Neutral Citation Number: [2009] EWCA Civ 588

Case No: B4/2009/0751

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRESIDENT OF THE FAMILY DIVISION
HIGH COURT OF JUSTICE (FAMILY DIVISION)
FD08P02518

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd June 2009

Before:

LORD JUSTICE WARD
and
LORD JUSTICE WILSON

- -

Between:

P-J (Children)

- -
- -

Clive Newton QC and David Blake (instructed by Messrs Mark Saunders) for the appellant Mother
Teertha Gupta (instructed by Messrs Dawson Cornwell) for the respondent Father
Richard Harrison (instructed by Messrs Lyons Davidson) for the Guardian
Hearing date: 9th April 2009

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Approved Judgment

Lord Justice Ward:

Introduction

1. The respondent and the applicant are husband and wife having married on 20th May 1995 in Spain. The respondent is a Spanish national serving as an officer in the Spanish army. The mother is Welsh. She is a school teacher. They have five children, S who will be 13 in a few weeks time, J now aged 11, T who is 9, E aged 6 and D who is 4 years old. On 27th March 2009 Sir Mark Potter, the President of the Family Division, ordered that the mother should forthwith return or cause the return of the children to the jurisdiction of Spain, that order not to be enforced by way of a tipstaff collection order or otherwise until after Saturday 11th April 2009. That was Easter Saturday and so this court sat as a matter of urgency on Maundy Thursday to hear the mother's application for permission to appeal the President's order which Wall L.J. directed be heard on notice to the respondents with the appeal to follow if permission is granted. S is the second respondent, the CAFCASS officer having been appointed her guardian ad litem. Having heard full argument, we granted permission to appeal, but dismissed it for reasons we would give in writing. These are my reasons for arriving at that conclusion.

The background

2. Until recent times the family unquestionably lived in Spain. The marriage may not have been an auspiciously happy one –so far as the mother at least was concerned, it had its difficulties and it has probably now irretrievably broken down. The President was not in a position to make findings, nor was it necessary for him to do so, in relation to the individual allegations of misconduct made by the mother against the father, but he was able to say "with confidence", that "the precipitating factor for her wish to escape the marriage and her fears for the future are based less on any incidents of violence which may have occurred than upon the father's controlling nature, volatility, and his refusal to take medical or counselling advice in respect of his bad temper despite promises in the past to do so".

3. The crucial issue in dispute was where the children were habitually resident, in Spain or in Wales. It is common ground that the family home was in Spain. Then on 23rd August 2007 father drove whole family to the maternal grandmother's home in Wales, father returning alone to Spain about a week later. Thus it was not in dispute that until this move the parties and the children were all living together and habitually resident in Spain. The mother asserted that she and the father agreed upon a trial separation for a year but the President became satisfied that no such separation was agreed in any formal or definite sense. Instead, as the President found:

> "58. … She and her husband were essentially at one in their evidence that it was desirable and convenient for the children to have a school year in England without unduly interfering with their Spanish schooling and at a time when the house, in which it was agreed they would live in Spain on their return, required extensive refurbishment, involving an architect and contractors, upon which the father would himself work, as well as supervising the operation while staying on in their army accommodation. As I have already indicated, it was not a

> consensual separation in any sense other than an arrangement between the parents, in the light of their then circumstances, that the mother and children would move to England and stay with the grandparents for the next school year, with the father visiting when he could.
>
> 59. It was the mother's evidence that, in the light of the state of the marriage, she had earlier in 2007 made known her desire for divorce; she had wanted to go in February but had been persuaded by the father's sister to stay. However, it was clear to me, both from her and the father's evidence that, in so far as he may have known of her desire or intentions at that time, he certainly never accepted them and they stayed together. The mother stated in her oral evidence that, although he knew her position, he simply ignored her views and mechanically went on planning for the future together. She also stated that, so far as she herself was concerned, the separation involved in her taking the children to England was temporary and represented a good opportunity to have "space" from her husband. Having heard and considered the parties' evidence, I am satisfied that, when the mother and children left Spain to go to Wales, their absence from Spain was by common agreement for the period of the children's school year only and it was their common hope and intention (whatever may have been the mother's private concerns about the future) that they would all return to Spain to resume family life together there in the home by then refurbished for that purpose."

4. By June 2008 the mother had had a change of heart or a stiffening of resolve, whichever way one looks at it. The President made these findings:

> "62. … while in many respects, in relation to later events, I prefer the account of the mother, having heard her oral evidence, I do not accept that the question of a possible non return by the mother or children at the end of the children's school year surfaced in any real or meaningful sense between the parties until the visit of the father to Wales in June 2008, when, (on an occasion denied by the father but vividly described to me by the mother) she informed the father that she did not wish to return to Spain but wanted a divorce and to remain in South Wales with the children. Until that time, as she essentially accepted in cross-examination, (a) she was aware that the husband did not accept or contemplate that they should separate, (b) she knew that he was expecting and planning for the whole family to return in July/August 2008 and (c) that her own state of mind was one of lack of decision, she retaining the hope that the marriage would still work. It was only gradually over the time of her stay in Wales that she came to see things clearly and decided that the relationship was over. Accordingly, in June she informed the father that she wanted a

> divorce. She also made clear that she did not wish to return to Spain.
>
> 63. Nonetheless she did so. On her own account, this happened because, at the time of her ultimatum, the father, having acknowledged that his behaviour had been intolerable and that he would seek professional help, persuaded her to return to Spain to give the marriage one last chance. I accept that on that occasion he assured the mother that, if things did not work out, he would personally accompany her back to Wales with the children to live and resume their schooling there. Nevertheless it was by agreement and with a view to resuming permanent residence in Spain that the father drove the children back to Spain, and the mother agreed to follow (as she did) thereafter. Thus, the mother returned in pursuance of the common hope and intention of the parties to save the marriage; she took up residence in the family home prepared for that purpose; and the children resumed schooling in Spain." [The emphasis is the President's.]

5. The detail of the family's return to Spain is this. The father flew from Barcelona to Wales on 9th August to help the family pack and effect the removal. On 15th August he drove the children back to Spain in the family motor car leaving the mother in Wales. She followed on 3rd September, but had to return to the United Kingdom a week later to collect the family dog and she and the family pet returned to Spain on 15th September.

