M v T (ABDUCTION) [2008] EWHC 1383 (Fam)

Family Division

Pauffley J

8 February 2008

Abduction – Grave risk of harm – Disturbed child unable to cope with tension between parents – Whether exceptional – Whether consent vitiated by mother's private decision not to allow contact – Children's objections

The Spanish father and the British mother lived in Spain with the three children. After the parents separated, they agreed to share joint care and custody of the eldest child, while the mother had care and custody of the younger children, with contact to the father. For 3 1/2 years the eldest child shared his time equally between the parents. During a session with a psychologist he revealed an incident in which the father had punished him by smacking and kicking him, but did not want to get his father into trouble. At about the same time the middle child moved to live with the father, refusing thereafter to have any contact with the mother. Because the mother was considering moving to England, the parents commissioned a report on the eldest child from a different psychologist; the report concluded that the ideal would be no significant changes in the child's environment and family relationships, that any change should be gradual, and that if the child were deprived of his bond with either parent or his siblings, the child's future mental health and personality development would be put at risk. The mother nevertheless resolved to move back to England. The parents entered into a private notarised agreement, providing that parental responsibility of the children was to be shared, with custody and care of the youngest to the mother and, provisionally, custody and care of the eldest to the father; there were detailed contact arrangements. The mother left for England immediately with the youngest child, without saying goodbye to the elder children. Within a matter of weeks the mother breached the agreement, failing to send the youngest child back to Spain for planned contact. A further psychologist's report concluded that the psychological repercussions for the eldest child of the mother's departure were highly negative. The mother did not inform the father of her new address, or give him any school details. The father tried, but was unable to collect the youngest child from England. Despite this, the father sent the eldest child to England for contact. When, at the end of the contact period, the father attempted to collect both children, he was again unable to make contact with the mother. A further attempt a few weeks later was also unsuccessful. The father was unable to communicate with either of the children. The father issued an application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 for the summary return of the eldest child, and later for the summary return of the youngest child, arguing that his consent to the removal of the youngest child had been vitiated by the mother's failure to disclose her true intentions. The mother resisted the application, arguing consent and acquiescence in relation to the youngest child, grave risk of psychological harm in relation to the eldest child, and the objections of both children to a return. The children, aged 12 and 7 were expressing objections to a return to the care of the father and his partner, but not to a return to Spain. The Cafcass officer who interviewed the eldest child described him as 'one of the most disturbed children she had interviewed in this situation', and was very concerned that he would not cope if he was moved backwards and forwards.

Held – ordering summary return of both children –

(1) On the evidence the mother had never had the slightest intention of complying with the terms of the signed agreement. The mother's deception of the father and all of the children had been cruel and serious, and had had the effect of vitiating the father's consent to removal (see paras [30], [33]).

(2) By his actions in flying to England on three occasions the father had plainly demonstrated his expectations that the agreement for contact would be adhered to. The father had issued Hague proceedings in respect of the youngest child as soon as he had become aware of his right to do so. Acquiescence had not been established (see para [38]).

(3) While the evidence established that the eldest child needed help to cope with the conflict of loyalties he had been experiencing, in the face of his parents' mutual distrust and antipathy, it had not been established that he was at grave risk of harm in the event of a return. While events since the mother's move to England had increased the eldest child's emotional difficulties, it would be quite wrong for the mother to rely upon a psychological situation for which she had been very largely responsible. Furthermore, adequate psychological support and assistance would be available in Spain so as to adequately secure the child's protection on return (see paras [45]–[48]).

(4) The mother's reliance upon the children's objections faced the insurmountable difficulty that they did not object to a return to Spain per se, and that a return to Spain did not necessarily involve a return to the father. In any event, given the mother's strength of feeling, there was good reason to believe that the mother had influenced the children heavily against the father, so that the views they were expressing were not their own. It was incumbent on the mother to return to Spain and participate in proceedings there so as to resolve a family crisis that was substantially of her own making (see paras [50]–[52], [54]).

(5) If any of the mother's defences had been made out the court would, in the exercise of its discretion, have ordered summary return in any event, for reasons including comity, the fact that the children had lived all their lives in Spain, the speed of legal proceedings and approach to relocation in Spain, and the mother's attempt to exclude the father from the children's lives since the move to England (see paras [53]–[55]).

