

Neutral Citation Number: [2011] EWHC 1315 (Fam)

Case No: FD09P01523

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
PRINCIPAL REGISTRY

**IN THE MATTER OF ARTICLE 11(7) OF THE REVISED BRUSSELS II REGULATION
AND IN THE MATTER OF THE HUMAN RIGHTS ACT 1998**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 May 2011

Before :

THE HONOURABLE MR JUSTICE PETER JACKSON

Between :

AF (Father)

Applicant

- and -

T (Mother)

- and -

A (a child, by his Children's Guardian)

Respondents

Miss Alison Russell QC and Mr Mark Twomey (instructed by Dawson Cornwell) for the Applicant father

The Respondent mother was not present or represented

Ms Melanie Carew (instructed by CAFCASS Legal) for the Children's Guardian

Hearing date: 20th May 2011

JUDGMENT (approved)

This judgment consists of 74 paragraphs. Pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken and copies of this version as handed down may be treated as authentic.

Mr Justice Peter Jackson:

Introduction

1. A was born in 2004. He is the son of Mr AF (the father) and Ms T (the mother), and both hold parental responsibility for him. He is the father's only child. In May 2008, the mother abducted A from England, where he had lived since birth, to Germany. That was three years ago, and apart from one brief meeting in December 2008, A, who is now 7, has not seen his father since. The father has been continuously attempting to maintain his relationship with A since the date of the parents' separation in 2005, but from his point of view his son has now simply disappeared. He does not know where he lives, or even what he looks like.
2. The German authorities know the mother's current address, but they will not give it to the father. Their reasons are described in this judgment.
3. The withholding of information about a child's whereabouts by the state from a parent is a flagrant interference with the mutual right to respect for family life as between the parent and the child. There could hardly be a more obvious departure from the positive obligation upon the state to promote contact between family members. There will undoubtedly be cases where this measure will be necessary and proportionate, but such cases are highly exceptional, and will typically involve a risk of maximum severity, such as a risk to life or other very serious harm. Where the risk exists, its extent must be demonstrated by evidence. In the present case, it is at least highly doubtful whether that threshold could be established, particularly when no proper assessment of risk has ever been attempted since the child's arrival in Germany. When the same relevant facts were assessed by the High Court in England, they fell far short of anything that might justify the total elimination of the father from A's life and consciousness. On the contrary, the English court considered A's welfare to require positive orders for supervised contact, and such contact was in fact taking place at the time of the abduction.
4. Following A's removal to Germany, which took place in the middle of a court hearing in England, the father immediately invoked the procedures under the Hague Convention 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention"). In January 2009, the German court declined under Article 13 to order A's return to England, that decision being upheld on appeal in April 2009.
5. In July 2009, the father brought these proceedings under Article 11(7) of Council Regulation (EC) No 2201/2003 ("Brussels II Revised" or "BIIR"). Article

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11, entitled "Return of the child", applies in cases involving Member States where a return under the Hague Convention has been refused under Article 13 of that convention. Paragraph 11(6) of BIIIR requires a court that has not ordered the return of the child under Article 13 to transmit a copy of its order to the state of the child's prior habitual residence within a month of its decision, a step duly taken by the German court in this case. Under paragraph 11(7) the parties are then entitled to make submissions to the court within three months of the date of notification "*so that the court can examine the question of custody of the child*". In this context, custody includes issues of return, residence and contact. Under paragraph 11(8), an order for return to the state of habitual residence may be made and is directly enforceable under Article 42 in the state to which the child has been taken. An order for access can also be made, and is again directly enforceable under Article 41. In each case, enforceability arises from the issuing of a certificate in the Member State of origin.

6. The present hearing therefore represents this court's long overdue "examination of the custody" of A. It is implicit in the regulation that this should take place in a timely way. The reason why that has not happened, and why the information before the court is so limited, appears below.
7. The mother has been given a more than ample opportunity to participate in these proceedings, but has not done so. Having heard submissions on behalf the father and on behalf of A's Children's Guardian, I shall make an order in these terms:
 1. Pursuant to Article 10 and Article 11 of Council Regulation (EC) No 2201/2003, Brussels II Revised:
 - i) The Cologne District Court, Family Court, having on 9 January 2009 under Article 13(b) of the Hague Convention 1980 refused to return the child, A, to the jurisdiction of England and Wales;
 - ii) The Regional Court of Appeal of Cologne having dismissed the appeal of the Plaintiff Father on 20 April 2009;
 - iii) The Plaintiff Father, [Mr AF], having made an application dated 16 July 2009 to this Court under Article 11(7) of the Regulation for the immediate return of the child;
 - iv) This Court having jurisdiction pursuant to Art. 10(b)(iii) and (iv);
 2. A Children's Guardian having been appointed to act on behalf of the child on 5 February 2010;
 3. The First Defendant Mother, [Ms T], having been served with notice of these proceedings and of this hearing;

AND HAVING HEARD Leading and Junior Counsel for the Plaintiff and the Solicitor for the child, the Mother having neither attended nor been represented:

IT IS ORDERED THAT:

1. The application of the Plaintiff Father, [AF], for an order for return of the child, A, to England and Wales is dismissed.
 2. The child, A, shall reside with the First Defendant Mother, [Ms T].
 3. The First Defendant Mother, [Ms T], shall make the child available for contact with his father, [Mr AF] on six (6) occasions annually; the contact is to take place under the supervision of the German Youth Welfare Authority and is to commence without delay.
 4. The German Youth Welfare Authority is requested to provide the Plaintiff Father, [AF] with details of how the contact is to take place through his solicitor, Ms Helen Kings of Dawson Cornwell, 15 Red Lion Square, London W1R 4 QT not later than 8 July 2011.
 5. Permission is granted to the First Defendant Mother and to the German Youth Welfare Authority to apply to this Court to suspend, vary or discharge this order, such an application to be listed before Mr Justice Peter Jackson, if sitting.
 6. A sealed copy of this order and the accompanying certificate is to be translated into German and served on the First Defendant Mother by the Plaintiff's solicitors sending the same by post to the lawyer who acted for the Mother in the Hague Convention proceedings in Germany, namely [Ms S], Lawyer, of [address], Cologne.
 7. CAFCASS Legal will be responsible for sending the sealed order and its translation to the German Central Authority for onward transmission to the Mother and to the relevant German Youth Welfare Office.
 8. The Father's solicitor shall arrange for the judgment given in this matter to be translated into German.
 9. The cost of translation is a necessary and appropriate charge on the Father's public funding certificate.
 10. A copy of the judgment in English and in German shall be sent by the Father's solicitor by post to the lawyer formerly acting for the Mother, and by CAFCASS Legal to the German Central Authority for onward transmission to the Mother and to the relevant German Youth Welfare Office.
 11. No order as to costs, except detailed assessment of the costs of the publicly funded parties.
8. In relation to the return of the child, and his application for a residence order, the father maintained that such measures are the only way in which his relationship with A can be restored. In the light of the history, this is an understandable fear, but even that would not justify this court making orders which would be so plainly contrary to A's interests. During the course of the hearing, the father, without withdrawing his applications, realistically accepted that this was bound to be the court's conclusion.
9. In relation to contact (access), I have issued a certificate under Article 41, with the result that the order will be enforceable in Germany. In the unusual circumstances, I have given specific permission to the mother and to the German Youth Welfare Office to apply to this court to suspend, vary or discharge this order. If they do not do so, the father can attempt to enforce the order in Germany, at least in theory (I say this because he cannot afford

German lawyers, cannot speak German, and does not know the location of the court in Germany to which he should apply). Failing that, he has indicated an intention to approach the European Court of Human Rights.

10. In issuing the Article 41 certificate, I have taken account of the terms of Art. 41(2), which relevantly provides that a certificate shall only be issued if:
 - (a) service of the proceedings has been proved;
 - (b) all parties were given an opportunity to be heard; and
 - (c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.
11. Conditions (a) and (b) are satisfied. As to (b), sustained efforts have been made since July 2009 to engage the mother in these proceedings, all of which have been ignored.
12. As to (c), the child has been represented in these proceedings by his Guardian, Mr McGavin. The German authorities have not enabled him to meet with A, so in one sense A has been deprived of the opportunity to be heard. Nonetheless, I am satisfied that in these limited and particular circumstances hearing from A can be described as inappropriate. For reasons beyond his control, his father is now a stranger to him and he is not of an age or degree of maturity to understand the position. Further, it cannot be the intention of the Council Regulation that the issuing of a certificate should be frustrated in a situation of this kind.

The law

13. In relation to the Council Regulation, the principles to be applied have recently been authoritatively summarised by Mrs Justice Theis in her decision in Re D, D v N [2011] EWHC 471 (Fam) at paragraph 39:

39. The position can be summarised as follows:

(1) The interrelationship of Articles 10 and Articles 11(7) and (8) of BIIR permit the State of origin (from where the child has been wrongfully removed or retained) to undertake an examination of the question of the custody of the child, once a judgment of non return pursuant to Article 13 has been made by a State where a request has been made under the Hague Convention 1980;

(2) Proceedings under Article 11(7) should be carried out as quickly as possible (*M v T* (Abduction: Brussels II Revised, Art 11(7)) at para [8] at 1689);

(3) In undertaking the examination of the question of the custody of the child, the Judge should be in a position that he or she would have been in if the abducting parent had not abducted the child. Thus the whole range of orders that would normally be available to a Judge should be available when examining the question of the custody of the child (*Re A*; *HA v MB* (Brussels II Revised: Art 11 (7) Application) at para [90]; *M v T* (Abduction: Brussels II Revised, Art 11(7)) at para [17] at 1691 – 1692);

(4) In undertaking the examination of the question of the custody of the child, the court exercises a welfare jurisdiction: the child's welfare shall be the court's paramount consideration (section 1(1) of the Children Act 1989; *Re A*; *HA v MB* (Brussels II Revised: Art 11 (7) Application); *M v T* (Abduction: Brussels II Revised, Art 11(7)) at para [17] at 1691 – 1692);

(5) It may not be necessary or appropriate to categorise the jurisdictional foundation for such an enquiry as deriving from, or relying upon, the inherent jurisdiction. The foundation for any examination of the question of the custody of the child is simply through the gateway of Article 11(7);

(6) The court has a well known and historic ability to order the summary return of a child to and from another jurisdiction;

(7) As part of the court's enquiry under Article 11(7) the court does have the ability to order a summary return of the child to this country to facilitate the decision making process leading to a final judgment (*M v T* (Abduction: Brussels II Revised, Art 11(7)) at para [17] at 1692; *Povse v Alpago* Case C-211/10 [2010] 2 FLR 1343);