6. On that day the children started school in Spain. The parties had arranged in March 2007 before the move to Wales, that the children should resume their education in Spain in the Arabel School. During a visit to Spain in February the parents viewed the school, met the teachers and informed the head teacher of their intention that the children who were then in Wales would attend the school in the academic year 2008/2009. That was not accepted by the mother but it was confirmed by a letter from the school. On 31st March 2008 the father completed application forms and on 26th May the school published the list of pupils for that year including S, E and D. On 9th September 2008, the day before the mother's return to Wales to get the family dog, the parties both attended the Arabel School together to confirm that S would be starting there but that the other children would be going to another school. A letter from the Arabel School confirmed that position.

7. As to what happened on the mother's return, the President accepted the picture of a rapid development of unhappiness in the home and a resumption of arguments between the mother and the father. He found:

> "64. … I accept that there a was conversation with the father at one point in which he appeared to accept that the marriage was over and spoke of going on a pilgrimage to reconcile himself to it. Despite this however, I am satisfied that, once again, the mother agreed to a further period of effort to keep the marriage together and, with the mother's co-operation and consent, the children resumed their schooling, she having

> decided to give the father and the marriage one more chance. I do not doubt that, at that point, the father, insensitive to, and essentially brushing aside, the wife's unhappiness, was optimistic that the storm had passed and was himself determined that the family should resume life in Spain where the children were once again back at school and happy (he knowing nothing of the wife's having held open their school places in Wales)."

8. This effort to keep the marriage together failed. On 15th October 2008 the mother removed the children from their respective schools and travelled with them to the airport. S telephoned the father to alert him to what the mother was doing. He rushed to the airport and sought to stop the mother from taking the children from Spain. He was obviously upset, shouting and waving his arms but he was restrained by the police and the children left Spain for the United Kingdom.

9. On 17th October 2008 the mother sent a telegram to the father which stated:

> "As you and I have discussed lately, and according to which we agreed verbally, I am leaving with the children for a while to try to resolve our family problems with calmness and to think what decisions to take. You know where we are so you can organise yourself to visit the children."

10. The mother began proceedings under the Children Act 1989 in the local County Court and obtained an interim order under section 8 of the Act. On 28th October 2008 the father presented a petition in Spain for "a disputed special separation suit". On 26th November 2008 he issued an originating summons pursuant to the Hague Convention on Civil Aspects of International Child Abduction ("the Convention") and Council Regulation (Council Regulation (EC) No 2201/2003) ("Brussels II Revised") seeking the return of the children to Spain.

The judgment under appeal

11. The mother had raised a number of defences to the claim, the President saying:

> "44. … I am satisfied that, despite the multiplicity of defences raised by the mother in her amended defence (see paragraph 9 above), the only issue of difficulty or substance is the first, namely that relating to habitual residence. It is therefore convenient for me, by way of preliminary, to consider the remainder of the issues in the order set out in the amended defence."

12. The first of those other defences was that the father did not enjoy rights of custody under Spanish law, alternatively that at the time of removal he was not actually exercising them. The President rejected this contention holding:

> "45. The reports on Spanish law of Sr. Lopez, plainly establish that under Articles 9.4 and 9.1 of the Spanish Civil Code, at the time of the removal of the children the father enjoyed all rights

> and responsibilities inherent in his parental authority (according to Article 154 of the Spanish Civil Code), including the right to determine the children's place of residence. In fact, both parents enjoyed such rights under Articles 154 and 159 of the Spanish Civil Code and, in the absence of agreement, the matter required to be brought before the local Spanish Court for determination. For reasons which I will elaborate under "consent" below, it is plain that there was no such agreement and the removal of the children by the mother was therefore in breach of the rights of custody of the father for the purposes of Article 3(a) of the Convention. Further, following receipt and consideration of the second report of Sr. Lopez, counsel for the mother conceded that, for the purposes of Spanish law, at the time of the removal the father was exercising such rights of custody."

13. Next, consent: the President applied the observations of Bodey J. in Re: L (Abduction: future consent)[2008] FLR 914:

> "[30] But common sense is everything in this sphere. If the consent was given when the facts were wholly and manifestly different from those prevailing at the time of the removal; or if the consent was given so long ago that it must clearly have lapsed; or if the consenting party had withdrawn that consent before it were acted on by a removal of the child, then in those various circumstances the defence would not be made out. It is all a question of degree." [Emphasis added by the President]

14. The President made these findings:

> "48. Having heard the evidence of the mother and her sister, it is not in dispute that the act of removal was surreptitious and that the immediate intentions of the mother and the arrangements for removal were concealed from the father and designed to present him with a fait accompli. Further, upon his arrival at the airport, he plainly made clear his objections to removal of the children at a time when the mother could still have turned back from the flight upon which they were booked, but she proceeded nonetheless. The mother has sought to rely upon discussions in England (amounting to a pact or agreement) with the father to the effect that, if following the mother's return to Spain, the so-called reconciliation period of one month was not a success, the mother would be free to return to England with the children. She further asserts (supported by her sister's evidence) that, a month before removal, the father was assenting to her return to Wales with the children and co-operated (unsuccessfully) in seeking to book tickets on the Internet for them to return to Wales on 9 September with the mother and sister, though he later indicated that he was not prepared to pay for the tickets himself. The father says that account is lies. On the basis of the evidence

> before me, I prefer the mother's version as to what happened in Spain at that time. However, I do not think it is sufficient to establish the husband's consent to the removal in mid-October, when I am satisfied that the mother knew or suspected that the husband would not consent, or at the very least was likely to object, at a time when the children were happy in the new home and had successfully re-started at Spanish schools. Not only was the husband volatile and therefore likely to change his mind, but a return at that time would have uprooted the children without warning or any preparation for the shock of such removal. I therefore reject the defence of consent."

15. He then dealt with the suggestion that the children objected to return to Spain. At that time S was stating her wish to return to Spain which the mother suggested was a wish formed under influence of pressure from the father. The guardian was satisfied that S "had convincingly made clear the independence of her own views as reported." The President was satisfied that:

> "… whatever be their wishes and feelings, it is clear that none has expressed objections (as opposed to shades of preference) to being returned to Spain."

He added:

> "52. Finally under this heading, I should mention that, in the closing stages of the case, the mother conveyed through counsel the information that J has very recently expressed happiness with her situation in Wales and a wish to remain. I am prepared to accept that this may well be so. However, such shifts of feeling are almost bound to occur in cases of this kind as time passes and delays are incurred before the Court can rule upon the matter. In any event, the information I was given did not appear to me to amount to the kind of clear and informed objection required for the purpose of the Convention. I therefore reject the defence of children's objections."