Statutory provisions considered

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 12, 13(a), (b)

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(4)

Cases referred to in judgment

A (Minors) (Abduction: Custody Rights), Re [1992] Fam 106, [1992] 2 WLR 536, [1992] 2 FLR 14, [1992] 1 All ER 929, CA

C (Abduction: Grave Risk of Psychological Harm), Re [1999] 1 FLR 1145, CA

H (Abduction: Acquiescence), Re [1998] AC 72, [1997] 2 WLR 563, [1997] 1 FLR 872, [1997] 2 All ER 225, HL

Klentzeris v Klentzeris [2007] EWCA Civ 533, [2007] 2 FLR 996, CA

M (Abduction: Zimbabwe), Re [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 FLR 251, [2008] 1 All ER 1157, HL

T v T (Abduction: Consent) [1999] 2 FLR 912, FD

Richard Harrison for the applicant

Geraldine More O'Ferrall for the respondent

Cur adv vult

PAUFFLEY J:

Introduction and issues

[1] This is an application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) for the summary return to the Kingdom of Spain, specifically the island of Ibiza, of two children – S who was born on 3 December 1995, now 12, and E born on 6 March 1999 who is rising 9. They are the younger two children of the plaintiff father, a Spanish national, and the defendant mother who is British. Their eldest child, C was born on 6 April 1992. He lives with the father and the father's partner in Ibiza.

[2] Until July 2007, when he was wrongfully retained in the UK by his mother, S was living with his father in Ibiza and attending the same private school as his brother. E has lived with her mother in England since the end of April 2007. Before that, she too had always lived in Ibiza, attending the same school as her brothers.

[3] The mother raises the following defences to the originating summons:

(i) the children object to a return and have reached an age and degree of maturity at which it is appropriate to take account of their views;
(ii) there is a grave risk that S's return would expose him to psychological harm or place him in an intolerable situation; and
(iii) the father consented to and has subsequently acquiesced in the removal of E.

Background

[4] The parties met and began their relationship in about 1988. All of their three children were born in Spain and are Spanish nationals. The parents were married in Granada, Spain in January 1997. They separated in about March 2003 when S was 7 and E was 3. In August of that year the mother came to England with C and E, leaving S with his father because, according to her written evidence, he was crying all the time for his father. But the stay in the UK was of short duration. In September, the mother, C and E returned to Ibiza. In December 2003, the parents agreed upon a joint care and custody arrangement for S so that for the next 3 1/2 years he divided his time between them. The agreement for C and E was different in that they were to continue to be in the mother's custody and care, spending less time with their father than did S. Although the public prosecutor's office had expressed some anxiety about the plans for the children, involving as they did a degree of separation between siblings, the court of first instance ratified the December 2003 parental agreement in June 2004.

[5] During the autumn of 2005 and the spring of 2006 S attended for sessions with a psychologist. As her single page report of 29 June 2006 relates, during the last sessions, S had disclosed a secret about a fight with his sister to which the father had reacted by smacking him in the street. He had fallen to the ground. The father had kept beating him by several kicks with his working boots. The report also contains this analysis: that the child's greatest concern is that his father should not find out he has told this story; that he neither wants to hurt his father or for him to suffer punishment; he is afraid his

father will stop loving him or that he will be blamed by the father for the circumstances in which they are involved; S forgives his father declaring that sometimes he does not behave which leads his father to become nervous; S declares that 'to smack a child is normal, that all parents sometimes smack their children and it isn't so serious'. The psychologist's view, in relation to that last sentence, was that it showed a distortion of reality and would be more appropriate as adult language than S's.

[6] In June 2006, C moved to live with his father and has since refused to have any contact with his mother. There is no question but that for the moment the relationship between them is completely fractured. Responsibility for that, according to the mother lies with the father though in earlier discussions with a psychologist in Spain she had said the problems resulted from C going through a natural adolescent crisis. It may be significant to note that in his recent discussions with Ms Polly de Boer of the Cafcass High Court team, S too has sought to blame his father for the difficulties as between C and his mother.

[7] In the latter part of 2006, the parents commissioned a report from a different psychologist in circumstances where the mother was contemplating a move back to England. Her focus was upon the question as to where and with whom S should live. There are a number of observations of significance not just as they relate to the predicament in which S found himself in November 2006 but also to the way in which his situation apparently has developed in recent times. Both parents had expressed the fear in their discussions with the psychologist that the other would stop S from seeing them. In the opinion of the psychologist the reason for those fears lay in the mutual mistrust between the parents and their continuing serious difficulty in adjusting to life as separated partners.

