RE S (ABDUCTION: CHILDREN'S REPRESENTATION) [2008] EWHC 1798 (Fam)

Family Division

Charles J

14 May 2008

Abduction – Children's objections – Mother granted leave to take children from Argentina to England for one year – Whether case still Argentinean

The divorced parents had been living in Argentina with the three children. The Argentinean court granted the mother permission to bring the children to England for a period, on the basis of detailed contact and return arrangements. At the end of the period the father warned the mother that unless the children returned he might initiate an application for their summary return under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). The mother returned to Argentina with the children, but applied to the Argentinean court for permission to go back to England. There was clear evidence that the children wished to return to England, and that they were to some degree hostile towards the father. A psychiatrist reported that the eldest child was extremely dependent on the mother, and that she was encouraging the two younger children to rebel against the father. The Argentinean court gave the mother permission to live in England for one year, but ordered that on the children's return to Argentina therapeutic treatment would begin with the aim of improving the children's relationship with the father. The mother left Argentina before the time limit for appealing the order had expired, and when the father appealed the order was suspended. Shortly after the end of the 'authorised' year in England the mother applied in Argentina for permission to retain the children in England. About 3 months later the father sought the children's summary return to Argentina. The question arose whether the children had been 'settled' in England for over a year, as would be the case if the wrongful retention had begun when the mother left Argentina before the order was finalised. The children were now 15, 12 and 9, and were expressing strong objections to returning to Argentina. It came to the court's attention that the father had recently been posted to Australia by his employers, and would potentially be asking that the children went to live with him in Australia.

Held – dismissing the father's application –

(1) In the context of a summary hearing the court would proceed on the basis that the settlement provisions in Art 12 of the Hague Convention were not triggered (see para [20]).

(2) When weighing general Hague Convention policy considerations against the interests of the child in the individual case, it might be relevant that certain wrongful retention cases, like settlement cases, were not paradigm 'hot pursuit' cases (see para [23]).

(3) The children's objections to returning to Argentina to some extent related to the mother's wishes, but all three of these children were speaking their own minds; there were compelling child-centred reasons as to why they did not wish to return, many of which related to their education (see paras [30]–[32]).

(4) It would be very surprising and disappointing if the Argentinean court had not had in mind when making its order the possibility that at the end of the authorised year in England real issues might arise under the Hague Convention as to whether or not it was appropriate for the children to return to Argentina. Points concerning comity had little force, given that the product of the Argentinean orders granting the mother permission to bring the children to England for substantial periods, together with the father's imminent posting to Australia, was that this was now essentially an English case (see paras [12], [36]).

Statutory provisions considered
Child Abduction and Custody Act 1985
Hague Convention on the Civil Aspects of International Child Abduction 1980

Cases referred to in judgment
D (A Child) (Abduction: Custody Rights), Re [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783, HL
D v S (Abduction: Acquiescence) [2008] EWHC 363 (Fam), [2008] 2 FLR 293, [2008] Fam Law 499, FD
L (Minors) (Wardship: Jurisdiction), Re [1974] 1 WLR 250, [1974] 1 All ER 913, CA
M (Abduction: Zimbabwe), Re [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 FLR 251, [2008] 1 All ER 1157, HL
S (Minors) (Abduction: Wrongful Retention), Re [1994] Fam 70, [1994] 2 WLR 228, [1994] 1 FLR 82, [1994] 1 All ER 237, FD

Markanza Cudby for the plaintiff father
Dermot Main-Thompson for the defendant mother
Edward Devereux for the children

