http://www.incadat.com/ ref.: HC/E/UKe 478
[17/02/2000; High Court (England); First Instance Court]
Re H. (Abduction: Habitual Residence: Consent) [2000] 2 FLR 294; [2000] 3 FCR 412; [2000] Fam Law 590

Reproduced with the express permimssion of the Royal Courts of Justice.

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

17 February 2000

Holman J.

In the Matter of re H. (Abduction: Habitual Residence: Consent)

Counsel: Marcus Scott-Manderson for the plaintiff; Jeremy Rosenblatt for the defendant.

Solicitors: Dawson Cornwell; Longville Gittings.

HOLMAN J: Introduction and background

This is an application under the Child Abduction and Custody Act 1985 and the Hague Convention on the Civil Aspects of International Child Abduction 1980 for the return to Sweden of a boy whose mother says he is being wrongfully retained here.

The mother is Swedish and her home and upbringing were all there. The father is British, but he has travelled and worked as a musician in a number of parts of the world and in the summer of 1994 he went to Sweden to work. That autumn he met the mother and they began to live together in her flat in Gothenburg. Their one son, H, was born on 13 January 1996. He is now aged 4.

The parents never married but on 7 March 1996 in Sweden they entered into a formal written Bekraftelse ('Confirmation') in which they both confirmed that the father is indeed the father of H and that they would share custody. The effect seems to be similar to, or the same as, a parental responsibility agreement under the Children Act 1989 and means for all purposes relevant to this case that each parent has equal custodial rights and duties in relation to H.

Sadly, the relationship between the parents was short-lived and they separated in May 1996. H continued to live with his mother but from time to time saw his father, who later moved to live in Malmo.

In July 1998 the mother decided that she wished to attend a one-year course in fine art with the Winchester School of Art which is attached to Southampton University. The course is in two parts. The first 9 months from 8 September 1998 to 20 June 1999 were to be spent in Barcelona in Spain. The last 3 months from 29 June to 12 September 1999 were to be spent in Winchester, England. The mother informed the father of this plan and they agreed that for the duration of the course H would live with his father who at the time was still living in a rented flat in Malmo in Sweden.

The mother went to Barcelona in September 1998. H remained in Sweden. The mother returned to Sweden for a few days during that autumn in order to see H. The father took H to Barcelona to see his mother during December 1998, after which they all returned to Sweden for a further week or so before the mother returned to Barcelona again.

There is no doubt that during December 1998 and early 1999 the parents discussed the idea of H and his father coming for a period of time to Wales, where the father has a good friend and where he thought it would be pleasant to live.

In March 1999 the father gave notice to his landlord in Malmo. In mid-March 1999 the father and H travelled to Wales by car, loaded with a large quantity of the father's and H's belongings. The father paid a deposit on a rented flat which his friend had found at Llanfechain in Powys, and left all the belongings there.

On 6 April 1999 the mother herself flew from Barcelona to Liverpool where the father and H met her. They all went to the flat at Llanfechain and spent a few nights there before all driving together to Sweden on 13 April 1999. The

mother spent a few days in Sweden and then returned to her course in Barcelona. H remained in Sweden, staying partly with his grandmother in Gothenburg and partly with his father in Malmo.

At the end of May 1999 the father and H travelled again by car to Llanfechain bringing another car-load of belongings. The father has lived at Llanfechain ever since and, until the inception of legal proceedings, H was living with him.

When her course finished in Barcelona in mid-June 1999, the mother drove to Sweden in her camper van, loaded up a quantity of her and H's belongings in Sweden, and travelled to Britain. She travelled first to Llanfechain where she stayed for a few days. She travelled next to Winchester with H where they remained for a week.

On 8 July 1999 she returned to Llanfechain where she stayed for a few days and then returned to Winchester, leaving H with his father.

