

RE W (ABDUCTION: CHILD'S OBJECTIONS)
[2010] EWCA Civ 520

Court of Appeal

Sedley and Wilson LJ

12 May 2010

*Abduction – Children's objections – Whether 6-year-old child sufficiently
mature to take objections into account – Weight of evidence required –
Whether relevant factors must be referred to again at discretion stage*

The relationship between the parents was troubled, and marked by occasional violence and problems with drink, for which each blamed the other. Eventually, the mother secretly removed the three children from the family home in Ireland and brought them to England, without the father's consent. The father responded by travelling to England; he remained there for a number of months, obtaining a job and attempting to salvage his relationship with the mother. However, a trial period of reconciliation ended after only a few weeks, following another violent incident. The father then went back to Ireland and applied under the Hague Convention on the Civil Aspects of International Child Abduction 1980 for the children's summary return. The mother accepted that the removal had been wrongful, but argued that the father had acquiesced in the children remaining in England, that there was a grave risk of harm to the children if they were to return to Ireland, and that it was appropriate to 'take account' of the objections of the children, now aged 8, 6 and 3, to a return to Ireland, under Art 13. The two older children spoke to the Cafcass officer together; the officer reported that the children had given a believable account of violence by the father towards the mother and towards them, and had told her that they were frightened of the father; the children had stated categorically that they did not want to return to Ireland, were upset at the prospect of doing so, and wanted, if it was necessary to return, to move to an address far away from the father and unknown to him. The judge found that there was no acquiescence, but that the children had strong objections to a return and that the older two children were not too young to have their views taken into account. She concluded that she should exercise her discretion not to return the two older children, and that, therefore, as the youngest child would be placed in an intolerable position if he were returned alone, none of children should be returned. The father sought leave to appeal, arguing that the views of the 6-year-old child should not have been taken into account, that the evidence of the children's objections was in any event too thin, and that the judge had failed to refer to various relevant factors at the discretionary stage of her judgment.

Held – refusing leave to appeal; but granting leave to cite the judgments pursuant to *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 –

(1) Although the defence of children's objections in the Hague Convention, Art 13 had originally been devised for mature adolescents, over the last 30 years the need to take decisions about much younger children not necessarily in accordance with their wishes but at any rate in the light of their wishes had taken hold internationally, and, fortunately, Art 13 was drawn in terms sufficiently flexible to accommodate this development. It was clear that the obiter observation in *Re D (Abduction: Rights of Custody)*, [2006] UKHL 51, that 'children should be heard far more frequently in Hague Convention cases than has been the practice hitherto' related to the defence of a child's objections. However, there was a danger that the lowering of the age at which a child's objections could be taken into account might gradually erode the high level of achievement of the Hague Convention's objective, namely, in the vast majority of cases, the swift restoration of children to the states from which they had been abducted: this policy consideration should always carry significant weight in the

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exercise of the discretion whether to order the return of an objecting child, particularly if the child was young. There was a considerable safeguard in the expectation set out in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, that in the discretionary exercise the objections of an older child would deserve greater weight than those of a younger child (see paras [17], [18]).

(2) Any confusion as to the meaning of the phrase 'to take account' in Art 13 had now been eliminated; the phrase meant no more than it said, albeit bounded by considerations of age and maturity. It was a fairly low threshold requirement; in particular it did not follow that the court should 'take account' of a child's objections only if those objections were so solidly based that they were likely to be determinative of the discretionary exercise that was to follow (see para [22]).

(3) Although the judge had failed to refer to certain factors when considering the exercise of her discretion, she had mentioned the relevant factors earlier in the judgment; given that a concerted effort was about to be launched for judgments in family proceedings to become shorter, it was difficult to succeed with an argument that judges should be reversed for failing to repeat references to specific factors (see para [24]).

Statutory provisions considered

Child Abduction and Custody Act 1985

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 4, 13(a)(b)

United Nations Convention on the Rights of the Child 1989, Art 12

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Art 11(2)

Cases referred to in judgment

D (Abduction: Rights of Custody), *Re* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783, HL

J and K (Abduction: Objections of Child), *Re* [2004] EWHC 1985 (Fam), [2005] 1 FLR 273, FD

Practice Direction (Citation of Authorities) [2001] 1 WLR 1001

R (Child Abduction: Acquiescence), *Re* [1995] 1 FLR 716, CA

T (Abduction: Child's Objections to Return), *Re* [2000] 2 FLR 192, CA

Edward Devereux for the applicant

Anmarie Harris for the respondent

Henry Setright QC and *Richard Harrison* for Reunite, the proposed intervener

Cur adv vult

WILSON LJ:

[1] On 14 April 2010 Sedley LJ and I heard an application by a father for permission to appeal to this court against an order made by Black J in the High Court, Family Division, on 4 March 2010, whereby she refused his application for an order under the Child Abduction and Custody Act 1985 that the three children of himself and the respondent mother be returned forthwith to Ireland.

