B v D (ABDUCTION: INHERENT JURISDICTION) [2008] EWHC 1246 (Fam)

Family Division

Baron J

22 April 2008

Abduction – Habitual residence – Education abroad – Consent based on lack of information – Whether wardship available as remedy – Jurisdiction

Wardship – Abduction – Education abroad – Consent based on lack of information – Whether wardship available as remedy – Jurisdiction

The British mother and the Portuguese father lived and worked in England, with the two children. The mother worked from home some of the time; the elder child was attending nursery school and the maternal grandmother provided back up childcare. When the maternal grandmother went away for a holiday the couple agreed to send the children, then aged 3 and 1, to the paternal grandmother in Portugal, for a holiday. The marriage was in difficulties, there were frequent arguments and money issues; the father persuaded the mother to consent to the children remaining in Portugal and being educated there for a time, while both parents remained in England to work things out. Shortly afterwards the father moved into rented accommodation alone, but the couple remained in close contact, and the mother was working towards a reconciliation. When the children returned to England for a month in the summer, the whole family stayed together in the father's apartment. The mother agreed that the children could return to Portugal, on the basis that education there was cheap, and in the belief that the marriage would survive. She had not yet realised that the father considered that the marriage was over. Both the mother and the father remained in England. Over the next few months the mother found it difficult to speak to the children when she telephoned, and also had difficulties seeking the children. When the father asked the mother for the children's birth certificates, the mother refused, asking that the children, now 4 and 2 years old, be returned to England. The mother finally realised that the marriage was over when the father informed her that unless she co-operated she would not see the children at Christmas. Instead of bringing abduction proceedings in Portugal under the Hague Convention on the Civil Aspects of International Child Abduction 1980, the mother sought an order for the return of the children under the wardship jurisdiction of the English court. After the English proceedings began the father moved to Portugal, where he began proceedings of his own.

Held – ordering the return of the children under the inherent jurisdiction –

(1) Both parents had clearly been habitually resident in England in the relevant period. No child sent abroad merely for the purposes of education could be said to have changed his or her habitual residence, and the children, by living with the paternal grandmother in these circumstances, had not changed their habitual residence; the children had therefore remained habitually resident in England. Any consent by the mother beyond consent to short-term education had been obtained on the false premise that the marriage had a long-term future and had been vitiated because of the father's failure to make full disclosure of his underlying motivation. The mother had consented only to a temporary move while the parents attempted to resolve their differences; she had not agreed to a permanent move to Portugal, and had not ceded care and control of the children to the father. There was no evidence that the mother had acquiesced in the children remaining in Portugal (see paras [22], [41], [43], [44], [48], [61]).

(2) Where two remedies were available in different courts in different jurisdictions, Hague Convention proceedings did not take automatic precedence. Wardship was not excluded simply because the Hague Convention provided an

alternative remedy. If the domestic court found that it had jurisdiction and that children had been wrongfully retained outside the jurisdiction, the domestic court was in a very good position to make specific findings and if, in the light of those findings, the facts demanded it, it was equally apposite for the court to make an order that the children return to the jurisdiction. In making such an order the domestic court would not be acting in derogation or contrary to the order of any foreign court (see paras [50], [51], [58]).

(3) It did not seem necessary for the mother to have to re-litigate abroad. Any Portuguese court would, on the basis of comity, be obliged to return the children to England, given the court's findings on the facts. In this case the English proceedings had begun first, and therefore, under Brussels II Revised, once the English court accepted jurisdiction, the Portuguese court was bound to cede to the English court. There was, in any event, no good arguable defence available to the father under the Hague Convention. It was in the children's best interests for them to be returned to England (see paras [59], [61], [62], [64]).

Statutory provisions considered

Supreme Court Act 1981, s 41
Children Act 1989
Family Law Act 1996, s 34
Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 12, 13(b)
Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses (Brussels II) (2000) OJ L 160/19
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, Arts 10, 11

Cases referred to in judgment

A (Wardship: Jurisdiction), Re [1995] 1 FLR 767, FD
Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951, CA
F v S (Wardship: Jurisdiction) [1993] 2 FLR 686, CA; [1991] 2 FLR 349, FD
H (Abduction: Acquiescence), Re [1998] AC 72, [1997] 2 WLR 563, [1997] 1 FLR 872, [1997] 2 All ER 225, HL
J (A Minor) (Abduction: Custody Rights), In re [1990] 2 AC 562, [1990] 3 WLR 492, sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, [1990] 2 All ER 961, HL
P (GE) (An Infant), Re [1965] Ch 568, [1965] 2 WLR 1, [1964] 3 All ER 977, CA
P v P [2006] EWHC 2410 (Fam), [2007] 2 FLR 439, FD
T v T (Abduction: Consent) [1999] 2 FLR 912, FD

Sharaz Ahmed for the applicant
Edward Devereux for the respondent

Cur adv vult

BARON J:

[1] This is an application by JB (to whom I shall refer as 'the mother') under the inherent jurisdiction of the High Court and also under s 41 of the Supreme Court Act 1981 by which she seeks an order for the return of the two children of the family, namely A (known in the family as 'S'), who was born on 30 November 2003 and is now 4 1/2 years old, and C (known as 'T') who

was born on 23 June 2005 and so she is now 2 3/4 years old. The mother wants the children to return from Portugal to London. Her application is opposed by Mr R D ('the father').