16. The President found little substance in the last defence of a risk of psychological harm or of the children otherwise being placed in an intolerable position. I need say no more about that.

17. Dealing then with the critical question whether or not the children ceased at some stage in 2007/8 to be habitually resident in Spain, the President correctly stated that only if they had become habitually resident in Wales would the further question arise of whether or not, as he put it:

> "On the basis of their return for a few weeks for the purposes of a parental reconciliation which failed, they nonetheless reacquired their habitual residence in Spain before their wrongful removal."

18. As to the approach he should take he directed himself as follows:

> "66. Whether or not a person is habitually resident in a specified country is a question of fact to be determined by reference to all circumstances of the case. It needs no quotation of authority for the proposition that, in our domestic law, as applied in Convention cases for the purpose of proving a change in the habitual residence of a person who moves from one country where he is habitually resident to another, it is necessary to prove (i) physical presence/ residence in the new country (ii) for a reasonable period of time (iii) for a settled purpose and with a settled intention. In relation to (ii) and (iii), it must be shown that the residence has become habitual and will, or is likely to, continue to be habitual."

19. He concluded:

> "69. … it does not seem to me that, so far as the children are concerned, there was any real, or at any rate manifest, diversity of purpose as between the parents until June 2008, when the mother told the father that she wanted a divorce and to stay in Wales rather than to return to Spain. Up until then, the children were by common agreement taken to England by the mother for the temporary purposes of their schooling and to stay with their grandparents during renovations, the mother accompanying them as their carer, but not in any sense for the purpose of a family move to England. The "family" did not move to England. The father, as the family provider, remained in Spain, habitually resident there, doing up the family home for occupation on their return and visiting England when he could. The mother for her part, similarly went to and fro from Spain for various reasons, including a visit by J to her dentist and, on her visits and in email correspondence from England, she showed an active interest and made input into the renovation of the house by the father on the basis that she would be returning to occupy it. The family roots thus remained firmly in Spain but, as it were, during a period of hiatus while the house was renovated. That was not only the position and understanding of the father; it was the perception of S and, as I have found, the declared position and understanding of the mother, the first indication of a contrary view on her part being the declaration of her desire/intention to obtain a divorce and stay in England in June 2008.
>
> 70. Upon making such declaration, she was then immediately dissuaded by the father and agreed that the children would return to Spain with the father at the end of the school year as originally agreed and intended by both of them. It thus appears to me that, if habitual residence had not been acquired by the children in England by the time of the conversation in June, pursuant to which the children returned to Spain with the father in August, their continued residence in Wales during the few

> remaining weeks of their school term before that return, did not advance the position. The planned return remained in place."

20. Mr Blake on behalf of the mother placed reliance upon a dictum of Sir John Balcombe in Re: M (Abduction: habitual residence) [1996] 1 FLR 887, explaining Lord Brandon of Oakbrook's speech in Re: J (A Minor) (Abduction: custody rights) [1992] AC 562 where Sir John Balcombe said:

> "All he was saying was where a young child is in the physical care of a mother who alone has parental responsibility for the child, then normally the child's habitual residence will be the same as hers, since it is her will that determines the element of volition involved in the concept of habitual residence."

As to that the President said:

> "73. … while I do not differ in any way from the statement of the law classically expounded in Re M, I note two important points in relation to the circumstances of this case. In the course of their exposition of the law, Sir John Balcombe at 892C-h and Millett LJ at 896b respectively recognised the correctness of Wall LJ's decision in Re S and that, where both parents have equal rights of custody/parental responsibility, neither can unilaterally change the habitual residence of the child. Furthermore, the court recognised and emphasised that habitual residence, while primarily a question of fact, is to be decided by reference to all the circumstances of any particular case. The court plainly recognised that, where there has been an agreement between the parties as to the basis on which the children will be sent or taken to another country for a temporary purpose, in particular that of education, that will not alone be sufficient to change their habitual residence (per Sir John Balcombe at 893g). Such an agreement is one of the main facts or circumstances to be taken into account."

21. The President concluded:

> "79. … I do not find it established that there was any change in the habitual residence of the children from Spain, the country where they had lived and been brought up prior to their sojourn in Wales. They simply stayed in the grandparents' household for the limited purpose of their education and providing a temporary home while the renovation works on the family home were effected.
>
> 80. That being so, it becomes unnecessary for me to consider the effect of the parties' discussions as to the future of the marriage if, on the return of the family to Spain from their stay in Wales, the differences between the mother and father persisted. Despite my concentration on the time spent in Wales, the time at which it is necessary to consider the issue of

> habitual residence is at the time of removal from Spain, when the children were installed in their new schools and the parties were living together in the renovated family home. I am satisfied that, at the time of removal, the habitual residence of the children was in Spain."

22. Finally he dealt with a submission that because of Article 3 of Brussels II revised, the phrase "habitually resident" had to be construed for the purposes of the Hague Convention in the autonomous way in which it was construed for the purposes of Brussels II revised. Mrs Justice Parker in Re: S [2008] EWHC 1873 (Fam) did not agree since she concluded that the concept of habitual residence had developed its own autonomous Hague Convention meaning broadly equating with the concept of ordinary residence and there was no reported authority, either European or domestic, in which the "centre of interest" test had been held to apply for present purposes. The President was of the view that Parker J was right to take the view which she did. But he added that even if he were to apply a 'centre of interest' test, he would have reached the same conclusion as he had when applying orthodox Convention principles. There is no longer any challenge to this part of his judgment.

The grounds of appeal

23. As the grounds were refined in the course of argument, the challenges to the judgment were twofold:

(1) As to habitual residence Mr Clive Newton Q.C. leading Mr David Blake who appeared alone below, submits:

(i) the learned President erred in law in that he failed to direct himself that the purpose to establish habitual residence may still be settled even though it is of temporary or limited duration. To require "roots" to be firmly planted is wrong in law.

(ii) Had the President applied the law to the facts which he found (and which are not the subject of any appeal), the only proper conclusion would be that the children had become habitually resident in Wales and never lost that habitual residence even when they returned to Spain.

