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Re H (Children) (Abduction) [2003] All ER (D) 308, [2003] EWCA Civ 355

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COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

20 March 2003

Dame Elizabeth Butler-Sloss P., Mummery and May L.JJ.

Re H (Children) (Abduction)

Counsel: Michael Horowitz QC and Nicholas Carden for the father; Henry Setright QC and Marcus Scott-Manderson for the mother.

BUTLER-SLOSS P:

1. This is an unusual and worrying case which arises in the context of an application under the Child Abduction and Custody Act 1985 for breach of the Hague Convention. The applicant father, who is Belgian, seeks the return of his three children to Belgium. The mother removed them, together with her eldest son by a previous marriage, from Walcourt in Belgium to England on the 31st March 2002. The father made an application for their return to the Belgian Central Authority on the 18th July 2002 and the request to the United Kingdom Central Authority was received on the 12th September. The first order in the High Court Family Division was made by Munby J on the 25th September. A CAFCASS officer reported on the position of the children on the 5th December and the application was heard by Singer J on the 30th January. At the hearing it was not in dispute that the children were habitually resident in Belgium and that the father had rights of custody. The mother accepted that the removal by her was unlawful but raised two defences under article 13 (b). The judge was satisfied that the article 13(b) threshold of grave risk to the children if they returned was reached on the unusual facts of this case and refused to return the children to Belgium. He was not satisfied that M, the eldest child of the parents, had a sufficient degree of maturity for his objections to be taken separately into account.

The Facts

2. There is a long and complicated history to this family and it is difficult to give an adequate flavour of the family problems within a short compass. All members of the family are Belgian nationals, French speaking with little or no English and have no connection with the United Kingdom other than the children's presence here through the actions of their mother. The father is 47 and the mother is 41. Her eldest son, J, is 17. The three children of the parents are: M born on the 3rd November 1992, now 10; T, born on the 4th May 1995, now 7 and V, born on the 27th May 1996. The parents married in Belgium on the 1st December

1995. There is conflicting evidence on many issues raised by the parents in a large number of supporting statements, which the judge was right, in my judgment, not to try to resolve by oral evidence. These are intended to be summary proceedings.

The mother's case

3. The mother had an unhappy childhood. She married her first husband in 1984 and they parted before J was born. She began to live with the father in 1989. She alleged a pattern of domestic violence involving regular assaults by the father on her and on her son J. The three younger children were also assaulted but to a lesser extent. The trigger was incessant and excessive drinking. She sought refuge twice at a women's shelter with all four children shortly after the birth of V in 1996. According to her she required medical treatment on several occasions and exhibited medical reports to her affidavits, relating to injuries to herself and also to J. She alleged that in 1998 she was forced by the father into prostitution. It seems clear that she was regularly visiting a nearby motorway long distance lorry park and was taken there and back by the father who waited for her while she went from lorry to lorry.

4. In 1998, she said that a social services agency, La Service d'aide a la jeunesse (SAJ) became involved with the family after a reference from the women's refuge. A representative visited the house. Also in 1998, J was becoming out of control and was stealing, among others from the paternal grandmother. The grandmother gave him a whip, said to be a cat-o-nine-tails, as a St Nicholas' Day present. The mother cut off the thongs off the whip and the father replaced it with another with which he used to beat members of the family. In 1999 the police were called by the school after M and V were seen with cuts on their faces. The police investigated and interviewed the children and both parents but, on this occasion, the cuts were accidental. The local Children's Court (Le Tribunal de la Jeunesse) became involved and a Mme Abbras, from the Court, sought a meeting with the parents in May 1999. Shortly before the meeting, on the 14th May 1999, the mother alleged a very serious assault after which the father 'threw' her out of the house. She later collected all four children and drove to France to a friend's house, another lorry driver, where she contacted the police and received medical treatment. The father went to the meeting with Mme Abbras. She 'fled' again to France with the children in October 1999 after another severe beating.

5. In April 2001 there was a scene with J who, according to the mother supported by a statement from the child minder, was seriously assaulted by the father. The police were called and statements taken by the police the following day. The mother's view of the police was that they were either unwilling or unable to help. The consumption of alcohol by the father increased even further during 2001. At another incident in August 2001 the police were again called. On the 1st September the mother broke her elbow and her account was that the father was inebriated and attacked her and pushed her to the ground. She called the police and went to hospital in an ambulance. The police checked up a week later after her return home, but treated the incident as closed. In an incident in the car on the 21st October 2001, the mother called the police because of a severe assault on J.

