RE D (ABDUCTION: CHILD'S OBJECTIONS) [2011] EWCA Civ 1294

Court of Appeal

Thorpe and Black LJJ

9 August 2011

Abduction – Child's objections – Whether judge should have exercised discretion to order return

The two French children had been living with their father in France for 18 months before their mother took them to England for an extended Easter holiday and wrongfully retained them beyond the agreed holiday expiration. The father applied under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) for their return. The judge was provided with a report from an experienced Cafcass officer, but the officer had very little time to investigate the case and some information only came to light after she had written her report, but before she gave oral evidence. However, she was in no doubt of the older child's maturity and the clarity of his objections to a return to France. During her interview with him, he disclosed that he had experienced racial bullying at a school in France. But the officer was not aware that he had changed schools prior to his removal to England and had reportedly been well integrated there. The father's primary position was for the children to be returned to France, into his care, or alternatively, to the mother's care. The mother's evidence on whether she would return to France with the children if the father were successful was inconsistent and firm arrangements for contact with the father if he were unsuccessful were not in place. The judge declined to make an order for the return of the children. The father appealed.

Held – allowing the appeal; ordering a return to France of the children in their mother's care –

(1) There were two stages to establishing an exception under Art 13 of the Hague Convention. First, the judge had to be satisfied of the child's mature objection and secondly, had to exercise a judicial discretion as to whether or not a return should be ordered. The judge had found that the older child had sufficient maturity and was in no doubt that he objected to returning to France. There could be no challenge to that finding (see paras [5], [6], [7]).

(2) The judge's exercise of discretion in deciding to refuse the application for a return order had been tainted by misunderstandings of fact. First, the Cafcass officer had not had sufficient time to grasp all the facts of the case, ie that the children had been living with their father in France for over a year or that the older child had changed schools, prior to their removal, from the one at which he had been bullied. Further, she had failed to consider the following: that the children and their parents were French speaking; the older child was reported to be well integrated in his new school in France; the amount of time the children had spent in France with their father and that it might, therefore, be easier for decisions of contact and care to be decided there. Secondly, the mother's position on whether she would return to France was sufficiently unclear for the judge to have made a finding on it. Thirdly, the mother's refusal to countenance contact in France only became apparent after the judgment had been given (see paras [26]–[30]).

Statutory provisions considered

Children Act 1989

Hague Convention on the Civil Aspects of International Child Abduction 1980, Art 13

Geraldine More-O'Farrell for the appellant
Robin Barda for the respondent

THORPE LJ:

[1] On 22 and 23 June Theis J heard oral evidence in the application by a French father for a return order under the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) in relation to his two children, L and LE. The respondent was, of course, their mother, who arrived in this jurisdiction from France in August 2009. She had, prior to that date, been the primary carer for the children, but the father took over that responsibility on her removal to England and he had accordingly been primary carer for the children for the intervening period of over 18 months, until agreeing to the children coming to this jurisdiction this year for an extended Easter holiday. They arrived in February: they were due to return in April. The mother wrongfully retained the children at the expiration of the holiday period. The father promptly sought the assistance of the French Central Authority. An originating summons was issued here collaboratively by the London Central Authority and the issues came for trial at the fixture on 22 June. The judge gave her oral judgment on the afternoon of 24 June. So there has been exemplary operation of the Hague Convention machinery: minimal delay between the abduction and the issue of proceedings, and very little time passing between the issue of the proceedings and their conclusion on 24 June.

[2] A number of issues were raised by the mother in defending the application, some of which involved issues of consent, and accordingly, unusually, provision was made for oral evidence. The parents are both primarily French speakers. Both required interpreters in order to give their evidence here and no doubt the judicial task was made no easier by the fact that it was necessary to hear both parties testify through interpreters. The judge did have the assistance of a report from an experienced Cafcass officer, Mrs Bartley, but she too was handicapped by the fact that she had very little time to carry out her investigations and, indeed, information of some importance came to her between the submission of her written report and her oral evidence.