[2] It had been directed that, were permission to appeal to be granted, the substantive appeal would be heard forthwith. So Miss Harris appeared at the hearing on behalf of the mother. In the event, having heard Mr Devereux on behalf of the father, Sedley LJ announced our decision to refuse the father

permission to appeal and to hand down our reasons for refusal in written judgments at a later date. So we never called on Miss Harris to address us.

[3] Reunite International Child Abduction Centre, a charity prominent in the field identified by its name, had somehow learnt of the proceedings in this court and had determined that, were permission to appeal to be granted to the father, it would seek our permission to intervene in order to make representations on matters raised by the appeal which it regarded as of general importance. To that end Dawson Cornwell, solicitors, and Mr Setright QC and Mr Harrison of counsel all generously agreed to represent Reunite pro bono. Indeed counsel drafted a substantial skeleton argument which, had permission been granted for the appeal to proceed and for Reunite to intervene, they would have invited us to consider. In case matters were so to develop, they also both appeared at the hearing before us. When we announced our decision to refuse the father's application for permission, we expressed regret that their work had not found voice and a hope that, in or out of court, they would nevertheless be able to use it on a suitable occasion.

[4] With an economy apt to a refusal of permission I write this judgment in order to explain my reasons for having subscribed to our decision.

[5] The three children are D, a boy who was born on 8 October 2001 so is now aged eight, G, a girl, who was born on 5 February 2004 so is now aged six, and C, a boy, who was born on 22 January 2007 so is now aged three.

[6] The mother is British. The father is Irish. In 2001 they began to cohabit in Ireland. All the children were born there. In 2007 the parents were married there. Some members of the mother's family live in Ireland, as do almost all the members of the father's family.

[7] The relationship between the parents was very unhappy. There were occasions of violence and problems with drink, for which each blames the other.

[8] On 19 June 2009 the mother secretly removed the children from Ireland and brought them to live, as she hoped permanently, in London. The children were habitually resident in Ireland. It was a wrongful removal.

[9] On 29 June 2009 the father followed the mother and children to London. He got a job in London and remained here until 16 November 2009. In September 2009 he persuaded the mother to undertake a trial period of reconciliation: he moved in with her and the children. But there was at least one other violent incident between them, for which, again, each blames the other. The attempt at reconciliation failed. On 16 November 2009 the father returned to Ireland and caused the summons under the Act of 1985 to be issued.

[10] Before Black J the mother raised three defences to the father's summons for an order for the return of the children forthwith to Ireland.

[11] First, the mother alleged that, from June to November 2009 and in particular from September to November 2009, the father had acquiesced in the children's removal within the meaning of Art 13(a) of the Hague Convention on the Civil Aspects of International Child Abduction 1980. The judge rejected this defence. She found either that he had never accepted that the children should remain indefinitely in London or that, if he had done so, such was only on condition that he would also be part of the family.

[12] Second, the mother alleged that there was a grave risk that the return of the children would expose them to physical or psychological harm or

would otherwise place them in an intolerable situation within the meaning of Art 13(b) of the Convention. The judge rejected this defence, save that, in relation to the youngest child, she returned to it at a later stage of her reasoning: see [13(b)] below.

[13] Third, the mother alleged that the two older children objected to being returned to Ireland and had attained an age and degree of maturity at which it was appropriate to take account of their views within the meaning of the second paragraph of Art 13. The judge upheld this defence. She:

- (a)
 - (i) found that the two older children each objected to being returned to Ireland;
 - (ii) found that each of them had attained an age and degree of maturity at which it was appropriate to take account of their views; and
 - (iii) held that the resultant discretion whether nevertheless to order them to return to Ireland should be exercised against ordering them to do so;
- (b)
 - (i) found that, were the youngest child to be ordered to return to Ireland in circumstances in which the two older children were not to be ordered to return there and therefore also in circumstances in which the mother might reasonably decide not to return there, there was a grave risk that his return would expose him to psychological harm or otherwise place him in an intolerable situation; and
 - (ii) held that the resultant discretion whether nevertheless to order him to return to Ireland should be exercised against ordering him to do so.

[14] Against each of the three steps in the judge's reasoning at [13(a)] above the father wished to mount a challenge in this court. Had he been able successfully to challenge any of them, the judge's refusal to order the return of the two older children would have had to be set aside and the reasoning behind her refusal to order the return of the youngest child would thereupon have fallen to the ground.