In mid-July 1999 there were some acrimonious telephone calls between the parents. On 19 July 1999 the mother consulted a solicitor in Welshpool in Powys. She actually attended at the solicitor's office for a consultation. It is relevant to note that in the solicitor's detailed attendance note of that date the solicitor set out the brief history and recorded:

'In September 1998 the mother obtained a place on an art course in Europe. Initially she was to be in Spain from September 1998 until 26 May [sic] 1999 and then at Winchester University until September 1999. It was very difficult to take [H] and the father offered to look after him. The mother agreed but the conditions were that she would have contact whenever she wanted and when she went back after the course was completed [H] would live with her.'

The reference to 'went back' is clearly, in its context, a reference to going back to Sweden.

The reason I refer to that attendance note is not because it is in any way probative of what the mother now asserts in evidence, but simply because it shows what the very first instructions to a solicitor were that that solicitor should have been acting upon.

Further, it is quite clear from the mother's statement dated 17 August 1999, which the solicitor prepared for her within the subsequent proceedings under the Children Act 1989 to which I will shortly refer, that the mother wished H to return with her to resume living in Sweden when her course ended in mid-September 1999. The solicitor failed to grasp that this was a situation to which the Child Abduction and Custody Act 1985 and the Hague Convention might apply, and inappropriately advised the mother that she would have to apply under the Children Act 1989 for a residence order.

Meanwhile, on 30 July 1999 the mother again collected H from Llanfechain and took him to Winchester. On 8 August 1999 she did not return him to Llanfechain as the father was expecting. The following day, 9 August 1999, the father issued an application in the Wrexham County Court in form C1 under the Children Act 1989. His application patently referred to the Swedish aspects of this case and said he was concerned that the mother would remove H from the jurisdiction:

'. . . either back to Barcelona where she has been a student or back to Sweden where her mother lives . . . I wish the return of my son to reside with me, it would be my intention to continue to allow contact both with the mother and her Swedish relatives.'

On 9 August 1999 a circuit judge in the Wrexham County Court made a without notice order prohibiting the mother from removing H from England and Wales, directing disclosure by the police to the court of the whereabouts of the mother and H, and adjourning the matter to 17 August 1999.

On 17 August 1999 there was a hearing with both parties present and represented by solicitors and barristers at the Wrexham County Court before a district judge. The order made that day recites that the court read the mother's statement dated 17 August 1999. That statement referred at para 5 to: '. . . all the assurances from the father . . . that everything else would remain the same and that as soon as I had completed my year abroad I would return to Sweden and [H] would live with me again'.

At para 8 of the statement she said:

'At Easter 1999 the father said that he wanted to spend some time in England so that [H] could meet his family but up to now the father has failed to arrange this. I believe it was the father's intention to return permanently to England. I agreed to [H] coming to live with him first on a short term basis because I would myself be in Winchester from June 1999. I did not have any choice anyway because the father had [H]'s passport. I did not want to say anything to jeopardise my contact with [H] at that time. I did to some extent humour the father that I would stay in Wales with [H] but I did make it clear to the father that it was my intention that after I completed the course that [H] would live with me whether it was in Wales or in Sweden.'

At para 19 of the same statement she said: 'It is my intention to remain in Winchester until September 1999 when I will return to Sweden'. And later in the paragraph it is manifest that she wishes to return there with H with a view to him living in Sweden with her.

The father's statement of the same date said, in effect, that the mother had agreed to H living on a permanent basis with him in Wales.

It should, accordingly, have been obvious to any informed family lawyer (including any judge with family law jurisdiction) that there was already a clear issue between these parties which fell to be resolved in the first instance by application of the Hague Convention.

The district judge made provision for a further hearing on 25 August 1999 and that meantime H would spend part of the time with his father and part with his mother.

In her written brief or instructions to counsel for that hearing on 17 August 1999, the father's solicitor did mention the possibility that this might be a case to which the Hague Convention applied and apparently there was some discussion at court, the details of which were not recorded and are not known to me, between the two counsel as to this possibility. I can only suppose that they concluded that it did not and could not apply, and apparently there was no mention of the possibility to the district judge, who does not seem to have spotted it himself.