6. On the 10th March 2002 there was another incident with J who was, according to the mother, seriously assaulted by the father and the police and ambulance were called. The mother then took the children to stay with a friend in a two bedroom flat in Thierry. This was clearly a short term arrangement. The father, according to the mother, had threatened to bum down the house where she was living, 'preferably at night' as soon as he found out where she was. The mother said that she took the threat very seriously and that the children were terrified of their, father.

7. The mother said, in her affidavit, that she did not consult a Belgian lawyer

"as I felt that there was no point obtaining a court order that I felt would not be enforced by the Belgian police".

8. She turned to an English friend she had met in the lorry park who drove regularly and frequently through Belgium and he drove the children to England on the 31st March. She took the family car. She said that the children had settled down in England and the effect on them of a prospective return to Belgium had been seriously adverse to their psychological well being. The mother suggested that the father was not genuinely interested in the children.

9. In an earlier statement dated the 29th January 1999 made to the police, the mother stated that she had been hit by the father in December 1997 and gone to a refuge for several days from which she returned home after she was told that the children would be taken away and she had to go to the psychiatric department of the hospital. She also stated that she did not intend to leave the matrimonial home because she knew that her husband loved her. She said that he was a good father and strict. The children wanted for nothing.

10. The mother's case was supported by the child minder, the lorry driver who drove them, the lorry driver to whom she went twice in France, and another friend.

The father's case

11. The father denied that he drank alcohol to excess and denied absolutely the allegations of violence towards her and the children. He suggested in his affidavit that the mother had had a damaging childhood, including abuse, and needed psychiatric help. He did not force her into prostitution. She told him she was going to do it because of a shortage of money and he tolerated it. After she had some trouble with other prostitutes at the lorry park, she persuaded him to take her there for her own protection. He refuted all the serious allegations made by the mother. He stated that after the birth of V, the mother became seriously depressed and began to assault him. She was advised to seek treatment for her depression and that advice was given by the women's refuge but she was not willing to do so. He agreed that his mother bought J a cat-o-nine tails because he did not deserve anything else. The tails were cut off and it was the mother who went out and bought another. He absolutely denied that he ever hit the mother or J with a whip. As far as he knew his children had never alleged that he hit them. He alleged that the mother was sometimes violent towards the children. The incident which caused the mother to break her elbow, on the 1st September 2001, was started by her hitting him in the back.

12. The father agreed that there was a quarrel on the 10th March 2002 as a result of which the mother and children left the matrimonial home. He had an argument with J and the mother intervened and J started to hyperventilate and was sent to hospital. The father agreed that he had pulled a spotlight track off the ceiling to relieve his feelings but he did not assault any member of the family. The mother and the children saw him almost daily after she left and the children spent the day with him on the 31st March. The father denied that any of the children were terrified of him. According to the father he was in full time employment whereas according to the mother he was unemployed.

13. The father's case was supported by other members of his family, by the May 2002 report commissioned by the SAJ and to some extent by the earlier statements to the police including the mother's statement of the 29th January 1999. The father alleged that the statements made in support of the mother were by her clients from the lorry park.

Intervention of the Belgian Courts and Agencies

14. The father's account of the intervention of the agencies was that the family had been on the Register of the Children Court for some years because of problems they were having with J. As a result, caseworkers from the SAJ were allocated to the family and J was seen by a child psychiatrist and a psychologist. In January 1999, after the referral by the school over cuts to the faces of M and V, the police interviewed the family and sent a report to the Children Court which directed the involvement of the SAL. The father alleged that the mother refused to co-operate with the SAJ and in May 1999 the parents were summoned to attend the Court. The mother was in France with the children and the father attended alone. The judge ordered the mother to attend and brought in the SPJ. Their representative was Mme Abbas, First Assistant to the Crown Prosecutor. According to the father, the mother was afraid that the SM would remove the children from her and she did not want to meet Mme Abbas. The father stated that he did not throw his wife out on the 14th May 1999 but that she left through fear of Mme Abbas.

15. Both parents were summoned to appear before the SM and were interviewed by the head of Department of the SPJ. She decided that the children were not to be removed from home but referred the family again to the SAJ and after an interview with Mme Decelle of the SAJ at the end 1999 or early 2000, a case worker, Mme Chabot, was assigned to the family. The family was subsequently seen on a monthly basis by Mme Chabot. The father alleged that the mother did not welcome the involvement of the SAL. On the removal of the children to England, the SAJ closed the file and sent it back to the Children Court. The mother accepted that she had never made any application to the Children Court or any other court, nor to the SPJ for any protection for herself from the father nor for the children.