(8) In deciding whether to order a summary return or to carry out a full welfare enquiry, the court exercises a welfare jurisdiction. (*M v T* (Abduction: Brussels II Revised, Art 11(7)) at para [17] at 1692). It is not altogether clear whether the decision to order a return of the child on a summary basis is more appropriately considered as akin to that which might be ordered under the inherent jurisdiction or whether it is effectively a specific issue order under the Children Act 1989 order: if it is more appropriately considered as akin to the inherent jurisdiction then – at least as to the question of summary return – it may not be necessary for the court mechanistically and slavishly to direct itself to the welfare checklist; that having been said, once the child has returned and the court is considering what order to make the court should direct itself to the welfare checklist;

(9) Any summary return order is directly enforceable through the procedures in BIIR (see, Article 42 and Article 47 of BIIR, *Povse v Alpago* (supra)).

14. With regard to welfare, the court acts in accordance with the principles set down in Section 1 of the Children Act 1989.
15. I have already referred to the obligation to give effect to the rights of the parties, and specifically to the right to respect for private and family life under Article 8 of the European Convention on Human Rights and Fundamental Freedoms, and to the positive obligations that this places upon the state.

The parents' history and A's birth

16. The history is summarised in the judgment of Mr Justice Bennett of 26 May 2006 at [2006] EWHC 2166 (Fam), given when A was aged two. At the hearing the judge made findings of fact on the unusually large number of major disagreements that existed between the parents.
17. The father, who is now aged 61, was born in Jordan. He came to this country in 1979 and became a British citizen in 2000. The mother, who is now aged 40, was born in Eritrea and has since 1973 been a German national. They met in England in late 2001, soon after the mother came here looking for work. She

began to live at the father's home. Between February and June 2003, the mother went to live in a women's refuge. The judge accepted the mother's claim that this was because the father was controlling and violent at intervals, and that this continued after that time. However, in June 2003 the mother returned to live with the father.

18. The father claimed that they went through a marriage ceremony in accordance with Sharia law in July 2003, a claim that the judge rejected.
19. In July or August 2003, A was conceived. The mother claimed that the father raped her. The judge did not accept this allegation, and considered that the probable explanation was that the mother regretted ever having had sexual intercourse with the father, and that she had tried to exculpate herself in her own eyes for having done so.
20. In addition, when the matter later came before the court, the mother argued that it was not in A's best interests to have any contact at all with the father. She denied that the father was A's biological father, but DNA testing in April 2006 proved that he is.
21. A was born in April 2004. Through his parents he inherits a Jordanian-Eritrean-British-German identity.
22. The father stated that after the birth of A he played a very full part in his care. The mother disputed this, but the judge did not accept her evidence on this point.
23. In July or October 2004, the mother went to Germany with A to visit her family. They returned in December 2004. An incident occurred in January 2005, which, despite the father's denial, the judge found to have involved him brandishing a knife at the mother in the course of an argument. The mother and A then returned to Germany. The father began court proceedings in England, and in April 2005 was granted a parental responsibility order to put him in a position to take proceedings under the Hague Convention. In June 2005, the mother returned with A. The judge accepted that she did so because she was in fear of the father and her will was overborne.
24. The mother and A went to Germany again in September 2005 and returned to England in the same month. In November 2005, the mother left the father following an incident of violence which the father untruthfully denied, and moved to a refuge with A, following which father had no contact. In December 2005 this court made an order prohibiting A's removal from England. The father also brought proceedings for contact, and it was these proceedings that were listed for the fact-finding hearing in May 2006.
25. Significant passages from the judgment of Mr Justice Bennett at the end of that substantial enquiry are these:

"The father is a strident, voluble, proud and emotional man ... I am satisfied that he deeply loves A and wishes to play as full a part in his son's life as possible." [48]

"By contrast, the mother struck me as a rather vulnerable and timid person." [49]

"The father describes in his statement and evidence how he has cared for A. The mother denies this. I'm afraid I do not accept her evidence on this point. It is at variance with the evidence of the doctor ... and ... the health visitor ... between August and November 2005. Both of them told me that A was comfortable with both of his parents and indicated that there was a bond between father and son. Furthermore, whatever else may be said about the nature of the evidence that the father gave in the witness box, his protestations of love for A were most certainly not put on." [74]

"The father is a volatile character. He probably found the presence of the mother's siblings oppressive and undermining of his control over the mother. I think he snapped and that he did brandish a knife." [81]

"... I am more than satisfied that he has in the past been violent to the wife, not continuously, but at intervals. I do not get the impression from the evidence that he is a man given to regular violence but more that he can intimidate a person who is weaker than himself, particularly the mother, and that his character can explode on occasions into violence against the mother." [98]

"I have no hesitation in finding that the mother left the father in November 2005 out of fear. She is and was very apprehensive of him. I accept and I wish to emphasise that there is not the slightest suggestion that the father has ever been violent to or any in any way mistreated A. He and A have a good bond, and ... A was comfortable with his father. But the father's behaviour on 16 November 2005, all in front of A, was inexcusable. I do not think that that he once paused to think of the effect of his behaviour upon A, let alone on the wife.