(2) As to consent, on the facts found, the father had given advance consent to the return of the children to Wales if the attempted reconciliation in Spain were to break down and that consent remained extant at the time of removal. A unilateral change of mind should not be permitted.

Discussion

(1) Habitual residence

24. Mr Newton accepts that the children were habitually resident in Spain until they went to Wales in August 2007. His primary case is that their purpose in going there, though for a year only, was nonetheless sufficiently settled to make their residence in a family home, their grandparents' home, habitual certainly for the duration of their stay. The purpose was partly educational, namely to improve their English, but their

living as a family, albeit with father absent, distinguished that move from their having been sent to boarding school. The fact that they were not settled in Wales or that they had not put down roots in Wales was irrelevant. The approach of the President in paragraph 66 of his judgment (see [18] above) was flawed because he did not take into account the fact that one can have habitual residence even if the purpose of the stay is temporary. Criticism was made of the President's reference in paragraph 69 (see [19] above) to "the family roots thus remain firmly in Spain"; in paragraph 70 (see [19]): "the planned return remained in place" and to paragraph 73 (see [20] above) to "a temporary purpose, in particular that of education … will not alone be sufficient …".

25. Mr Teertha Gupta accepts that the President did not expressly acknowledge the sufficiency of a stay to achieve a purpose of limitation duration but he submits that it is overwhelmingly obvious from the judgment as a whole that the President had well in mind the authorities to which he was referred and did not misdirect himself as is contended by the appellant. He is supported by Mr Richard Harrison who appeared in this Court for the Guardian.

Analysis of the habitual residence issue

26. The following principles are by now firmly established:

(1) the expression "habitually resident" is "not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains": per Lord Brandon of Oakbrook in In re J (A Minor) (Abduction: Custody Rights) [2990] 2 A.C. 562, 578F.

(2) Although there is an overlap between the meaning of "ordinary" and "habitual" residence and one is sometimes defined in terms of the other, Lord Slynn of Hadley was reluctant to treat the two words as always synonymous being of the opinion that

> "Each may take a shade of meaning from the context and the object and purpose of the legislation. But there is a common core of meaning which makes it relevant to consider what has been said in cases dealing with both ordinary and habitual residence.": see Nessa v Chief Adjudication Officer [1999] 1 W.L.R. 1937, 1941E.

In Mark v Mark [2005] UKHL 42, [2006] 1 A.C. 98 it was common ground that habitual residence and ordinary residence were interchangeable concepts and since that case concerned a question of jurisdiction under the Domicile and Matrimonial Proceedings Act 1973 and this case also involves a question of jurisdiction, this time under the Hague convention, there can for present purposes be no difference in the core meaning to be given to the two phrases.

(3) The words "ordinarily" resident were given their ordinary and natural meaning in the leading case of Reg. v Barnet London Borough Council, ex parte Nilish Shah [1983] 2 A.C. 309, Lord Scarman stating the test at p. 343G to be:

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used

> requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."

(4) The test is not where the "real home" is: this was rejected by Lord Scarman at p. 348G. There is a distinction to be drawn between being settled in a new place or country and being resident there for a settled purpose which may be fulfilled by meeting a purpose of short duration or one conditional upon future events. To ask whether the family are settled in the sense of putting down substantial roots is a misdirection: see Thorpe L.J. in Al Habtoor v Fotheringham [2001] 1 F.L.R. 952 where he held:

> "[37] … habitual residence may be acquired despite the fact that the purpose of the move was intended to be fulfilled within a comparatively short duration or … the move was only on a trial basis.
>
> [38] … [The judge] misdirected herself in asking whether the family had settled in Dubai in the sense of putting down substantial roots."

Although these remarks are strictly obiter (see [31] of his judgment) I agree with him: the distinction is necessary to mark the difference between acquiring habitual or ordinary residence which permits a stay of comparatively short time and domicile which requires an intention to remain there indefinitely.

(5) There is, per Lord Brandon in In Re: J at p. 358,

> "A significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B."

As Lord Slynn said in Nessa at p. 1943,

> "The requisite period is not a fixed period. It may be longer where there are doubts. It may be short."

(6) Habitual residence of young children of married parents all living together as a family is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the

court: see Lord Donaldson M.R. in In Re: J at p. 572C approved by this Court, inter alia in Re: M (Abduction: Habitual Residence) [1996] 1 F.L.R. 887.

(7) Last but not least and certainly a point of importance for appellate courts reviewing the judgment below, whether or not a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of the particular case: see Lord Brandon in In Re: J at p. 578G, Lord Scarman adding in Shah at p. 344E that the answer depends "more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind."

27. In the light of those general principles, can it fairly be said that the President misdirected himself? I am satisfied that would be an unfair reading of a careful, well-reasoned judgment read as a whole. I take the criticisms in reverse order.

28. First, as to paragraph 73 of his judgment and to the reference that an agreement to take the children "to another country for a temporary purpose, in particular that of education, will not alone be sufficient to change their habitual residence". The context is clear. The President was referring to the judgment of this Court in Re: M upon which Mr Blake, who then appeared for the Mother, was relying (see paragraph 71 of the President's judgment). The President was not saying that a visit for a temporary purpose could never establish habitual residence. On the contrary, he was saying, correctly, that "such an agreement is one of the main facts or circumstances to be taken into account". That is precisely what Sir John Balcombe was saying in the passage to which the President referred, namely,

> "So, that part of the finding by the judge was, as I understand it, a finding that the decision to send the children to Pakistan for the temporary purpose of education was not of itself sufficient to change their habitual residence; they remained habitually resident in England, not withstanding that they were going temporarily to Pakistan for educational and cultural purposes. As to that finding, I find no difficulty; it must depend on the circumstances of the particular case and the judge had the evidence before her."

29. Secondly, as to paragraph 69 of his judgment and the family roots remaining firmly in Spain, this again is not a misapplication of principle but a statement of fact. The President was contrasting the continuity of the family's presence in Spain with the transient position in Wales which lacked the requisite element (per Lord Scarman in Shah) of it being part of the "regular order of life whether of short or of long duration".

