RE A (A MINOR) (ABDUCTION)

Court of Appeal

Mustill and Nourse LJJ

10 June 1987

Child – Child abduction – Wrongful retention of child by mother outside country of habitual residence – Father applying for child to be returned to him under Child Abduction and Custody Act 1985 – Convention on the Civil Aspects of International Child Abduction, arts. 3, 12 and 13

Custody – Child abduction – Wrongful retention of child by mother outside country of habitual residence – Father applying for child to be returned to him under Child Abduction and Custody Act 1985 – Convention on the Civil Aspects of International Child Abduction, arts. 3, 12 and 13

The parents were Canadian citizens living in Canada. The child of the marriage was born in Canada in November 1983. In September 1985 the wife took the child to England to visit her parents and said that she did not intend to return. On 19 August 1986 the Supreme Court of British Columbia ordered, by consent, that the mother and father be granted joint custody, the mother to exercise custody in England for 6 months of each year commencing on that date. In January 1987 the mother told the father that she was going to keep the child in England and issued an originating summons seeking to make the child a ward of court with care committed to her. The father issued an originating summons under the Child Abduction and Custody Act 1985 which enacted parts of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. At the hearing it was not in dispute that the child had been wrongfully retained in England under art. 3 of the Convention and that accordingly the court was bound, by virtue of art. 12, to order his return to Canada forthwith unless, as the mother contended, the case fell within the material part of art. 13 (b), namely that there was a grave risk that the child's return would expose him to psychological harm. The judge made an order for the child to be returned after receiving assurances from the mother that, if he made the order, she would go with the child to Canada, and from the father that the child would remain in the mother's care in Canada until such time as the British Columbia court ordered otherwise. The mother appealed on the basis, first, that in deciding that the psychological harm to the child of staying in England outweighed the psychological harm of returning to Canada the judge had carried out a balancing exercise on the erroneous footing that he was exercising a discretion, and, second, that the question whether there was a risk of psychological harm was preliminary to return and the judge had therefore been wrong to consider the practical consequences of an order to that effect.

Held – dismissing the appeal – the judge, having decided from the wording of the material part of art. 13 (b) of the Convention that the risk to the child must be a weighty risk of substantial harm, had properly concluded that any psychological harm resulting from the order in the present case was not sufficient to fall within that part of the article and, therefore, that he had no discretion in the matter and no power to refuse an order for the child's return. In considering the matter of possible psychological harm to the child the judge had been entitled to consider the practical consequences of his return. It could not have been the intention of art. 13 that the consequences of an order should be disregarded, and moreover there was internal evidence in the article to the contrary.

Statutory provisions considered
Child Abduction and Custody Act 1985
Hague Convention on the Civil Aspects of International Child Abduction 1980, arts. 3, 12 and 13

Case referred to in judgment
Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA
APPEAL from the order of Ewbank J.

Robert Johnson QC and *Paul Stewart* for the mother;
Peter Singer QC for the father.

NOURSE LJ:
This appeal raises a question under the Child Abduction and Custody Act 1985, which was enacted in order to enable the United Kingdom to ratify two international conventions. The one which is in point here is the Convention on the Civil Aspects of International Child Abduction ('the Convention'), which was signed at the Hague on 25 October 1980. By s. 1(2) of the 1985 Act, and subject to the provisions of Part I thereof, the provisions of the Convention set out in Sch. 1 thereto have the force of law in the United Kingdom. One of the other contracting states is the Province of British Columbia, as between which state and the United Kingdom the Convention came into force on 1 August 1986.

The subject of these proceedings is a small boy called G, who was born on 11 November 1983 and is now aged 3½ years. On 13 March 1987, on an application by his father under the 1985 Act, Ewbank J ordered G's mother to return him to Canada forthwith, the operation of the order being suspended by consent on terms to which I will refer in due course. Against that order the mother now appeals.

The material facts, most of which I can take verbatim from the judgment of the judge, are these. The mother and father were married on 22 October 1981. The father is 36 and the mother is 30. The father was born in Argentina and has lived in Canada since the age of 5. The mother was born in England and she lived in Canada from 1975 onwards. They are both Canadian citizens. During the marriage they were part-time hairdressers and they shared the care of G. In September 1985 the mother came to England on a visit to her parents. It was a 6-week holiday and she brought G with her. When she arrived in England she said that she was not going to go back to Canada and she kept G with her in England. The father started proceedings in Canada. He obtained an ex parte order from the Supreme Court of British Columbia on 16 December 1985. That order gave him interim custody of G. The father and mother had discussions on the telephone. The father came to England in February 1986 and the mother handed G over to him in accordance with the Canadian order.