[2] This case was originally listed for 1 1/2 days but has, in fact, taken 2 1/2–3 days of court time. I have heard extensive oral evidence from each party. In addition, I have read their lengthy statements. I have had excellent written/oral submissions from counsel who have appeared on their behalf. I have also had the benefit of several authorities being cited to me. In short, this has been a very full hearing. All the issues have been ventilated in detail. I, therefore, feel that I am in a good position to make positive findings of fact.

The factual matrix

[3] I will now set out the relevant facts as I find them. For the avoidance of doubt, insofar as the matters set out differ from the evidence of either the mother or the father, this is because I have preferred the evidence of the other or because I consider that documents produced confirm my findings of fact. I do not believe that either of the parties has given me a wholly truthful account of the situation from about March 2007 to date. This judgment will therefore incorporate what I find is the true reality of the underlying situation.

[4] The mother was born in the Philippines on 8 September 1974, so she is now 33 years old. She came to the UK when she was 16 years old and has become a British citizen. I understand that she attended London University, where she took a degree. Her own mother ('the maternal grandmother') and one sister (for she has two) also live in England. Since about 2004 this family made its home with the maternal grandmother. Upon leaving university the mother commenced employment as an IT specialist and was working as such when she met her future husband.

[5] The father was born in Portugal on 20 November 1974. He is also 33 years old. He is a Portuguese citizen. I have not been told a great deal about his education, but he is obviously well educated for he has a good job and, like his wife, is an IT specialist. It would seem that his expertise is greater than hers because, as I understand it, he is employed to redesign corporate software so as to tailor it to a particular customer's needs. The mother's job was originally as a software engineer and latterly as a project manager.

[6] The parties met whilst they were each working for Hewlett Packard. The mother was 5 months pregnant when they married in July 2003. They moved to Brussels and their son, S, was born there in November 2003. The father alleges that the mother suffered from acute 'antenatal' (wrongly stated, for he meant postnatal) depression after the birth of their son. He says that she found it difficult to cope and if she did not get her way, tended to self-harm. His evidence to me referred to her hitting her head against a wall in order to secure compliance with her wishes. The father stated that she only displayed this behaviour in front of him and never in front of others. The mother denies his assertions. Whatever the truth of her alleged depression, it does not seem that she obtained any medical treatment.

[7] To assist the parties, the father's sister came to live with them for a short period of time whilst they were in Brussels. I accept that the mother was unhappy in that country, away from her home and family in England. The parties remained in Belgium until 31 July 2004 when, by agreement, they

returned to London. Their first home in England was a rented apartment in Earls Court Road, London W8. The mother was nearer her family and, as such, they began to assist with the care of the children. Although the parties had a young baby, it was agreed by both of them that each would work. At that time the mother's employment required her to attend at Hewlett Packard's premises and so she needed assistance with the care of the baby. As I understand it, a cousin came and assisted with S's care. I do not consider that the mother can be criticised for this situation, given that it was agreed by the parties that she should be in remunerative employment. I say this only because in his oral evidence to me the father seemed to indicate that the mother was not the primary carer. Obviously she could not look after the child whilst she was away at work; but I accept that the arrangement with her cousin was by way of her being (in loose terms) a nanny. I accept that each of the parties assisted with childcare duties at the weekend, although I cannot make any finding on the evidence available to me as to who (if either) did more.

[8] Within a short period of her return to this jurisdiction, the mother became pregnant for a second time. She gave birth to T in mid-2005 and was on maternity leave for the next 12 months. It was agreed by the parties that they would give up their rented accommodation in order to live with the maternal grandmother. It was hoped that she would assist with the care of the two children and also, I have no doubt, money was short with the result that the parties thought that they should save rent. The family therefore moved to London W10. The mother was, as I have already stated, on maternity leave for a year. The father accepts that during this period she cared for the children on a full-time basis. It had been hoped that the maternal grandmother would assist, but it seems that she spent a great deal of her time assisting her second daughter who also had a young child.

[9] Throughout this period the father continued to work for Hewlett Packard. In about November 2006 the mother returned to work. However, it was accepted by her employers that with two children she could not attend their office premises on a regular basis. Consequently her role within the company changed and she became a project manager working from home. I understand that she was able to fulfil her duties over the telephone because she could assist by having conference calls. She was expected to hold them in the morning and in the afternoon.

[10] I am clear that money was still in short supply in this family and the mother's earnings were an integral and important source of funding. By this stage the father had ceased to be an employee of Hewlett Packard and he had become a self-employed contractor. He had formed a company in England and another in Portugal. No doubt it made fiscal sense for him to route his earnings through those corporate entities. However, in reality, his main source of gainful employment remained, as before, with Hewlett Packard and he used to travel to their site in Cambridge on a daily basis. He told me that it was his habit to leave home at between 7 am and 7.30 am each day in order to travel to work by train.

[11] In addition to this employment the father acquired contracts from an American corporation to undertake work on their behalf. He was able to do this work from home and online. It is clear that whilst the mother was actually working she needed some support with the children. It was in this way that

her mother assisted on an ad hoc basis. However, despite this, from 2005 onwards I am sure that she had the main responsibility for caring for the children during the week. The father told me that he assisted at weekends. I expect that he did, but I have not heard detailed evidence about this aspect and so I am not in a position to decide which, if either, party did more at weekends during this period.

[12] The parties agreed that S should be placed in a private, fee-paying nursery school. I have no doubt that this was a financial burden that they both thought was worth it. The father complained that the mother did not always take him to school on time and there were a number of days when he missed classes. The father felt very keenly that this was a waste of money. Accordingly from the autumn 2006 the parties began to discuss the cost of S's education and whether it could be afforded. The mother went to see a number of schools. The parties also considered whether a local State school might not be appropriate, particularly a Catholic school. This would have necessitated regular attendance at Mass, which was not their habit as a matter of course.

