridden to remove the intolerability T would face returning alone, thus enabling his future to be determined where it should be, in Spain. Once again, in my judgment, upholding the spirit of the Hague Convention is too high a price for these children to pay.

Conclusion

Not without considerable hesitation, I conclude that the Hague Convention application for the return of these children must be dismissed.

The claim under the European Convention

Article 4(1) provides:

'Any person who has obtained in a Contracting State a decision relating to the custody of a child and who wishes to have that decision recognised or enforced in another Contracting State may submit an application for this purpose to the central authority in any Contracting State.'

If the order is registered, then under art 5(1):

'The central authority in the State addressed shall take or cause to be taken without delay all steps which it considers to be appropriate, if necessary by instituting proceedings before its competent authorities, in order . . . (c) to secure the recognition or enforcement of the decision; (d) to secure the delivery of the child to the applicant where enforcement is granted.'

For present purposes I am prepared to assume that the order of 7 February is an order capable of recognition and enforcement. Article 10 provides grounds for refusing to do so and they include:

'. . . (b) if it is found that by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child; (c) if at the time when the proceeding were instituted in the State of origin: (i) the child was a national of the State addressed or was habitually resident there and no such connection existed with the State of origin; (ii) the child was a national both of the State of origin and of the State addressed and was habitually resident in the State addressed . . .'

I am not prepared to find that the original decision is manifestly no longer in accordance with the welfare of the child because we have hardly started upon an inquiry of the merits as to where the welfare of the children truly lies. It seems to me, however, that there can be no answer to ground (c). G was born in this country and although T was born abroad the parents registered his birth at the British Embassy and he is a British citizen and thus 'a national of the State addressed'. The importance of enforcing the orders of the courts of habitual residence after having determined disputed custody issues is as weighty a factor under this convention as returning the children is under the Hague Convention. Nevertheless, in the particular and exceptional circumstances of this case, the interests of the children in remaining here should not be sacrificed on the altar of comity between nation states. Consequently I would dismiss that application.

Conclusions

I very much hope these findings will not be thought to be any affront to the Spanish court. The task upon which it was engaged, as set out in the first paragraph of its decision of 7 February, was to give effect to 'the supremacy of the interest of the minor over any other legitimate interest'. Our judgment is not to be seen as any attack whatsoever on the correctness of their decision. We have not conducted an inquiry into the question with whom the children should live when the welfare of the children would have been our paramount consideration.

Indeed art 19 of the Hague Convention makes it clear that we do not approach the case looking at the merits because, as the article provides:

'A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.'

So far as G is concerned, the Spanish court itself concluded that 'there is a doubt as to how to evaluate her wishes'. We were required by art 13 to resolve those doubts in the changed circumstances of the family. The Spanish court will therefore understand that in coming to our conclusion, we were giving effect to para 30 of the Explanatory Report to the Hague Convention (see The Explanatory Report of the Convention on the Civil Aspects of International Child Abduction Actes et Documents of the XIVth Session of the Hague Conference on Private International Law, vol III (1982)) by Professor Elisa Pirez-Vera, who said:

'In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way the Convention gives children the possibility of interpreting their own interests.'

In T's case, it will readily be appreciated that there is a huge difference between deciding whether he would be placed in an intolerable situation were he to be returned alone and with whom he and his elder sister together should live.

Having emphasised that we have not been looking at the merits, it is now time that this should be done, and with expedition. It may be that the mother will establish her case that she is now fit enough to have care of her children. In any event it is important that her contact to them be decided. She has for too long been denied that contact and it is becoming urgent that the court decides what visiting or staying contact she should have. (Both parents and particularly G should note that in my opinion-which of course will not bind the judge hearing the matter-the only question is what contact, not whether there should be contact. The time has come to mend the broken bridges in this family and as the strong man in this family the father has responsibility to begin the process of reconciliation for otherwise he does his children a grave disservice. He must mark my words.) I would have thought that the appropriate course would be for the mother to undertake to institute wardship proceedings so that we can give an indication of the directions we would invite the High Court judge to consider making which would include our inviting the Official Solicitor to act as guardian ad litem for both children so that their voices can be independently heard in what is and will remain a difficult case.