The mother returned to Canada in July 1986. Whilst she was there she made an application to the British Columbian court to vary the custody order by making an order for joint custody instead. On 11 August 1986 she swore an affidavit in those proceedings. She said she had to return to London on the following day or she would lose her job. She said that G had been with the father for approximately 8 months by then, and that she would like the custody of G for the next 6 months. She said this:

> 'I believe my husband is worried that if he agrees to joint custody and allows [G] to live with me in England that I would apply for full custody in an English court. I have no intention of doing so since I feel it is in [G's] best interests to see his father and maintain a close relationship with him. I know [V] loves our son as much as I do and I am applying to the court for an order of joint custody so that I have a legal right to take my son to England.'

Although the mother had stated in her affidavit that she would like her 6 months' custody of G to start in the following September or October and that she or her father would be willing to go to Vancouver to take him back to England, the father agreed that she should take him with her on her return to England on 12 August; and that she duly did. On 19 August the matter came back before the Supreme Court of British Columbia when, after hearing counsel for each parent, it was ordered by consent that they be granted joint custody, the mother to exercise custody in England for 6 months of each year commencing on 19 August and the father for the other 6 months of each year. Counsel who then appeared for the father has sworn an affidavit in these proceedings, stating that the British Columbian judge, Judge Boyd, inquired of counsel as to whether they were satisfied that the joint custody order was in the best interests of G.

The mother's 6 months' period of custody was due to expire on 19 February 1987. In September 1986 the father had visited her and G in England for 2½ weeks, in order to help her to move into a new flat in South London. Before that she and G had lived with her parents nearby. In January 1987 the mother told the father that she was going to apply to vary the consent order for joint custody. She had decided that she was not going to comply with it. The result was that the father came over to England on 13 February. By an originating summons issued on the same day the mother sought to make G a ward of court, with care and control being committed to her. On 25 February the father countered by issuing an originating summons under the 1985 Act.

The convenient course is to refer next to the material provisions of the Convention and the 1985 Act. The provisions of the Convention set out in Sch. 1 to the 1985 Act and thereby having the force of law in the United Kingdom do not include the preamble of arts. 1 and 2. However, it is not suggested that we cannot look at those provisions in order to construe the articles which are set out in Sch. 1. The preamble expresses the desire of the States signatory:

> '. . . to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.'

Article 1 states that the objects of the Convention are:

'(a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and

(b) to ensure that rights of custody and access under the law of one contracting State are effectively respected in the other contracting state.'

These and other provisions of the Convention demonstrate that its primary purpose is to provide for the summary return to the country of their habitual residence of children who are wrongfully removed to or retained in another country in breach of subsisting rights of custody or access. Except in certain specified circumstances, the judicial and administrative authorities in the country to or in which the child is wrongfully removed or retained cannot refuse to order the return of the child, whether on grounds of choice of forum or on a consideration of what is in the best interests of the child or otherwise.

The provisions of the Convention which are most in point in the present case are to be found in arts. 3, 12 and 13. Article 3 is in these terms:

> '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; and,
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above arise in particular by operation of law or by reason of a judicial or administrative decision or by reason of an agreement having legal effect under the law of that State.'

The first two paragraphs of art. 12 are in these terms:

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

Article 13, so far as material, is in these terms:

> 'Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> (a) . . .
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. . . .

> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

In the application of these provisions to the facts of the present case a number of points are clear and undisputed. First, G has been 'retained' here by the mother from 19 February 1987 onwards. Immediately before that date he was habitually resident in British Columbia. The retention is in breach of the rights of custody attributed to the father under the law of that state, and at the time of the retention those rights would have been actually exercised but for the retention. The retention of G is accordingly to be considered wrongful under art. 3. Secondly, at the date of the issue of the father's originating summons under the 1985 Act (25 February 1987) a period of less than one year had elapsed from the date of the wrongful retention. It follows that the English court is bound to order the return of G forthwith under art. 12(1), unless the mother establishes that the case falls within art. 13, in which event the court has a discretion as to whether the return should be ordered or not. The ground on which the mother contends that the case falls within art. 13 is that there is a grave risk that G's return would expose him to psychological harm. That is the question which is in issue between the mother and the father in these proceedings.

The matter first came before Ewbank J on 6 March 1987. At that stage the independent evidence which went to the question of psychological harm consisted of letters dated 20 and 27 February respectively from a general practitioner and the principal of the day nursery at which G has been since September 1986. G had not then been seen by a consultant psychiatrist. The mother sought an adjournment so that that could be arranged. The judge expressed the view that the mother's case at that stage was not a strong one and, with some doubt, he granted an adjournment for 7 days. On the afternoon of 12 March the parents, the mother's parents and G were seen for one hour by Dr Dora Black, a consultant child pscychiatrist at the Royal Free Hospital and at Great Ormond Street and an experienced expert witness in cases concerned with the psychological well-being of children. As the judge said, she made a report with great expedition which was available to the parties at the adjourned hearing on the following day.

