C v H (ABDUCTION: CONSENT) [2009] EWHC 2660 (Fam)

Family Division

Munby J

5 March 2009

Abduction – Consent – Parents both minors – Parental rights of minors – Whether father consented to the child's removal – Whether consent by parent of minor father sufficient

The child had been removed from Spain, his country of habitual residence, to Wales by the British mother. The Spanish father issued Hague proceedings, seeking the child's summary return to Spain. The unmarried parents were both 17 years old and, therefore, legally minors. A Spanish expert gave evidence that, both as a matter of Spanish domestic law and under the Hague Convention on the Civil Aspects of International Child Abduction 1980, the father had been exercising rights of custody at the time of the removal, and that his minority was irrelevant to the proceedings. The mother relied on the defence of consent. According to the mother the relationship had been in difficulty for some months prior to her removal of the child, and she had made it clear to the father during one of their many arguments that, in the event of the relationship breaking down, she would return to Wales with the child; she claimed that the father had agreed to this plan. The father's evidence was that, while he had been aware that if the relationship were to break down the mother would be likely to return to Wales with the child, he had believed the relationship to be amicable, with only a few moderate disputes of the kind every couple experiences from time to time and that there had been no specific conversation about the child relocating to Wales; he denied that he had agreed to the child moving to Wales. In her written evidence the mother described a dramatic altercation with the father's sister on the day prior to the removal, based on the sister's suspicion that the mother had embarked upon a relationship with another man, followed by a conversation with the father in which the father agreed that the mother could return home to Wales with the child immediately, provided that he could see the child regularly. However, in oral evidence the mother gave a different account of this conversation with the father, in which the father did not respond to the mother's plan to leave Spain with the child, because he was crying too much to say anything. Thereafter the paternal grandparents assisted in the mother and child's departure by driving them to the airport; the mother gave evidence of discussions at this stage with the paternal grandmother, which the mother alleged amounted to the grandmother consenting to the child's removal to Wales. The father's account was the paternal grandparents had assisted the mother in the belief that the mother and child were returning to Wales only for a brief holiday and that the paternal family had first learned that the mother and child were intending to stay permanently in Wales 2 weeks after the departure.

Held – ordering the child's summary return to Spain –

(1) In the light of the evidence from the Spanish expert, the fact that the father had been a minor at the time, and that his parents might, for certain purposes of Spanish law, have been able to give a consent on his behalf, was completely irrelevant in the context of an application under the Hague Convention. The only consent relevant in that context was the consent of the father. Therefore, even if, which was disputed by the father, the paternal grandmother had given her consent to the child's departure, it had correctly been conceded by the mother that such consent could not be operative or indeed relevant for Hague Convention purposes. The mother could not, therefore, rely on conversations that had taken place with the paternal grandmother prior to removal as establishing a defence of consent (see para [8]).

(2) The mother had failed to establish that the father had ever positively and unequivocally given his future consent to her taking the child back to live with her permanently in Wales in the event of the relationship coming to an end. The mere fact that someone in the father's position, in the course of conversation, might have used the word 'agree' or some such word, did not necessarily mean that he was giving, either immediately or with future effect, positively and unequivocally his consent within the meaning of the Hague Convention. The words had to be evaluated in the context in which they had been used; in the light of the parties' relationship at the time; in the light of their contemporary understanding of where things stood and how things might develop; and, importantly, if, as in this context, the consent was a future consent, having regard always to the crucial question of whether such consent was still operative at the crucial date. Assuming for the purposes of judgment that the mother's account of the discussions which had taken place some months prior to the child's removal was true, such discussions had not, in all the circumstances, been sufficient to establish future consent but had constituted no more than preparatory discussion about what the outcome might be were some event to happen and was not the unequivocal giving of consent. On the mother's own oral evidence the father had not said or done anything in the course of their conversation on the day prior to departure which could on any basis have been construed as the giving of consent (see paras [8]–[10] [19] [20], [36]).