[8] S who was of normal intellectual ability had 'full awareness' of his parents' relationship difficulties. He did not take sides between them and tried to remain neutral so as not to lose either. His personality was described as that of a 'docile child with a desire to please others and avoid any dispute, conflict or suffering in third parties'; and he asked for 'help in the conflict of loyalties in which he finds himself'. He told the psychologist that his parents had said he could decide who he wanted to live with. Neither had 'put ideas' into his head. S had told the psychologist that his father would 'get cross more but only if you step out of line and don't do as you should'. His mother 'is very good and never gets cross', he said.

[9] There had been occasions when the psychologist was able to observe the interactions between the parents and children when expressions of closeness and affection had been obvious. The existence of 'shows of affection' and protection had been observed between S and both parents. He was affectionate to and respectful of them at all times.

[10] The overall conclusion and recommendation mentioned the following: the ideal would be no significant changes in S's environment and family relationships. Modifications should be gradual. Changes would adversely affect his emotional stability. It would be essential to ensure the permanence of the affective bond with the absent parent because depriving S of that attachment would jeopardise his future mental health and disturb his personality development. The permanence of sibling bonds must be ensured. It would be more difficult for S to adapt to a move with his mother to England

because in addition to the distance from father there would be a language barrier, unfamiliarity with customs, adaptation to a new school, social and family environment.

[11] In the latter part of 2006, the mother was progressing with her plan to relocate to England and there were negotiations between the parents' lawyers so as to settle the arrangements for the children.

The notarised agreement of 27 April 2007

[12] On 27 April 2007, the parents entered into a private notarised agreement which provided that parental responsibility for the three children was to be shared; custody and care of C was to the father; custody and care of E was to the mother; the provisional arrangement for S was that custody and care of him was to his father having regard to the conclusions and recommendations in the psychological report, particularly that the ideal for S's personality development would be for no significant changes in his environment and current relationships. There was detailed provision for contact between the children and their absent parent, between the siblings themselves and specific terms relating to contact between E and her father so that she might attend her cousin's first communion between 19 May and 3 June 2007. Additionally, there was explicit provision for contact between S and his mother in England from 27 June until 23 July 2007 at which point he and E were to return to Ibiza. E would remain there for contact with her father and brothers until 2 September 2007.

[13] The father's case is that it was an essential part of his agreement to E living in England that she would be able to maintain her relationship with him and her siblings through contact. He believed when he signed the notarised agreement that the mother accepted and supported all of its terms.

[14] The mother's evidence is that she was never particularly happy with the contents but felt she had no option but to sign so as to ensure she could return to England. In her first affidavit she said she had never been happy with the arrangement that E would have to spend all of her summer holidays with her father … but felt she had no option other than to sign the agreement. In oral evidence the mother said, on three occasions, she had felt the agreement was 'very biased' in favour of the father. For example, it had said (i) she could not have contact with C unless he agreed; and (ii) E would have to be taken out of school to comply with the contact arrangements. The mother had to agree with Mr Harrison that on the face of the document there was explicit provision for E to go to Ibiza for her cousin's communion because that was in accordance with E's express wishes. But, the mother explained, she 'could honestly say (E) had never said to (her), "I want to go"'. Her solicitor had suggested to her, said the mother, that it was a case of 'signing or nothing'.

[15] According to the mother, when the agreement was signed she had walked out of the notary's office. She thought she was being followed by her own lawyer but as she stood by the lift the father had walked past towards the stairs. Without looking at her face he had pointed his finger over his shoulder and behind him saying, in Spanish, 'When the little girl comes it will be the last day you see her'. He had been laughing, says the mother, as he said what he did. Then he left the building. The two solicitors had emerged from the office and stood talking at the lift with the mother about a picture she wished returned to her. Thereafter she had walked over to the courthouse with her

lawyer to withdraw the denuncios, as had been agreed. She had not discussed with her own or the other solicitor anything of the comment made, she says, by the father.

[16] The father, who gave evidence through an interpreter, denies there was a conversation as the mother asserts outside the notary's office or elsewhere. He says he left after signing the agreement with his solicitor and went to work. He was unsure but thought he had left before the mother. After leaving the notary's office, he had not spoken with her that day nor before she left Ibiza although he had not known of her intention to depart the following day. He maintains the conversation at the lift as alleged by the mother did not happen. It is, said the father, a lie. He had never said such a thing.