CHARLES J:
[1] This is an application under the Child Abduction and Custody Act 1985 in respect of three children who are in court. They were born, respectively, in December 1992, June 1995 and March 1999. They are the children of the marriage of the plaintiff and the defendant to the proceedings. Their parents are now divorced.
[2] The application is by their father for their return to Argentina. As is my custom in cases of this type when family members are in court, I propose to say what I am going to do now so that they do not have to spend time guessing where they think I am going to end up. I am going to refuse this application. The result of that is that the children can remain in this jurisdiction.
[3] Very briefly, the history is that the parents and the children are all citizens of Argentina. The father is now 49 and the mother 43. They were married in 1988 and separated in or around 2002. In August 2002 the parents entered into an agreement by which the mother was given sole custody of the children and that agreement was ratified by a court in Argentina. The parties divorced in September 2003: that agreement being endorsed at that stage. Both parents have since remarried. The father has another child of that marriage, a young boy.
[4] At the end of 2003 the mother initiated proceedings in Argentina to enable her to bring the children to this country. The mother's purpose in coming here was to study. In the early part of 2004 she travelled to this country alone leaving the children in Argentina in the care of the plaintiff father. There was an agreement entered into in April 2004 reflecting that arrangement namely that the children would live with the father whilst the mother came to the UK. She came here without the children for a period of about 3 months between April and July 2004. She returned to Argentina in July of 2004 and in August 2004 the parties agreed and, as I understand it, this agreement was also endorsed or made before a court, that the father was to have custody of the children whilst the mother was studying in England, but part of that agreement was that the mother would be authorised and permitted to collect the children in December of that year and bring them to England for a year to be with her. There were provisions in that agreement/order as to

contact between the father and the children. There were also some quite detailed arrangements relating to all the children but in particular to the youngest child as to whether or not he should be returning to Argentina. It was drawn to my attention that at this stage particular provision was included referring to the need to have regard to the wishes and feelings of the children in the context that if they expressed a desire to go back to Argentina the parties would respect those wishes.

[5] In June of 2005 during that period whilst the children were in this country the father travelled for contact. There is a disputed allegation that on that occasion he assaulted the oldest child, Maria. There is an extract from a police notebook in the papers. That notebook indicates that the parents did not wish to pursue or for the prosecuting authorities to pursue, any case against the father. The mother in her evidence says that this did not happen because the father returned to Argentina. Be that as it may, there is a record evidenced by the police notebook that an incident took place on that contact visit. The father denies that he did anything inappropriate or wrong on that occasion.

[6] In December of 2005, that is at the end of the period agreed for the children to be in the UK, the father sent an email to the mother advising her that he may initiate a Hague Application requiring return of the children.

I mention that at this stage because it makes it clear that at this stage in the history the father was aware of the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). Those proceedings did not go anywhere and their relevance is the one I have just mentioned. The mother, in December 2005, filed in Argentina a request for authorisation for the children to be in the UK plus a further authorisation, and returned some 2 months later to Argentina with the children in February of 2006.

In April 2006 the mother married her present husband and for a short period in 2006 the youngest child, recorded in the chronology, attended school in Argentina.

[7] Proceedings then followed in Argentina and in that context a report was obtained from a psychologist. It seems that that report was a follow up to an earlier report in respect of the proceedings in 2004. It is unclear whether it was the same psychologist or a different one. I have been referred to that report and I cite a short passage from it in the following terms:

> 'There is a strong power alliance instilled by the eldest daughter who tried to place her younger siblings in rebellion towards the rules of their father's home. At that particular time the eldest sister, MI, suffered selective feeding and eating disorders with an extreme maternal dependency lower than her maturing age.'

[8] In a judgment of the Argentinean court in the context of the application made by the mother for authorisation to bring the children to the UK, and the opposition of the father, his evidence indicates that he opposed on a number of grounds. Included with them was his assertion that the mother intended to remove herself and the children to the UK on a permanent basis. Also, as I understand it, he had other arguments relating to the welfare of the children. The minors' advocate is recorded in the judgment as expressing the

opinion that she did not doubt the love that the children feel for their father and the need to start a therapeutic treatment upon return.

[9] The issues that faced the Argentinean court at that stage were therefore these. The parents of these three children were divorced and seeking to lead, and were leading, separate lives. So far as the mother was concerned, that life with her new husband was hoped to be in England. So far as the father was concerned, he was at that stage based in Argentina. The children were expressing views that they wished to be with their mother and they wished to return to England. There was clear evidence of some hostility in the minds of the children towards the father and, as I understand it, there were disputed issues as to the causes for that position.

[10] The solution that the Argentinean court reached was to give the mother permission to take the children to England on the basis that at the end of the permitted period the children would be returning to Argentina to embark upon a therapeutic exercise designed, as I understand it, to improve the relationship between the children and their father, but no doubt it would have had a wider remit to help promote relationships throughout this family. The order made originally on 6 July 2006 granted permission for the mother to go to the UK until 27 February 2007. On the face of it that seems to be a typing error, or some form of error. Also the next paragraph in that order provided that the minors were to be personally informed that the primary objective is that as of February 2008 the father/child relationship is to be renewed with therapeutic support.