Statutory provisions considered
Hague Convention on the Civil Aspects of International Child Abduction 1980, Art 3

Cases referred to in judgment
B (Care Proceedings: Standard of Proof), Re [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141, HL
H and Others (Minors) (Sexual Abuse: Standard of Proof), Re [1996] AC 563, [1996] 2 WLR 8, [1996] 1 FLR 80, [1996] 1 All ER 1, HL
K (Abduction: Consent), Re [1997] 2 FLR 212, FD
L (Abduction: Consent), Re [2007] EWHC 2181 (Fam), [2008] 1 FLR 914, FD
M (Abduction: Zimbabwe), Re [2007] UKHL 55, [2008] AC 1288, [2007] 3 WLR 975, [2008] 1 FLR 251, [2008] 1 All ER 1157, HL

Michael Gration for the applicant
Malcolm Sharpe for the respondent

MUNBY J:
[1] This is a father's application pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) seeking the return to Spain of the child with whom I am concerned, F, who was born on 19 November 2007. F's father is Spanish. His mother is British and lives in Wales. The mother went to live in Spain, together with her parents, and remained in Spain with the father and F after her parents returned to Wales.
[2] The father and the mother are both minors in the eyes of both Spanish and English law, being each of them still 17 years old. At one time it was thought that this might give rise to complications as a result of what were thought to be possible parental rights exercisable in relation to the father and, therefore, indirectly in relation to F by the father's parents.
[3] Expert evidence has been obtained in accordance with the orders of the court from a well-known and highly experienced Spanish lawyer, Senor Alberto Perez Cedillo. I need not go into the details. It is apparent from his

report, which is not challenged, that as a matter of Spanish law, the fact that F's father is himself a minor is, so far as concerns the Hague Convention, neither here nor there. Equally it is not suggested by anyone that the fact that the mother is a minor affects the matter at all for present purposes. As it happens, the father has, since the date which is relevant for present purposes, been emancipated formally in accordance with the procedures of Spanish law. I record that fact but emphasise that it is common ground that neither that fact, nor the fact that he was previously unemancipated, has any bearing upon the issues with which I am concerned.

[4] It is common ground that immediately before F was taken from Spain to Wales on 25 October 2008, that being the date which is critical for present purposes, F was habitually resident in Spain.

[5] It is also common ground that although the father and the mother have never been married, the father had and has, both as a matter of Spanish domestic law and within the meaning of the Hague Convention, rights of custody, which rights he was exercising both in fact and in law up to 25 October 2008. In those circumstances it is common ground that, on the face of it, the mother's action in taking F from Spain to Wales on 25 October 2008 was a breach of the father's rights of custody within the meaning of Art 3 of the Hague Convention and was, therefore, on the face of it, unlawful, both as a matter of Spanish domestic law and in terms of it being a breach of the Hague Convention, with the consequence that it is common ground that, subject only to the mother being able to establish a defence in accordance with the Hague Convention, the father has established his case and, subject only to the mother establishing some defence, has established his right to an order in accordance with the Hague Convention.

[6] The mother relies upon a single defence. Her defence is that the father consented to her taking F from Spain to Wales. The consent relied upon is said to be a consent given by him before F was taken from Spain to Wales. It is not suggested that there has subsequent to 25 October 2008 been anything said or done, or not said or not done, by the father constituting either a consent or acquiescence in F's removal.

[7] It may be convenient to interpolate at this point that on the father's evidence, which on this point is supported by his mother (the paternal grandmother), it was on 9 November 2008 that, as he would have it, he and his family discovered for the first time that the mother was not intending, as they had previously understood she intended, to return with F from Wales from what on his case they had previously understood to be a brief holiday. By 25 November 2008 a little over a fortnight later and precisely one calendar month after F had left Spain, it is accepted by the mother that the father had not merely instructed Spanish lawyers but that those lawyers had put the case before the Spanish Central Authority. There was some delay thereafter, for none of which is the father in any way responsible, before the originating summons which is before me was issued on 13 January 2009. It is quite apparent, not merely from a consideration of that short chronology but from everything I have read and heard, that there is no conceivable basis upon which it could be alleged – even if it was alleged, which it is not – that there had been any acquiescence on the part of the father, or delay on the part of the father, in pursuing his claim.