16. After the departure of the children with the mother to England, on the application of the father, a Justice of the Peace of the Canton of Florenne- Walcourt sitting on the 8th May 2002, at Walcourt, in the absence of the mother by default and in the first instance, awarded the father the exclusive right to exercise parental authority over the children.

The Belgian family report

17. A report dated the 13th May 2002 was made on the family. From that report it appears that a team consisting of a psychologist and a social assistant was asked by the SAJ on the 16th November 2001 to become involved. There was a meeting arranged at SOS Parentants with Mine Chabot, who was in charge of the case. The report set out problems in the behaviour and the attitudes of the mother rather than those of the father. The report stated that from three meetings with the whole family, the presence of physical abuse was confirmed and it emerged that the family dynamics led to effects which were detrimental for all the children. The recurrence of abuse and apparent co-operation by the parents not corroborated by results, required the protection of the children. During the hearing before the judge, the father produced a fax sent by a representative of the SAJ to the effect that she would investigate the situation of the children on their return to Belgium and, if necessary, would take interim steps for the protection of the children.

Evidence of CAFCASS Reporter, Mrs Hayes

18. On the 1st November at a directions hearing, Kirkwood J directed a Child and Family Reporter, Mrs Hayes, to interview M and also his elder half brother J in order to ascertain any objections by M to the return to Belgium. She interviewed each child on his own and had the help of an interpreter.

19. M told her that he had no wish to return to Belgium. He was hit by his father every day and his brothers were also hit, particularly J. M was frightened of his father who drank a lot of alcohol and became annoyed when they were noisy. His father often beat his mother. He described an incident in which his father held a knife to his mother's neck and stomach. M said that if he had to return to Belgium he did not want to see his father.

20. J was then seen. He said that he would not return to Belgium. He said that the father constantly hit or punished him in various ways and told J that he could not love him as a son. J was hit with a belt or the cat-o-nine-tails. The father's behaviour stemmed from his heavy drinking and he was rarely sober and could not bear the level of noise generated by a family of four boys. The father denigrated and insulted the mother and assaulted her and made her work as a prostitute. J felt he was most often hit when he tried to support his mother. He gave details of some of the incidents in which he was injured by the father. J said that the father had made threats in September 2002 to kill the mother and take the children. He felt his father did not really want contact with his brothers but wanted to 'get at' his mother. He felt he might have to return to Belgium with the family to support them but in his view it would be a very dangerous situation.

21. Mrs Hayes formed the view that over the years J had had to cope with many inappropriate situations and that he was very mature for his age. Her conclusion was

"...the children both tell of a very unhappy life in Belgium where a whole catalogue of abuse took place. Rarely have I heard of children tell of such persistent abuse over a lengthy period of time."

The judge's findings

22. The judge approached the mother's evidence with a considerable degree of caution but preferred the version given by the mother to that given by the father. He posed the primary question whether the mother's account of a reign of drunken violence and threats was broadly made out or was virtually entirely fabricated. The judge was persuaded that, whatever the faults of the mother might be, the family was dominated by the father's control, exercised through violence and threats. He formed the firm conclusion that the mother's case was broadly made out and had predated her flight from the father. He was satisfied that the children had been in an intolerable situation prior to their removal and that a return of the children to their father would expose each of them to a grave risk which crossed the article 13(b) threshold.

23. The judge recognised that there had been police and social work intervention but formed the view that its extent was unclear and it seemed never to have been sustained. His approach to the question whether the children should return to Belgium was based upon his view that the authorities had done little or nothing to protect the children and the mother and he was not satisfied that they would do anything effective in the future. He looked at two alternative scenarios. The first was that the children would return without their mother direct to their father, He said

"On the basis that my finding of the mother's account of persistent and almost sadistic threats and violence, accompanied by sustained drunkenness, is broadly accurate, I must be allowed to take into account, it seems to me, the fact that over the years there is no evidence of effective intervention to protect these children and indeed her.

Against SAJ's stated intention to take effective action must therefore be set this history, upon the evidence available to me, of sustained inaction. There must at least be the risk that any future initiative will prove ineffective and, in the circumstances of this case, such an

outcome would be disastrous for these children were they to find themselves alone in this father's care."