30. Thirdly, as to the omission of any reference in paragraph 66 of the judgment to a stay of short duration being capable of establishing habitual residence, I simply cannot accept that having regard to the abundance of authority cited to the President, so ample that it needed "no quotation of authority" for the main propositions to be set out as he did in paragraph 66. One must also read paragraph 71 of the judgment where the President records Mr Blake's reliance on Re: M (at 598G) "… not simply for the propositions I have set out at paragraph 65 [sic] above". [I am quite sure the President meant to refer to paragraph 66 of his judgment which does refer to "the propositions" to be applied whereas in paragraph 65 he was referring to the "critical

question" which arose.] At p. 90(a)-(g) Sir John Balcombe set out the propositions that might be deduced from the authorities, the first of which was reference to Lord Scarman's statement of principle in Shah including the material words "a person's abode in a particular place … which he has adopted … for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration", with emphasis added by me. In those circumstances I simply cannot accept Mr Newton's submission that the President was unmindful of this elementary proposition, that he fell into the error of believing that a temporary stay was inconsistent with habitual residence and that he approached his fact finding exercise on this fundamentally wrong basis.

31. I turn, therefore, to the President's application of those principles to the facts of this particular case. The first observation is that if the President correctly addressed the principles to apply, and in my judgment he did, then the facts are for him to find and this Court will not interfere unless he took some irrelevant fact into account or failed to have regard to some relevant fact so as to have made some material error. He otherwise has to be shown to have been plainly wrong. This was a full and careful judgment and I cannot fault it.

32. If I am to stand back and review his findings, I think it helpful to look at Shah in a little more detail because Shah tells judges nearly all they need to know. Consider the following passages. At p. 340F Lord Scarman stated that the natural ordinary meaning of the words had been authoritatively determined in two tax cases reported in 1928. The first was Levine v Inland Revenue Commissioners [1928] A.C. 215 where Viscount Cave L.C. said at p. 225:

> "I think that [ordinary residence] connotes residence in a place with some degree of continuity and apart from accidental or temporary absence."

Lord Warrington of Clyffe said at p. 232: "If [ordinarily resident] has any definite meaning I should say it means according to the way in which a man's life is usually ordered."

Lord Denning M.R.'s observations in the Court of Appeal in Shah were approved. He said:

> "The words 'ordinarily resident' mean that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration."

At p. 344D Lord Scarman said:

> "All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."

He added at p. 344F:

> "For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite

> temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose."

Finally at p. 349C he posed the question which judges could well adopt:

> "My Lords, it is therefore, my view that local education authorities, when considering an application for a mandatory award, must ask themselves the question: has the applicant shown that he has habitually and normally resided in the United Kingdom from choice and for a settled purpose throughout the prescribed period, apart from temporary or occasional absences."

33. Applying those thoughts to this case, has it been shown that the family was habitually and normally resident in Spain from choice and for the settled purpose throughout this prescribed period apart from temporary or occasional absences? Common sense must be used to answer the question for as Waite J. said in Re: B (Minors) (Abduction)(No. 2) [1993] 1 F.L.R. 993, 998:

> "A settled purpose is not something to be searched for under a microscope. If it is there at all, it will stand out clearly as a matter of general impression."

34. In my judgment the only answer to those questions is, as the President found, that the children were habitually resident in Spain. The ordered way of life was Spanish. Their education had been undertaken there and with the mother's collaboration it was arranged that it should continue in Spain upon their return. Their schooling in Wales was for a temporary period and for the limited purpose of improving their English. Their home was in Spain, not with their grandparents in Wales. The visit to Wales was a convenient respite to meet the dual objectives of increasing their language skills and refurbishing the Spanish home. The mother actively participated in the planning of the work even whilst she was in Wales. The essential dental work was carried out in Spain. Without wishing to apply a Brussels II revised test, the fact is that family life was centred on Spain, which is simply another way of saying Spain was the regular order of their life. Putting it most simply, and applying what Viscount Sumner said in Inland Revenue Commissioners v Lysaght [1928] A.C. 234, 243:

> "I think the converse to 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes is not 'extraordinary'."

Spain was where the family ordinarily lived, their sojourn in Wales was extraordinary. The mother's unilateral change of mind in June could not alter that. The father expected, indeed probably insisted, they return to Wales whatever the difficulties in the marriage. The mother agreed to and did return with the children to Spain where life for the children resumed as normal, however ambivalently the mother felt about it and whatever her personal intentions were. Spain was, therefore, and Spain remained the children's habitual residence. In my judgment this ground of appeal must fail.

(2) Consent

The arguments

35. Mr Newton submits in essence as follows:

(1) The correct approach is to require clear consent to the removal in question.

(2) Consent does not have to be given at or near the time of removal for advance consent will suffice if the agreement is still extant at the time of removal.

(3) Whether the agreement is still extant at the time of removal, at least where the party acts in reliance upon it, depends essentially upon the construction of the agreement. In particular a consenting party should not be permitted unilaterally to terminate the agreement or withdraw his consent if on a true construction of the agreement that consent was to apply up to the date of removal.

(4) He supports these propositions by drawing an analogy with the law of contract: a party cannot unilaterally change his mind with impunity.

(5) Fairness demands that the agreement be honoured; to allow a party freedom to withdraw at will would be contrary to good policy because it would discourage reconciliations attempted in order to save the marriage.

36. Mr Gupta relies on the President's findings of fact. If advance consent is to be binding, it must be an informed consent, clear and unequivocal, and if it is subject to the occurrence of some future event, that event must be objectively ascertainable, not dependent upon a subjective determination by the other party that the event has come to pass.

Discussion

37. Article 13 of the Convention is always assumed to be the relevant Article. It provides as follows:

> "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 it 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 position.

> The judicial or administrative authority may also refuse to order the return of the chid 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."

It may, however, be possible that Article 3 is also relevant. That provides:

> "Article 3
>
> The removal or the retention of a child is to be considered wrongful where –
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; …"

38. I say that Article 3 may be in play in a case like this only because when dealing with the "exceptions to the duty to secure the prompt return of children" there is the suggestion (with which I have some difficulty in agreeing) in the Explanatory Report by Elisa Pérez-Vera that the consent being referred to in Article 13 is a consent given after removal of the child. The report says this:

> "27. Since the return of the child is to some extent the basic principle of the Convention, the exceptions to the general duty to secure it form an important element in understanding the exact extent of this duty. It is not of course necessary to examine in detail the provisions which constitute these exceptions, but merely to sketch their role in outline, while at the same time stressing in particular the reasons for their inclusion in the Convention. From this vantage point can be seen those exceptions which derive their justification from three different principles.
>
> 28. On the one hand, article 13a accepts that the judicial or administrative authorities of the requested State are not bound to order the return of the child if the person requesting its return was not actually exercising, prior to the allegedly unlawful removal, the rights of custody which he now seeks to invoke or if he had subsequently consented to the act which he now seeks to attack. [The French text reads … lorsqu'il a donné son accord postérieur à l'action qu'il attaque désormais. I have added the emphasis to "subsequently" and to "postérieur"]. Consequently, the situations envisaged are those in which either the conditions prevailing prior to the removal of the child do not contain one of the elements essential to those relationships which the Convention seeks to protect (that of the actual exercise of custody rights), or else the subsequent behaviour of the dispossessed parent shows his acceptance of the new situation thus brought about, which makes it more

> difficult for him to challenge." [Again I have added the emphasis.]