[8] The case accordingly turns entirely upon the question of whether or not the mother can establish that the father gave his consent. There is much evidence from the mother in particular of discussions which she undoubtedly had, not least in the hours leading up to her departure on 25 October 2008 with the paternal grandmother. But Mr Sharpe, who appears on behalf of the mother, acknowledges that in the light of the expert evidence of Senor Cedillo, the only relevant consent for present purposes is that of the father, and the fact that the father being at the relevant time a minor and his parents might for certain purposes of Spanish law have been able to give a consent on his behalf, is completely irrelevant in the context of an application under the Hague Convention. Even if it be the case, which is not accepted either by the father or by his mother, that the paternal grandmother consented to what the mother was doing, it is correctly conceded by Mr Sharpe that such consent cannot be operative or indeed relevant for the purposes of the Hague Convention.

[9] I need not go into the authorities. It is common ground between Mr Sharpe and Mr Gration, who appears on behalf of the father, that it is the mother who has the burden of proving that the father gave his consent; that the standard of proof is proof on a simple balance of probability, namely, is it more likely than not that the father did give his consent?; and that what has to be proved to that standard of proof is the positive and unequivocal giving of consent.

[10] In some other old authorities it is said that clear and cogent evidence is required before such consent can be proved. That is not, in my judgment, a principle which was ever treated as being special to cases under the Hague Convention. It was merely an application, appropriate at the time that principle was adopted, of the more general principle laid down by the House of Lords in the case of *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, [1996] 2 WLR 8, [1996] 1 FLR 80. Much more recently, in the case of *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141, the House of Lords has re-visited the question and has made it clear that the standard of proof required is the balance of probability pure and simple. The requirement that evidence be clear and cogent is no longer part of our law, and I, therefore, approach the question before me as being simply this: having regard to the totality of the evidence I have read and heard, has the mother established, the burden of proof being upon her to establish, on a simple balance of probability, that there was, prior to F's departure from Spain to Wales, a positive and unequivocal giving of consent by the father to that removal?

[11] There has been written and indeed sworn written evidence from the mother, from the father and from the paternal grandparents. In addition and in accordance with directions given on an earlier occasion by the court, both the mother – and she gave evidence first, the burden of proof being upon her – and then the father gave oral evidence and were cross-examined. In the light of how matters stood at the end of the father's evidence, Mr Gration decided that although the paternal grandmother had travelled with her son to Liverpool to give evidence, there was no need in the circumstances for him to call her to give oral evidence on behalf of the father. Mr Sharpe, for his part, did not desire to cross-examine the paternal grandmother. Accordingly, her evidence is before me in written form but I have not had the advantage of hearing her

give oral evidence or being cross-examined. The fact that she was not required to be produced for cross-examination carries with it, of course, acceptance by Mr Sharpe that her evidence is correct so far as it goes.

[12] There are differing accounts given by the mother and the father as to the state of their relationship in September and October 2008. The mother's account is that the relationship was in difficulties at least by the end of August 2008 and that there were, between then and 25 October 2008, a number of occasions when there were rows and arguments between them. The father disputes that and says that until the crisis which, on his account, erupted almost out of a clear blue sky on 24 October 2008, the relationship was perfectly amicable, there being no more than a few very moderate disputes of the kind which every couple from time to time experiences.

[13] Whether or not the relationship was at that time as described by the mother or as described by the father is not, of itself, central to anything I have to decide. The significance is that, according to the mother, in the course of these arguments there was discussion between her and the father as to what was to happen to her and F in the event of their relationship finally breaking down. Her case is that she always made it clear to the father – and it will be recalled that by then her own parents had already returned to Wales – that in the event of her relationship with the father breaking down, she would return to Wales with F.

[14] The father says there were no such conversations. The furthest he is prepared to go is that he was conscious that the mother's stance would probably be that if the relationship broke down, she would want to return to her country of origin, the country where her parents were by now living and, that is to say, would wish to return to Wales with F.

[15] The mere fact that there may have been such discussions and the mere fact, if fact it be, that the mother made her views and wishes, or even it may be her plans, clear to the father, does not of itself establish consent on his part. What has to be established is unequivocal consent. Inactivity or passivity in the face of the mother's plans is not, of itself, consent.