There was a yet further hearing, in fact at the Warrington County Court, on 25 August 1999. The same counsel acted for each of the parents. An order was made by consent setting the whole case up for a full hearing of contested residence applications on 25 January 2000, exactly 5 months later. A welfare officer's report was ordered, including express reference to: 'The mother's proposed application to take H out of the jurisdiction permanently'.

Thus it must have been quite clear at the hearing on 25 August 1999 that what the mother wished to be able to do was take H back to Sweden again.

An elaborate schedule divided up H's time with each parent between then and 25 January 2000, with H oscillating between the two of them but having no settled home with either of them. Again, no one seems to have spotted the possible relevance of the Hague Convention, including the circuit judge himself, although he gave quite a detailed judgment, of which I have been shown a note, dealing with the history and the proposed interim arrangements.

However, the mother was dissatisfied with the advice she was receiving. During September 1999 she contacted a Swedish lawyer in London who in turn referred her to a very well-known expert in the field of child abduction, Miss Anne-Marie Hutchinson, in the firm of Dawson Cornwell. She, of course, did realise at once that on the mother's case, if right, H was being wrongfully retained in England and Wales and that the correct remedy of the mother was to apply under the 1985 Act and the Convention, and that by Art 16 of the Convention it was the duty of the court to consider that matter before deciding on the merits of rights of custody.

There was some delay while solicitors were changed, the Central Authority for England and Wales under the Hague Convention involved, and legal aid obtained. The proceedings in Wrexham were stayed and the application under the Hague Convention has now come on for final hearing before me.

In defence of the application under the Hague Convention, the father says, first, that the mother consented to H coming to live indefinitely and on a long-term basis with him in Wales; and, secondly, that even if not, she later acquiesced in his doing so.

At para 1 of his affirmation within these proceedings, dated 4 January 2000, he said that H: '. . . presently resides with me . . . in Wales and has done ever since May 1999 when I came into this jurisdiction with him with the tacit consent of the mother'.

At para 7 he said:

'It is therefore my case . . . that the place of [H]'s permanent habitual residence is England, such residence having been assumed with the intention of myself and the mother, and with her tacit and utterly obvious consent upon our permanent relocation in May 1999.'

The scope and purpose of the Hague Convention is to secure the prompt return of a child to the State in which he was habitually resident immediately before his wrongful removal or retention, as defined in the Convention. There is no question of wrongful removal in this case, since the mother undoubtedly and freely agreed to H being brought to England and Wales in May 1999 and staying here for a period of time. She says, however, that he should have been returned, if she wished, to Sweden when her course ended in mid-September 1999 and that he was wrongfully retained here in August 1999 when the father prospectively opposed that outcome and obtained court orders to prevent it happening.

I mention parenthetically that Mr Rosenblatt, who now appears for the father (but was not acting at the time of the events last August 1999), has wisely and correctly taken no point that the orders of 17 and 25 August 1999 were made by consent. There is no doubt that the mother was only going along with the proceedings in the county court because

she thought she had no option but to do so and because neither her lawyers nor any of the judges alerted her to the right that she had under the Hague Convention to seek the summary return of H.

Habitual residence

The first question is, accordingly, whether H was in fact still habitually resident in Sweden at the time of the alleged retention in August 1999, or whether he had ceased to be habitually resident in Sweden (even if he did not become habitually resident anywhere else) when his father left Sweden with him and brought him here at the end of May 1999.

H was in the lawful custody of both his parents jointly. His father clearly ceased to be habitually resident in Sweden at the end of May 1999. He gave up his flat there, brought his belongings here, and clearly had a settled intention not to return to Sweden but to take up long-term residence in England and Wales.

If the mother also had ceased to be habitually resident in Sweden, then, on the facts of this case, it seems to me to be difficult (although not theoretically impossible) to conceive of H himself continuing to remain habitually resident in Sweden.

Did the mother cease to be habitually resident in Sweden when she embarked on her course in Barcelona in September 1998? In Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, 578G, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442, 454B, Lord Brandon of Oakbrook said:

'. . . the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case . . . there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead.'