[11] The mother returned to court and sought clarification from the court as to what permission had been granted. On 27 July 2006 the court clarified and amended the court order and granted authorisation for the children to come to the UK for one year as from the date of their actual departure. On the other point that I have just referred to, the clarification was that the relationship of the minors with their father under therapeutic treatment should commence on the date the minors actually returned to Argentina. So the scheme remained the same, namely that the solution to the difficult welfare issues facing the court was that the children should come to England with the mother and on their return there would be some therapy.

[12] I pause at that stage to comment in respect of that approach and order. As I have already indicated, at the time that order was made the father was fully aware of the existence of the Hague Convention. The Argentinean court clearly would have been aware of the provisions of the Hague Convention. The initial order referred to a date for return. The clarification was that the children would be in the UK for a year and the therapy envisaged, and to commence on their return to Argentina. Putting myself in the position of the Argentinean judge, I would be very surprised and very disappointed if when making that order I had not had in mind the possibility that at the end of the period that the children were in another country pursuant to my leave real issues might arise under the Hague Convention as to whether or not it was appropriate for them to return. That, it seems to me, flows inexorably from the difficulties that then existed, namely the children indicating some hostility towards their father, a desire to live with their mother and a desire to return to the UK. It is to be remembered that they had already been in the UK for a period of a year effectively throughout 2005. Part of the thinking may have been that the best way to trigger and promote a relationship between the

children and their father, given the difficulties that then existed, and the underlying disputed issues that were the background to that position, was to give the children time in the UK where they were saying they wished to be with their mother, where the mother was studying and where her new husband also wished to be.

[13] Having obtained the clarification, the mother left Argentina on 27 August. The chronology and timetables I have been given, indicate that the father was notified of the clarification of the judgment on 14 August. The father in his evidence asserts that under Argentinean law, as the time for appealing that order had not expired, the mother left too soon and therefore that the order did not give her the necessary authorisation. He also, 2 days after the mother had in fact left, applied for a suspension and an annulment of the order giving permission for the mother to leave Argentina with the children. On 13 September that application by the father was admitted by The Supreme Court of the Province of Buenos Aires.

[14] I was referred to a part of a ruling referring to the views of a judge, a Judge Kogan, who stated as follows:

> 'According to the report from the National Department of Migration found at exhibit 267, the children in this case are recorded as having left the country for Italy on 27 August 2006.'

I pause to comment that the family travelled via Italy as I understand it:

> 'On that date, however, the leave to travel granted by the family court and found in exhibit 186192 and 198200 had not become final. I must also emphasise that the decision in question was subject to an extraordinary appeal and that when the court granted leave to enter the appeals in question, the effects of the original decision were thereby suspended and then he cites an article of the relevant code.'

The view of that judge was therefore that certainly by 13 September, and possibly from 29 August, the order which had authorised the mother to come to this jurisdiction was suspended.

[15] To complete the timetabling, the mother and children have remained in this jurisdiction from August 2006. During that period there was some telephone and email communication between the father and the family in England. There was also email communication as to a contact visit in Argentina to take place in August of 2007 and the parties disagree as to their underlying intentions in respect of the relevant email exchanges. That contact visit did not take place. Shortly after the expiry of the year from the departure of the family the mother made an application in Argentina for further permission to keep the children in the UK.

[16] The originating summons in these proceedings was issued on 3 December last year. I am not clear why this case has taken so long to come on for hearing, but it seems to me that the trigger date for issues that I have to consider is therefore 3 December, and that further periods in this country thereafter add little to the exercise.

[17] The father's case as put through a skeleton argument drafted by an earlier counsel, but adopted by his present counsel, is that there was a

wrongful retention of the children in this country at the end of August 2007. In advancing that submission both in the skeleton argument and orally, the representatives of the father assert that there is insufficient clarity as to the effect of the father's applications relating to the order made in Argentina in July 2006 to demonstrate what had actually happened in respect of that order, namely whether it was suspended or stayed, or whether it remained valid. Hence, the basis upon which the argument is put is an acceptance or assumption that pursuant to the order of the Argentinean court, notwithstanding the attack made upon it by the father, the mother was lawfully in this country with the children for the period of that year, from August 2006.