[3] The one issue that the judge ultimately had to try was the defence raised under Art 13 of the Hague Convention, namely that L objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of his views. The outcome hung on the judge's finding on that issue in relation to L alone, for the father sensibly conceded that, if he failed to obtain a return order in relation to L, he would not press for a return order in relation to LE alone.

[4] The welfare officer, Mrs Bartley, was extremely impressed by her interview and conversation with L and she was in no doubt that he had a degree of maturity that exceeded his chronological age. She was also in no doubt at all about the clarity of his views, the independence of his views and the emotional strength that underlay those views.

[5] The judge, in an admirably conscientious judgment, having recited the relevant background and history, explained her clear conclusion that the statutory exception to return had been made good. She was in no doubt that L had sufficient maturity and she was in no doubt at all that he objected to a return to France.

[6] To that finding there can be no challenge and the only remaining issue open for the appellant is whether the judge sufficiently explained the balancing exercise that preceded her discretionary conclusion to refuse the return order.

[7] It is trite to add that there are two stages to the determination of an asserted exception under this paragraph of the Article. The judge has to be satisfied of the child's mature objection. That does not lead to the refusal of the application: it opens the gate to the exercise of a judicial discretion as to whether or not return should be ordered. There is abundant recent authority as to that two-stage process and as to how each stage should be undertaken. The judge directed herself impeccably as to the law and equally reminded herself more than once of the objectives of the Hague Convention and of the importance of upholding the overriding policy of the Hague Convention.

[8] The application for permission to appeal was the subject of an appellant's notice of 7 July, the judge having herself refused permission on 25 June. The appellant's notice was put before me, and on 4 August I directed this hearing on notice with appeal to follow if permission granted. For the attention of the Bar, who would have to respond to this direction at very short notice, I did express my preliminary view that the appellant would be limited to a submission that the judge's discretionary conclusion was either plainly wrong or the product of a flawed analysis.

[9] I went on to say that the appellant's best prospects derived from paras [69] and [70] of the judgment, where the judge rejected the mother's claim that she would not return with the children. That rejection arguably removed or weakened many of the considerations to which the judge attached weight in her expressed discretionary balance. I concluded by observing that important were the factors that first, these were French children through and through, plainly out of water in this jurisdiction; secondly, this was a classic wrongful retention at the end of an agreed holiday visit; thirdly, the Hague remedy was promptly invoked; and, fourthly, a return to France in the mother's care was arguably the principled outcome at which the judge should have arrived.

[10] This afternoon we have had the advantage of submissions from Ms More-O'Farrell who appeared below, expanding on those points and adding fresh points of her own. We have also had the advantage of skilful submission from Mr Robin Barda who did not appear below and who has come into the case at very short notice in vacation. The mother's case in this court has not in any way been disadvantaged by that consideration; nobody could have said more on her behalf than has Mr Barda.

[11] The value of the oral submissions that we have heard this morning is that they have clarified my mind and brought out the rationalisation of my conviction that the judge came to the wrong conclusion. In my view the case started to go off the rails as the Cafcass officer investigated and then reported. It was obviously a very difficult case for the Cafcass officer because of the fact that none of those that she had to interview has a fluent command of English. Initially she simply spoke I think to L, and then as her investigations developed, she spoke to the other principal participants. However, my disquiet with the Cafcass officer's contribution is, first, that she did not sufficiently separate out the alternative implementations of a return order.

[12] The order to return is for the child alone. So the question is to whose care do they return? Would the abducting parent go back with the children on return? The father's primary case was that the children should return to his care since he had been the primary carer for the considerable time between the mother's voluntary removal to England and the commencement of the school holiday. His alternative or secondary case was that the children should return to France but in the care of their mother. Essentially the Cafcass officer seems to have reported on the understanding that implementation inevitably meant the separation of the children from their mother and their return to the father's primary care.