Events thereafter

[17] On the day or the day after the agreement was signed, the mother and E left Ibiza and came to England. She did not see S to say goodbye. He did not know of her departure until he went to her flat to collect his school books. According to the father, S cried for three quarters of an hour. E had no opportunity to say goodbye to her father, his partner or her brothers.

[18] On 19 May, in accordance with the agreement of 27 April, E was due to fly to Ibiza for contact. She did not go. The mother maintains the reason for that lay in the comment made, she says, by the father after the agreement was signed. The father made arrangements to collect E from Birmingham airport through the parties' Spanish lawyers. According to him, he tried calling the mother from the airport upon his arrival but the phone was not answered. He flew back to Ibiza without E. The mother accepts she had received a telegram from her Spanish lawyer informing her of the obligation to send E to Spain in accordance with the agreement but claims she was unaware of the flight times and also of the father's calls to her mother's home where she was then living.

[19] On 12 June 2007, S was interviewed again by the psychologist. It was apparent, she said, that he 'attempts to maintain, with great mental effort, the neutrality which he should show as a son in the conflicts inherent in his parents' separation'. He is reported as saying, 'this will never end. I want them to make up now so that I can see my sister E … I want to see my mother too but I want to live with my father'. On the question of holiday contact in England, he said, '… my mother says that if I go on holiday, I can go back to Ibiza at the end of the holidays. I think I can but I don't know, but I think I can …' The psychological repercussions for him of his mother's move to England were said by the psychologist to be highly negative and included feelings of abandonment, sadness and confusion, insecurity and doubts as well as poor performance at school. The overall conclusion was that the father was able to 'guarantee greater security, protection and stability for the correct psychological development of the child'.

[20] On 27 June last year, and notwithstanding the mother's failure to send E to Ibiza for contact in May, S travelled to England. He was due to return with E on 23 July. On 21 July, according to the father, he learned through the children, that the mother considered he was only entitled to have E for half of the holidays which would begin on 10 August. By that stage, he had already booked flights for 23 July. He flew to England but was unable to contact the mother or either child. He came here again on 9 August because, according to him, he had been told by E he should collect her and S from the maternal

grandmother's home. His case is that the grandmother and maternal uncles were aggressive towards him. The children were not at the house and he had no option but to return once more to Ibiza alone. Thereafter and until late November 2007, the father says he was not permitted to speak with the children. According to the mother, she never prevented telephone contact but left it to S and E as to whether they wished to speak with their father. S was later to tell Ms de Boer that he had had credit on his mobile phone and it was capable of receiving calls from Spain. The mother, however, has accepted that after a while, the credits on the telephone ran out.

The bringing of Hague proceedings: interviews of S and E

[21] At all events, the father initiated his application under the Hague Convention towards the end of October last year. At first, he sought summary return on the basis of wrongful retention in relation to S alone. The mother's affidavit evidence of 6 December prompted a request on the father's behalf to amend his originating summons to include application also for E's return on the basis that his consent to her removal here was vitiated by the mother's deception or non-disclosure.

[22] On 7 December, S was interviewed by Ms de Boer. He had nothing good to say about his father. It was Ms de Boer's assessment that S's maturity is within the normal range for his age. However at times his answers were somewhat confused which, suspected Ms de Boer, was the result of his anxiety and distress. He had been eager to talk about his feelings and appeared to her to be a 'very sad child'. He does not object to a return to Spain as such. He said clearly that his objection is to a return to the care of his father and his father's partner. He told Ms de Boer how he had asked his mother if he could stay with her at the end of the summer holiday and how difficult it was to inform his father of that wish. He said he wanted his father to say he could live with his mum and sister. That, according to S, 'would show he loved me'.

[23] In her report, Ms de Boer observed that S had been caught up in the parental dispute for several years. She fears he does not have the resilience to cope with being the subject of a tug of war. He is struggling, she believes, to make sense of the resultant confusion and division of loyalties. He seemed to Ms de Boer to be a very troubled child and she was anxious about the impact of further moves between the parents and of his being the focus of litigation.

[24] In accordance with the request of Hedley J, Ms de Boer interviewed E on 4 January when she took the opportunity for a further brief discussion with S. E said she was much happier in England than in Spain. Her school was more interesting and she had more friends. She said she did not wish to live in Spain under any circumstances. She had been, she said, 'a little bit pleased' to see her father for contact and would be willing to spend holidays with him in Spain on the proviso she could come back to England at the end of the holiday. S confirmed to Ms de Boer that the views he had expressed in December remained the same. Both children denied they had been told what to say by their father.