[16] The mother, in her evidence, asserts that there was certainly one and perhaps two occasions prior to 24 October 2008 when the father not merely listened to what she was describing as her plans in the event of the relationship breaking down but occasions when, on her account, he went further and expressed his agreement to her acting in that way, were that event to happen. In particular, the mother's evidence focused, as did Mr Sharpe's submissions, upon a conversation which the mother says that she had with the father on an occasion during September 2008 when it is common ground that they were both in Wales with F visiting the mother's parents. On the mother's account, the father agreed that they were not getting on and told her that if the relationship broke down, she should take F with her (that is, take F with her back to Wales) so long as she agreed to bring him back to Spain for contact. On any view, that was not a discussion addressing some plan which it was contemplated would be implemented imminently. It was a discussion which, even on the mother's account, was a discussion of a hypothetical event which although, consistently with the tenor of her evidence, she plainly thought, if her account is to be accepted, was distinctly on the cards, was nonetheless an event (namely, the breakdown of their relationship) which might not happen and the timing of which, if it did happen, was very much a matter for

speculation and up in the air. On any analysis that discussion, if it involved anything that can properly be described as the giving by father of his consent, was the giving of what, in some of the authorities to which Mr Gration helpfully referred me, has been described as a future consent; that is, an anticipatory consent tied to or coming into effect on the happening of some future event of uncertain timing.

[17] Mr Gration does not accept that there was any such conversation and, indeed, his client denies it, but he says, 'Let us leave out of account altogether the father's evidence in relation to the matter, let us have regard only to the mother's evidence and let us assume for the purposes of this submission that the mother's evidence is correct and reliable' – he disputes that the mother's account demonstrates the positive and unequivocal giving of any consent at all by the father. He submits in substance that even on the mother's own account, this was no more than a discussion of what might or might not happen if, on some future unascertainable and uncertain event, something did or did not happen. He draws attention to the language of Bodey J in *Re L (Abduction: Consent)* [2007] EWHC 2181 (Fam), [2008] 1 FLR 914 where, having considered various earlier authorities, that judge found that there was:

> 'no reason in principle why a consent should not be valid if tied to some future event even of uncertain timing provided that the happening of the event is a reasonable ascertainability. It cannot be something too vague, too uncertain or too subjective.' (Para [29])

Bodey J went on in the same judgment to say that 'common sense is everything in this sphere'.

[18] What happened – assuming for present purposes that what happened on that occasion was, in fact, as described by the mother – has to be evaluated in the light of all the surrounding circumstances. Consent does not require to be in writing. There can be consent by words or by actions. There can be consent in appropriate circumstances by words and/or actions even if the person giving the consent does not use some magic word such as 'agree' or 'consent' or in the present case (because the evidence of both of them is that the mother and the father always spoke in Spanish) the transcriptions of such words.

[19] Conversely, the mere fact that in the course of some conversation someone in the father's position may actually use the word 'agree' or some such word or may utter words to the effect that 'If something happens, you should take F with you' does not necessarily mean that by those words he is giving, either immediately or with future effect, positively and unequivocally his consent within the meaning of the Hague Convention. One has to evaluate the words used in the context in which they were used, in the light of the parties' relationship at the time, in the light of their contemporary understanding of where things stood and how things might develop, and, importantly, if, as in this context, the consent is as I have described it, a future consent, always having regard to the crucial question of whether such consent offered on some previous occasion, was still operative at the crucial date, that date being for present purposes, of course, 25 October 2008.

[20] My conclusion in relation to events before 24 October 2008 is that the mother has failed to establish that the father ever positively and unequivocally

gave his consent to her taking F back to live with her permanently in Wales in the event of the relationship coming to an end. I am content to assume for the purposes of this judgment that the mother's account is on this point to be accepted in preference to the father's. That, I stress, is an assumption I am prepared to make. It is not necessarily the finding I would make, were it necessary for me to make the finding. There is in fact, in my judgment, no necessity for me to make any particular finding. It is perfectly appropriate for me to proceed upon the assumption I have mentioned because so far as concerns this part of the history, I accept Mr Gration's submission that even accepting the mother's own evidence, even putting on one side the father's very different account, on her own account the mother has simply failed to establish that there was the positive and unequivocal giving of consent without which the conversations take the matter no further. Taking that conversation in the context of all the circumstances as they existed at the time, it seems to me that the discussion, the conversation, constituted no more than preparatory discussions about what the outcome might be were some event to happen. It was not the unequivocal giving of consent.