Proceedings in England concerning the father's contact with A

26. The father's contact with A had been stopped between the separation in November 2005 and the hearing before Mr Justice Bennett in May 2006, not least because the mother had alleged that he was not A's natural father. At the end of the hearing in May 2006, Mr Justice Bennett ordered the Children and Family Court Advisory and Support Service (CAFCASS) to file a report and make recommendations as to how contact should resume. The case was allocated to one of its most experienced officers, who arranged for two occasions of contact in November 2006. He found that it was a positive experience for A and recommended that more contact should take place. An order was made on 8 December 2006 that the father should have an occasion of contact in the presence of the CAFCASS officer in January 2007 and thereafter fortnightly supervised contact at the Coram Contact Centre for a period of four months. The first two occasions took place, but there was then a delay while the father was placed on a waiting list. On 16 July 2007, Mr Justice Bennett himself ordered that there should be fortnightly contact for one hour supervised by the Coram Contact Centre. Fortnightly contact then took place until October 2007.
27. A further hearing took place before Mr Justice Bennett on 12 October 2007, and he ordered that supervised contact should continue on Wednesdays until

December 2007, and should thereafter continue on whatever basis the Coram Centre thought suitable after consultation with the parents. The mother took A on holiday to Germany for three weeks in December 2007, and contact then resumed on four occasions in February and March 2008.

28. The CAFCASS officer produced a report on 1 April 2008. He reviewed the notes of contact at the Coram Centre and hosted two meetings at his office between A and his father. On each occasion A was brought to the office by his mother with no difficulty.

29. The CAFCASS officer wrote this about the first meeting on 18 March 2008:

"A came happily with me and accepted a hug and a kiss from his father. A quickly became involved with toys, some of which he had remembered from before. That included toys brought by the father and those that had been at my own office.

I noted that there were some immediate problems in the communication as A was not able at the beginning to explain things fully in English. I noticed however, that as the contact progressed, A's English became more fluent and he and the father were better able to communicate.

The father had brought a variety of toys and some food and drink for A. I noticed that the father was attentive to his son's needs which included wiping his nose as and when required. A enjoyed the food that his father had brought even though he did not eat as much as his father had hoped.

Sometimes A had coughed or sneezed. It was apparent from what the father had said to me that he was being very over anxious. He was asking his son, are you sick, and asking me if he can obtain some medicine for his son.

Father and son played very well together with the father being prepared to move from one activity to another as his son moved around the room. The father also gave his son appropriate praise. It is apparent that A has a good sense of fun and was very much at ease playing with his father. Towards the end of his contact A mentioned his mother and quickly returned to playing with toys in the room. He did not exhibit any signs of distress.

It was my impression that A had been happy throughout the contact and that the father may be over anxious. That in my opinion is linked to the fact that the father loves his son very much."

30. The second meeting on 25 March 2008 is described in this way:

"Both the parents and A arrived early on this occasion. A was again dressed in jeans. He had a fleece top and was once again cleanly presented.

A readily came into the family room to commence playing with his father. A was delighted to find that his father had set up an electric helicopter and a train. At the commencement of the contact father looked up to me and complained that A is aged four and has no English. I reminded him that A's English improves as the session progresses as shown in the previous contact.

Throughout the contact the father played well with his son. A was happy and responsive to the encouragement from his father. I noticed that when A was playing with the Scalextric cars he had good coordination and was able to use both controls at the same time.

Although in general terms the father responds well to A, I noted that at times he needs a little prompting as to what A really needs. I believe that the father was lacking in that regard on account of not being tuned into his own son through lack of contact. At times during the contact there were squeals of laughter from A.

About a third of the way through the interview the father had told me that he had brought some medicine for A. He found it difficult to accept that A, in my opinion, did not need any.

It was my impression once again that father and son interact well together and that they do not need any supervision in that regard. A also mentioned his mother on one occasion in passing. A again was still at ease and showed no distress.

At the end of the contact period A transferred easily from father to mother without any difficulty."

31. The conclusion of the CAFCASS officer was this:

"Having now supervised two periods of contact between A and his father I was reminded that father and son play well together and that they do not require any supervision during contact times as far as their relationship is concerned. The Court will however have to consider whether or not there needs to be any supervision, whether supported or otherwise, in order to safeguard A bearing in mind the mother's fears that the father might retain A and not return him to her or take him back to his own country. If the Court decides that supervision of any sort is not required the mechanics of contact would be that much easier to facilitate whether contact be in Germany or in England. As a means of enhancing contact between father and son the use of e-mails would be a good step forward as long as the father appreciates that any response from A would be mainly directed by the mother and only at a very basic level."

32. The overall effect is that there were some 17 occasions of supervised contact between A and his father in the 17 months between November 2006 and March 2008. The subsequent conclusion of the Cologne District Court that the father had not been exercising rights of custody at the time of the abduction in May 2008 is incompatible with the known facts and I notice that it was not specifically upheld on appeal.

33. Reviewing this material, it is clear that at the time A was removed to Germany, his relationship with his father was alive, and that the mother was able to cooperate with arrangements for contact without any unusual difficulty. The professional and judicial assessment of A's welfare contained provided no support whatever to the idea that it would be against A's best interests for his developing relationship with his father to be continued and strengthened.

34. In the meantime, in January 2008, the mother had applied for permission to take A to live permanently in Germany. The hearing took place before Her Honour Judge Pearl on 10 and 11 April 2008, but it was not completed, and was adjourned to 11 June 2008. The judge ordered that contact should continue in the meantime as provided for by the order of Mr Justice Bennett.