In my judgment and understanding, however, the element of intention to take up long-term residence in country B is not in fact an essential prerequisite of ceasing to be habitually resident in country A. Thus a person might leave country A with a settled intention not to return to it but with no particular intention about residence anywhere else. For example, somebody who sets out to travel the world.

The mother has been described on behalf of the father as 'peripatetic'. As recently as last summer she inquired to the University of Lisbon in Portugal about a possible course during the year 1999-2000, although she never pursued the matter further. The father says that she might have chosen to stay in England at the end of her Winchester course.

I am quite satisfied, however, that there has never been a stage when the mother reached a settled intention, or indeed any intention, not to return to Sweden. The very highest it can be put is that events might have developed in such a way that she might in the end have decided not to return. But her family live there; she has retained her flat there; throughout the whole relevant period she was merely a student abroad for a finite one-year course.

In my judgment she clearly retained and retains her habitual residence in Sweden.

That being so, in my view the discrete question of whether H retained his former habitual residence in Sweden really depends on the issue of consent to which I will shortly turn. The father could not unilaterally change the habitual residence of H whilst his mother continued, as I have held, to be habitually resident in Sweden. If, as the father says, the mother tacitly consented to the permanent or indefinite relocation of H in England and Wales in May 1999, then of course she thereby equally consented to him ceasing to be habitually resident in Sweden.

But if, as the mother says, she never agreed to him coming here on a long-term basis but only temporarily, and he was to resume living with her in Sweden if she wished after she had completed her course, then in my view he necessarily remained habitually resident in Sweden until such time (which never arose) as she evinced an intention not to return with him to Sweden.

Consent

I turn, therefore, to the issues of consent and acquiescence. Article 13 of the Hague Convention provides as follows:

'Notwithstanding the provisions of the preceding Article, the judicial . . . authority of the requested State is not bound to order the return of the child if the person . . . which opposes its return establishes that --

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

In the case of Re C (Abduction: Consent) [1996] 1 FLR 414, I myself held that (i) the burden of establishing consent is placed by Art 13 on the person (in this case, the father) who opposes the return of the child; (ii) the standard of proof for that purpose is the balance of probabilities; (iii) there is no requirement that consent be given or evidenced in writing; and (iv), at 419C:

'If it is clear, viewing a parent's words and actions as a whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgment that is sufficient to satisfy the requirements of Art 13. It is not necessary that there is an express statement that "I consent". In my judgment it is possible in an appropriate case to infer consent from conduct.'

I understand and believe, without making specific reference to them, that there is now a considerable body of reported cases, albeit at first instance, which support and apply each of the above propositions; and I accordingly apply them today and direct myself by them in this case.

In the case of Re C (Abduction: Consent) I went on to say, at 419D:

'[Consent] needs to be proved on the balance of probabilities, but the evidence in support of it needs to be clear and cogent. If the court is left uncertain, then the "defence" under Art 13(a) fails.'

In the later case of T v T (Abduction: Consent) [1999] 2 FLR 912, 918, Charles J has politely pointed out that those particular words of mine were ill-chosen. The use of the phrase 'if the court is left uncertain' might seem wrongly to suggest that the standard of proof is one of 'certainty'. The reference to the evidence needing to be 'clear and cogent' needs clearly to be understood in the light of the judgment of Lord Nicholls of Birkenhead in Re H and Others (Minors) (Sexual Abuse: Standard of Proof [1996] AC 563, 586-587, sub nom Re H and R (Child Sexual Abuse: Standard of Proof [1996] 1 FLR 80, 95-97. On the facts of a particular case a court may consider that evidence of consent needs to be cogent before it can overcome the degree of improbability of consent having been given on those particular facts. But in the end there is only one question, namely has consent been established? And only one standard, namely the balance of probabilities.

Insofar as those words of mine seemed to erect an additional hurdle or higher test, they were wrong.