24. The alternative scenario was the return of the children with their mother and J. The judge was satisfied as to the extreme nature of the father's behaviour and his degree of instability and irrationality and doubted the reliability of any undertakings the father was, grudgingly in the view of the judge, prepared to give if the mother returned with the children. The judge held that it was an extreme case where the risk of extreme behaviour on the part of the father could not be discounted. He accepted Mr Scott-Manderson, the mother's Counsel's, description of the father as an "uncontrollable risk" and that no attempt had yet been made to try to control him so that its efficacy was an open question. He took into account the total absence of any connection of the family with this country and that none of the participants spoke English but concluded

"It is rare indeed for an Article 13(b) defence to be made out, but this is an extreme case, and when I set the desirability of support for the principles of the Convention against the fear, the confusion, the uncertainty, and the risk of harm to which return would expose these children, I have no hesitation in exercising my discretion not to make such an order."

25. The judge made a number of orders to protect the mother and the children and, on the basis that the mother would issue application within the Children Act and/or wardship, directed a section 7, Children Act report from the local Social Services Department.

The Hague Convention

26. In a case where a child is habitually resident in one country and removed by a parent to another country, and the left behind parent has rights of custody and has not consented to the removal, that removal is unlawful and the court of the country to which the child has been removed has a duty under the Hague Convention to arrange the speedy return of the child to the country of habitual residence. The requirement is to return to the country and not necessarily to the left behind parent. That distinction is of particular importance when a defence under article 13(b) is raised by the abducting parent.

27. The relevant terms of article 13 (b) are

"... 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

(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."

28. In re C (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 FLR 478 I said at page 484

"Article 13(b) is an exceptional remedy intended to deal with the unusual issues of welfare of the child which takes the case outside the normal provisions of the Convention."

29. Hale LJ in TB v JB [2001] 2 FLR 515 helpfully set out, at page 525, a summary of the approach of the English Court to the application of the Convention and the place of article 13 (b) which I gratefully adopt

"The policy of the Convention is that disputes about children should be determined in the courts of the country of their habitual residence. Children should not be uprooted and placed beyond their jurisdiction. It is for them to determine where the best interests of the

children lie. Article 13(b) is the one exception to this. No requested country can be expected to return children to a situation where they will be at serious risk, but this must not be turned into a substitute for the welfare test, usurping the function of the courts of the home country.

30. The threshold to be crossed when an article 13(b) defence is raised is a high one and difficult to surmount. Hence the courts in this country have always adopted a strict view of Art 13(b). The risk must be grave and the harm must be serious. The courts are also anxious that the wrongdoer should not benefit from the wrong: that is, that the person removing the children should not be able to rely on the consequences of that removal to create a risk of harm or an intolerable situation on return. This is summed up, after a review of the authorities, in the words of Ward LJ in *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145, 1154, cited by the judge in the present case:

"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 much 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.

31. There are two parts to article 13(b). Even if the threshold is crossed there still remains a discretion in the court whether to return the child.

Application of the Convention to this appeal

32. In a case heard summarily without oral evidence, the advantage of the trial judge over the appellate court is less obvious and we have had an opportunity similar to that of the judge to assess the case from the documents. In the absence of any testing of the conflicting affidavit evidence of the witnesses and taking into account the conclusions in the Belgian report of the 15th May 2002, I am, I must confess, much less certain than the judge that the father was entirely to blame and that the mother was the innocent victim. I do not, for my part, consider that it is possible to form the firm conclusions to which the judge came that the father dominated the family and exercised control through violence and threats or that the nature of the case was extreme in the irrationality and instability of the father or that he was proved to be an uncontrollable risk. He had never been the subject of any injunctive order nor in breach of any court order. The assessment of the judge may be true but, in my judgment, he was not entitled to make those findings on contested and untested allegations. It may well be that both parents have contributed to the serious situation in which the children appear to have suffered. Whether the picture at the family home in Belgium was as black and bleak as was painted by J and M to Mrs Hayes, I have no doubt that the two children were giving the CAFCASS Child and Family Reporter their understanding of the situation. It would appear likely that the children have been living in a most unsatisfactory home environment and have been the witnesses to scenes and violence between their parents. The mother took the four children from their home on at least five occasions, including twice to France and finally to England. The moves to France and to England appear to have been fortuitous in that it was the opportunity to go to or with a friend that precipitated the destination, not the destination itself. This is a disturbing picture of the family and I would not wish to see these children restored to the situation from which they were removed in March 2002. To do so might well bring the case within the article 13(b) grave risk of placing the children in an intolerable situation.