The abduction of A to Germany

35. On 5 May 2008, the mother removed A to Germany without the knowledge or consent of the father. The father obtained an order from this court declaring the removal to have been unlawful and sought an order in Germany for summary return. That application was heard in the Cologne District Court on 16 December 2008. The record of the hearing shows that the mother became so distressed that she could not take part in the hearing. After some negotiation, the mother allowed the father to see A, who had been brought to court:

"The Judge then left the courtroom in order to make photocopies. The child was waiting outside the courtroom with the accompanying person [Mr DK, a police officer and friend of the mother]. The child beamed at the Judge and explained in response to questions: I go to kindergarten. I'm happy there. To the question of whether he recognised the man in the room, he said no. He was told that the man was his father. He then smiled.

... [Mr DK] then entered the courtroom with the child. The child greeted the father. He received many presents from him. Both unpacked the presents and played with them in the courtroom. [DK] then suggested that, if possible, he could go with the Applicant and the child together to the Cologne Christmas Market.

The Applicant explained he had some time free before his return flight.

The court approved this.

[DK] then left the courtroom to discuss this with the Respondent. This lasted a somewhat long time. ... The court, likewise, went out. The Respondent wept a lot and stated she had difficulties with the contact plans for reasons explained in detail. The court then explained the situation to her and that the father had visiting rights to the child.

The Respondent finally agreed to the visit.

... [DK said] he would ask the Respondent to have current photos made of the child and pass them on to the applicant."

36. The visit to the Christmas market on 16 December 2008 was the last time A saw his father. No photographs have ever been sent.

The decisions of the German courts

37. On 9 January 2009 the court refused the application for summary return. It recorded that it had received no input from the Youth Welfare Office. Nor was there any psychological assessment of the mother.
38. The Father's application for return was refused on two grounds. First, under Article 13(a), the limited amount of contact in England was said not to be "a factual exercise of parental care" and it was further held that the question of who was responsible for that limited access was not relevant. In the course of its decision, the court recorded the mother's contention that "due to the long separation the child has no relationship with his father". The court found as follows:

"According to the result of the hearing of the parties involved, the Court assumes that the Applicant did not in fact exercise custody rights of the child at the time when the child was brought to Germany and has not since the parents separated in November 2005. According to the contention of the Respondent, the applicant has not seen the child at all in the year 2008. From January 2007 infrequent, brief visits to the child's father took place under supervision. There was no cooperation between the parents for the well-being of the child."

39. It can be seen that the mother's assertion and the court's understanding are in conflict with the available information about the actual relationship between A and his father seven months earlier.

40. The court decided against an order for return, citing Article 13(b). It recorded that the mother was evidently considerably traumatised and cried inconsolably when the father simply sat opposite her. It continued:

"Since November 2005 the child has been cared for exclusively by the mother and not by the father. Certainly, in the presence of a trusted person he approached the father openly, received his presents, played with the father and also continued the game when the trusted person temporarily left the courtroom. How strongly the child was influenced by the more than generous presents cannot be determined in any simple manner."

41. It would therefore appear that there continued to be a reasonably comfortable relationship between A, then aged 4½, and his father. Nonetheless, the court continued:

"Certainly, the Applicant has a right of access to the child and information about the child. This can, however, only be exercised with the intervention of third parties (private persons included) willing to make contact and in a manner which does not cause a further traumatising of the Respondent. Otherwise, the child's well-being would be impaired to a considerable extent because strains on the mother also have an impact on the child."

42. I emphasise this observation, made over two years ago. The intervention of third parties has been non-existent. In the time that has passed, A and his father have become estranged by default.

43. The Regional Court of Appeal of Cologne dismissed the father's appeal on 20 April 2009. It did not find it necessary to debate the lower court's conclusion that the father had not been exercising custody rights under Article 13(a) because it upheld the decision under Article 13(b):

"A is a small child who hardly knows his father, the Applicant, and is not fluent in the English language, not to mention in his father's mother tongue. Contact between the Applicant and A has taken place to only an absolute minimal extent over the past years and the child has no contact persons in Great Britain. There is no attachment to the father; according to the observations of the district court, A did not even recognise his father initially at the official hearing before the presentation of numerous gifts. In these circumstances, A's return without his mother does not come into consideration. Rather, the Senate shares the view of the district court that the change of environment associated with a return would represent a massive break for the child due to continuous care from the mother in the past years and taking into consideration the child's age, his specific situation in life and also the good integration he has just achieved in Germany. This break cannot be justified by reasons of the child's well-being."

This impending impairment of the child's well-being, unusually severe in the conviction of the Senate, cannot, under the circumstances of the case, be counteracted by the Respondent accompanying her child to England. According to the observations made by the district court, the accuracy of which there is no reason to doubt, as opposed to the Applicant's ideas related to this, the Respondent is considerably traumatised. In the presence of the Applicant she is not in a position to articulate herself, despite the attendance and support of other persons in the courtroom. She evidently has an immense fear of the Applicant and weeps continually and inconsolably in his presence. The Family Judge of the district court, known to the Senate as thoroughly experienced, particularly in [Hague Convention] proceedings, has certified the Respondent ... as having been incapable of acting with legally binding effect in the Applicant's presence, despite the support of her lawyer and a social worker from the social services of Catholic women; the Respondent reportedly had to leave the hearing room and a renewed attempt to participate in the hearing was not possible for her. The extraordinary psychological state of the Respondent can be explained, in the conviction of the Senate, by the physical abuse she has had to suffer, which has not been substantially disputed by the Applicant and the core truth of which he has even expressly admitted ... The Respondent's considerable and sustained traumatising, which, in the conviction of the Senate, can be definitively traced back to the Applicant's behaviour, does not allow her to accompany A in the event of an order that he return to England. Indeed, this is also the case even if, as the Senate presumes, the English authorities take all the necessary protective measures conceivable for the benefit of the Respondent."