Finally in this context I would like to express my agreement with Charles J's observations at 918D, that it should only be exceptionally that the onus of proof itself is determinative of the issue of consent.

I now return to the facts of the present case. I heard oral evidence from both parents. The mother remained adamant that at no time did she agree to moving to live indefinitely or permanently in England or Wales. She readily agrees that as she herself would be in Winchester between June and September 1999, she was entirely happy for H to come to England and Wales with his father in the spring, which would indeed have the advantage that H was already here and more accessible to her while she completed her course in Winchester. But she says that she clearly wished to resume his care when she finished her course, just as she had been his primary carer beforehand, and that she never agreed to H remaining with his father, or against her will in England and Wales, after September 1999.

She did say to the father, as she put it at para 8 of her statement of 17 August 1999 within the Children Act 1989 proceedings, that:

'I did to some extent humour the father that I would stay in Wales with [H] but I did make it clear to the father that it was my intention after I completed the course that [H] would live with me whether it was in Wales or in Sweden.'

But on her account she never surrendered, nor consented to the surrender of, her right to take H back to Sweden after her course if she wished to do so. I found the mother's evidence to be clear and consistent.

The father initially said that by January 1999 the parents had agreed a 'definite plan' that H would live with him in England and Wales for at least 2 years and that there was in or by January 1999 an oral agreement to that effect.

In my view, however, that account is not consistent with two events. First, as is common ground, there was an argument on the telephone on or about 27 January 1999 when the mother in Barcelona rang the father in Sweden. The father was asking the mother to agree in writing that H should live with him for the next 2 years; but she refused to do so and there was an argument. I stress again, as in the case of Re C (Abduction: Consent) to which I have recently referred, that there is no requirement that a consent for the purpose of the Convention need be in writing. But, when assessing the evidence in the context of this particular case, it is clearly significant that the father made an express request for a written document and the mother refused to make one. If in truth she was consenting and in agreement with the father, why should she decline to put something in writing?

In my judgment that telephone call clearly indicates that as of that date (whatever she may earlier have said) she did not agree to H living with his father for the next 2 years, whether in England and Wales or in Sweden, and the father knew it.

The second event is the letter which the mother wrote to the father from Barcelona on 9 February 1999. Some allowance has to be made when reading the letter for her obviously imperfect use of English. The letter begins:

'I will try to write this letter in English as well as I can. I feel it is time to write and clarify my wishes, thoughts and worries in this situation.'

She then, in effect, analyses some of the conflicting needs of H. His need to spend time in England and have contact with his English family. His need to maintain contact with his mother and his Swedish family and language. His need to see much of both parents.

She continues later on:

'I have not disappeared, I keep a good contact and it will last to September then I want to see [H] more.'

The letter concludes:

'If I come now [viz to Sweden], we have more time to talk and plan things. I want to know when exactly you are planning to go to Britain, and if you planned to go with [H] or not. I told you that I want to be with him at least for two weeks when I have Easter holiday and I also want to be in Sweden. Probably are we talking about these things over the phone. I want you to write a letter too, I believe that would be good.'

The father himself, at the end of his affirmation of 4 January 2000, refers to that letter as giving:

'. . . the impression of her utter equivocation regarding [H] and herself.'

If her state of mind was, as the father himself understood it to be, one of 'utter equivocation', then she was not consenting to the indefinite and long-term removal of H from Sweden to England.

Later the father said in his oral evidence that she was definitely consenting by or in March 2000, although no decisive event during that month is referred to or relied upon.

The father further relies as evidence of consent, or of subsequent acquiescence, upon the visit that the mother made to Wales between 6 and 13 April 1999 when she flew in to Liverpool airport. He says that the purpose of the visit was to inspect the home he had found as a long-term home for H as well as himself. He says that during the visit he showed her the school that H would attend, which, since at that time he was only 3 1/4, was only consistent with H being in Wales well past September 1999 and into the age of his primary schooling.