39. There is little further help to be gleaned from the commentary on Articles 3 and 13. In paragraph 71 we read:

> "… it should be stressed now that the intention is to protect all the ways in which custody of children can be exercised. … Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other is equally wrongful, and this wrongfulness derives in this particular case not, from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise," [emphasis added by me.]

40. The commentary on Article 13 contains this:

> "115. The exceptions contained in a arise out of the fact that the conduct of the person claiming to be the guardian of the child raises doubts as to whether a wrongful removal or retention, in terms of the Convention has taken place. On the one hand, there are situations in which the person who had the care of the child did not actually exercise custody rights at the time of the removal or retention. …
>
> On the other hand, the guardian's conduct can also alter the characterization of the abductor's action, in cases where he has agreed to, or thereafter acquiesced in, the removal which he now seeks to challenge. This fact allowed the deletion of any reference to the exercise of custody rights 'in good faith', and at the same time prevented the Convention from being used as a vehicle for possible 'bargaining' between the parties."

41. If I correctly understand the report, then questions of consent seem to arise at two stages of the enquiry, first consent given at the point of removal, and the second, consent given after removal. If there is consent to the removal then arguably its effect is that there is no breach of the rights of custody, and conversely if there is no consent, then removal is in breach of the rights of custody. Article 156 of the Spanish Civil Code apparently provides that: "The authority of the parents will be exerted by both, or by one of them with the express or tacit consent of the other". So if there was express or implied agreement that the mother alone would look after the children, then there would be no breach of the father's authority over the children. It follows that issues about whether or not there was express consent, or tacit consent; whether or not consent had been unilaterally withdrawn and whether not the father would be permitted unilaterally to withdraw consent would all be arguments about the breach of the right of custody.

42. The President appears to have covered that ground by finding in paragraph 45 of his judgment (see [12] above).

> "For reasons which I will elaborate under "consent" below, it is plain that there was no such agreement and the removal of the children by the mother was therefore in breach of the rights of custody of the father for the purposes of Article 3(a) of the Convention."

43. Perhaps it does not matter at what point in time the question of consent has to be considered. It certainly does not matter on the facts of this case. Since no argument has been addressed to us on this question I proceed to consider the question of consent as one arising under Article 13(a) of the Convention and leave the above debate for another day. I do not encourage that debate: in my view it is much better to deal with consent as a discrete issue being a defence under Article 13(a) and thus to ask the simple question, some would call it a jury question which really needs little elaboration: did the father (in this case) give his consent to the removal of the children from Spain.

44. There is surprisingly little authority on what constitutes sufficient consent. In Re K (Abduction: Consent) [1997] 2 F.L.R. 212 Hale J., as she then was, had to choose between the views of Wall J. and Holman J. In Re W (Abduction: Procedure) [1995] 1 F.L.R. 878, 888 Wall J. said about the issue of consent:

> "It follows, in my judgment, that where a parent seeks to argue the Article 13(a) "consent" defence under the Hague Convention, the evidence for establishing consent needs to be clear and compelling. In normal circumstances, such consent will need to be in writing or at the very least evidenced by documentary evidence. Moreover, unlike acquiescence, I find it difficult to conceive of circumstances in which consent could be passive: there must in my judgment be clear and compelling evidence of a positive consent to the removal of the child from the jurisdiction of his habitual residence."

Holman J. pointed out in Re C (Abduction: Consent) [1996] 1 F.L.R. 414, 418 were that Article 13 does not use the words "in writing" and that:

> "… parents do not necessarily expect to reduce their agreements and understandings about their children into writing, even at a time of marital breakdown. What matters is that consent is "established". The means of proof will vary."

He added at p. 149:

> "If it is clear, viewing a parent's words and actions as whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgment that is sufficient to satisfy the requirements of Art 13. It is not necessary that there is an express statement that "I consent". In my judgment it is possible in an appropriate case to infer consent from conduct.

> However, I am in complete agreement with Wall J. that the issue of consent is a very important matter. It needs to be proved on the balance of probabilities, but the evidence in support of it needs to be clear and cogent. If the court is left uncertain, then the "defence" under Art 13(a) fails."

Hale J. said:

> "It is obvious that consent must be real. It must be positive and it must be unequivocal. But that is a separate issue from the nature of the evidence required to establish it. There will be circumstances in which the court can be satisfied that such consent has been given even though it has not been given in writing. It stands to reason, however, that most people who wish to retain or remove a child would be well advised to get written consent before they do so to place the matter beyond argument. There may also be circumstances in which it can be inferred from conduct."

45. In that case Hale J. accepted that the mother, who was English, left the matrimonial home in Texas at a time when the marriage was in difficulty but on the father's assurance that if she chose to remain in England she could keep the child with her. Hale J. held:

> "Having allowed the mother and C to come to this country on that basis, can it be said that the mother has failed to establish that the father had consented to C's removal or retention? Not without some difficulty, I have reached the conclusion that that is sufficient to amount to consent and that that consent is not taken away by the father subsequently thinking better of it. Having had that consent, the mother was entitled to rely upon it in making up her mind and in keeping C in this country."