44. Once again, nothing was said about the fact that contact had in fact been taking place up to the time of the abduction, or that in the proceedings that had been taking place in England since 2006 the mother had been able to participate without any suggestion that she was incapable of acting with legally binding effect, or that she was too distressed to function. Nor did the appeal court refer to the relationship between A and his father, which had been described in positive terms following close professional assessment, or to the future of that relationship in the light of the mother's extreme views.

The present proceedings

45. The determination of the father's application under Article 11(7) has been unsatisfactorily protracted. Attempts to engage the mother and to obtain meaningful information from Germany began with an order in this court on 16 July 2009, the first of 14 orders in all. The matter came before Mr Justice Singer prior to his retirement on five consecutive occasions between November 2009 and July 2010. No judge had a deeper appreciation of the issues arising in international cases, or was more active and imaginative in pursuing solutions for the benefit of children, but even his interventions produced little by way of dividend. It is now clear that the individual orders, designed to be fair to the mother and to take account of the child's situation, have collectively failed to achieve the purpose for which Article 11 BIR was devised.
46. The first problem was that the mother and A lived at an unknown address. A number of orders for service of the proceedings on the lawyer who had acted for her in the Hague convention proceedings were made. Adjournments were granted and the mother ordered to attend hearings. No response having been

received, proceedings were served on the mother via the German Central Authority. Documents were sent in translation.

47. On 5 February 2010, Mr Justice Singer invited cooperation between the International Child Abduction and Custody Unit and the German Central Authority further to Article 55. He appointed a Guardian for A. He gave a judgment and made arrangements for the case to be referred to the office of the Head of International Family Justice (Lord Justice Thorpe).
48. In his judgment, Mr Justice Singer observed that there could not be a clearer case of wrongful removal. Following the dismissal of the father's appeal, his entitlement to institute proceedings under Article 11(7) had led to little progress because of the evasiveness of the mother and defects in the international arrangements to facilitate the service of court process. There was an embargo upon the mother's address in Germany being disclosed, which frustrated the intention of the Service Regulation (Regulation EC 1393/2007). He described the situation as absurd.
49. In May 2010, Lord Justice Thorpe's office was informed by the German International Liaison Judge that the Cologne District Court did not have an address for the mother, and nor did the mother's former lawyer. The District Court judge would try to find the address.
50. Also in May 2010, a brief report from a Youth Welfare Authority was forwarded to the Children's Guardian by the German Central Authority. The name of the welfare authority was not given "as the residence of the child in this matter cannot be disclosed". The report was based on a visit to the mother's home by a qualified social worker on 15 April 2010 (two years after the abduction) when the now six-year-old A was observed but not spoken to. A further discussion with the mother took place on 3 May 2010 at the Youth Welfare Office. The report is about one page long and the relevant parts are these:

"The child's situation:

A is a healthy, cheerful and lively child who has a good, close bond and relationship with his mother. He has developed appropriately for his age and regularly attends a day-care centre where he feels very comfortable and where the positive course of this development is supported and promoted. He has a stable social environment, friends and is integrated into his environment. In the autumn of 2010 A will begin school and he is already looking forward to it a great deal. A loves all sporting activities and has a great urge towards movement. In all that concerns him his mother takes care of his needs responsibly and lovingly. Mother and child live in stable financial and domestic circumstances.

The mother's situation:

The mother explains the child's previous history in detail: conception of the child by rape, imprisonment of child and mother by the child's father, flight to the women's refuge and flight from England and Germany due to threatened circumstances.

The mother reports that she continues to feel threatened and pursued by the child's father. She says she lives in constant fear that the child could be abducted by his father, which is why

the father should on no account learn of the child's residence in order to ensure the child's safety.

Assessment of the Youth Welfare Office:

The mother-child's relationship is full of trust, stable and robust.

After learning of their personal circumstances and due to the subjectivity of the mother's description of events, it is not possible from our position to assess or verify the actual existence of threat. However, as a whole, the mother makes a credible and reliable impression and is trying to protect her child from a possibly dangerous situation. She endeavours to keep the impact of a possibly dangerous situation for the child as low as possible in order not to burden the child too much.

In the view of the Youth Welfare Office no parental aid measures are necessary for the child as the mother completely fulfils her responsibility to him.

If there are any further queries about the social situation of the child, we would be glad to assist at any time via the Central Authority of the Federal Office of Justice in Bonn.

51. In June 2010, Lord Justice Thorpe's office was informed by the Liaison Judge that the District Court Judge had reported as follows:

"She phoned with the former advocate of the mother, named Mrs [S]. The advocate is of the opinion that the mother [**10 or more words blacked out**]. But the mother objects to accept official deliveries and doesn't accept telephone calls. On the other side she doesn't refuse to accept normal postal deliveries. The advocate informed the mother that she doesn't have to fear the English justice. But she hasn't shown any reaction and the advocate can't reach her personally.