But the father himself had never actually visited the school, nor did the mother, and 'showing' it to the mother amounted to no more than pointing across the field from the house where the flat is to the school buildings beyond.

In my view the visit of the mother to the house in Wales is as much consistent with her wanting to spend a period of time with H, as she did from time to time during her course, and being interested to see the home where H would stay for the next few months, as it is with her tacit consent to living there indefinitely and long term.

Further, the mother was en route to Sweden. She flew to Liverpool and later they all drove to Sweden. There is nothing especially odd or significant about the fact that she chose to fly to Liverpool rather than direct from Barcelona to Sweden.

The father, and Mr Rosenblatt on his behalf, point to various other matters which they say are not consistent with the mother's case.

First, she let out her flat in Sweden to her cousin D. The let was for one year, and after he moved out his sister, E, moved in. The mother told E that she might have to move out again at short notice but she did not tell E exactly when she would be returning to Sweden. That seems to me to indicate no more than that the mother had not settled in her own mind how speedily she would return to Sweden once her course had ended.

Secondly, when she went to Barcelona she leased a flat there for 4 years and indeed remains the nominal lessee. But the mother says that it was not easy to rent a suitable flat for a shorter or one-year term. A friend of hers has now taken over the flat and is paying the rent directly to the landlord or his agent.

Thirdly, when the mother came from Barcelona to Winchester in June 1999, she went via Sweden and brought a considerable quantity of her and H's belongings in her camper van. It is accordingly suggested that she had a plan to stay here longer than the remaining 3 months of the course. That may be so, but it does not indicate that meantime she had consented to remaining indefinitely with his father, nor that she had consented to him remaining out of Sweden once she herself had decided to return. Further, the mother says that although she brought a quantity of belongings in the camper van, she still left other belongings in Sweden, including furniture and some of H's toys and clothes and H's bed.

Fourthly, in January 2000 the mother booked H into a pre-school in Sweden to commence in March 2000. In her evidence she said that one would normally expect to make such a booking about 4 months in advance. So it is suggested that if she had really intended to return with H to Sweden in mid-September 1999 at the conclusion of her course, she would have made a similar booking in, say, mid-May 1999, but she did not do so. At that time, however, H was only around 3 1/2. Compulsory schooling in Sweden does not begin until the age of 7 and this, too, seems to me to indicate, at the most, uncertainty about the timing of her return but not her prior consent to H remaining here long term with his father.

Viewing the evidence as a whole, and placing weight on my observation of the oral evidence of each parent, I am far from satisfied, even on a balance of probabilities, that the mother ever consented to or acquiesced in remaining with his father or in England and Wales beyond the end of her course in September 1999. Indeed, I am satisfied that she did not so consent. Undoubtedly she equivocated and was uncertain about her precise plans, but she never gave her consent to H living here and with his father beyond mid-September 1999. I consider, too, that the father was well aware of this, but he decided to come in May 1999, settle himself and H in as much as possible, and hope for the best.

Conclusion

It follows that H is being wrongfully retained here for the purposes of the Hague Convention. The defence under Art 13 fails and I must, pursuant to Art 12, order the return of H to Sweden forthwith.

The duty of courts and practitioners -- a cautionary tale

Before I conclude this judgment, however, I wish to revert again to the course of the proceedings before the Wrexham and the Warrington County Courts during August 1999. As I have now held, this is a case to which the Child Abduction and Custody Act 1985 and the Hague Convention apply. And, as I have now held, the court is bound, without any discretion, to order the return of this child to Sweden, that being the continuing wish of the mother. That is exactly what she wanted to achieve from September 1999, and what she first consulted a solicitor about at the very first consultation on 19 July 1999. Once the matter first came before a court, the court itself was subject to its own duty under Art 16 of the Hague Convention which provides as follows:

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

There was a complete failure by the mother's solicitor in Wales, or by the counsel (who was over 20 years in call) (not Mr Scott-Manderson) whom the solicitor instructed, to spot that this was a case to which the Hague Convention did or might apply. Indeed, an attendance note dated 24 August 1999, the day before the hearing in the Warrington County Court, records that:

'We will also have to disclose to the court that client intends to return to Sweden. This will give them a very real problem. Counsel does not feel that the court will entertain an application to transfer to Sweden as mother had not done anything to protect her position in Sweden. If there was a Swedish court order things would be different.'