At that hearing oral evidence was given by Dr Black, the mother, the grandfather and the father. The grandfather expressed extreme hostility to the father, and the judge thought that he had not been a particularly helpful figure in maintaining contact between the father and G. There was also affidavit evidence before the court, including one sworn by the principal of the day nursery.

It is unnecessary for me to refer to the evidence at any great length. At the end of her written report Dr Black, having expressed the opinion that G should remain with the mother and have good access to his maternal grandparents who were important attachment figures to him, said this:

> 'If the court feels that this matter must be considered in Canada, then I respectfully submit that it will imperil [G's] personality development unless he goes in his mother's custody and preferably with his grand-

> parents too. I am not sure if this is feasible and would recommend that the least detrimental solution for [G] would be for him to stay in England.'

These views were confirmed by Dr Black at the end of her cross-examination. That led to the judge raising with counsel for the mother the possibility that she might go back to Canada with G. Counsel said that his understanding was that if she was forced to, then she would, by which he meant that if G was ordered to be returned to Canada the mother would move heaven and earth to return with him. However, the mother had not dealt with that in her affidavit evidence and she had not yet given her oral evidence. The matter was raised with her at the end of her cross-examination when her answers pointed up the very understandable dilemma of her inability to be parted from G on the one hand and the great difficulties which she would face in going to Canada with him on the other. On being pressed to say what she would do in the event of an order being made for the return of G to Canada, she said that she would go there as soon as she could thereafter.

When the father came to give his evidence, he said in cross-examination that if the mother went back to Vancouver he would propose that she stayed with G and that he slowly moved back into G's life. At the end of his evidence he appeared to indicate to the judge that the mother could have G, so long as he could be involved in G's life.

In giving judgment, Ewbank J reviewed the evidence at some length. In regard to an allegation by the mother that she had consented to the order of 19 August 1986 under duress he said this:

> 'The duress she is speaking of arises because she felt that she had to agree to joint custody in order to persuade the father to allow her to bring the child to England at all. It is not duress in any normal sense. She told me that although she had consented to an order for custody for 6 months there was a private agreement between her and the father that the period should be a year. Her evidence on this aspect and on other aspects of this case is unsatisfactory. I do not accept that she was under duress. I accept that she may have decided to trick the father. I do not accept there was any private agreement.'

Having dealt extensively with the written and oral evidence of Dr Black, the judge said that the mother had to establish a grave risk of psychological harm. He continued:

> 'I take the words to mean that the risk has to be more than an ordinary risk. I take it to mean that it is recognized that such psychological harm may be expected from the implementation of an order which involves taking a child away from one parent and passing him to another, and that the grave risk of psychological harm means something more than would otherwise be expected. In that context I remember that no professional advice or treatment for any psychological problems was sought prior to the father's arrival.'

The judge then contrasted the two possibilities of G living only with his father in Canada on the one hand, and only with his mother in England on

the other. He said that if that was the choice there were aspects of psychological harm to be weighed up and balanced. Then comes the decisive part of his judgment:

> 'In fact, however, the situation is not balanced in that way because the mother has made it clear that if an order is made under the Act and [G] has to return to Canada she will go with him as soon as she can, although there will be innumerable financial and practical difficulties. And the father has made it clear that if the mother will go back to Canada he will let her stay in his flat with [G], or alternatively agree to her staying with her brother who lives in Bowen Island, about 1½ hour's drive from his home, with [G]. What he wishes to do is to have regular contact with [G] and to be part of [G's] life. He is prepared to make those arrangements and to agree to those plans, at any rate in the short term, and at any rate until the Canadian court makes a decision. So, in reality the balance I have to strike is between the psychological harm to which [G] will be exposed if he stays in England and loses his father and the psychological harm, if any, that he would be exposed to if he returns to Canada with his mother and stays with his mother in Canada, seeing his father regularly until such time as the Canadian court deals with the question of his future. Once that is realized to be the real choice before the court the answer is clear. The psychological harm of not making an order far outweighs any psychological harm of making the order. That being the case, and the Convention being clear, I have to order the return of the child forthwith. But I stay that order by consent, provided the mother returns to Canada with the child and the father agrees that she should have the care of the child until such time as the Canadian court orders otherwise.'