46. The question of advance consent was considered by the First Division in Scotland in Zenel v Haddow [1993] S.L.T. 975. There a Scottish mother returned to Australia with the child as part of an attempted reconciliation, it being agreed that she and the child would return to Scotland if the attempted reconciliation failed. Fifteen months later when she had become unhappy in her relationship, she clandestinely returned with the child to Scotland. The majority held that the terms of the agreement were still extant even after fifteen months of co-habitation and that the agreement to removal did not require to be connected in time to the actual removal. Article 13(a) required the defendant to establish that the claimant "had consented to … the removal". The argument was advanced that the use of the word "the" before the word "removal", meant that consent must have been given by the claimant to the particular removal in question which presupposed knowledge on the part of the claimant of the actual removal at the time so that he could give the necessary consent. Thus the clandestine removal did not have the required consent. That argument was rejected by Lord Allanbridge who held at p. 983:

> "The use of the word "the" before the word "removal", must mean the actual removal which took place but it does not

> follow that the consent must be given instantaneously at the time because consent could clearly be given to a removal which would take place at a future and even indefinite date. A person could agree that a child could be removed, for example, when the child came out of hospital and was fit enough to travel. There would be no definite date but consent was being given for a future removal. The use of the past tense in the words "had consented to … the removal" demonstrates that at the time of removal the consent had already been given and looks to the past prior to the removal. In other words a person could consent to the removal of a child in the future unless some other event occurred, such as the child not being well enough to travel."

Lord Mayfield agreed because in his opinion:

> "While the words "the removal" in art 13 (a) refer to the actual removal which took place it does not in my view mean that the consent must be given at the time of removal. The words "had consented to … the removal" are not consistent with that view. In my view there is nothing in the article which bars consent to the removal sometime in the future."

Lord Morton of Shuna dissented because:

> "In my opinion it is quite clear that art 13 (a) is providing only for consent to or acquiescence in a particular act of removal or retention."

47. The next case to which we were referred was Re L (Abduction: Future Consent) [2007] EWHC 2181 (Fam), [2008] 1 F.L.R. 914. Bodey J. had managed to obtain an unreported decision of Bennett J. in Tonna v Tonna [2004] EWHC 2516 (Fam) which has not been made available to us. Apparently Bennett J. reviewed the decision in Zenel and summarised the decision succinctly as follows:

> "Put shortly, the principle would appear to be [that] consent can be given by one parent for the future removal of their child by the other, even if the timing of the future removal is uncertain."

Bodey J. said:

> "[29] I respectfully agree [with Bennett J.]. Obviously, these questions of consent will always be fact specific and will involve questions of degree; but I can see 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 of reasonable ascertainability. It cannot be something too vague, too uncertain or too subjective. The following should for example be capable of forming the basis of the consent defence: "… If my job application succeeds … ", or (as

> per the example given in Zenel "… when the child comes out of hospital".
>
> [30] But commonsense is everything in this sphere. If the consent was given when the facts were wholly and manifestly different from those prevailing at the time of the removal; or if the consent was given so long ago that it must clearly have lapsed; or if the consenting party had withdrawn that consent before it were acted upon by a removal of the child, then in those various circumstances the defence would not be made out. It is all a question of degree. …
>
> [32] … In a non-contractual sphere such as this, a party cannot purport to act on an original wide agreement which has been later superseded by a more restricted one. …
>
> [41] Where a removing party knows or assumes that the formerly consenting party would not continue that consent at the time of the actual removal and/or if he or she knew the full facts, it is my view that the consent defence fails even though the original consent may never have been expressly withdrawn."

48. In my judgment the following principles should be deduced from these authorities.

(1) Consent to the removal of the child must be clear and unequivocal.

(2) Consent can be given to the removal at some future but unspecified time or upon the happening of some future event.

(3) Such advance consent must, however, still be operative and in force at the time of the actual removal.

(4) The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party, for example, "Whatever you may think, I have concluded that the marriage has broken down and so I am free to leave with the child." The event must be objectively verifiable.

(5) Consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract.

(6) Consequently consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.

(7) The burden of proving the consent rests on him or her who asserts it.

(8) The enquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case.

(9) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?

49. The answer in this case is plain. Whatever the terms were upon which the mother returned to Spain, she knew or suspected, as the President found in paragraph [48] of his judgment, that the husband would not consent or at the very least was likely to object to the children being removed from Spain at a time when they were happy in the new home and had successfully restarted at Spanish schools. She knew the husband was volatile and therefore likely to change his mind. Thus she embarked upon a clandestine and surreptitious removal with the intention of concealing the arrangements for removal from the father and presenting him with a fait accompli. Her anticipation of the father's reaction was justified. Having been alerted by S he followed the family to the airport and, as the President found, "He plainly made clear his objection to removal of the children at a time when the mother could still have turned back from the flight upon which they were booked, but she proceeded nonetheless." He made those objections loud and clear as the mother well knew. He had to be restrained by the police. On those facts the answer to the simple question, whether or not this father had consented to the removal of his children from Spain, is plain as a pikestaff. He did not consent.

50. In the result the appeal must fail and so we ordered to enable the return of the children to take effect as the President directed.

Lord Justice Wilson:

51. At the conclusion of the hearing my Lord announced our joint decision: namely that the mother's challenge to the President's finding that on 15 October 2008 the children were habitually resident in Spain, rather than in Wales, should be rejected; that her alternative challenge to his finding that the father had not consented to her removal of them to Wales should also be rejected; and that accordingly her appeal should be dismissed.

52. My reasons for subscribing to our decision about the habitual residence of the children are precisely in accordance with those expressed by my Lord in his judgment; I cannot improve upon what he has said. In relation, however, to our decision about consent, I would wish, with respect to him, to express my reasons for subscription with a slight difference of emphasis.

53. Nowadays not all law can be simple law; but the best law remains simple law.

(a) However Professor Pérez-Vera may have expressed herself in her explanatory Report, we have to construe the words "had consented to or subsequently acquiesced in the removal or retention" in Article 13(a) of the Hague Convention. The use of the pluperfect tense ("had consented"), contrasted with the qualification of the word "acquiesced" by the word "subsequently", seems clearly to show that the concept of "consent" relates to a stance taken by the left-behind parent prior to the child's removal (or retention) and that the concept of

"acquiescence" relates to his stance afterwards. In some contexts (for example, in planning law) a consent to something can be given ex post facto. But in my view it would cause unnecessary confusion to import into Article 13(a) the idea that "consent" can be given to the removal after it has taken place. We have proceeded for almost 23 years on the footing that, in Article 13, consent means prior consent; and such was, for example, the confident interpretation given to it in this court in In Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106, per Balcombe LJ at 115E, Stuart-Smith LJ at 119F and Lord Donaldson MR at 123C.