[25] When Ms de Boer gave oral evidence and on the subject of the children's objections she said 'neither … objects to Spain as such'. For them Spain is indivisible from a return to the full-time care of their father and his partner. It is to that they object and very strongly. They would not resist

staying with their father if at the end of the visit they were to return to their mother. If the children were to go back to Ibiza with their mother then in Ms de Boer's view the psychological impact upon them would be reduced though E would be 'outraged because she feels her move here was agreed'. She is far more resilient and, thought Ms de Boer, she would cope.

The legal framework

[26] Pursuant to Art 12 of the Hague Convention, the court is bound to order a return unless satisfied one or more of the defences under Art 13 has been established; and the burden of so doing lies upon the mother to the degree of cogency which is appropriate in the circumstances. The evidence of an abductor seeking to justify or explain conduct should be subjected to rigorous and perhaps sceptical scrutiny.

[27] The issues in relation to S are 'objections' and 'grave risk of psychological harm'. For E, the court must consider the validity of the father's consent to her removal, whether or not he had acquiesced in her continued presence in the UK and also her 'objections'.

Article 13(a) 'consent'

[28] I take the consent question first and remind myself of what was said by Charles J in *T v T (Abduction: Consent)* [1999] 2 FLR 912 namely that in order to come within the provisions of Art 13(a) the court must find the consent to be 'real in the sense that it was not based on a misunderstanding or non disclosure which would vitiate the consent for the purposes of the Hague Convention'. As Charles J said at 917:

> '… such a misunderstanding or non disclosure … would exist if the mother knew that the father was proceeding on the basis of a misunderstanding, or she had not told him something, and in either case she knew or ought to have known that such misunderstanding or non disclosure would, or would be likely to, affect the father's decision to consent …'

[29] The father's argument is that although he signed the agreement on 27 April giving his consent to E's removal, it was vitiated by the mother's deception in that she falsely represented to him she would abide by the contact provisions when, in fact, she never had any intention of so doing. The mother contends there was a valid agreement at the time of signing with which she intended to comply. Her mind was changed – she says – when, outside the notary's office, the father made his comment, 'when the little girl comes, it will be the last day you see her'. In evidence, the mother said when she had gone to sign the document it was not in her mind that she would not carry it through. But she has also said, as already related, her view of the agreement was that it was 'very biased', that her solicitor had said it was a case of signing 'or it's nothing', she was never happy with the contact arrangements for E but felt she had no option other than to sign so as to be able to bring her to England and that her cousin's communion in May coincided with E's education.

[30] The true position, surely, is that the mother never had the slightest intention of complying with the terms of the agreement, particularly the contact provisions for E. I rely in so concluding upon:

(i) the mother's stated view of the agreement which clearly predates its signing and continues right up to the present time;
(ii) her actions in leaving Ibiza so precipitately within hours of the trip to the notary's office;
(iii) the events of mid May when quite obviously E was not sent for contact;
(iv) the mother's denial in evidence that E had ever evinced a wish to attend her cousin's first communion when the written agreement expressly reflects the exact opposite; and
(v) all of the mother's subsequent actions in secreting the children away from the father at an undisclosed address as well as preventing them from having direct or even, latterly, indirect contact with him.

[31] The father's remark – if it were made and I'm far from satisfied it was, not least because there is no described context in either of the mother's affidavits – seems to me to have been fairly peripheral in terms of significance at the time for the mother herself. On her own account, she was joined immediately after the alleged comment by the two solicitors. She went with her own lawyer to the nearby courthouse to withdraw her denuncios. There was no discussion with either solicitor about what the father had said which strikes me as distinctly unlikely if in truth, for her, the comment had the significance she now attributes to it.

[32] Irrespective of whether the father made a remark at the top of the lift as the mother alleges, it seems to me that she had made up her mind in advance of the appointment at the notary on 27 April as to the action she planned for herself and E. Plans must have been already far advanced for immediate departure. She had formed the view that signing was the key to achieving her goal of relocation with E to England and she had no intention of complying with contact requirements in relation to E most of all because they conflicted with the school term in England but also because her opinion of the agreement, as she said, was that it was biased in favour of the father. When she gave oral evidence that on the occasion she had signed the paper 'it was not in (her) mind that (she) would not carry it through', I am afraid to say I did not believe her at all.