[18] The mother and the children, who are separately represented and parties, have argued that the wrongful retention commenced at the latest by 13 September 2006, relying on the passage I have read out from the Argentinean ruling to the effect that the permission granted by the court was suspended. The relevance of this dispute will be apparent to those familiar with the Hague Convention because it relates to the 12 month period referred to in Art 12. To my mind, as a result of the history, there is also a point or a potential point that on the father's approach that either pursuant to the order or a combination of the order and his decision not to seek to enforce any suspension of it and/or his consent that the children should remain here for the period originally set out in the order, whether at the end of that period of time there was a wrongful retention for the purposes of the Hague Convention at all. That argument involves an analysis of the provisions of Art 3 and in particular the need to show that the children were being retained from a country in which they were habitually resident *immediately* before that retention. I have in a recent decision of my own referred to potential problems so far as that is concerned. That is a case called *D v S (Abduction: Acquiescence)* [2008] EWHC 363 (Fam), [2008] 2 FLR 293 in which it was acknowledged that the decision of Wall J (as he then was) in *Re S (Minors) (Child Abduction. Wrongful Retention)* [1994] Fam 70, [1994] 2 WLR 228, [1994] 1 FLR 82 was or may be wrong on the habitual residence aspect of that case.

[19] No party has argued that point before me. Indeed, the mother's submissions in writing and orally were to the effect that she accepted there was a wrongful retention. It is understandable given her application in Argentina in August of 2007 why that stance was taken. On behalf of the children the point was not argued, again, in my judgment, understandably. In my view the point raises some difficult issues as to the application of the Hague Convention in circumstances in which the Requesting State has given a time limited permission for children to be outside its jurisdiction for a settled purpose. They relate in the main to inter-relation between the operation of the concept of habitual residence for the purposes of the Hague Convention and other approaches to that concept which the cases tell us is an issue of fact.

I therefore shall proceed on the basis that the Hague Convention does apply.

[20] The argument whether or not there was a wrongful retention in September 2006, having regard to the suspension of the July 2006 order, to my mind also raises a number of points of fact and as to the application of

Art 3. Having regard to the extent of the argument in this case, I am not prepared or in a position to reach a conclusion on that issue in an extempore judgment.

I would wish before reaching any conclusion on it to give the matter further thought and carry out some further research. I am therefore going to proceed on the basis that the wrongful retention took place in August 2007 and therefore on the basis that the settlement provisions in Art 12 are not triggered in this case. That does not meant when exercising a discretion the history is not taken into account and the argument given the description of settlement with a small 's' during the course of submissions is not a relevant factor.

[21] The defences raised originally included an argument based on acquiescence. To my mind, correctly, that was not pursued. That leaves within the issues raised by Art 13 two matters, namely Art 13(b), (intolerable situation) and the wishes and feelings of the children. I shall deal with the wishes and feelings of the children first.

[22] To my mind, it was correctly not argued that given the wishes and feelings of the children as expressed both to the Cafcass officer, to their solicitor and in an affidavit of the oldest child, that this was a case in which the court does not have a discretion by reference to the wishes and feelings of the children. In the course of argument I was helpfully referred back to points as to whether or not influence of the children by others can mean that the trigger to the exercise, namely that they are truly the wishes and feelings of the children is in existence. Here, to my mind, rightly it was not argued that the children and in this I include the youngest child, have not expressed views which, having regard to their age and understanding, the court should take into account. Here, what is said is that in the exercise of its discretion the court should take into account the background dispute and the point asserted by the father that the children in expressing their views have been significantly influenced by their mother and indeed by discussions amongst themselves.

[23] The House of Lords have recently given guidance as to the approach to be taken both to the representation of children and as to existence and exercise of discretion under the Hague Convention in two recent cases: *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783 and *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 FLR 251. At this point I will focus on *Re M*. The most relevant paragraphs are to my mind in the speech of Baroness Hale of Richmond at paras [40] through [48]. What I take from that guidance is that in a Hague Convention case when the court is exercising its discretion, there are general policy considerations which may be weighed against the interests of the child in the individual case. Baroness Hale of Richmond refers to those policy considerations in para [42]. She says:

> 'These policy considerations include not only the swift return of abducted children but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there not only to secure the prompt return of abducted

> children but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states.'

