No.FD14P00321

Neutral Citation Number: [2014] EWHC 2069 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Thursday, 15th May 2014

Before:

SIR PAUL COLERIDGE

(**In Private**)

- - - - - - - - - - - -

B E T W E E N :

C — Applicant

- and -

B — Respondent

- - - - - - - - - - - -

*Transcribed by **BEVERLEY F. NUNNERY & CO.***
Official Court Reporters and Audio Transcribers
One Quality Court, Chancery Lane, London WC2A 1HR
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

- - - - - - - - - - - -

MR. W. TYZACK (instructed by Dawson Cornwell) appeared on behalf of the Applicant Mother.

MISS M. TAYLOR (instructed by Kilic & Kilic) appeared on behalf of the Respondent Father.

- - - - - - - - - - - -

J U D G M E N T

SIR PAUL COLERIDGE:

1 The Child Abduction and Custody Act, based as it is on an International Convention, is a brutal procedure, and has sometimes been described as a "blunt instrument". That is illustrated by in particular this case.

2 The application before the court is an application by a mother ("Applicant") for the summary return of her two children – H, born on October 2007; and A, who was born on September 2009 – to Germany. As can be seen, the children are young. H is six and a half and A is four and a half.

3 The application is made against the background of the fact that the German court has itself been heavily involved in the lives of these parties and these children for some considerable period of time now, and has itself made orders which in reality preclude this court from investigating in perhaps as much detail as it might otherwise have done, the various defences which the father raises.

4 I will turn to the chronology of this matter in a moment, but it is only necessary to say that in proceedings taken in Germany by the mother and by a decision originally on 7th February of this year, that the German court found that the children were habitually resident in that country. They also determined that it was the right court in respect of decisions relating to parental responsibility – in other words that the court was properly seiSed of this issue because the children were living there after due process in which both parties took part – and found that the children, as I say, were habitually resident in Germany.

5 That is crucial, because central to the whole ethos of this jurisdiction is that the court of the children's habitual residence should be the court that makes decisions about the children's welfare; all aspects of the children's welfare, and in particular in the context of the kind of issues that are in this case, in which country they should live.

6 The German court, therefore – having reached the conclusion that they are the proper place for the decision making in relation to the children's long term home – not only made that decision, but also found that the children being held in this country was unlawful in the sense that although they had been brought here lawfully by the father in the context of a short visit, when they were not returned they were being withheld in this country unlawfully. They also found, quite apart from the fact that the children had acquired a habitual residence in Germany between July 2012 when they first went there and June 2013 when they were brought to this country they also found further that the mother had never expressed her consent to the children staying in London beyond the two week period. That was, as I say, the primary decision of the German court.

7 The father, as he was entitled to, appealed that decision to the higher regional court in Stuttgart and a full appeal took place. The German Appeal Court, in a decision which is in the papers before me, set out at length the reasons why they dismissed the father's appeal. That decision was made on 10th April 2014, in other words a little over a month ago.

8 As a result of the process that had ended in the German decision in February, the mother on the back of that, brought these proceedings for summary return by an application dated 27th February 2014. Since that time these proceedings have been taking their course, and the matter is before me today for a final order.

9 In relation to the evidence, this is a summary process and it should always be remembered that that is a summary process. It is not a process which involves detailed hearing of oral evidence except in rare cases. I have had statements from both the parties, and in the mother's case by her solicitor. I have also had a report by a CAFCASS officer who was, perhaps somewhat surprisingly given the ages of the children, invited to speak to the children and discover what their views were – in particular to inform the decision as to whether or not the children objected to being returned to Germany – which is one of the defences which the father raises.

10 I am not going to set out the chronology at great length. It seems to me to be entirely unnecessary for two reasons. Firstly, Mr. Tyzack who appears for the mother today has produced a very detailed and as far as I can see entirely uncontentious chronology setting out the movement of the children, in particular the fact that they had been living in this country up until July 2012 when, as a result of a reconciliation between the parties - it had been a stormy period – they went to Germany ("relocated" to Germany would be a better way of describing it because they had been there on a prior occasion in May of that year) and how from that time until the children were brought to this country on 9th June 2013, they had made their home in that country and taken all the steps which one characteristically sees in these proceedings which indicate that the move to Germany was intended at the time to be permanent.

11 As I say, I do not propose to go into any further detail than that because, as I have already indicated, the German court which is the proper court to make these decisions has already made those decisions, and it would be highly irregular for me in those circumstances to enter into a detailed analysis of whether or not the German court made the right decision. I am not sitting as a Court of Appeal over the German Court of Appeal. The German court made the decision, the German Court of Appeal has confirmed the decision. It would be wholly contrary to all the principles of these cases for the English court then to question a decision of a competent court being a co-signatory to

the International Convention. And so there is, as I say, no reason to delve into that.