[13] It is equally uncertain as to the extent to which the Cafcass officer understood that the children had not been in the primary care of their mother since August 2009. Finally the Cafcass officer failed to understand an important point in the history, namely that the racial bullying experienced by L in school had been at a school, St Joseph's, which he had attended, and where he had suffered, in 2008 and 2009. What she did not sufficiently understand was that since September 2009 he had attended a school, Jean Jaures, and there was a report from that school which indicated that his behaviour there was entirely satisfactory and that he was a well-integrated pupil, if an idle and under achieving pupil.

[14] So, whereas the Cafcass officer drew a distinction between an English school to which he had been admitted following the wrongful retention, and a school at which L had experienced unpleasant racial bullying, she was drawing the wrong comparison. She needed to compare the report from Jean Jaures, which was broadly satisfactory, and the telephone report received from his current English school, which suggested that he was doing reasonably, given the circumstances of his admission which had led to some challenging behaviour and some poor timekeeping.

[15] All these deficiencies or errors in the Cafcass report seem to find their reflection in the judge's explanation of the exercise of her ultimate discretion. Again it seems to me plain that the judge did not sufficiently separate out and separately judge the father's alternative cases. What she essentially does is to explain why she rejects the father's primary case, and that she was plainly entitled to do so on the evidence. It was quite plain from the Cafcass officer's report that L was very attached to his mother and was very opposed to returning to his father's primary care.

[16] However, she does not seem to recognise that a consequence of rejecting the father's primary case was to shift residence from the father to the mother. Obviously if she was going to make such a shift in arrangements that had been blessed in France, the father was entitled to an explanation as to why he was losing the responsibility of primary care.

[17] All that it was open to her to impose, but it was then incumbent upon her to reason the rejection of his secondary case, which conceded a shift in primary care. It was essential for her to evaluate and adjudge the secondary case once she had made the findings which she made in paras [69] and [70] of her judgment. They are important paragraphs and accordingly I must read them into this judgment in full:

> '[69] The mother's case is that she would not return back to France if LU was ordered to return there. Her oral evidence was inconsistent

> about that. In her oral evidence on the first day, after careful questioning from me to ensure she understood the questions, she quite clearly stated in the event that the children were returned to France she would go back and care for the children whilst her application for the children to live with her in England was considered by the French courts.
> [70] I gave permission for there to be discussions about this overnight, as it was a change from her stated position at the start of the case, to see if there was any common ground between the parties. When she returned her oral evidence the following evidence, she said she would not return but was unable to articulate any real reason for her change in stance. I found her change in evidence about that aspect wholly unconvincing. I noted in some of her answers on this aspect on the second day she said, "If" which I took to mean that the reality was that she was holding her position until the court made a decision. Although I find it more likely than not that if I did order the children's return to France she would accompany them, I have to acknowledge there is no guarantee about that.'

[18] Her reasons for exercising her discretion to refuse return all go to the primary case and hardly apply to the secondary case. That broad assertion I can make good by referring to the factors on which the judge relied: in para [65] where she records and adopts some of L's reasoning; in para [67], which is all about the difficulty for the father if he resumed primary care; in para [71], where she deals with the mother's difficulties in returning on the basis that she has no support (that seems to give insufficient weight to the mother's initial evidence that she had family with whom she could stay for some 2 or 3 months and the judge's finding that she had some €16,000–€20,000 in a French deposit account); in para [72] where, unfounded on hard evidence, she concludes that therapy for L would be more advantageously obtained in this jurisdiction (there was no evidence as to the availability of therapy and no reflection of the fact that L is not primarily an English speaker); in para [73] where the judge seems to fail to make the distinction between St Joseph's school and Jean Jaures; in para [74] the conclusion that a return order would strengthen the father's relationship with L seems to me on the face of it a non sequitur. Finally para [75], dealing with the arrival of the new partner in the father's household, is highly relevant to the primary case but hardly to the secondary case.

[19] Further there are difficulties over the judge's assumptions in relation to contact. In para [74] she noted that outside litigation the parties have been able to agree good contact. That was pursued in para [83] when she said they have been able to agree good and generous contact: 'in the event of [LE] not returning to live in France with his father, he is likely to be able to continue to see his father on a regular basis'.