She goes on in para [43] to say that:

> 'In cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy alongside the circumstances which gave the court a discretion in the first place and the wider consideration of a child's rights and welfare.'

Going on, in para [46] she deals specifically with child objections cases and says this:

> 'In child's objections cases the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met. First, the child herself objects to being returned and, second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days and especially in the light of Article 12, United Nations Convention on the Rights of the Child courts increasingly consider it appropriate to take account of the child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play the court may have to consider the nature and strength of the child's objections and the extent to which they are authentically her own or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare as well as the general convention considerations referred to earlier. The older the child the greater the weight that her objections are likely to carry, but that is far from saying the child's objections should only prevail in the most exceptional circumstances.'

She then goes on to settlement cases and makes the point that those could never be perceived as hot pursuit cases. I pause to add that it seems to me that in retention cases the point that they are not hot pursuit cases may exist. Particularly when the wrongful retention takes place sometime after children have been lawfully in another country the concept of hot pursuit is less easy to apply than in a renewal or the paradigm abduction case. In para [48] Baroness Hale of Richmond says this:

> 'All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases and has to be weighed together with the circumstances which produce the exception and such pointers as there are towards the welfare of the particular child. The convention itself contains a simple sensible and carefully thought out balance between various considerations all aimed at serving the interests of

children by deterring and where appropriate remedying international child abduction. Further elaboration with additional tests and checklists is not required.'

[24] Therefore in exercising its discretion the court has to look at what it is being asked to do. In the context of the Hague Convention what it is being asked to do is to return children to the Requesting State for the purposes of enabling that State to make decisions as to their medium to long-term welfare. It is in this context that a general approach exists which underlies the Hague Convention and can be found in a passage from a judgment of Buckley LJ[1], cited by Baroness Hale of Richmond. It is the desirability of decisions concerning children's medium to long-term welfare being made by the courts or their habitual residence because they are the courts which are likely to be best informed in the making of those decisions.

[25] This lies at the heart of the father's case. His most recent statement is in very firm terms that he regards issues as to his children as being ones that should be decided by the courts in Argentina. Miss Cudby, on his behalf, puts the points rather less confrontationally than the father does in his evidence by reference to a number of factors which I accept need to be taken into account. She points to the fact that since 2004 the Argentinean courts have been engaged on and off with this family. There have been psychological reports. There have been contested hearings and the Argentinean court set a regime in 2006 which envisaged and indeed required the return of the children to Argentina in 2007. To that she adds that a study of the documents indicates that there are some contradictions in the evidence advanced by the mother and the children which she says supports her client's, that is the father's denial of allegations made by the mother and the children. She points to the fact that in the context of the allegations of violence between the parents and of violence to in particular the oldest child by the father that the mother did leave the children with the father on a voluntary basis in 2004. She also points to indications within the psychologist's report, an equivalent to the children's guardian or representative in this jurisdiction, and the judgments of the court that there were good aspects as her client asserts of his relationship with the children. She does not assert that I am in a position to decide these disputes. I clearly am not.

[26] On the other side of the equation to my mind on reading the documents and the reaction of the father, in particular since August of last year, the accounts given by the mother and the children carry real weight. Included amongst them is a persistent assertion by the children, particularly the two older children, that the father simply will not listen to them at all and will not take into account what they wish rather than what he wishes, or what he says their mother is telling them they should want. There are allegations of quite a serious nature as to violence towards the eldest child which are consistently asserted by her and the father's documents in particular emails, acknowledge that his relationship with that child is more difficult than with the other children. That also seems to be reflected by the psychologist's report I have quoted from.

---

1 Editorial Note: The case referred to was *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250, [1974] 1 All ER 913.

[27] The backdrop therefore is that in the context of the relationships that exist in this family there are a number of disputes, and Miss Cudby urges upon me that the Argentinean court would be much better placed than this court to determine those matters because, for example, the relevant events essentially took place in Argentina and the relevant court would be operating in the first language of all the parties. She also says that the Argentinean court set a regime and as a matter of comity on an application of the Hague Convention this court should be slow to depart from it. So far as that is concerned, I have already indicated that it seems to me that it must have been or should have been in the mind of the Argentinean court that at the end of the year it set issues under the Hague Convention might well arise.