They suggest to the English court to get in contact with the International Social Service in order to ask for a report of the Youth Welfare Office in Stuttgart."

52. The redacted passage evidently contains the address at which the mother's lawyer thought she might be living, because the lawyer in Lord Justice Thorpe's office wrote:

"Plainly, there is no way currently verifying the above address. Nonetheless, as of course you are aware, it cannot be disclosed to the Father personally."

53. The Guardian pursued the suggestion of making contact with the Youth Welfare Office in Stuttgart. On his behalf, CAF/CASS Legal attempted to identify the relevant office and to set up a meeting between the mother and the Guardian. This attempt was not fruitful. All that has been received is a further report from a Youth Welfare Office (identity withheld) dated 25 January 2011. It refers to a personal discussion between a social pedagogue from the youth welfare office and the mother on a home visit on 18 January 2011. It says that contact with the five-year-old (sic) child A was also made during the visit.

54. The report, which again runs for about one page gives a brief and positive description of A's welfare and school situation. As to the question of A's father, it continues:

"A description of what the mother has told A about his father:

According to the mother, the subject "father" is not discussed with A. A does not know who his father is and she has never told him why mother and child had to appear before the County Court in Cologne in December 2008.

When questioned, the mother says that A has not so far asked who his father might be. The mother is keeping a diary for A, so that she can answer his questions and give him information in an age-appropriate way when he is older and enquires after his father.

What has the mother told A about his origins and the reasons for leaving Great Britain?

A knows that he was born in Great Britain. He has apparently never asked for the reasons why he left Great Britain, which is why the mother has not told him anything about these to date.

Is the mother prepared to send current photographs of A that can be passed on to his father?

The mother does not want photographs of A to be passed on to his father under any circumstances. She continues to be very frightened of A's father and fears for the welfare of the son if the father should find out where the child lives."

The position of the parties present at this hearing

55. In seeking an order for A's return, the father sets out the arrangements that would exist in London and his willingness to offer full-time care to his son, and says this:

"Whilst I understand that it may be theoretically possible for me to make an application for a contact order to A in Germany, I feel that it would not achieve anything at all. Unfortunately my experience of the German Court process has not been a good one. I believe that it would be exceptionally difficult for me to litigate in Germany in a foreign jurisdiction and in a foreign language. I would not have the benefit of legal aid and I could not pay privately for representation. I do not believe that there is any possibility that even if I were awarded a contact order that the Defendant would comply with it. She has shown herself reluctant to comply with English contact orders, by way of example there were a number of occasions when she simply did not turn up to the Coram Centre with A when contact was due to go ahead. I could not afford to travel to Germany on a regular basis for contact and certainly not if contact were to be cancelled at the last moment. Further, it is quite clear that the Defendant continues to adopt an obstructive stance."

56. Through his counsel, Miss Alison Russell QC, the father also explains that he finds the situation unbearably upsetting and that he would find it emotionally difficult to go to Germany. The practical obstacles he faces include the fact that he is dependent upon state benefits.
57. In default of an order for return, the father seeks an order for contact in broadly the terms set out earlier in this judgment.
58. Miss Russell accepts that the appropriateness of making a welfare-based order for return after an abduction will dwindle over time. However, she strongly submits that the circumstances in this case amount to a breach of the Article 8 rights of the father and of A, that the German authorities have not taken the necessary positive steps to uphold those rights, and that this court should

therefore do so. She argues that the father has effectively been prevented from participating in any form of welfare dialogue about his child since April 2008, which may also give rise to issues under Article 6.

59. Mr McGavin, the Guardian, became involved in February 2010, and interviewed the father in March 2010. The father described how he is a Bedouin, brought up in Jordan. His family would live in tents during the summer, tending livestock, and in a house during the winter months. The father continues to prefer being outdoors, and spends much of the daytime in a Bedouin style tent in the back garden of the flat that he rents in Kilburn. After coming to England in 1979 he was successful in the property business, but became homeless when his business collapsed in the recession of the early 1990s. He then ran a restaurant for a time. Since A's removal he has at times suffered from depression.

60. Mr McGavin commented that he was impressed by the father's commitment to A. He dearly loves his son. His eyes lit up and he became emotional when he talked about him. His life is on hold in A's absence. However, he was concerned that the father is unrealistic in believing that A could easily be transferred to his care.

61. In his report of 6 May 2011, Mr McGavin says this:

"Whereas the German authorities have been helpful in visiting the mother and providing reports, they are ensuring that distance is kept between the mother (and A) and father, and also between the case workers in Germany and myself.

I am very sympathetic to the father's position and to his attempts to at least recover contact with his son; however in my view, in the face of the German position there is no prospect of contact now or, as things stand, during A's minority.

My position regarding an enforced return remains the same as it did in March 2010.

Sadly, I cannot now see what can be achieved by pursuing these proceedings further other than offering false and unrealistic hope to the father.

I therefore recommend that the proceedings are concluded on 20th May with no order".