[13] On 26 January 2007 the mother informed S's school that he would not be attending it for the next semester, ie after Easter, because they were 'going to the Philippines'. At this time it was the family's plan that the mother would visit the Philippines for about 2 months and take the children with her. This had been agreed with the father on the basis that she would be able to continue working for Hewlett Packard and earning whilst she was abroad. The mother's evidence was that Hewlett Packard agreed to this but I prefer the father's evidence on this point, to the effect that the time difference made it impossible from a work perspective. Hence the plan was abandoned.

[14] At about this time the maternal grandmother had also planned a holiday and she continued with her arrangements to go away for Easter. The consequence of this was that there was no back-up childcare arrangement in place for a period of time. It was in this context that the parties had discussions and agreed that the children would go to Portugal for a holiday to stay with their paternal grandmother and paternal aunts. The mother gave her consent to this holiday. The children went to Portugal on about 23 March 2007.

[15] In parallel with this, or perhaps because of this, the parties discussed the cost of education. The father felt that if the children remained in Portugal the cost of education might be far less. However, I do not believe that any firm plans were made in relation to this before the children departed to Portugal. It is clear that both parties accept that they went for the purposes of a holiday.

[16] It would seem from the evidence that has been placed before me that by now the marriage was not happy. It may be that money problems and the cost of education were part of the difficulties but the personal relationship was also in difficulty. The parties had frequent arguments and, as I understand it from their statements, some even occurred in front of the children. The arguments continued after the children had gone to Portugal. The parties then agreed that it might be sensible for the children to avoid seeing more rows if they remained abroad whilst the parents sought to solve their marital difficulties.

[17] It was against this background that the father persuaded the mother that the children should have an extended holiday in Portugal whilst they attempted to work their way through their problems. The father has given

evidence to the effect that the mother told him that she had 'given the care of the children over to [him] and his family at this time'. He referred to it as giving him 'carte blanche'. I do not accept that evidence and he was not telling me the truth about that agreement. As I find, the mother only agreed to a further extended holiday while the parties sought to solve their marital difficulties.

[18] It is clear from the documents which I have seen that on about 23 April 2007 the father registered S at a Portuguese school. I accept the mother's evidence that he did so without her permission and, indeed, without her knowledge. The father gave evidence to me to the effect that she knew all about the new school because, inter alia, he had given her a Google map of the area when she visited Portugal at a later date to see the children. That map would have enabled her, he suggested, to visit the school if she had wished. The implication being that she was not interested enough to visit the school premises. Whilst I accept that he gave her Google maps, he did not do so, as he asserts, to give her an opportunity to visit the school. The maps were to enable her to take the children out and about as a tourist whilst they were on holiday and he was working. I am clear that this mother took a very active role so far as finding schools in the UK was concerned and I believe that she would have visited every school in Portugal if she had been aware that it was proposed for one or other of her children. In fact, in his original evidence the father indicated that both children had been registered in about April and that the agreement had been made 'in about May'. That late assertion was in his pleadings put before the Portuguese court. Clearly as S was registered on 23 April, that submission cannot be correct. As we discovered when documents were made available during the course of the trial, T was not in fact registered with the school until September.

[19] Whilst the children were in Portugal the parties continued working in the UK. The rows between them resumed. Towards the end of May 2007 the relationship between the parties deteriorated to such an extent that the father moved out of the matrimonial home. He rented a studio apartment in Earls Court.

[20] Despite this separation, the parties remained in frequent contact. The mother visited the father's home on a regular basis and they both accept that their sexual relationship continued. I accept the mother's evidence that she was working towards a reconciliation and, as far as she was concerned, the father was also trying to make their marriage work. I am not certain about his motivation at about this time. He may well have regarded the marriage as effectively at an end when he left their home; but, as I find, he did not make his feelings known to the wife at this time. I am sure that the continuation of their sexual relationship gave her cause for hope. Indeed, at that stage he too may have harboured the intention to save this marriage if at all possible.

[21] The children returned to London in July 2007 and they were here for about a month. The father claims that this was just a holiday but I do not accept his evidence. The children returned to England because the parties' relationship had improved and they were together in London as a family. For the most part they stayed at the father's rented apartment. I accept the mother's evidence that by then their relationship had improved and that she believed the marriage was back on track. The father told me that after a few days he noticed that the problems were emerging once again and there were

arguments in front of the children. From his perspective he realised that the marriage could not be saved on a long-term basis. If these were his beliefs at the time, he did not communicate them to the mother. In fact, he persuaded her that the children should return to Portugal for a 'bucket and spade holiday' for the month of August. It was his family's habit to rent an apartment on the coast close to their home. I am clear, and so find, that the mother agreed that the children would return to Portugal in August for another holiday.