[28] The other arguments that are put on behalf of the father are essentially to the effect that the children are not speaking their own minds but are stating wishes in accordance with influence placed upon them by their mother. In that Miss Cudby goes back to the point made in the first agreement as to taking account of the wishes and feelings of the children concerning a return to Argentina. A number of points she took me to in her client's statements demonstrate that her client has been saying that the mother has set out to create the position that now exists namely that the children are all saying they do not wish to return to Argentina. She also asserts that much of the reasoning, so she says, of the children is related to a wish not to live with the father in Argentina rather than a wish not to return to Argentina.

[29] I accept that in giving some of their explanations that is part of the children's reasoning. It is difficult, it seems to me, for children and indeed non-legally qualified adults to appreciate distinctions between being returned to a country and being returned to a person in that country. In this case, there is the added confusion that the father's present position is that he either will shortly or has instituted criminal proceedings against the mother which it seems to me justifiably provides the basis for a concern that if the children were to be returned to Argentina it would be into the care of their father or their paternal family.

[30] To my mind, Miss Cudby has done the best she can to build bricks in this case with precious little straw. As to the report of the Cafcass officer, and the statements of the mother, of the solicitor acting for the children and the eldest child, I do not dispute that there are aspects of the reasoning of the children which relate to the wishes expressed by the mother over the years, discussions between the children, a wish not to be with the father. But what also, to my mind, shines out with a real clarity in this case is that all three of these children, and in that I include the youngest who is only 9, are speaking their own minds. As with everybody's minds the decisions they make are influenced by what others think, what others say, what others have done and their perceptions of what others have done, but to my mind it is clear that all three of these children are expressing, for understandable and sound reasons, a real and compelling wish to remain in the UK. That of course means that they remain with their mother, but individually they also have their own particular reasons for that decision. In respect of the older two children, those reasons in large measure revolve around the commitments they have at school and outside school to the UK. They have been living here for quite some time now in the context of their lives. The older two also had fairly extensive schooling in Argentina. They are now clearly well established and doing well

in their schools here. They are committed within the community. They have a circle of friends and, to my mind, are obviously both psychologically and physically settled in this country. A return to Argentina would result in a considerable disruption of their education even if it was only in the short term. Those, it seems to me, are powerful and child-centred reasons.

[31] So far as the youngest is concerned, it seems to me, reading the Cafcass report, that he was correctly corrected by his older sisters about things he was saying he remembered. He simply did not in fact do so because he was too young. But, equally, within the report in my view there are passages which clearly come from him as to why he wishes to remain in England. During the course of the hearing I raised one, but it is not the only one, and that was a reference to him saying a return to Argentina would be like being born again so far as he is concerned. In that context, I accept a point made that he has spent little time in school in Argentina and would not have a wide circle of school friends there. But it seems to me that that assertion by this young boy is something which comes from within him. It is understandable. He also points to his friends in England and to a particular friend who he spends a lot of time with.

[32] There are therefore, to my mind, compelling child-centred reasons as to why the children do not wish to return to Argentina for decisions to be made as to their future in Argentina. Those reasons relate to that short-term period whilst those decisions are made, and to the longer term.

[33] Turning to the nature of those medium to long-term decisions. The guidance given by Baroness Hale of Richmond as to the exercise of discretion by this court shows that a wider consideration of the child's rights and welfare, and such pointers as there are towards the welfare of the particular child are factors. I have therefore asked myself whether there is any realistic prospect in this case of a court exercising the paramount approach reaching a decision that these three children's welfare is not best promoted by them remaining in England living with their mother, and I cannot see that there is a powerful argument in the other direction.

[34] The real welfare issues therefore, it seems to me, will essentially be related to ones concerning contact.

[35] Also having regard to the wider welfare issues, it has been drawn to my attention that the father has a posting to Australia. It is not entirely clear from instructions to counsel and the evidence whether that posting has been finally confirmed, albeit that the mother's search of the relevant website would indicate that it has. But it is common ground that the father is expecting and would take up a posting to Australia. The emails he has sent indicate that he would potentially be asking that the children go to live with him in Australia.