During the discussion which took place after judgment, counsel for the mother took instructions as to the time limit which she proposed for her return to Canada with G. Having done so, he told the judge that it might take something in the region of 6 weeks. The judge said that he thought that that was reasonable. The order in the proceedings under the 1985 Act as drawn, having ordered that the mother do return G to Canada forth-with, proceeds as follows:

> 'By consent it is further ordered that the operation of this order be suspended provided that:
>
> (i) the defendant returns with the said child to Canada within 6 weeks,
> (ii) the plaintiff agrees that the defendant should keep the care of the said child prior to any order that the Canadian courts may make upon the basis that the plaintiff has liberal access to the said child.'

In the wardship proceedings it was ordered, first, that upon G leaving the jurisdiction the wardship be discharged and, secondly, that the mother be restrained from removing G from the jurisdiction save for the purpose of travelling to Canada.

Two points clearly emerge from the decisive passage in the judgment of Ewbank J. First, he thought that in deciding whether there was a grave risk

that G's return to Canada would expose him to psychological harm he was entitled, indeed bound, to consider the practical consequences of his making an order to that effect. Secondly, on what he had been told by the parents and through counsel, he thought that the practical consequences would include the return of the mother with G and his remaining in her care until such time as the British Columbian court otherwise ordered. A third point is not quite so clear. The judge expressed himself to be carrying out a balancing exercise. I believe that it is not mere pedantry to say that he was in truth carrying out a comparative exercise. Having done so he concluded that the psychological harm of not making an order far outweighed any psychological harm of making the order. That was not precisely what he had to decide, because it would still be possible, in theory at any rate, for the psychological harm of making the order to fall within art. 13(b). However, I think that there can be no doubt that the judge thought that that was not the case here. He really said as much when he said:

> 'That being the case and the Convention being clear I have to order the return of the child forthwith.'

His view of the matter was clearly tenable on the basis of the passage which I have read from Dr Black's written report. He found that there was not a grave risk of psychological harm. He therefore recognized that he had no discretion in the matter and no power to refuse an order for G's return.

The judge's view on the first of these points is attacked by Mr Johnson, who has appeared for the mother in this court. He submits that the judge asked himself the wrong question for two reasons: first, because he carried out a balancing exercise on the erroneous footing that he was exercising a discretion; secondly, because the question whether there is a grave risk of psychological harm is a preliminary to return, and the judge was therefore wrong in considering the practical consequences of an order to that effect.

The first of these objections disappears once it is recognized that the judge was, in truth, carrying out a comparative exercise and was in reality of the view that any psychological harm of making the order was not sufficient to fall within art. 13(b). It is important to remember that he had already taken the material words of art. 13(b) to mean that the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree with Mr Singer, who appears for the father, that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'. It is unnecessary to speculate whether the *eiusdem generis* rule ought to be applied to the wording of an international convention having the force of law in this country. Assuming that it ought not, I nevertheless think that the force of those strong words cannot be ignored in deciding the degree of psychological harm which is in view.

The second objection is, in my view, misconceived. The intendment of art. 13(b) cannot be that the judicial or administrative authority of the requested state is to be blinkered against a sight of the practical consequences of the child's return. The procedure cannot be as summary as

that. Moreover, as Mr Singer has pointed out, there is internal evidence to the contrary within art. 13 itself: see the last paragraph, which requires the authority of the requested state to take into account the information relating to the social background of the child provided by the Central Authority (in this country the Lord Chancellor – see s. 3(1)(*a*) of the 1985 Act) or other competent authority of the child's habitual residence.

Two further points have been debated in relation to art. 13(b). First, Mr Johnson has submitted that the 'return' contemplated in that and the other provisions of the Convention, as it applies to this case, is a return to the custody of the father. On a consideration of the Convention as a whole, in particular of the preamble, I think it is clear that what is contemplated is a return to the country of the child's habitual residence. On that footing I need not consider an argument which Mr Johnson sought to base on the view propounded by him. Secondly, it is suggested that it is unclear whether remote, as opposed to proximate, practical consequences can be considered. I do not find it necessary to express any general view on that question, which I would expect to be answered by an application of probabilities and common sense. In the present case it is enough to say that the judge was entitled to proceed, as he did, on the footing that an order for G's return would result in the mother's returning with him and also that there would be a further application to the British Columbian court as soon as practicable thereafter.