[22] At this stage in the summer of 2007, probably in August (although I cannot be precisely certain as to the date on the basis of the evidence that I have heard), the parties had a number of discussions about the children's education. The father told the mother that he might well be based in Portugal once his contract with Hewlett Packard came to an end in September 2007. I am clear that he persuaded her, in the context of their marriage continuing, that they would be able to save money if the children were based in school in Portugal. The father expected to travel to Portugal in September, and the mother agreed that the children could be educated there too, at least, for the September term although I do not think that any definite date was agreed. I am clear that she gave her agreement in the context and in the belief that their marriage was going to survive. She did not give her consent to the children remaining in the care of the father or of his family on the basis that their marriage was at an end. The father may have been clear that there was no prospect of a reconciliation, but he knew, as he accepted in his evidence before me, the mother thought that it would survive. In his oral evidence he told me that she remained of this belief until November 2007. As I find, he used her wish to continue the marriage to his advantage. He persuaded her that it was cheaper to educate the children in his homeland. He told her that he would be there to assist with their care in September, but he did not explain the true underlying circumstances of that agreement. Despite his denial, I accept that the mother only gave limited agreement that the children could be educated in Portugal for a period. I do not believe that she was focused upon the longer term arrangements and I am clear that she did not agree to the children moving permanently to Portugal. Nor did she cede their care and control to the father. She only agreed to a temporary stay for the purposes of inexpensive education. Perhaps she thought that it would enable the parties to make further plans as to their own long-term future. Although she has denied this agreement in her oral evidence, I do not accept that part of her evidence because the underlying facts speak for themselves.

[23] All of this was on the basis, as I have already outlined, that the marriage would survive and she would continue to be a pivotal part of the children's lives. As I find, the father deliberately used her wish to save the marriage to manipulate the removal of the children from her care. To that extent her consent to a stay in Portugal was not based on full or informed information. I am clear that if he had told her the truth about his view of the marriage she would never have agreed to the children staying in Portugal after the August holiday. Whatever consent was drawn from her during this period, it was therefore obtained on a false premise.

[24] The father registered T in school in September 2007. The mother took out the children's toys and warmer clothing on her visits. She did this because she knew that they would be in school in September. Her evidence to the contrary was incorrect and untrue. I consider that her motivation for these

untruths to me was her belief that any acceptance of any agreement would mean that the children would remain in Portugal. That was a misconception but it does not excuse the fact that she was not wholly frank but it does explain it.

[25] During October and November the mother made attempts to see the children. There is a dispute between the parties as to the number of times she telephoned. I accept her evidence that she tried to call the children on a regular basis but found it difficult to speak to them. Equally, she found it difficult to see them because the father and his family did not make contact with the children easy. In reality, the father or his mother increasingly sought to assert rights over the children. By this time the father had decided that he and his family would be the children's long-term sole carers. Having inveigled their return to Portugal, the father then took additional steps to seek to secure their permanency in that jurisdiction. He asked the mother for her birth certificate. He told her that he required it in order to register the children with the local medical practitioner. This was a lie and he knew it. As he told me, he wanted her birth certificate to start divorce proceedings in Portugal – this in circumstances where he knew that she still believed that the marriage was viable. In fact (although this may have been part of his motivation), I believe that his primary need for the birth certificates was, as he later revealed in his oral evidence to me, his desire to register the children as Portuguese citizens. I find that he attempted by stealth to secure the children's links with Portugal. That evidence convinces me that he had made a plan to retain the children in Portugal against what he knew would be the mother's true wishes. If she had agreed to the children being based in Portugal with him, there would have been no need to use these underhand tactics.

[26] I have seen a chat log dated 4 November 2007 in which the father attempts to secure the birth certificate. The contents of that document speak for themselves. The mother was suspicious of his reasons for wanting her birth certificate. She pleaded with him to bring the children back to the UK. She indicated that she had agreed to them being in Portugal and being educated there, but on the basis that the father would be there in September. In her evidence to me she sought to unscramble that documented evidence. However, I think that the log is the nearest and best evidence of what each of the parties was thinking in November 2007. As I have already outlined, the mother's consent for the children's stay was given on a false premise.

[27] Moreover, whatever the father may have told her in August, in fact he remained in the UK and was still there in September, October and November because he had extended his contract with Hewlett Packard. He says it was due to end in December 2007.

[28] The father was, as I find, habitually resident in England and Wales throughout that year until he left for Portugal in the middle of December 2007 after these proceedings had commenced. I so state because, as he said, he continued to work in this jurisdiction in his accustomed way throughout 2007 even after his contract ended formally in September of that year. He had a base in the UK; he lived in rented accommodation in Earls Court; he worked on a full-time basis with Hewlett Packard based in Cambridge; and he undertook his settled and accustomed mode of life in England. He was, without doubt, habitually resident here.

[29] The mother is, as I have already outlined, a British citizen. There is no doubt in my mind that she was habitually resident in the jurisdiction. She was based in her mother's home in W10; she worked for Hewlett Packard as before; and she continued her accustomed and settled mode of life in England. Thus the facts show that it is uncontroversial that both these parties were habitually resident in England and Wales.

[30] What then of the habitual residence of their children? I will deal with the law in relation to habitual residence in the next section of my judgment, but at the relevant time these children were very young. At the outset of their move to Portugal they were 3 and 1 years old respectively. Even now they are only 4 and 2 years old. They are not capable of having their own habitual residence. They are not in any sense *Gillick*-competent children. According to the law, they retain the habitual residence of their parents. As I find, they were abroad for one agreed purpose and that was for short-term education. Going abroad for the purposes of education, as I shall explain, based on a long line of authority does not change their habitual residence. The only agreed purpose was short-term education and therefore these children were, as I find as a matter of fact, still habitually resident in England and Wales. Therefore, when these proceedings commenced on 13 December 2007, the children and their parents were habitually resident in this jurisdiction. Such consent as the mother may have given for further underlying matters in relation to their sojourn in Portugal was, as I have already found, on the basis of incomplete facts.