I confess I do not see how one gets to that result applying a welfare principle on the undisputed facts and history of this case. If contact is the relevant ambit of the dispute, the relevance of the historical disputes and the need to resolve them is less strong. Additionally, the scheme of the original Argentinean order of there being a therapeutic exercise in Argentina becomes wholly unrealistic because the father will not be in Argentina to take part in it.

[36] Therefore it seems to me that having regard to what I would expect to be in at least the back of the Argentinean court's mind, namely that a Hague Convention issue could arise at the end of the authorised year, the points I

have just made as to the likely issues in the medium to long-term welfare debate mean that the points made relating to comity and this originally being and continuing to be an Argentinean case, have little force. It seems to me that an Argentinean case, but the product of the orders that the Argentinean courts made and of the present position that the father is to be posted to Australia, and the fact that the children have been here for a year and then earlier for another year is that now this is essentially an English case. In the exercise of my discretion it does not seem to me that the aspects of the Hague Convention and its underlying purposes which the father prays in aid, and to my mind understandably prays in aid given the fact that he is Argentinean as are his family, begin to do any real battle with the points made in the opposite direction based on the wishes and feelings of the children which to my mind are their own and, albeit that they contain points which relate to issues concerning with which parent they should live, also contain convincing themes as to why they wish to be in this country and do not wish to return to Argentina for the purposes of a court deciding their medium to long-term futures.

[37] That deals with the case in the sense that in the exercise of discretion I refuse the present application.

[38] The children through their representatives also raised a point that Art 13(b) was satisfied in this case. In that context, they relied on the assertion as to physical chastisement and abuse of the eldest child, delay, and the practical arrangements awaiting the children in Argentina. In the context of delay I was referred to paragraphs in *Re D* and in particular paras [51]–[53]. So far as the physical chastisement of the child is concerned, I have already dealt with that and it seems to me that there are issues that are disputed which I am not able to determine. The force of the argument under Art 13(b) is based upon a combination of the period of time the children have been in this country, their wishes and feelings and the situation they would be placed in if returned to Argentina in the absence of their mother, not through choice of the mother but through the existence of a criminal process in Argentina against their mother. On one view that practical arrangement would also be a return to Argentina, in those circumstances, when their father too was not in Argentina. The purpose of the argument is one to found a conclusion that if the grounds in Art 13(b) are satisfied then the court would not, as a matter of discretion, order a return.

[39] In this case there have been some problems relating to communications between the father and the solicitors who are his solicitors in this country compounded by difficulties concerning funding. At one stage the funding was removed. It was then reinstated but the solicitors felt that they could no longer act having regard to communications with their client and very properly came to court to be taken off the record. When the matter first came before me last week that was the position. The solicitors are now acting for the father and I have indicated he has counsel. However, his counsel had not seen the statement of the father indicating that he was going to proceed shortly with a criminal prosecution of the mother and was not in a position to give me the father's up to date position on that. Equally, and although I accept there has been considerable time for the consideration of undertakings, that aspect of the case has not been fully explored and I am not prepared at this stage simply to proceed on the basis of an assumption that this father would

continue with a criminal prosecution and would not ensure that appropriate arrangements were made on a return to Argentina to effectively mean that the Art 13(b) defence was not established. Having said that, I accept that there are arguable points as to the stage at which undertakings in the context of Art 13(b) become relevant, namely as to the trigger or as to the exercise of discretion.

[40] If they are relevant at the discretion stage, albeit that, as I have mentioned, it seems to me that the father's attitude to criminal proceedings against the mother adds another convincing reason to the children's thinking, I have not taken it into account in what could be described as a free-standing exercise of discretion in the context of the children's wishes and feelings. It therefore seems to me that it is unnecessary for me to invite further inquiries as to the father's stance as to this in the context of the Art 13(b) defence. I leave it on the basis that on the present information I recognise that it is an arguable point but it is one which, it seems to me, need not be pursued further in this litigation. I say that because if it were not established because of the offer of undertakings, the wishes and feelings of these children still gives the court a discretion which I have exercised in the way I have indicated.

[41] I therefore dismiss the application.

Order accordingly.

Solicitors: *Anthony Louca & Co* for the plaintiff father
Access Law for the defendant mother
Dawson Cornwell for the children

PHILIPPA JOHNSON
Law Reporter