[21] The story in those circumstances moves on to the events of 24 October 2008. It is common ground that on that day the mother was seen by the father's sister sitting in the car of another man. The mother's account is that the meeting was entirely innocent, that the man was a friend (using that word in its ordinary rather than its colloquial or cynical sense) and that she was there because that friend had indicated that he might be in a position to help her in obtaining the advice or assistance of a Spanish lawyer. Consistently with the mother's account, the father's understanding on the basis of what he was subsequently told by his sister was that his sister formed a very different impression indeed and had formed the view that the mother was (to use the English colloquialism) carrying on in some inappropriate way with this other man. It is common ground that the sister, when she saw this as she was passing the car on her moped, stopped, and there was an unattractive scene involving the mother and the sister in which, on the mother's account, the sister attacked her and pulled her hair.

[22] In circumstances which remain slightly obscure (but it does not matter) the sister, the man and the mother went their separate ways and the father bumped into the mother as she was walking back home in tears. The accounts by the mother and the father of what exactly took place between the time at which they met up with each other on the pavement and the time at which their ways parted that evening differ in certain respects. In particular, there appears to be a difference between them as to whether they parted before the mother reached the father's home, whether they parted in or shortly after he had got out of the lift or whether they parted after they had both returned home and he then went out. That seems to me not to matter at all.

[23] It is common ground that there came a point that evening at which the mother and father parted, by which I mean a point at which the mother remained in the house while the father either remained out or went out. It is common ground that after that moment the father and the mother neither saw each other nor spoke to each other before the mother departed from Spain with F the following day. And it is common ground that it was only after the moment at which the mother and the father had parted that the father, being rung up by his sister, learned from the sister what had happened.

[24] The father's account is that having discovered the mother in tears, as I have said, and on asking her what had caused the problem, why she was in tears, she did not tell him what it was but used words to the effect 'You'll find out soon enough'. I do not know what exactly it was that the sister told the father. I do not know whether the account which the sister gave the father, whatever that account was, was a truthful and accurate account or an account which was untruthful or inaccurate. The fact is that, on the father's account, the only explanation he had of what had happened the previous evening was the one which he derived from his sister.

[25] His account is, consistently with evidence which he had given to the same effect at an earlier stage while giving evidence, that although previously he had thought that the relationship between him and the mother was perfectly satisfactory, he came almost immediately to the conclusion having been given this information by his sister, that the relationship between him and the mother was at an end and that he became, as a result, very distressed, that being his explanation for why he did not return home that night and why he was not present the following day when the mother was taken to the airport by the paternal grandmother and paternal grandfather and seen off with F on the aeroplane to Liverpool airport.

[26] Mr Sharpe understandably expresses some scepticism as to whether that account by the father can really be correct. If there had not been any difficulties in the relationship until the evening of 24 October 2008 – and that was the father's stated position repeated more than once in the course of evidence – then why, merely because of what his sister had told him, should he immediately come to the conclusion that the relationship with the mother of his child was over? Those are not matters which I need to explore further.

[27] The relevance of the events, as I have been describing them, is merely to set the scene in a general way which suffices for present purposes before examining what precisely it is said by the mother that she said to the father and, more particularly, what, according to the mother, the father said to her in the course of their conversation on the evening of 24 October 2008 between the point at which they met on the pavement and the point at which a little later they parted, she to stay at home, he to go out and, as it turned out, stay out overnight with his friend.

[28] In her affidavit, the mother describing this incident, said this:

> 'I walked home and en route met the plaintiff who had seen me walking along. I told him what had happened and we carried on walking back to his family's home. I told him I wished to leave Spain and return to Wales with F immediately. He informed me that he agreed with my leaving provided that he was able to see F regularly. He then left as I entered the lift to go up to his parents' apartment.'

As will be appreciated, the importance of that part of the mother's evidence is not so much for present purposes whether or not and, if so, to what extent she did, contrary to his account, explain to him what had happened, nor whether she is right or, as he would have it, wrong in saying that they separated as she was going into the lift. The importance of that piece of her evidence lies in her assertion, first, that she told him that 'I wished to leave Spain and return to

Wales with F immediately' and, secondly, that he then 'agreed with my leaving provided he was able to see F regularly'.