[31] The mother told me that she first realised that the marriage was at an end in November 2007, specifically after her return from Portugal to see S on his birthday on about 29 November 2007. She said that she found it difficult to be with her son and (for the mother) her daughter. The father in effect told her that, unless she co-operated, she would not see the children in England for Christmas. It was in those circumstances that she finally appreciated that he intended to keep the children in Portugal against her fundamental wishes.

[32] In order to ensure that the children were returned to England, the mother agreed to a Christmas visit which was booked on the basis of return flights. I accept her evidence that she only came to that agreement because she appreciated by that time that return flights would be necessary, otherwise the father would not sanction the children's visit to the UK at all.

[33] The mother commenced proceedings on 13 December 2007. At about that time the father made final plans to remove himself from England and to return to his family home in Portugal. He commenced proceedings in Portugal on 21 December 2007. The Portuguese court of its own motion made an order granting him interim custody. It did so effectively on a 'without notice' basis. Recently, there has been an inter partes hearing in which the mother appeared with the assistance of a Portuguese attorney. The case was adjourned for 15 days to enable the parties to conciliate and no doubt to await the outcome of these proceedings.

[34] The proceedings in the UK commenced, as I have already said, in mid-December. The first hearing was before Hogg J on 18 December. On that occasion she made a number of orders which permitted the children to return to this jurisdiction for a holiday, but only on the basis that the mother made no application to retain them here and they could return to Portugal at the end of the holiday.

[35] On 4 January 2008 the matter came before this court because, despite the order that Hogg J had made, the mother issued an application seeking the interim care of the children. However, she accepted, no doubt on the advice of her advisers, that she could not pursue that application, and so the matter was abandoned. There was a short hearing before His Honour Judge Hayward-Smith QC when he dismissed her application and made an order for costs in the father's favour.

[36] This case was due to be heard on 31 January 2008 and was listed apparently 'At risk'. It did not proceed but the parties agreed directions. The first date which the court could give was 17–18 April 2008 and that is how it came to be dealt with in front of me. The delay in fixing the summons in an international case such as this was too lengthy and to that extent has been unacceptable.

[37] The issues with which I am dealing are as follows:

(1) Does the court have jurisdiction to make any of the orders sought?
(2) Should the court as a matter of policy exercise its discretion to make any of the orders sought?
(3) Is the court in a position on the evidence which is available before it to exercise its discretion to order, as the mother seeks, the return the children to this jurisdiction?

This is a wardship matter and therefore falls to be dealt with under the inherent jurisdiction of the High Court.

[38] I have been presented with a very careful outline of the law prepared on behalf of the father by Mr Devereux. It seems to me to be an accurate exposition of the inherent jurisdiction. In his written submissions he takes the court through the powers that have derived from the Crown over many centuries as parens patriae to care for those who are unable to take care of themselves. He has set out with clarity, and in a way that is not in any sense disputed, what the inherent jurisdiction means. The powers of a judge exercising the inherent jurisdiction are, in theory, limitless but in practice it is well recognised that there are a number of limitations on the exercise of the jurisdiction. The court should only exercise its jurisdiction if it is appropriate and prudent so to do.

[39] I have been referred to the well-known authority of *F v S (Wardship: Jurisdiction)* [1991] 2 FLR 349, a decision of Ward J (as he then was), in which he stated that he knew that he had very extensive powers. He then said at 356:

> 'Whilst this ancient corroborative jurisdiction survives, I shall scrupulously and rigorously enforce it where I can. Nevertheless, despite this reluctance to curtail my jurisdiction, I consider to exercise these powers would be wrong and I cannot justify what would be a devious entry to the court by the back door where Parliament has so firmly shut the front door to custody orders being made in these circumstances.'

He was there dealing with the conflict between the wardship jurisdiction and the powers of the court under s 34 of the Family Law Act 1996. In *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951 the Court of Appeal set out again the limits on wardship in circumstances where a child had been taken abroad and had become habitually resident in another jurisdiction (the United Arab Emirates). In the leading judgment Thorpe LJ set out the limits, as he perceived them, on the wardship jurisdiction. He said at para [42]:

> 'The courts of this jurisdiction should be extremely circumspect in assuming any jurisdiction in relation to children physically present in some other jurisdiction founded only on the basis of nationality. Parens patriae jurisdiction has a fine resounding history. However, its practical significance has been much diminished domestically since the codification of much child law within the Children Act 1989 in order to achieve essential collaboration internationally. It has been necessary to relax reliance upon concepts understood only in common law circles. Thus our historic emphasis on the somewhat artificial concept of domicile has had to cede to an acknowledgement that the simpler fact-based concept of habitual residence must be the currency of international exchange. The parens patriae concept must seem ever more esoteric to other jurisdictions than the concept of domicile. If we are to look for reciprocal understanding and co-operation, so vital are the steady increase in mobility and mixed marriage together with an equal decrease in the significance of international frontiers, we must refrain from exorbitant jurisdictional claims founded on nationality. To make a declaration of unlawful detention in relation to a child of dual nationality, cared for by a biological parent in a jurisdiction whose courts have sanctioned the by order is only to invite incomprehension and perhaps even stronger reactions in that other jurisdiction.'

Of course, in that judgment Thorpe LJ was dealing with a factual matrix which was wholly different from that with which I am faced. In that case the child had been taken by the mother to the United Arab Emirates and had been there on an habitual basis with her agreement until the relationship between the parents had foundered. The courts in that jurisdiction had made clear orders in favour of the child's father. The mother's return to the UK and her appeal to the English court was made on that basis. Accordingly, the judgment given by the Court of Appeal is understandable and unimpeachable.