[33] Accordingly, in my assessment, the mother does not establish her defence of consent to E's removal. Her deception of the father (and all of the children for each was affected by the failure to send E for contact in May) was cruel and serious. The effect of it is to vitiate the father's consent to removal.

'Acquiescence'

[34] I turn then next to consider acquiescence which – as was said in *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 2 WLR 563, [1997] 1 FLR 872 – is to be considered according to the subjective intentions of the wronged parent. It is a pure question of fact to be determined by the trial judge on the, perhaps limited, material before him. I bear in mind all that was

said in the speech of Lord Browne-Wilkinson about acquiescence in the passages cited by Mr Harrison particularly the extract dealing with the 'exception' – where a party has so conducted himself, *knowing of his rights* (my emphasis) as to lead the abducting parent to believe the other is not going to insist upon the summary return of the child.

[35] The father's case is that had he known of the mother's intention not to abide by the terms of the agreement he would not have consented to E's removal. His efforts to collect E and/or S by flying to the UK on three separate occasions between May and August last year were to no avail. He was incompletely aware of the mother's deception, it is said, until the filing of her initial evidence in these proceedings and knew not of a remedy under the Hague Convention until advised of the potential at the end of December. Immediately thereafter he gave instructions to seek E's return to Ibiza. Mr Harrison clarified that it was only when he had had the opportunity to assimilate the mother's evidence prior to the hearing before Hedley J on 21 December that he sought instructions from the father as to whether he wished to pursue an application for E's return. Before he had a proper understanding of the mother's stance in relation to the agreement, and received legal advice upon its potential effect, Mr Harrison says the father was in the position of being duped by the mother.

[36] Miss More O'Ferrall, submits the father did indeed acquiesce in E's retention by taking no action on the mother's failure to comply with the agreement. Most importantly, it is suggested that at a time when he had the benefit of English as well as Spanish lawyers and knew of the mother's non-compliance with the agreement, he elected not to include E in the originating summons. She points to the father's affidavit of 18 December in which he indicated his intention to make a 'separate application' to this court for contact with E because it had not occurred and, argues Miss O'Ferrall, the court should infer actual subjective intention of acquiescence.

[37] A parent cannot be said to have acquiesced in the unlawful removal or retention of a child unless he is aware of the act of removal or retention, is aware that it is unlawful and knows, at least in general terms, of his rights against the other parent: see *Re A (Minors) (Abduction*: *Custody Rights)* [1992] Fam 106, [1992] 2 WLR 536, [1992] 2 FLR 14 a decision of the Court of Appeal some years before *Re H* (above) but entirely consistent with it.

[38] I must do the best I can to assess the conduct and reaction of the father in the round. By his actions in flying here to England on three occasions to collect E, and later E and S, he was plainly demonstrating his expectations that the agreement for contact would be adhered to. No explanation was given by the mother as to why the children were not travelling to Spain for contact. He must have been mystified and, as the months went on, increasingly sceptical as to the mother's good faith. He did not pursue a legal remedy in relation to E until the morning of 21 December because, as I accept, he was unaware of its availability to him. How, otherwise, could one account for the passage relied upon by Miss More O'Ferrall in his December affidavit and his reaction on receiving Mr Harrison's advice? The mother may have fondly imagined the father would not pursue an application for E's return. Her feelings were probably reinforced when the proceedings were begun in relation to S and there was no mention of E. But it is not her state of mind that is under scrutiny in circumstances where, as I accept, the father did not know

even in general terms of his rights. Moreover, if consent is vitiated on the basis of the mother's deceit then it is difficult to envisage on the facts of this case how acquiescence could be construed. It seems to me there can only be one answer to the 'acquiescence' defence which is that it is not established. Thus, I reject the mother's defence on that ground also.

Article 13(b) 'grave risk of psychological harm …'

[39] I turn then to consider the Art 13(b) defence, that a return would expose the child to grave risk of … psychological harm or otherwise place him in an intolerable situation. There is a requirement in order for this defence to be satisfactorily established for:

> 'clear and compelling evidence of the grave risk of harm … which must be measured as substantial not trivial and of a severity that is much more than is inherent with the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of habitual residence': see *Re C (Abduction: Grave Risk of Psychological Harm), Re* [1999] 1 FLR 1145.

[40] Moreover, pursuant to Art 11(4) of 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:

> 'A court cannot refuse to return a child on the basis of Art 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.'