For these reasons, I conclude that Ewbank J was entitled to consider the practical consequences of an order for G's return to Canada and that he did not consider any consequences which he was not entitled to consider. However, on the basis of fresh affidavit evidence on behalf of the mother, which we have admitted this morning, it is said that it can no longer properly be assumed that the mother will return to Canada with G if the judge's order stands. It must be very doubtful whether the requirements laid down in *Ladd v Marshall* [1954] 1 WLR 1489 are satisfied, but a benevolent approach is sometimes appropriate in cases where the interests of children are concerned. I should record that Mr Singer intimated that if the fresh evidence was admitted and if we thought it possible that it would affect the outcome of this appeal, he would wish to apply to cross-examine the mother and perhaps even to file evidence in answer. Before giving judgment, we for our part have intimated that the fresh evidence will not affect the outcome of the appeal.

The fresh evidence consists of affidavits sworn by the mother's solicitor and the mother herself. The solicitor submits that this court should at least consider the financial and other difficulties which stand in the way of the mother's plan to return with G to Canada becoming a reality; that the mother and her advisers could not have anticipated the order of Ewbank J; and that she had not fully considered her financial circumstances and, in the light of those circumstances, her ability or inability to return to Canada.

The mother deposes to her earnings and outgoings, which include the repayment by monthly instalments of a bank loan taken out for the purchase of a motor car. She estimates that if she were now to sell the motor car she would be left with a debt in the region of £1,000 which cannot be satisfied out of other assets, because she has none. The bank has refused an extension of her borrowing facility. Then she says that she has

unsuccessfully asked for help from her friends and her employer by lending her the money for the air fares to Vancouver and her initial living expenses there. I will say at once that the problem over the air fares has been resolved, because G has an open-dated return which is still valid and the father has offered to provide the mother with a one-way ticket.

Reverting to her living expenses, the mother says that she would have to rent accommodation because her brother is leaving Bowen Island and moving several hundred miles inland. Furthermore, there is no certainty that she would be able to find accommodation or even employment whilst she was in Vancouver. It is also the case that the father's offer to let her stay in his flat with G is no longer open because his circumstances have now changed. In her affidavit the mother says this:

> 'When I was asked by Ewbank J if I would travel to Vancouver if he ordered that [G] be returned I had not considered the financial or other arrangements which would be required. I was and remain primarily concerned with [G's] welfare and it was for that reason that I said in answer to Ewbank J's questions that I would follow [G] to Vancouver in the event that Ewbank J ordered that [G] be returned to Canada. However, in practice I cannot see how I can comply with the order.'

Finally, she refers to her present position in England; to her flat, which is ideal for her and G and which she would very much like to keep; to her inability to earn sufficient money to support homes both in England and Vancouver, even if she was able to obtain employment there; to the fact that her employer could not keep her present job open for her on her return after, say, 2 months, which might well be an underestimate; and to the fact that the life which she has established here for G and herself would in all probability be completely disrupted, even if it should subsequently be ordered that she and G should be allowed to return to England.

Having carefully considered the fresh evidence, I am in no doubt that the obstacles which the mother now raises against her return to Canada do not extend beyond the innumerable financial and practical difficulties to which Ewbank J referred on 13 March and all of which (with the exception of her brother's move inland and the unavailability of the father's flat) must have been within the reasonable contemplation of the mother on that day. The judge, who saw and heard her give evidence, thought that she had made it clear that she would go to Canada with G as soon as she could, and he accepted her proposal that she should be given 6 weeks to do so. I also bear in mind that the judge rejected her allegation that she consented to the order of 19 August 1986 under duress and her evidence about a private agreement with the father, and that he thought that her evidence on those and other aspects of the case was unsatisfactory. He also accepted that she may have decided to trick the father. All this means that we should treat this further evidence of hers, albeit untested by cross-examination, with some reserve and as a further attempt to avoid an obligation previously undertaken.

Both the father and the mother now agree that the order which they asked Judge Boyd to make on 19 August 1986 is not in the best interests of G. There can be no doubt that the British Columbian court is the proper authority to decide all questions relating to G's long-term future. It is the

duty of both parents to that court to refer the matter to it again as soon as practicable. It is the parental duty of the mother to G to go with him to Canada and thus minimize so far as is possible the further instabilities which are likely to beset him. It is incumbent upon both parents to do everything which they can to help G over the difficult period until the British Columbian court can decide what are his best interests in the long term.

I think that Ewbank J came to a correct decision on the evidence which was before him, and that his decision is not in any way invalidated by the fresh evidence which is now before this court. I would, therefore, dismiss this appeal.

MUSTILL LJ:
I agree.

Appeal dismissed. Extension of 4 weeks. Leave to appeal to House of Lords refused. Legal aid taxation on both sides.

Solicitors: *Dawson Cornwall & Co.* for the mother;
Thomson Snell & Passmore for the father.

P.H.