[40] So far as the concept in law of habitual residence is concerned, the term is not treated as a term of art with some special meaning, but is understood according to the natural meaning of the words. The question is simple: is a person habitually resident in a specified country? That is a question of fact which has to be decided by reference to all the circumstances of a particular case. That well-established principle was set out as long ago as 1990 by Lord Brandon in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, [1990] 3 WLR 492, sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442. In short:

> '"Habitual residence" refers to a man's abode in a particular place or country which he has accepted voluntarily for a settled purpose as part of the regular order of his life for the time being, whether that is of a short or long duration.'

That is the classic definition set out in *Shah v Barnet London Borough Council* [1983] 2 AC 309, at 343G. All the law requires is that there is a settled purpose, that is not to say that the propositus intends to stay indefinitely. Indeed, his purpose while settled may be for a limited period. Business or profession, employment, health and family, or merely love of the place spring to mind as common reasons for a choice of regular abode. There may well be many others.

[41] In this case, as I have already found, the law and the factual matrix show that these adult parties were habitually resident in the UK. So far as the children are concerned, the law is also clear. As a general rule, a young child in the custody of his parents has the habitual residence of those parents. No unilateral action by one of them can change the child's habitual residence, save by the agreement or acquiescence over time, or by a court determining rights of residence and custody. That was decided as long ago as 1965 in *Re P (GE) (An Infant)* [1965] Ch 568, [1965] 2 WLR 1. In that case Lord Denning MR said at 586 and 10 respectively:

> 'Quite generally I do not think a child's ordinary residence [for that read habitual residence] can be changed by one parent without the consent of the other. It will not be changed until the parent who is left at home childless acquiesces in the change or delays so long in bringing proceedings that he or she must be taken to acquiesce. Six months delay would, I should have thought, go far to show acquiescence. Even three months might in some circumstances, but not less.'

[42] In this case the mother issued this summons as soon as she appreciated what had happened. In fact, within a matter of days, so there was no undue delay.

[43] It is clear that no child who is sent abroad merely for the purposes of education can be said to have changed his or her habitual residence. There are a number of authorities to which I have been referred which support that assertion. I note in particular *Re A (Wardship: Jurisdiction)* [1995] 1 FLR 767. The headnote reads:

> 'If parents were together the habitual residence of the child is that of the parents unless there was a contrary agreement. One parent could not unilaterally change the child's habitual residence without the agreement of the other unless circumstances arose which quite independently pointed to a change in the child's habitual residence. It was open to the parents to agree to change their child's habitual residence without changing their own, but an agreement to send a child abroad to a boarding school is not sufficient.'

The child in that case was habitually resident in England and Wales and the court therefore had jurisdiction to determine the issue.

[44] In this case the agreement for the children to be educated more inexpensively in Portugal necessitated their stay with the paternal grandmother. In a sense that was the boarding element. So the children, by living with their grandmother in those circumstances, did not change their habitual residence.

[45] In *P v P* [2006] EWHC 2410 (Fam), [2007] 2 FLR 439 Macur J also found, in different factual circumstances, that a child being abroad for the purposes of education did not change their underlying habitual residence.

[46] I am clear, on the basis of the findings of fact that I have made, that all of these parties were habitually resident in England and Wales and therefore this court has jurisdiction to deal with this case. That jurisdiction is unchallengeable on the basis of my clear findings.

[47] The only basis upon which these children could have changed their habitual residence would have been if the mother had given true and voluntary consent. I therefore consider as a matter of law whether her consent was so given. In *T v T (Abduction: Consent)* [1999] 2 FLR 912, Charles J said this about consent, at 917:

> 'Additionally, and again in my judgment correctly, it was accepted that if the mother is to succeed I must find that consent was 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. It is not sensible for me to try and give a general definition of what would constitute such a misunderstanding or non-disclosure. For the purposes of this case, in my judgment, such a misunderstanding or non-disclosure, and thus deception asserted by the father, 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 he knew or ought to have known that such a misunderstanding or non-disclosure would, or would be likely to, affect the father's decision to consent to her taking H to England, whether that consent was given on the basis she alleges or on the basis that the father alleges. In such circumstances the mother could not believe, as she asserts, that the father had unequivocally consented to her taking H to England on 2 May on the basis that he would make his home here.'

Obviously the factual matrix in that case is entirely different, but the logic is the same. As I have already found that the mother did not understand the basis of her agreement, she did not give the necessary consent in law.

[48] It has been alleged that, whatever may be the position in relation to consent, there has been sufficient delay or acquiescence in this case to take it out of the norm. I accept the mother's evidence that it was not until the end of November 2007 that she realised the children would not be returning to the UK. On that basis it is clear that she has not excessively delayed in making her application to this court. I do not believe that there is any evidence that she acquiesced in the children remaining in Portugal. She did not understand that she had given an agreement to them remaining there permanently. As a matter of fact, she made a number of attempts to contact them, and she also made a number of attempts to see them whilst they were in Portugal.

[49] In *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 2 WLR 563, [1997] 1 FLR 872 the House of Lords made it clear that attempts to save a marriage or attempts to reach a voluntary agreement for the return of the children do not amount to acquiescence. So in this case, as a matter of law, I do not find that this mother acquiesced.

[50] The point has been raised that the mechanism by which the mother came to this court to seek the return of the children is, in reality, improper. Mr Devereux asserts that what she should have done was to bring proceedings in Portugal under the terms of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) for the immediate return of these children to the jurisdiction of England and Wales. It is his case that the mechanism of the Hague Convention should take precedence to any application in this jurisdiction and indeed 'it is an exclusive initial mechanism' by which applicants should seek the return of their abducted children to the country of their habitual residence. So, he submits, it is the case that wardship is effectively excluded.