[15] The issues whether the two older children objected to being returned to Ireland and whether they had attained an age and degree of maturity at which it was appropriate to take account of their views substantially depended upon the evidence of a Cafcass officer who had interviewed them together three weeks prior to the hearing. Her evidence, by way of report and orally, was in summary, as follows:

- (a) Their level of maturity was commensurate with their ages.
- (b) They told her that the father had physically chastised them and that they were scared of him, did not like him and did not want to have contact with him.
- (c) G spoke vividly of being required by the father to look at blood in his vomit.

- (d) Both of them spoke of an incident in which a brick had been thrown through a window of the home in Ireland and which had very much upset them.
- (e) They said that they loved the mother, their home and school in London.
- (f) They categorically indicated that they did not want to return to Ireland.
- (g) Such constituted an objection to returning to Ireland, not just a preference for remaining in England.
- (h) Although they found it difficult to distinguish between the return of the family to Ireland and its return to life with the father, the children did manage to do so in that, with reluctance, they said that, were they to return to Ireland, it should be to an address far away from the father and unknown to him.
- (i) When warned at the end of the interview that, despite their views, a judge might order them to return to Ireland, D became very agitated and uncomfortable and tears welled up in G's eyes.

[16] The father's first ground of appeal related to the age of G. At the time of the judge's decision she was aged six years and one month and, when interviewed by the Cafcass officer, she was a fortnight short of her sixth birthday. Mr Devereux argued that the defence based on a child's objections could not, or should not, apply to so young a child. He conceded that in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 this court, by a majority, took into account the objections of two boys of whom the younger was only a month older than G. But he submitted that to take into account the objections of a child so young was very rare; that in the reported jurisprudence of England and Wales there was no example of it in relation to a child quite as young as G; that in the discretionary exercise the objections of the boys in *Re R* were ultimately overridden; and lastly that the notion that a child aged six could fall within the defence based on a child's objections was outside the contemplation of those who signed the Hague Convention in 1980.

[17] Mr Devereux's last submission seems to have been well founded. The defence was originally devised as an escape route for mature adolescents only slightly younger than the age of 16 at which, under Art 4, the Convention ceases to apply: Beaumont and McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999) at 178 and 191. But over the last thirty years the need to take decisions about much younger children not necessarily in accordance with their wishes but at any rate in the light of their wishes has taken hold: see Art 12 of the United Nations Convention on the Rights of the Child 1989 and note, for EU states, the subtle shift of emphasis given to Art 13 of the Hague Convention by Art 11(2) of Council Regulation (EC) No 2201/2003 (Brussels II Revised). Fortunately Art 13 was drawn in terms sufficiently flexible to accommodate this development in international thinking; and, although her comment was obiter, I am clear that, in context, the observation of Baroness Hale of Richmond in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, at [59], that 'children should be heard far more frequently in Hague Convention cases than has been the practice hitherto' related to the defence of a child's objections.

[18] I therefore concluded that in any full appeal Mr Devereux would not be able to persuade us that the age of G by itself foreclosed the possibility that she had objections to returning to Ireland of which account should be taken under Art 13. There is however a concern, which I share, that the lowering of the age at which a child's objections may be taken into account might gradually erode the high level of achievement of the Convention's objective, namely – in the vast majority of cases – to secure a swift restoration of children to the states from which they have been abducted. Such is a consideration of policy which should always carry significant weight in exercise of the discretion whether to refuse to order the return of an objecting child, but particularly so if that child is young; and Black J was right expressly to refer to it. A considerable safeguard against such erosion is to be found in the well-recognised expectation that in the discretionary exercise the objections of an older child will deserve greater weight than those of a younger child: *Re R*, cited above, per Balcombe LJ at 731A.

[19] As Mr Devereux's first submission proceeded, I could not help but reflect on the fact that its focus was the age of G rather than of D and on the conclusion reached by the judge in relation to C, which was not the subject of a ground of appeal. Had G been found not to be of an age at which her objections to returning to Ireland could, or should, be taken into account, I could see no reason why a refusal to return D to Ireland by reason of his objections would not have precipitated a refusal to return G for reasons analogous to those adopted by the judge in refusing to return C.

[20] The father's second ground of appeal was that the evidence of the Cafcass officer disclosed, at its highest, objections on the part of D and G to returning to a home in Ireland in which the father would be present as opposed to objections on their part to returning to Ireland itself. In this respect Mr Devereux relied strongly on the evidence that, albeit with reluctance, they had stated that, were they to return to Ireland, it should be to an address far away from the father and unknown to him. In my view it was valuable confirmation of their relative maturity that they could articulate a scenario which pinpointed the distinction between life in Ireland and life with the father in Ireland. The fact that they could articulate it does not demonstrate that they did not object to it; and their adverse reaction to the Cafcass officer's final warning was another factor which entitled the judge to accept the officer's assessment that they objected to returning to Ireland.