That was in fact gravely mistaken and incorrect advice. The result was that no one drew the attention of any of the three judges who considered this case in the county court to the possibility that the Hague Convention might apply, nor did any of the judges spot that possibility for himself, including the judge who conducted the hearing on 25 August 1999 and in fact gave a judgment of some length of which I have read a note. From first to last that judge treated this as a case of fully contested cross-residence applications. He gave no consideration to a summary resolution, or to the important guidance given in this class of case by Stuart-White J in the case of R v R (Residence Order: Child Abduction) [1995] 2 FLR 625, 637D-F and by Butler-Sloss LJ in Re D (Abduction: Acquiescence) [1998] 2 FLR 335, 345B-C, although in that particular passage Butler-Sloss LJ was referring in terms to litigants in person.

The result has been that all three members of this family have suffered needlessly from the failures by the English legal system, in which I include both the judges and the lawyers. The mother has had to stay here 5 months longer than she wished, living in temporary accommodation in London. H has spent an additional 5 months, at a very formative age, away from his home country and exposure to its language, and has oscillated throughout that time between his parents with no settled home with either of them. And the father has had to endure a protracted delay before being confronted by the reality, which should have confronted him last August or September, that H must go back to Sweden for his future to be resolved there by agreement between the parents or by proceedings in the Swedish courts.

There nay be a tendency to think that child abduction is a specialist branch of family law and only to spot it when there has been an obvious 'snatch'. It is specialist, which is why it is heard only by the very small number of judges in the Family Division of the High Court. But, just as every general practitioner must be alert to spot a rare illness even if he does not have the expertise to treat it, so also anyone, whether judge or practitioner, having any involvement with cases concerning children, must always be alert to spot a possible case of international child abduction.

As soon as a court learns that it is concerned with a child who has formerly lived abroad in a Convention country, and whom one parent does, or may, wish to return to that country, a possible case under the Hague Convention may arise. The concept and ambit of 'wrongful retention' extends the arm of the Convention way beyond a 'snatch', and means that it can apply even after a child has been here for a substantial period of time.

The alarm bells should ring at once, and if there is any doubt at all the practitioners or the judge, as a matter of the court's own responsibility, should at once consider transferring the case to a full-time judge of the Family Division,

and/or seeking expert advice from experienced practitioners in the field of the Hague Convention and international child abduction, and/or seeking the advice and help of the Child Abduction Unit of the office of the Official Solicitor, which is always available to give it.

These duties upon practitioners and the court arise at the outset. It is, indeed, particularly important that judges and district judges who hear without notice applications should be alert to the possibility that underlying the case in which the without notice application is made, there lurks a wrongful removal or wrongful retention. In order to assist judges to discharge that duty and their duties under Art 16 of the Hague Convention, there is, in my view, a duty upon practitioners who act for parents in a position such as the father in this case, to draw the attention of the court to the possibility that the Hague Convention may apply.

In this particular case the father's solicitor, as I have said, seems to have been the only person with the skill and experience to spot that this may have been a case to which the Hague Convention applied. She very properly drew the attention of counsel whom she instructed to that fact. As counsel did not then, in turn, raise the matter with the court, primary responsibility clearly lies in my view with counsel and not with that solicitor who, in my view, did all she fairly should have done. But I do wish to stress that in any case of this kind if a solicitor, though acting for the 'abducting' parent, does appreciate even the possibility that the Hague Convention may apply, then he is under an important duty to draw that fact to the attention of the court at the first opportunity in any legal proceedings.

Child ordered to be returned to Sweden.

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

All information is provided under the terms and conditions of use.

For questions about this website please contact : The Permanent Bureau of the Hague Conference on Private International Law