[51] I have already pointed to the acknowledged limits on the inherent jurisdiction after the implementation of the Children Act 1989 and the Family Law Act 1986. I have also pointed to the limitation on the grounds of international comity, which were set out so clearly by the Court of Appeal in the case to which I have already referred. However, I do not accept that, where two remedies are available in different courts in different jurisdictions, the Hague Convention proceedings should take automatic precedence.

[52] The submission made on the father's behalf in this regard was not made to me at the outset of these proceedings as a preliminary point. In fact, it was only raised in any way in the final written submissions. Before those submissions were made, I had already heard some 2 days of evidence. That placed me in the position of understanding each of the parties' clear positions on the facts. It seems to me that I am now in an unrivalled position to make clear findings, for this has not been an application which has been dealt with on a 'submission only' basis. But to give credit to the careful arguments of Mr Devereux, I will outline his submissions and the reasons why I do not accept them. He has referred me to 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, and specifically to Art 11. In passing, of course, I note the terms of Art 10. Article 10 states:

> 'In the case of the wrongful removal or retention of a child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired an habitual residence in another Member State.'

Subparagraphs (a) and (b) set out the factors and matters which are of importance.

[53] In this case, as I have already found, the children have not obtained a new habitual residence. Therefore, under the terms of Art 10, it is clear that this country has retained its jurisdiction over them.

[54] Recital 17 of Brussels II Revised provides:

> 'In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay and to this end the Hague Convention of 25 October 1980 would continue to apply as complimented by the provisions of this regulation, and in particular Article 11.'

Article 11 provides:

> 'Where a person or institution or other body having rights of custody applies to the competent authorities in the Member State to deliver a judgment on the basis of the Hague Convention on the civil aspects of international child abduction in order to obtain the return of a child that has been wrongfully removed or retained in a Member State, other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2–8 shall apply.'

The conjunction of the recital and that Article, according to Mr Devereux, means that this court should not assume jurisdiction because to do so would not enable the terms of Art 11, paras 2–8 to be taken into account. It is his assertion that the proper manner in which to secure the return of the children is to make an application in the Portuguese courts so that they can employ the terms of the relevant paragraphs.

[55] In order not to lengthen the terms of this judgment, those relevant paras 2–8 are appended to this judgment as Appendix 1. The essence of the argument is that there are protective measures set out in those paragraphs so that, for example, when applying the defences of Arts 12 and 13 of the Hague Convention, the terms ensure that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his age or degree of maturity. There are also, of course, a number of other matters which are set out there. It is Mr Devereux's submission, therefore, that the court in Portugal should deal with the case in order, inter alia, to give the children an opportunity to be heard. Clearly that is a flawed argument in this case, given the ages of the children. Mr Devereux also raises the point that if this case were heard in Portugal, defences under Arts 12 and 13 would be available to the father. Those Articles, which are well known to this court and are appended as Appendix 2, set out the limited grounds upon which the foreign court can refuse to return the children on a summary basis. Article 12 deals with the position where the period of a year has elapsed between the wrongful removal and the application being dealt with. The Article provides for the judicial or administrative authorities to take into account how settled a child is in its new environment. Article 13 applies where the court is clear that to return the child would put it in the position of grave risk or physical or psychological harm or otherwise place the child in an intolerable situation.

[56] I have outlined those defences in brief, but my outline should not be taken as derogating from the precise wording of the Articles which are annexed to this judgment. I do not accept that in this case either of those defences would, in reality, be open to this father. The children, although they have been in Portugal since March 2007, were not placed there, even on the

father's case, with the mother's agreement until at the very earliest May 2007, and on the basis of my findings August or September 2007. That point is conceded by Mr Devereux on behalf of the father, and so he describes this as a 'quasi settlement' case. Of course, Art 12 does not deal with 'quasi settlement'.

[57] There has been no suggestion in any of the papers placed before me that these children would be placed in any form of grave or psychological harm or other risk if they were returned to the jurisdiction of this court. Clearly, in most cases when the court deals with an application under the Hague Convention, there is no oral evidence and the matter is dealt with by way of a summary hearing.

[58] I do not accept Mr Devereux's arguments as a matter of principle. It does not seem to me to be the law that a parent cannot approach the domestic court. Indeed, he accepts that it is usual for parents to approach the court in England in order to seek an order that the children were habitually resident in the jurisdiction before the wrongful removal or retention took place and for an order that they should be placed in the interim custody of the wronged parent. This type of hearing often occurs on a without notice basis after the other parent has left (not returned) the jurisdiction with the children. Mr Devereux has no quarrel with that level of application. However, he maintains that the domestic court cannot go on to make an order for the immediate return of the child to the jurisdiction because he asserts that only the foreign court can do so with the safeguards and defences which the Hague Convention permits. I do not accept his argument. Indeed, it seems to me to be fundamentally flawed. If this court finds, as I have found, first, that it has jurisdiction and secondly, after hearing full oral evidence and argument, that the children have been wrongfully retained outside the jurisdiction, it follows that this court is in a very good position to make specific findings. In the light of those findings, it is equally apposite to order the children back to the jurisdiction if the facts demand it. By this, no court will be acting in derogation or contrary to the order of any foreign court. In fact, it will be assisting the foreign court which, when it applies the Hague Convention on a summary basis, will have clear findings of fact to assist it.