12 Now, it is right to say, as Mr. Tyzack emphasises in his careful written submissions, that given the existing German decisions the English court's hands are in reality tied, because even if I came to a decision that was contrary to the German court's initial decisions about habitual residence and consent, and refused therefore to send the children back to Germany in accordance with the Convention the mother, having established her rights in Germany, would be able immediately to go to the German court and obtain a decision in Germany pursuant to the Brussels II Regulations ordering the children to be returned. If she was to do that and she came to this country armed with that further decision, the English court would have absolutely no discretion but to enforce the order in full, because it would be a decision based on the welfare of the children. It would trump internationally speaking any refusal by this court to return the children.

13 So, in one sense, as Mr. Tyzack emphasises, the process of considering the father's conventional defences is really stymied by the prospect that the mother could simply get round them by going back to the German court. However, in deference to the father's quite understandably very strongly held views and the submissions so ably put before me today by Miss Taylor on his behalf, I shall deal with them.

14 The only basis upon which a court, once it is satisfied that children have been wrongfully removed from a country – as they have in this case in accordance with the German findings – can refuse a return order is if the court is satisfied that there is one of a number of particular defences which is available to the retaining parent. In this case the father relies on three. Firstly he says that the mother acquiesced in the children being kept in this country and accordingly she can no longer rely on the court's duty to return the children because she had in effect agreed, either at the time or after the event, to the children remaining here.

15 Let me deal with that. Firstly, that is immediately met by the finding made by the German court that the mother never consented to the children returning to this country. However, the father says that that is a superficial analysis of the position because if you look at the evidence he says that she contacted him and told him to come over and take the children, "Come and take them" were his words; and that it is his case that the mother agreed that he would have to care for the children, and that she knew perfectly well he would be caring for them in England and on an indefinite basis. He makes the point, and the German High Court were not unalive to it before they made their decision, that there was on the face of it a six month gap between the mother becoming aware of the situation and her beginning proceedings in Germany. So, he says, if you

take all that together the mother's consent can be collected from her lack of activity is what it really comes down to, combined with the things she said to him at the time.

16 As I say, he faces two difficulties in relation to that defence:

1 firstly, he is faced with the fact the German court has already dealt with it; but,

2 secondly, even as a matter of English law, for a "defence of consent", as it is described in the Convention, to be established it is necessary to have the clearest evidence that the party who let the children come to this country knew exactly what it was they were consenting to, that it was not just a partial consent or a partial indication for a temporary arrangement. In other words that this was a permanent and intended to be permanent long term arrangement.

17 Well, I have read the evidence, I have read the statements and – quite apart from the fact there is a complete conflict of evidence about this – I am not satisfied even on the father's case that the evidence that he puts forward amounts to the defence of consent.

18 The second defence he raises is in relation to what is sometimes called in shorthand, "the child's objections", in other words, that the children themselves vehemently object to being returned to the country from which they have moved. The problem with that defence is that it is again not at all easy to establish, especially with children of this age – indeed it is extremely unusual if not unheard of for children of this age, four and six, to be able to understand the nature of the decision which they are being asked to contribute to for them to raise an objection which gets over the threshold. In order for the court to be satisfied about that:

1 firstly they have to be satisfied that the words used by the children really do amount to an objection to returning as opposed to merely a fairly vague wish not to leave the parent with whom they are presently living;

2 secondly (and I think crucially in this case) the court has to be satisfied that they were of a sufficient age and maturity for their objections to be given proper and appropriate weight.

19 Well, if you read the report of Mr. McGavin who interviewed the children, he took the view within no time at all that the younger child did not have the faintest idea what he was being asked about. So, leaving that aside, that cannot possibly be established so far as the younger one is concerned. But even so far

as the older one is concerned, the six year-old, I am quite sure that she was also of insufficient age and maturity for proper account to be taken of her objections. She said forcefully she did not want to go back to Germany. But, as I say, for her to understand, to be able to make an informed "choice", if that is the right word in this respect, one has to take into account that she has had no contact with her mother for some time. She has been in the sole care of her devoted father and, as I say, it would be rare in my experience for that defence to be able to be made out, and certainly Mr. McGavin's report does not give me confidence that those views were being expressed in sufficiently clear terms for me to take them into account.

20 Which leaves finally what is sometimes described as the "Article 13b defence", in other words that there is a risk the children will suffer grave psychological or other harm if they are returned. Miss Taylor sets out this case, putting it if I may say so, as high as she conceivably and reasonably can in her note. She sets out these points, she says that:

1 firstly the mother was unable to cope with the children while they were in her sole care;

2 secondly, that the father has always had concerns about the mother's mental wellbeing, and that she constantly changes her mind;

3 thirdly, that there is some doubt about whether there would be suitable accommodation for the children if they returned;

4 fourthly really generally that the mere removal of the children from their settled home – and I have no doubt at all that they have settled in with the father perfectly well – would place them at risk of emotional harm if they were ordered to be returned; and

5 finally, and really allied to that point, the disruption of their education would also cause them some considerable harm.