[41] Mr Harrison argues the mother has failed to meet the high threshold required for the establishment of an Art 13(b) defence. He stresses that the father accepts both S and E can return to Ibiza with their mother and remain with her until the Spanish courts are in a position to make interim welfare determinations. It would not be open, he says, to the mother to rely upon her unwillingness to return as the basis for an Art 13(b) defence and I pause to observe that nothing said by or on behalf of the mother, in fact, suggests she would do other than go back with the children if the father is successful. She says she could not afford it but that is a long way from asserting a return would be impossible.

[42] Miss More O'Ferrall invites me to accede to the proposition that in S's case the court can and should be satisfied the Art 13(b) defence is established and in so saying she urges the court to compare and contrast the case of *Klentzeris v Klentzeris* [2007] EWCA Civ 533, [2007] 2 FLR 996. There, the Court of Appeal upheld the decision of Kirkwood J who had found in relation to a 10 year old that the case fell into the most exceptional category and the Art 13(b) defence was established. The judge relied upon the extraordinary strength of the evidence of the Cafcass officer and her advice that the father's proposed safeguards for the return would not diminish the likelihood of psychological harm. Miss More O'Ferrall urges me to a similar conclusion on

the basis that here the child concerned is 12 rather than 10 and also that Ms de Boer's evidence reaches the required high standard. Miss More O'Ferrall suggests there is no good basis for finding there are adequate arrangements to secure S's protection after his return.

[43] In her oral evidence, Ms de Boer stated in relation to S that she is 'really quite concerned'. She says he is barely coping at the moment and 'really quite desperate to remain in England with his mother where he feels safe'. He is, she said, 'one of the most disturbed children she had interviewed in this situation'. He had struck her as a very, very troubled child. It is her view that if he is moved backwards and forwards and there is no resolution he will not cope. This has been 'a mess for many years' and for some time S has been caught up in that mess and he is not coping. Ms de Boer said that S is a very confused child who does not know who to believe. She believes that 'in the last six months in order to stop his confusion he has decided to side with his mother'. Ms de Boer said it may be helpful to have a child psychiatric report before S is sent back. He is of an age to state his views and it is 'quite hard' for children (of his age) to make sense of what is happening. She ended her evidence by observing that it seems to her to be almost abusive to canvass the views of children in this situation when in the result they may not be followed.

[44] It is instructive, to my mind, when considering the mother's Art 13(b) defence to reflect upon all that has occurred since the parental separation as it has affected this 12 year old and also upon his particular personality type. There is a great deal of information, already related, from the evidence of Ms de Boer and the three Spanish psychological reports.

[45] The information from those sources, in combination, provides a compelling picture of a young person who has struggled and earnestly desired, at least until June 2007 when he was unlawfully retained here, to maintain neutrality as between his warring parents. Neither the mother nor the father, apparently, has been able to satisfactorily adjust to life after separation or resolve their distrust and antipathy each for the other so as to concentrate upon securing a favourable outcome for their children. S is a meek child whose instinct is to seek to avoid disputes. For a long while now, he has needed help to cope with the conflict of loyalties he has been experiencing. Right up to the present time, there is a quite startling resistance on the part of either parent to begin the process of co-operating together so as to achieve a consensual outcome for their second son.

[46] Be that as it may, on the crucial question as to whether he is at grave risk of psychological harm or other intolerability in the event of a return, I am far from satisfied he comes within that exceptional category. After all, as Ms de Boer relates, he does not object to a return to Spain as such. What he resents, and strongly so, is the notion he should be returned to his father and his father's partner. The opinion of the psychologist in June 2007, so very shortly before he was retained here in July, was that there had been highly negative psychological repercussions for S of his mother's move to England. At that stage, the father was found to be the parent who was able to guarantee greater security, protection and stability so as to ensure S's psychological development.

[47] It is inevitable that S has been emotionally affected as the result of events in his life these past 6 months. For a child who had obvious close and

affectionate bonds with both parents, as observed by the psychologist in November 2006, the effect of complete separation from his father since July – save for recent very brief contacts ordered by the court – must have been as disturbing and unsettling as the abandonment he sensed when his mother came here so precipitately in April. The emotional difficulties with which S has wrestled for many years have been increased, perhaps markedly so, by the problems associated with his abduction. But it would be quite wrong to permit the mother to rely upon a psychological situation for which, as I see it, by her various actions since April last year she has been very largely responsible.