For the reasons I have given at this regrettable great length, I would allow the appeal and dismiss the mother' s applications under both the Hague Convention and the European Convention.

SEDLEY LJ. With the very greatest reluctance I concur in the outcome proposed by Ward LJ. As the decision of Wall J illustrates, the United Kingdom's courts have a creditable record of abiding conscientiously by the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) (The Hague, 25 October 1980; TS 66 (1986); Cm 33), as set out in Sch 1 to the Child Abduction and Custody Act 1985. In particular our courts do not allow parents to reap the fruits of abduction by placing reliance on the situation which they themselves have unlawfully brought about. In large part that is exactly what is happening here: it is only by defying the Spanish courts that the father has been able to establish the children in a new home and schools where, no doubt, they are now secure and relatively content and well on the way to complete alienation from their mother.

What makes it worse is that the Spanish courts have visibly gone about their task in a manner, and on the basis of legal principles, which are beyond criticism from an English juridical standpoint. There is and has been no good reason why the father should not press his claims there; but he has in effect boycotted the process, refusing among other things to speak to a Spanish psychologist because of assumed language difficulties-and this in the country which he has chosen for his and his children's habitual residence.

But just as the Hague Convention ordinarily makes return inevitable under art 12 if it is sought reasonably promptly, so art 13 creates an exception in the child's own interests if, among other things, the child opposes return and is old and mature enough to have her views taken into account. Even then, the child's views are not determinative: the final decision as to return must be the court's own.

Moreover, none of the factors which affect G's possible return affect T. If he were the only child, return would be inevitable. But it is equally plain that to split the children up would be indefensible. It has to follow, for the reasons explained by Ward LJ, that G's fate will be T's.

There is no shadow of doubt that the father has played a conscious role in alienating the

children from their mother, both before and after the abduction. The mother for her part has tried, but with less success, to do the opposite. But there comes a point at which, for better or for worse, an intelligent and articulate child's views, whatever their genesis, have to be taken for what they are-and the views of G, who at 11 is perceptibly both intelligent and articulate, are now made disturbingly apparent by the letter she wrote to her mother on 1 February 2000, about four weeks after the abduction to England and which Ward LJ has quoted in full.

This is not the work of a child whose mind has simply been poisoned, though her father has played a sedulous part in shaping her views; nor does the letter itself show any obvious sign of being written under dictation or pressure from the father, though it will certainly have had his tacit or overt encouragement. It is the work, in my view, of a child made shrewd beyond her years by parental warfare and family breakdown, who detects in her mother's behaviour the pathos and shifting of a defeated woman. I have great sympathy for the mother, with all her failings, and none for the father, who seems to me a calculating individual accustomed to getting his own way and not too concerned who gets hurt in the process. His instrumentality in trying to use G to put his case to this court is only one instance. Another is the ingratiating letter by which-improperly, as he must know-he has sought after the conclusion of the hearing to bolster his case to the court. It is the doctor to whom the father took G and whom the father briefed about the situation who described what G had been put through as emotional child abuse.

But none of this is what art 13, or for that matter s 1 of the Children Act 1989, places centre stage. For better or for worse, G's clear and reasoned objection to return brings her, and by extension T, within the art 13 exception.

What is to follow is almost equally unsatisfactory. The courts of this country must now decide what is best for the children's future, for the parents show no sign whatever of negotiating a truce for the children's sake. The father may now risk punishment if he returns to Spain-a handicap of his own making but one which he will no doubt advance as a further reason for keeping the children here. He has already placed intolerable stress on the children by telling them that he will not visit them if they return to Spain. The mother, who has her own reasons for not wanting to return to live in England, is likely, and with good reason, to want the Spanish court's order respected. The Spanish court for its part will wonder what the point was of its work and of the Hague Convention. I hope that it will understand that we have sought loyally to abide by our treaty obligations, but that we are now confronted with a crystallisation of G's feelings about living with her mother which was not available to the Spanish court nor, in significant measure, to Wall J, and which we are obliged to take into account.

It will not help to add further to the comprehensive exposition by Ward LJ of the reasons why G's objections as they can now be perceived compel this court to over set the painstaking and humane decision of Wall J.

SIMON BROWN LJ. I agree with both judgments.

Appeal allowed. Permission to appeal to the House of Lords refused.

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