21 Again, I think, as Miss Taylor recognises, the law is extremely harsh in this respect as well. It is a very difficult test to satisfy to show that children will be at risk of suffering serious emotional harm or other harm if they are returned to the other parent in a foreign jurisdiction. The cases are very clear, the evidence has to be very clear and cogent, and looking at the particular matters upon which the father relies I am quite satisfied that as a matter of law his case does not come up to the required standard.

22 So even if, as I say, my hands were not 99 per cent tied by the decisions already taken by the German courts, I would not be persuaded that the father has managed to establish a defence, even ignoring the German process.

23 Accordingly, there is no room for my exercising any discretion, even ignoring the German position, and I have to order the children to return. That is the duty that is placed upon me. As I say, I do not have a general discretion to refuse. Indeed, even if the defences were established I would still have to be satisfied in the circumstances that it was appropriate to go against the German decision and, as it were, disrupt the well-trodden path of the International Convention which is used in this court dozens of time every week.

24 The father's fall-back position is twofold in the circumstance where I have found that there is no defence. Firstly, he says by Miss Taylor that it would be right in the exceptional circumstances of this case to not order a removal until the father has had the chance to apply to the German court for permanent leave to remove the children back to this country. He says that this is only a humane decision, because if he applies to the German court and is successful, then it would involve the children going back to Germany and then coming back to this country, and that might be very destabilising for them if they had to move twice.

25 There are, on very rare occasions, cases where to take such a course is justified, particularly where the country to which the children would be removed is a country, perhaps a third world country, where the life would be so hugely different from the life which they are living in this country, and therefore to expose the children to a dramatic change of lifestyle only for them then to be sent back here might be a step too far. That simply cannot be established in circumstances here where they are going back to a country every bit as well organised as this country, or indeed better organised so far as welfare services and the like are concerned. If the father has any concerns about the mother or anything of that kind when the children return, then there are, I am quite sure, avenues available to him to approach public authorities for them to investigate. I have never had the slightest doubt that the German system is every bit as well organised as our own. And so, attractive though it might be in one sense, I do not think it is the right answer in this case.

26 Accordingly, I shall make an order for the return, and the only question is how that should be done. I invited Mr. Tyzack to speak to his client today on the telephone to discuss with her the suggestion made by the father that, given the fact that the mother has not had any contact with the children of any particular kind since last September, it would be in their interests to prolong the handover process so that they could be familiarised with her. Mr. Tyzack took instructions and his client is not attracted to that course for two reasons. Firstly I think I detect in what Mr. Tyzack said that she very much wants this process to be brought to an end, it has gone on for a long time and she says with some justification this is a summary process and the English court needs to grasp the nettle and order a speedy return.

27 But, and I think if I may say so, with more child-focused force it is unlikely to benefit the children if the process is long and drawn out. They have got to go back to Germany. They have not seen their mother for a long time. I have no reason to believe from what I have read that they will not be easily re-familiarised with her, particularly the six year-old and probably the four year-old as well.

28 The father complains that there has been no contact. The mother complains that she has not been able to have contact because all sorts of obstacles have been put in their way. There is undoubtedly a considerable level of general hostility in the case and I do not think that in the circumstances prolonging the agony for anybody is going to be in the children's interests. If this had been completely consensual, if the father had said today that he recognised that the children had to go and he was only concerned that the children should be reacquainted with the mother over a prolonged period that might have been one thing; but he has – and if I may say so, I totally understand his position – he has fought tooth and nail right down to the last minute to try and prevent them going. That is the clearest possible demonstration, it seems to me, of his intense unhappiness at the thought of his children being removed from his care and I think, given what I have read, there is every chance that a prolonged handover would not work and that the children in fact would be more likely to be harmed. In the end, that is the focus for my decision in relation to this particular part of the case.

29 I have no discretion in a welfare sense to refuse the return, but I do have some discretion over the way in which the return takes place. As I say, if there had been some level of contact between the parties in the intervening months and the father had recognised that the inevitable was going to happen and indicated his willingness to assist, I might have taken a different view, but at the end of the day I think that I shall respect the mother's view. She is the children's mother. She, I am quite sure, has their best interests at heart, and I think in the circumstances – as I say this is a brutal process but it is a question of being brutal in the end to be kind – I think it is only sensible for the mother to be allowed to collect the children on Saturday and return them to Germany and her home on Sunday, and I shall make that order accordingly.