[29] Although ironically at the outset of the hearing Mr Gration had raised the question of whether there was any need to hear oral evidence from the parties, his stance being that the mother's written evidence was so shot full with difficulties and inherent improbabilities that her case failed without need for oral evidence, he accepted on reflection that it would be appropriate that both the mother and the father should give oral evidence. It was, as it turned out ironically, happy for his client that that course was followed because what was striking in the mother's oral evidence was what she did *not* say. She was taken in her evidence-in-chief very carefully by Mr Sharpe through the events of the evening of 24 October 2008 and the crucial part of her evidence was to the effect that she said to the father – and this part of her oral evidence was entirely consistent with her affidavit – that she wanted to go back to Wales immediately, but in her evidence-in-chief, not merely did she *not* assert that the father thereupon expressed his agreement with that; what she actually told me was that, in effect, she had no response, 'He was ignoring me'. The course of her evidence-in-chief continued. It reached the point at which she described how she and the father had parted at the entrance to the house. At no stage, either down to that point in her evidence-in-chief or thereafter in her evidence-in-chief, did she assert that the father had agreed with her, nor did she assert that anything had happened which might, as a matter of law, be construed as the giving by him of consent.

[30] Mr Gration in his cross-examination skilfully pinned the mother down in confirming, more than once, that that account was correct, before bringing to her attention that she had not in her oral evidence made the assertion contained in her affidavit. He carefully took the mother through the relevant sequence of events as she had already described them. The precise words she used in answering Mr Gration's questions differed in some minor respects from the words she had used in answering similar questions from Mr Sharpe, but the essence of her evidence was precisely the same; thus, for example, describing the same episode in response to questions from Mr Gration, she said: 'He did not speak. He was crying too much. He said nothing in response to what I was saying.' Mr Gration took the precaution of getting the mother to confirm that account again and she summarised her evidence saying: 'He said nothing and left'.

[31] Mr Gration submits – and the detailed arguments in support of this submission are helpfully and clearly set out in his position statement – that the mother's case is inherently improbable. Obviously he relies upon the fact that the accounts given in material respects by both the father in particular and supported as they are in certain respects by the evidence of both the paternal grandmother and the paternal grandfather contradict the mother's account. But in the final analysis at the end of the day, never mind how improbable the mother's account may be, never mind whether it accords or does not accord with the evidence of the father and the paternal grandparents, and let it be assumed that the mother's evidence is correct, his submission is stark and simple: on the mother's own account as given in her oral evidence, she does not even assert that the father, in the course of that conversation on 24 October

2008, either agreed or consented or said or did anything which she understood or could reasonably understand as being the giving by him of any form of consent at all. On the contrary.

[32] He says not merely does the mother's oral evidence contain not a word of reference to the father agreeing or consenting to anything; as the extracts I have already set out show, the mother, more than once, described the father's response to what she was saying, and in particular the father's response to her saying she wanted to go back to Wales, as being, as she variously put it, 'He was ignoring me. He didn't speak. He was crying too much' or 'He said nothing and left'. So, says Mr Gration, not merely is there lacking from the mother's oral evidence any assertion that anything was said or done which is capable of amounting to the giving of consent, the suggestion that consent was given is actually inconsistent with the mother's own evidence that the father said nothing and made no response to what she was saying and, moreover, as she described, giving circumstantial colour to her account, that in part that was because he was crying too much.

[33] Mr Gration also ties that analysis of that part of the mother's evidence in with a comment she had made at an earlier stage in her evidence-in-chief when, being asked questions in relation to the possible use of a Spanish lawyer, the mother used words to the effect that the father 'would not have listened at all' to any discussion on the topic. If that was the mother's view in relation to that, then, says Mr Gration, it is hardly to be imagined that the father would have expressed agreement, consent, on the pavement on the evening of 24 October 2008.

[34] Now, Mr Sharpe, of course, says, and can properly say 'Well, the mother has sworn to this in her affidavit'. So she has, but it was most striking that in the course of being taken carefully through these events, first by Mr Sharpe in evidence-in-chief and then more than once, as I have pointed out, by Mr Gration in cross-examination, and being given every opportunity to give the fullest possible account of what was happening, there was completely lacking from the mother's oral evidence any reference to the matters set out in that crucial sentence in her affidavit, namely, 'He informed me that he agreed with my leaving provided he was able to see F regularly'. Moreover, the oral account she gave, which in many respects was a much more detailed account than the account set out in the relevant paragraph of her affidavit, was in the circumstances as I have already described them *inconsistent* with the assertion that the father had expressed agreement.