[59] In this case this is the primary court with the primary jurisdiction. Indeed, the proceedings in this country were commenced before those in Portugal. Therefore, under the terms of Brussels II Revised, provided this court assumes jurisdiction, the court of the foreign jurisdiction, namely Portugal, is bound to cede to the English court. As I have found that I have jurisdiction, and as I consider it is appropriate to exercise it, the Portuguese court is bound to cede to this jurisdiction under the terms of Brussels II Revised.

[60] No preliminary point was taken that I should not hear evidence. In fact, as I have already outlined, the novel arguments in relation to the provisions of Art 11 of Brussels II Revised were raised only in closing submissions. A technical argument such as this, if it is to be advanced, should, in my view, be advanced at the outset of any case. It seems to me to be too late to deal with it after there has been a full hearing and 3 days of court time have been employed.

[61] I am clear in my findings of fact that this mother only agreed to the children going abroad for short-term education while the parties resolved their

differences. That did not alter their habitual residence. Any further consent that may have been obtained has, as I have already outlined, been vitiated because of the failure on behalf of the father to make full disclosure of his underlying motivation. Having made those clear findings on the basis of evidence, I consider that they are sufficient to ensure that any Portuguese court would, on the basis of comity, be obliged to return the children to England. Moreover, as I have already outlined, it does not seem to me that there is any evidence before me of a good arguable defence under the terms of the Hague Convention.

[62] The reality is, therefore, that if the mother made an application in Portugal, the Portuguese court would be bound to return the children to this jurisdiction after a summary hearing. In those circumstances it does not seem to me necessary for her to have to re-litigate abroad when I have heard all of the necessary evidence and have come to clear findings of fact. Therefore, I do not believe that the technical arguments are appropriate in the circumstances given the facts as I have so found. It seems to me, therefore, it is proper for me to make such orders as I consider are appropriate.

[63] The final submission made on behalf of the father is that this court is not in a position on the basis of current evidence to make the orders that the mother seeks. I do not agree with that submission. The court has a clear discretion to make such orders as are appropriate. In a wardship case the children's welfare is the paramount consideration. I take into account all of the evidence that has been placed before me, but I do not consider that the children are so settled in Portugal that it militates against their return to the UK. At their ages I do not consider that their education will suffer if they return here after having been in Portugal, in one case at a primary school for one term at the age of 4 years old, and in the other at a nursery school at the age of 2 years old. Those are not fundamental years in terms of a child's education. Therefore, I consider that I have sufficient information available to me to make an order if I consider it is in the children's best interests.

[64] Having heard both of the parties, I consider that it is in these children's best interests for them to be returned to the UK. I accept the submission that they have spent, as is suggested by Mr Devereux, one quarter to one third of their respective lives in Portugal; but that was not with the mother's full agreement. There has not been a delay in bringing these proceedings. The father has not provided a settled home in Portugal on the basis of an agreement between these parties and I have sufficient evidence to enable me to feel sure that the children can return without their being placed in any danger. Therefore. I am clear that they will return to the UK as soon as practicable.

[65] The mother remains in the former matrimonial home. The father has retained his studio apartment in Earls Court which is the place, I remind myself, where the children spent a month in July 2007. He is well able to return to England. As I understood his evidence, although he is in the process of winding up his English companies, and has a company in Portugal, he is able to undertake the bulk of his work online with the result that he can still earn money, even if he is based in England. In his evidence he accepted that there were issues between himself and the mother that required a solution. He said that in November or early December 2007 he had not minded whether there was a court case in England or in Portugal, but now he would like it to

be in Portugal. I am clear that he will be able to litigate this case properly and fully in the UK. Indeed, it will be easier for him (for he speaks English fluently) to litigate in this jurisdiction – much easier than it would be for the mother (who does not speak fluent Portuguese) to litigate in Portugal. I so state even though this latter point does not affect my mind in coming to the conclusion I do. I simply mention it as a matter of practicality.

[66] What sways me as to what is in these children's true best interests is that the issues between their parents should be litigated in the country of their true habitual residence, namely England and Wales. Consequently I order that they return to this jurisdiction as soon as practicable. However, they will remain based with their father in his flat until this case is dealt with again by this court. I know the court can accommodate a 2-day hearing in May, and so there will not be a long delay. I will listen to submissions as to the precise date upon which the father will return to the jurisdiction with the children, but make it clear that they will be brought back as soon as possible. I also expect these parties to agree interim contact to the mother. If they cannot agree it today, it will be dealt with at a short appointment with a one hour time estimate to deal with this issue. That is my judgment.

Appendix 1

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:

Recital 17

> (17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Art 11. The court of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained. …

Article 11

Return of the child

> 1 Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 Hague Convention'). In order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than

the Member State where the child was habitually resident immediately before the wrongful removal or retention, paras 2 to 8 shall apply.

2 When applying Arts 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3 A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law. Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4 A court cannot refuse to return a child on the basis of Art 13b 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.

5 A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6 If a court has issued an order on non-return pursuant to Art 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the chid was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7 Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child. Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8 Notwithstanding a judgment of non-return pursuant to Art 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable with s 4 of Chapter III below in order to secure the return of the child.

Appendix 2

Hague Convention on the Civil Aspects of International Child Abduction 1980

Article 12

Where a child has been wrongfully removed or retained in terms of Art 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the chid is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child had been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Order accordingly.

Solicitors: *Knights* for the applicant
Dawson Cornwell for the respondent

PHILIPPA JOHNSON
Law Reporter