(b) If a left-behind parent with rights of custody gave consent, by which I therefore mean prior consent, to the child's removal, how can he successfully complain that it was in breach of his rights within the meaning of Article 3 of the Convention? There is no good answer to this question. So the poor draftsmanship of the Convention gives rise to a conundrum: although Article 13 expressly suggests that the consent of the left-behind parent is something which the removing parent may seek to establish by way of defence, is not its absence, rather, something which the left-behind parent must establish as part of his case under Article 3 that the removal was in breach of his rights of custody and thus, in effect, wrongful? But the conundrum is an old chestnut and I would not wish to say anything which might prompt resurrection of it, even if such were possible. In Re P (Abduction: Consent) [2004] 2 FLR 1057 this court decided that the specificity of the reference to consent in Article 13 sufficed to draw all issues of consent into it and out of Article 3; as it happens, I also consider that the decision was correct.

54. The mother's appeal in relation to consent is largely founded upon the finding of the President that, in June 2008 in Wales, the father told her that, if her return with the children to family life with him in Spain did not work out, she could return with them to live permanently and separately from him in Wales and indeed that he would take them there in order to enable them to settle there with, as it were, his seal of approval; and that such was an important part of the basis upon which, in August and September 2008, she returned with them to family life with him in Spain. I should add that the President made a further finding that early in September 2008, when the mother was arranging herself to return to Wales, albeit in the event only in order to collect the dog, the father again agreed that the children could also return with her and tried to help her to book tickets for them; but, since it is not clear that this further finding is to the effect that the father then agreed that the children might return to Wales permanently, rather than either very temporarily or, at most, for one further school term, it is to my mind of no significance.

55. There is no dispute in this case that an effective consent to removal can be given in advance and thus can in principle be given in June to a removal in October. I am clear however that the consent has to subsist at the time of removal. I am full of admiration for the analysis of 'advance consent' offered by Bodey J in [29], [30], [32] and [41] of his decision in Re L (Abduction: Future Consent) [2007] EWHC 2181, [2008] 1 FLR 914, quoted by my Lord at [47] above; and I adopt the analysis of Bodey J as my starting-point. In argument to us Mr Newton suggested that Bodey J was wrong to imply, at [30], that consent could always be withdrawn prior to removal. He submitted that whether an advance consent could be withdrawn depended upon the way in which it was expressed and/or the circumstances in which it was given and/or whether in the interim the other parent had acted upon it to her disadvantage. In some ways it

was an attractive submission but I reject it. That the consent has to subsist at the time of removal (or retention) seems to me also to have been recognised by Hale J in Re K (Abduction: Consent) [1997] 2 FLR 212, in which the father's withdrawal of consent came too late in that it was responsive to the mother's communication to him of the retention. Once we allow arguments to the effect that, although the left-behind parent had, prior to removal, clearly purported to withdraw an earlier consent, he was not entitled to do so, legal concepts crowd in upon the straightforward enquiry; and the stance taken by parents on the ground becomes rewritten as the stance which the law deems them to have taken. Decisions about children are best taken without such artifice.

56. Although, however, we should accept that, prior to removal, a refusal to consent may replace an earlier consent and, conversely, that a consent may replace an earlier refusal to consent, we must confront the consequential difficulties. They arise in particular because, when intimate human relationships break down, our emotions lead us – whether in anger, jealousy, pain or a wish to wound – to say things which we do not mean and/or which are entirely inconsistent even from one hour to the next. Take a father who has clearly consented to a removal of the children with the mother to England. Is he to be taken to have withdrawn his consent because he rushes to the airport and there shouts "You can't go"? Of course not. Or take a father who has clearly not consented to a removal to England. Is he to be taken to have consented because, when the mother is piling the children into the taxi which will take them to the airport, he unexpectedly returns home and, in his shocked distress, tells her, in his vernacular, that she can take them wherever she pleases? Of course not. So the task of the judge in weighing a defence that an advance consent subsisted can prove difficult; and he will need to call upon his understanding of how, with all our imperfections, we human beings operate. Thus if, as here, the defendant asserts the other's advance consent to a removal, the judge has to persuaded that in reality it subsisted at the time of removal.

57. It seems to me that the most obvious (albeit not always decisive) indication of whether in reality an advance consent subsisted at the time of removal is whether the removal was clandestine. I accept that a consent to the removal of children within Article 13 does not have to include a consent to their removal on the particular day, or by the particular means or more generally in the particular circumstances, on, by or in which the other parent elects to remove them. Nevertheless a clandestine removal will usually be indicative of the absence in reality of subsistence of the consent; see, for example, the judgment of my Lord in this court in P v. P (Abduction: Acquiescence) [1998] 2 FLR 835 at 836H – 837A.

58. It is with such considerations in mind that I turn, with respect, to the decision of our Scottish colleagues in the First Division, Outer House, in Zenel v. Haddow [1993] SLT 975. The Scottish mother returned with the child to the Australian father in Australia on their express agreement that, if the relationship again failed, she could again return with the child to Scotland. Fifteen months later she returned with the child to Scotland. She did so clandestinely, by telling the father that she was leaving home with the child only for the weekend. It was accepted both at first instance and on appeal that the mother had to establish that the agreement subsisted at the time of removal but, by a majority, the First Division refused to interfere with the finding that the mother had established its subsistence. The court did so even though, in the words

of Lord Allanbridge at 982I, "it may well be, as suggested by the [trial judge], that both parties had forgotten of the existence of the agreement at the time she left Australia". I find it impossible to understand how the mother could have established the subsistence of the agreement made 15 months earlier given that in the interim both she and the father might well have forgotten about it; and in my view the majority failed to address the significance of the fact that the mother chose to make her removal of the child clandestine.

59. In the present case, by contrast, the President squarely addressed the fact that the mother tried to conceal from the father her removal of the children from Spain. Having received oral as well as written evidence from the parties, he found that the father's attempt at the airport to prevent the removal of the children did not represent a last-minute volte face on his part; and that, instead, it reflected the stance which, following the ostensibly successful introduction of the children to their new home and schools in Spain, the father had by then already adopted, and which the mother realised that he had probably adopted, namely that he no longer consented to their removal to Wales even if the resumption of family life could be said to have failed. There was in my view ample material to justify the President's conclusion that the mother had failed to establish that in reality the father's advance consent given in June subsisted in October; and in my view he might have treated the mother's issue of an application to a county court for a residence order within two days of arrival in Wales as a further indication that she recognised that she had acted otherwise than with his consent.