[35] In those circumstances Mr Gration is entitled to submit that the mother's account – certainly the mother's account upon which I ought to proceed – is the account she gave me in the witness box. She was examined and cross-examined entirely properly and fairly. Mr Gration is not seeking to trap her on a single, ill-considered answer because, as I have indicated, he carefully took the precaution before closing the trap around her of taking her himself not once but twice through the crucial events which she had already described. The oral evidence she gave of these crucial events was, in substance, completely consistent, as will be apparent from the extracts I have demonstrated.

[36] What has to be established, to repeat, the burden being on the mother, is that the father positively and unequivocally gave his consent. It is, in my judgment, quite impossible for the mother to make that assertion insofar as it

is suggested that that consent was expressed on 24 October 2008. On her own evidence, it was not and that, so far as concerns the events of 24 October 2008, is the end of her case even assuming, which for present purposes I am entirely willing to assume, that her evidence is in every respect correct and assuming, although without so finding, that her account is to be preferred to that of the father. Neither on his account, nor on her account, but more particularly not on her account, did he say or do anything, or not say or not do anything, in the course of that conversation on the evening of 24 October 2008 which can on any basis be said to be the giving of consent.

[37] Mr Sharpe, without in any way resiling from the weight which he sought, albeit unavailingly, in my judgment, to attach to what the mother had said in the affidavit, sought to persuade me that the father had given consent, even if express words of consent or agreement were not uttered by him on 24 October 2008, as a result of a combination of what he had said during the course of the earlier conversation in Wales which I have already described, taken in conjunction with the fact that on the mother's account, as I have said, she made it explicitly clear to him on the pavement on the evening of 24 October 2008 that she would be going back to Wales.

[38] Mr Sharpe analyses the matter thus. He submits that the conversation in Wales in September 2008 was the giving of a future or anticipatory consent to come into effect upon the happening of a particular event, namely, the breakdown of the relationship, that that event happened in October 2008 in circumstances where the mother spelled out to the father on the evening of 24 October 2008 that she was going back to Wales the following day, so that the event or the condition upon which the earlier anticipatory consent had been given was thereupon satisfied with the consequence, submits Mr Sharpe, that even if the father did not, on 24 October 2008, utter positive words of agreement or consent, his failure to offer words of opposition or dissent to what the mother was saying is neither here nor there because she was merely, as it were, giving him notice that the event upon the happening of which his previous consent would operate had now come to pass.

[39] As a matter of legal analysis, the argument, if I may say so, is faultless, but, of course, it depends upon the facts. And the argument, if it is to succeed – which, in my judgment, it does not – involves reading more into the conversation in September 2008 than can, in my judgment, properly be read into that conversation. I need not refer back to the observations I have already made about that.

[40] As I have already indicated, at the end of the conversation on 24 October 2008 which I have just been considering the mother and the father went their separate ways and did not speak to each other again until after the mother had returned with F to Wales. It is common ground that the mother did speak that evening with the paternal grandmother, just as it is common ground that the mother, having got her father in this country to arrange her flights, that being done over the internet, was then driven to the airport the following morning, 25 October 2008, by the paternal grandparents.

[41] So far as concerns what the grandmother is alleged to have said on the evening of 24 or on the morning of 25 October 2008, it seems to me not to matter at all. The expert evidence from Senor Cedillo makes it clear that so far as concerns the matter with which I am concerned, the only relevant voice is that of the father, albeit at that stage unemancipated, not that of his mother. It

is the consent of the father which the mother has to demonstrate if she is to establish a defence. Even if the paternal grandmother expressed her consent, it is legally neither here nor there.