[21] The father's third ground of appeal was that the evidence before Black J was too thin to enable her to find that D and G had attained an age and, in particular, a degree of maturity at which it was appropriate to take account of their views.

[22] Earlier confusion in our jurisprudence about the meaning of the phrase 'to take account' in Art 13 (exemplified, for example, in *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192 at 204B–D) has in my view now been eliminated. The phrase means no more than what it says so, albeit bounded of course by considerations of age and degree of maturity, it represents a fairly low threshold requirement. In particular it does not follow that the court should 'take account' of a child's objections only if they are so solidly based that they are likely to be determinative of the discretionary

exercise which is to follow: see *Re D* above per Baroness Hale of Richmond, at [57], and *Re J and K (Abduction: Objections of Child)* [2004] EWHC 1985 (Fam), [2005] 1 FLR 273, at [31].

[23] Mr Devereux's complaint was that the only evidence of the degree of maturity of D and G came from the Cafcass officer who, following an interview with them which proceeded only for just over an hour, adjudged them to have a maturity no greater than was commensurate with their ages. I am clear that it was open to Black J not only to accept the officer's evidence but to conclude that the degree of their maturity, along with their ages, made it appropriate for her to take their views into account. For two months prior to the hearing before Black J the father was aware that the mother proposed to submit that D and G had attained a degree of maturity at which it was appropriate to take account of their views and he had ample time in which to adduce evidence about their low level of maturity if such it was.

[24] The father's fourth ground of appeal was that, at the stage at which, in relation to D and G, she came to conduct the discretionary exercise mandated by Art 13, Black J failed to refer to various relevant factors, such as the ages and degree of maturity of the two older children, the confidence which she should reasonably repose in the Irish courts to make decisions which would serve their welfare, the undertakings offered by the father to ensure a peaceful life for the family in Ireland, separate from him, at any rate in the short term and the likely negative impact of a refusal to order their return upon his relationship with them. But, save for the last factor (which begged the question about the extent of the relationship between him and them which would most serve their interests), the judge had referred to all these factors at earlier stages of her judgment. A concerted effort is about to be launched for judgments in family proceedings to become shorter (the success of which will crucially require a greater degree of robustness on the part of this court) so Mr Devereux picked an unfortunate moment in which to argue that judges faced reversal of their decisions if they failed to *repeat* reference to specific factors already made.

[25] The father's final ground of appeal was that, in conducting that same discretionary exercise, the judge had attributed some but *insufficient* weight to seven factors and had attributed *excessive* weight to three others. My experience is that it is exceedingly rare for an appeal against a discretionary decision to succeed by reference to the *amount* of weight attributed by the trial judge to a specified factor: for it is of the essence of the discretion that the exercise of attributing weight is committed to her or him. In very rare cases this court may consider that the amount of weight attributed to a factor by the trial judge was so aberrant that it is driven to conclude that the decision was plainly wrong. But it is seldom worthwhile for an appellant to complain (and, with respect, it was not worthwhile for Mr Devereux to complain) about the *amount* of weight attributed to a factor in the exercise of a discretion.

[26] My view was (and remains) that the discretionary exercise which fell to be conducted by Black J was difficult for her but that review of her decision was not difficult for Sedley LJ and myself. D and G objected to a return to Ireland and it was appropriate to take account of their views. But, for this purpose, they were indeed very young and, although they had maturity sufficient to enable their views to cross the threshold, they could not bring to the prospect of a return any such sophisticated appraisal as would have been

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born of greater maturity. In these circumstances the objective of the Convention was a powerful factor militating in favour of a return notwithstanding their objections. In my view however the factor which strongly militated in the contrary direction was that, by the date of the judge's decision, the family had been settling into life in London for nine months and that, although he had not acquiesced in their removal, the father had at all material times known of their whereabouts in London and, instead of swiftly taking proceedings, had allowed time to pass and indeed for two months had himself joined the family here.

SEDLEY LJ:

[27] I respectfully adopt and endorse the reasons given by Wilson LJ for refusing permission to appeal.

[28] My one reservation concerns the conventional use of the word 'discretion' to describe what Black J was called on to do. The kind of decision required by the Hague Convention is in my view more appropriately described as an exercise of judgment. Its components have to be explicitly identified, evaluated and balanced so that the parties, especially the losing party, the public and other courts can understand and appraise the decision. Even at a time when efforts are being made to condense judgments, this will continue to be so. What protects such a decision against all but radical attack is not that it is an exercise of discretion – typically a decision which could legitimately have gone either way – but that the judgment it entails is best made by the judge on the spot, who is more likely to be right than an appellate court distant in time and place.

Order accordingly.

Solicitors: *Bindmans LLP* for the applicant
Slater Bradley & Co for the respondent
Dawson Cornwell for Reunite, the proposed intervener

PHILIPPA JOHNSON
Law Reporter