33. The return of children under the Convention is to the jurisdiction of their habitual residence and it is not generally necessary or likely that the return would be to the same

situation nor should it be in the present case. The judge formed the clear view that the authorities in Belgium had been indifferent to the plight of the children or alternatively ineffective in their protection. That is not the conclusion to which I have come on the documents available to this Court. The reality was that the police, the Children Court, the SAJ and the SM have been involved for a number of years with this family. The SAJ has been deeply and, it appears, regularly involved monitoring the family. The report, commissioned by the SAJ and critical of the mother, was received after her departure with the children. There had been consideration of the possibility of removing the children from the home. The case was only closed because the family was no longer in Belgium. During the hearing before Singer J, the SAJ made it clear that it would intervene on the return of the children to Belgium and the children might be placed briefly in care while the agencies tried to sort out the family. In my judgment, it is very significant that the mother, apart from regularly calling the police, did not seek any help from the Belgian courts or agencies. I do not consider that an English court is entitled to assume a lack of will to protect these children by the Belgian authorities. Equally I do not consider that we are entitled, in England to assume that either the father is an uncontrollable risk or that the Belgian authorities would be unable to manage the problem.

34. Mr Setright QC who represented the mother on appeal, accepted that the most obvious forum for a contested hearing in this essentially Belgium case was the Belgium court. All the relevant witnesses, including the agencies engaged with the family, with the exception of the English lorry driver, are outside the United Kingdom. The language of the proceedings would naturally be French. However, Mr Setright also submitted that an Article 13(b) case had been made out, that in the summary Hague proceedings the father had not offered or put in place adequate assurances so that a summary return could safely take place, and that accordingly Singer J. had been right in his discretion not to order a return. Nothing had changed, and the appeal should be dismissed. If the father so wished, he could seek a return to Belgium in domestic English proceedings if he could establish a case for such a return, including in the light of suitable protective arrangements. Those arrangements, in my view, can be made within the ambit of the Convention and swiftly. I can see no reason to delay the return beyond what is necessary to protect the immediate welfare of the children.

35. Lord Donaldson of Lynton MR in *re C (A Minor) (Abduction)* [1989] 1 FLR 403 said at page 413

"... in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words "or otherwise place the child in an intolerable situation" which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the state to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, i.e., the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country - Australia in this case - can resume their normal role in relation to the child."

36. With Lord Donaldson's words in mind, I turn to consider what, in my view, should be done to smooth the return of these children to the country of their habitual residence and to ensure the best arrangements until such time as the Belgian Court, the SAJ or the SPJ take over the management of these children and deal with their future welfare. Although it is highly desirable that they should return soon, the sad fact is that they have now been in England for nearly a year and there has already been a considerable interruption of their

normal life. In those circumstances, in my view, another short period of delay designed to facilitate the arrangements for their return will not do much, if any extra harm. It may reduce the degree of anxiety of J and M as to what they will face on return with the likely effect on their younger brothers. One must have in mind that the children have not seen their father for a considerable period and have been in the sole care of their mother and there is going to be a lot of repair work needed to restore a relationship between M and probably the younger children and their father. It is clear from the report of Mrs Hayes that the children could not immediately return to live with their father. The father recognises that he would not take over their care immediately on return, and, if the mother returns with the four children, they would live with her prior to any decisions of the Belgian authorities. The question whether the children should be returned to the SPJ and looked after outside the immediate family is of course a matter for the Belgian authorities.

37. In my judgment, this matter should be remitted to a High Court judge, other than Singer J, for a directions hearing to put into place the mechanics of the return. It would seem that a number of matters should, if possible, be resolved whilst the family is still in England. The following are the ones which occur to me.

1. Set aside the order of the court at Walcourt of the 8th May 2002 giving sole parental rights to the father.

2. On the assumption that the mother will return with the children and unless or until there is any decision by the Belgian Court or other authorities to the contrary, the mother will need

a. housing for herself and the children

b. social welfare/ income support for herself and the children

3. Some clear understanding between the father and mother as to how and in what circumstances the father should see the children prior to any decision of the Belgian Court, the SAJ or the SPJ.

4. If it can be arranged, either a hearing before the Belgian Court or action by the SPJ to take over control of the future of these children as soon as possible after their return to Belgium.

38. There may be other matters which arise in addition to those I have set out above. All of them would seem to me to be capable of resolution and on the facts available to this Court, subject to their being resolved, there should be no bar to the return of the children within the next two to three months. It will, of course, be a matter for the High Court judge to whom this case is remitted as to when the children can return and the necessary safeguards. I would hope that the Central Authorities of both our countries could work together and help to achieve success in these arrangements.

39. I would allow the appeal and remit the case to a High Court judge of the Family Division to arrange the return of the children to Belgium.

MUMMERY LJ:

40. I agree

MAY LJ:

41. I also agree.

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