[42] It is, of course, said 'Well, plainly the mother and F left Spain with the blessing of the father and his family. It was the father's own parents who took her to the airport in circumstances where, although the father was not there, it seems that he was by then aware of the fact that the mother was leaving and, moreover, leaving with the assistance of his own parents'. No doubt in one sense the paternal grandparents were content that the mother and F should leave although they were understandably upset that their grandson was going. It all depends, however, upon whether their understanding and belief was, as the mother would have it, that the mother and F were going permanently with a view to returning to live in Wales, albeit that they would be returning for contact, or whether, as the paternal grandparents tell me they believed, the purpose of the mother's journey to Wales was simply, as, for example, had happened in the month or two previously, to enable her to take a short holiday in Wales with F. If it was the latter, then it is entirely understandable that they should have assisted in the process.

[43] It does not seem to me very much to matter what the paternal grandparents said or did or thought or understood. As a matter of law under the Hague Convention, the only matter which is relevant is the father's words and acts insofar as those words or acts did or did not amount to the giving of consent. The only way in which, consistently with the expert evidence of Senor Cedillo, the paternal grandmother's words, even if words of consent, could be relevant and binding upon the father is if, in uttering such words, she was acting as his agent. One can, of course, act by oneself or by some properly appointed agent, so there is no obstacle in legal theory in an appropriate case in a father's consent having been communicated through some intermediary or agent. But there is from beginning to end in this particular case nothing, in my judgment, which lends the slightest credence to any idea that in saying or doing whatever it was she said or did, the paternal grandmother (and I focus upon her rather than the paternal grandfather because, perhaps understandably in the circumstances, much of the talking seems to have been done by her and she seems to have had a close and warm relationship with the mother) was said otherwise than by her speaking her own mind on her own account and no doubt speaking on her account both as the mother of her son and as the grandmother of her grandson. No doubt she spoke with the interests of her son in mind, no doubt she spoke with the interests of her grandson in mind, but that is far from saying that in saying or acting as she did, she was acting as agent or intermediary for her son.

[44] I end where I began. The issue in this case, the only issue in the light of what is properly common ground, is whether the mother can demonstrate, the burden of proof being upon her, that the father positively and unequivocally gave his consent to what she did when she brought F from Spain to Wales on 25 October 2008. I conclude that the mother has failed to establish that the father gave his consent. She has failed to establish that on her own evidence and the conclusion to which I have come is the conclusion I would have come to if I had heard no evidence of any sort from either the father or his parents. The simple fact, in my judgment, at the end of the day, despite Mr Sharpe's valiant endeavours on behalf of his client, is that on the

mother's own account, even if one accepts it in its entirety, and even if one leaves on one side altogether the accounts of the father and his parents insofar as they conflict with the mother's account, she simply does not establish her case.

[45] In the circumstances, the only defence which is put forward to the father's claim having failed, the father is entitled to the order he seeks under the Hague Convention. The question of discretion, therefore, does not arise. Had I found that the father had given his consent, there would still have been a discretion which I would have been required to exercise judicially in deciding whether or not, notwithstanding the giving of that consent, he was nonetheless entitled to the order he seeks. That question does not arise but it is right for me to say very briefly that if I had been persuaded that the father had given his consent, I would not in all the circumstances have exercised my discretion in favour of making the order he seeks.

[46] Discretion in every Hague case is at large and unfettered: see in particular the recent judgments of the House of Lords in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] AC 1288, [2007] 3 WLR 975, [2008] 1 FLR 251 and in particular the speech of Baroness Hale of Richmond. There was a certain amount of debate before me as to the extent to which the learning in *Re M* requires a re-visiting and re-appraisal of the earlier learning encapsulated in particular, as it happens, in the judgment of Hale J (as she then was) in the case of *Re K (Abduction: Consent)* [1997] 2 FLR 212 in 1997: see in particular her observations in the penultimate paragraph of her judgment. I am inclined to think that the approach which Hale J there set out remains good and wise learning notwithstanding the subsequent elaboration of her thinking as Baroness Hale of Richmond in *Re M*. I am inclined to think that it will be an unusual case in which consent having been established, it is nonetheless appropriate to order a return. But, as I have said, that question does not arise. It is sufficient and dispositive of this case that, in my judgment, for the reasons I have given, the mother has failed to establish the positive and unequivocal giving of consent by the father, which alone is relied upon as the only defence to this claim.

Order accordingly.

Solicitors: *Dawson Cornwell* for the applicant
Griffiths Hughes Parry for the respondent

SAMANTHA BANGHAM
Law Reporter