[48] Moreover, there really can be no room for doubt as to the availability in Ibiza of adequate psychological support and assistance so as to adequately secure S's protection upon return. The help and advice on offer to him and his parents in the past will surely be accessible again, and in the short term.

'Child's objections'

[49] The final matter for determination is as to whether the children object to a return to Spain. There are three issues to be considered: first whether each child objects to a return; second whether they have reached an age and degree of maturity at which it is appropriate to take account of their views; and third, in the event that the first two questions are satisfied for either child, the court then has a discretion as to whether to return that child. Miss More O'Ferrall invites the court, against the weight of the evidence from Ms de Boer to find the children object to a return. Whereas there may have been the potential for some ambiguity from the tenor of her written report in relation to E, those doubts were decisively suppressed when Ms de Boer gave her oral evidence: see para [25] above.

[50] In those circumstances, the mother's argument based upon the children's objections faces an insurmountable difficulty. In this case, a return to Ibiza does not necessarily involve a return to the father. He is accepting of the notion that until the court there can resolve the interim welfare arrangements for the children they should remain with their mother. It is implicit in the way the mother's case has been advanced that should she fail in this court, she would envisage a return to Ibiza to litigate there. Nothing has been said to suggest her return with the children would be impossible for her. It may be a significant inconvenience in terms of resources and dislocation but I have no doubt but that she and the children are capable of the exercise. After all, Ibiza had been the mother's home for some 19 years when she left to make a new life for herself in the UK last year. The children have known no other until very recently and Spanish is their first language.

[51] I agree with Mr Harrison's submission that it is incumbent on the mother to return to Ibiza and participate in proceedings there so as to resolve a family crisis which is substantially of her own making. This is not a case of inextricable linkage between the country of habitual residence and a particular parent. Nor is it an instance of a parent being genuinely prevented for some entirely sustainable reason from returning with the children in the event of an outcome adverse to her.

[52] Of course, I accept that S and E have attained an age and degree of maturity at which the court should take account of their views. But they do not object to a return although they may not wish it, conscious as they are no doubt as to their mother's stance in the matter. Even if they had objected to

going back to Ibiza per se the court would have been bound to consider whether those views were authentically their own or shaped as the result of some influence, express or indirectly absorbed, from their mother. Given her strength of feeling and the seemingly drastic circumstances surrounding her departure with E, it is straightforward to conceive of how easily she may have and almost certainly has influenced the children. Accordingly, in my judgment, the mother fails to establish her defences on any of the grounds suggested.

Discretion

[53] Had it been necessary to deal with the exercise of the court's discretion arising from the mother's success in making good a defence, I should have borne in mind and applied in detail those passages of relevance to the instant case from the speech of Baroness Hale of Richmond in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 FLR 251. For the reasons given I do not believe it is necessary to say more than this: that any exercise of discretion on the basis that the mother had succeeded in establishing an Art 13(a) defence would have resulted in a summary return. General considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to these particular children who until very recently had lived all their lives in Spain would have impelled me, without hesitation, to order their return.

[54] If the children's objections to a return to Spain had been established, again, I should have exercised my discretion in favour of a return. It is highly material in that regard that throughout the months the children have been in England the mother has sought to exclude the father from their lives, to the extent that – for what seemed to me to be extremely dubious reasons – she has kept her address and the names of their schools secret. The children have hardly a good word to say about their father now, whereas in times past they experienced no apparent difficulty in spending extended periods of time with him. There is good reason, as I see it, to believe the mother has influenced the children, heavily so, against their father; and, accordingly, that the views they now express, so adverse to him and his partner, are not authentically their own. In addition, when the general Hague Convention considerations are weighed in the balancing exercise as well as the ready availability of the Spanish court to make timely welfare based decisions about these children the clear result for me is in favour of summary return.

[55] Of course I accept it was not the policy of the Hague Convention that children should be put at serious risk of harm or placed in intolerable situations. However, had the mother succeeded on that ground in relation to S, the court would have been bound to apply the terms of Art 11(4) of Brussels II Revised. All the information suggests there are indeed adequate psychological support services so as to adequately secure S's protection in Ibiza. Accordingly, had I been required to conduct the balancing exercise under Art 13(b) again the result would have been identical.

Order accordingly.

Solicitors: *Osmond Gaunt and Rose* for the applicant
Rothera Dowson for the respondent

PHILIPPA JOHNSON
Law Reporter