62. On behalf of the Guardian, Ms Carew confirms the concern about the father's lack of insight into the needs of A, and his ability to meet those needs as a full-time carer. However, she emphasises that in the light of the inability to carry out a welfare assessment, the Guardian must remain neutral as to the order that the court should make. In other words, the Guardian neither supported nor opposed the contact order proposed on behalf of the father, which was that there should be "at least six occasions" of supervised contact annually. To that extent, the Guardian's final submission is at variance with the positive recommendation that this court should make no order.

63. Essentially, the Guardian lacks the ability to make positive submissions in relation to a child that he has never met, and where he has not been enabled

to meet the mother. Nonetheless, I was able to engage Ms Carew in a useful, if inevitably tentative, consideration of the welfare issues that might be said to arise in these unusual circumstances.

The appropriateness of an order

64. It must be highly unusual for an application under Article 11(7) to arise for decision three years after the abduction of the child and two years after the refusal of a return order. There will come a point where by virtue of the lapse of time the court in the state of origin may consider it inappropriate to make any order at all. In this case, if there was any sign that the issues raised by this application could be reliably resolved in Germany, this court would almost certainly decline to make any order after such a lapse in time. However, the practical reality is that the father is now faced with almost insuperable difficulties, and further significant delay, in starting proceedings in Germany to revive his prior relationship with his son.
65. It is no part of the philosophy of the Hague Convention that a refusal to return a child should be accompanied by the extirpation of the child's relationship with the parent left behind. On the contrary, the maintenance of such relationships in some shape or form is intrinsic to the purpose of both the Hague convention and BIR, quite apart from the obligations arising under the European Convention on Human Rights.
66. In the unusual circumstances of this case I believe that it is appropriate for this court to make an order, provided that it is justified on welfare grounds. Making no order would almost inevitably lead to the irretrievable loss of the relationship between A and his father. If this court allowed that to happen it would not in my view be meeting its obligations under Article 8 ECHR.

Welfare factors

67. Although the orthodox approach to a decision under Article 11(7) is to approach the matter as if the abduction has not taken place, this cannot be valid in the present belated circumstances. I shall therefore consider welfare issues in the light of such information as is presently available.
68. As to A's wishes and feelings, in April 2008 he appears to have been enjoying the limited time that he was allowed with his father, and at that date it is likely that he would have wanted the meetings to continue. It is not at all inappropriate for the father to have brought presents for his son, and the insinuation that A's pleasure in seeing his father was limited to such material considerations is groundless. A's present wishes and feelings are likely to be that he is not missing his father because he is entirely dependent upon his mother and is not aware of what a renewed relationship with his father might mean to him.

69. A's physical and educational needs are being met. On the face of it, his emotional needs require a continuation of the good care that his mother is said to be providing. However, A is a child with a richly mixed heritage and he is currently being deprived of the benefit of exposure to and familiarity with his paternal heritage.
70. The father's ability to meet A's needs amounts on the present information to an ability to do so through contact rather than primary care. The mother plainly has the ability to meet his needs as his primary carer, but her ability to meet this need for a relationship with his father is in question. She is plainly unwilling, but it is not clear that she is unable. Her previous opposition to any form of contact was not upheld by the English court, and it is impossible to evaluate the genuineness of her dramatic presentation to the German court in the absence of proper assessment. The father's case is that her behaviour in December 2008 was put on and it is not possible to know whether he is right. The evidence from England suggests that the mother was able to function as A's carer and sustain some level of contact with the father. There is also an unexplained discrepancy between her ability to participate in English proceedings in April 2008 and her inability to participate in German proceedings at the end of the same year, although the only intervening event was her own abduction of the child. Nor is it possible to rely on the mother's self-report. Mr Justice Bennett, who had, in his own words, "been able to observe closely the father and the mother give evidence", consisting also of cross-examination, did not find her to be a reliable witness in all respects, even though he preferred her evidence to that of the father on several important issues.
71. As to any harm suffered by A in the past, there is no doubt that the father's disgraceful behaviour towards the mother will have been harmful. The concept of harm includes harm arising from witnessing the ill-treatment of another. The father's controlling and sporadically violent behaviour deserves the strongest condemnation, but its nature and degree did not lead to a contemporaneous conclusion that contact should not be taking place or that the mother was incapable of supporting it.
72. As to future harm, there is no reliable evidence that the father represents an ongoing physical threat to the mother. There has been no report of any such behaviour by him since the separation in November 2005. There is certainly no indication of any risk of maximum severity, such as a risk to life or other very serious harm. Nor is there any reliable evidence to support the idea that he might abduct A. He has taken no improper steps in Germany to find out where the mother is living. The suggestion that he might take A to Jordan is implausible. He has lived a fully integrated life in England for over 30 years. It should not be forgotten that the only unilateral removals of A from country to country have been by the mother.

73. The effect of a change of circumstances as a result of an order for contact are essentially unknowable as result of the paucity of information. The making of an order will no doubt be unwelcome to the mother but, important though they are, her rights are not the only ones that are engaged, and there is no reason to believe that A's situation will be seriously destabilised. On the other hand, a contact order might conceivably bring about some beneficial progress. I realise that this will depend upon the degree of resolution of the German authorities. I also acknowledge that in the face of limited information the court's prescription is bound to be approximate; accordingly, if the German authorities consider that the order would benefit from modification, they shall have liberty to apply.

Conclusion

74. Weighing up all the known factors, I consider the order set out at paragraph 7 above to be the outcome that best contributes to A's welfare, and I shall so order.
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