[20] Finally in para [89] she said that she thought it important that the parties should agree contact arrangements and followed with this sentence:

> 'This, in my judgment, should include the children seeing their father in France, sooner rather than later, with suitable orders made in this jurisdiction to secure their return.'

[21] The judge's optimistic assumptions hardly survive the post-judgment exchanges, because when an order came to be drawn the third recital reads: 'and the parties agreeing reasonable visiting contact in England, the mother not agreeing to staying contact in France'.

[22] It does seem to me that if the judge was minded to refuse the application it was dangerous for her to assume that there would be general consent to contact to the father in France. Of course the children were fully needful of contact in France with their father, and not just contact in this jurisdiction, because they are French children and their Frenchness needs to be nurtured.

[23] So it does seem to me that it was important for the judge to be sure in her mind that if she refused the return the mother, in generous response, would agree to contact in France.

[24] That is relevant to the exercise of discretion because, as Ms More-O'Farrell points out, without an agreed contact order written into the refusal of the return application, the father is left with the unattractive alternative of invoking domestic English law by issuing an application under the Children Act 1989 for which he has no entitlement to public funding.

[25] For all those reasons, with great respect to the fact that this is a very conscientious judgment and to the fact that it expresses a discretionary conclusion from a judge who has seen and heard the parties, I am in the end persuaded that the judge was led into misunderstandings of fact which tainted the exercise of her discretion. I am confirmed in my conviction that the principled outcome was a return order on the father's secondary case; that is to say a return of the children in the care of their mother with necessary protective measures or undertakings to ensure that she has a smooth transfer and an opportunity to put her case to the relevant French court, the *Tribunal de Grande Instance de Lille*.

BLACK LJ:

[26] I confess that this case has given me considerable anxiety because the focus of the appeal has essentially been the exercise by Theis J of discretion and it is abundantly clear to me that the trial judge gave this case the most careful consideration. However, in the final analysis I agree with my Lord, Thorpe LJ, that the appeal should be allowed for the reasons that he has given.

[27] I would like to add, however, that I have the utmost sympathy for the judge and that I am sure that the way in which the case unfolded would have contributed significantly to the omissions in her judgment. The sands were continually shifting. Late development of a Hague abduction case is not unusual given the summary nature of the proceedings which have to be resolved very quickly, but there were particular difficulties here. I will give just three examples.

[28] First, the Cafcass officer had to act very quickly. I am not at all sure that she had a clear grasp of the fact that the children had been living with the father for over a year in France and that L had changed schools from the one at which he had been bullied. The Cafcass officer only saw the father with the children during the hearing and she had to report on that orally on the second day of evidence. She was clearly impressed by the power of L's objections, but I do not detect any consideration by her of the factors that could have pointed in the direction of a return to France; notably the fact that:

(i) these are French children of French-speaking parents (the mother still gave evidence through an interpreter before the trial judge notwithstanding that she had been here for a considerable period of time since 2009) who spoke only French themselves;
(ii) whatever L's traumatic memories of the former French school, he was said by his recent French school to be integrated with friends;
(iii) the time that the children had spent in France with the father and that it might potentially be easier for issues over future care and contact to be litigated there.

All of those matters might, to advantage, have been put into the balance by the Cafcass officer in considering L's objections. Had she done that, she would no doubt have been able to convey relevant considerations to the trial judge.

[29] Secondly, during the hearing the mother's position with regard to whether she would be returning to France if the children had to do so altered as well, and ultimately, the mother's position was sufficiently unclear for the judge to have to make the finding about that.

[30] Thirdly, the reality about contact and the mother's refusal to countenance it in France only became apparent after the judgment had been given. I have no doubt that factors such as these made it a great deal more difficult than it might have been for the judge to keep track of and deal separately with the issues that had to be addressed by her in the exercise of her discretion, including in particular not only the option of a return to France with the mother remaining here to live with the father, but also of a return in the care of the mother which had the potential to be a very different experience for L.

Appeal allowed.

Solicitors: *Williscroft & Co* for the appellant
Hornby & Levy for the respondent

SAMANTHA BANGHAM
Law Reporter