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IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION  
**[2019] EWHC 1347 (Fam)**



No. FD19P00052

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Thursday, 11 April 2019

Before:

MR JUSTICE MOSTYN

**(In Private)**

B E T W E E N :

CA

Applicant

- and -

KA

Respondent

MR M. GRATION (instructed by Bindmans LLP) appeared on behalf of the Applicant Father.

MISS V. GREEN (instructed by Atkins Hope Solicitors) appeared on behalf of the Respondent Mother.

**J U D G M E N T ( A p p r o v e d )**

MR JUSTICE MOSTYN:

1 This is my judgment on the application by CA for the summary return to Germany of his daughter, IA, who was born on 5 July 2016, and who is therefore not yet three. On 3 August 2018 IA and her mother, KA, travelled to this country for the purposes of a holiday. They were booked to return to Germany, where IA was habitually resident, on 30 August 2018; but they did not return.

2 Article 3 of the 1980 Hague Convention provides:

“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 ...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 ... or would have been so exercised but for the removal or retention.”

I have cited Article 3 by reference to the relevant facts of this case. It is said by the father that the retention of IA by her mother in this country on 30 August 2018 was wrongful within the terms of Article 3.

3 Article 12 provides that where a child has been wrongfully retained in the terms of Article 3, and at the date of the commencement of the proceedings a period of less than one year has elapsed from the date of the retention, the authority concerned shall order the return of the child forthwith. However, under Article 13, it is provided that, notwithstanding the provisions of Article 12, the judicial authority of the requested State is not bound to order the return of the child if the person opposing the return of the child establishes that the person having the care of the child was not actually exercising custody rights at the time of the removal or retention, or had consented to, or subsequently acquiesced in, the retention.

4 The words “consented to” and “subsequently acquiesced” are effectively synonymous. The phrase “consented to” is a reference to agreement reached before the event in question; and the phrase “subsequently acquiesced” refers to an agreement made after the event in question. There is no reason to suppose the framers of the Convention, in using these different words, intended in the latter instance that the agreement in question had to be of any lesser quality than in the former. That this is so is made clear by the speech of Lord Browne-Wilkinson in the well-known decision of the House of Lords, *Re H (Minors) (Abduction: Acquiescence)* [1998] AC 72. At p.87 Lord Browne-Wilkinson says this:

“What then does Article 13 mean by ‘acquiescence’? In my view, Article 13 is looking to the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted?”

This demonstrates that in determining a defence which is founded on this aspect of Article 13, the court is asking itself whether there has been actual consent made by the wronged parent to the retention, or, as Lord Browne-Wilkinson puts it, “the continued presence of the child in this jurisdiction”.

5 Following the retention on 30 August, the applicant father submitted his application for the return of IA to Germany to the German Central Authority on 27 September 2018. It is important to understand the function of relief that is sought under the 1980 Hague Convention, particularly in circumstances where the country is either a Member State of the European Union, or a subscriber, like this country, to the 1996 Hague Convention. The role of the 1980 Convention in such a case is procedural. It does not render any substantive relief beyond ordering a return of the child to the land of her habitual residence where the court of her homeland will make the substantive welfare decision. That the role of the court under the 1980 Convention is strictly one of being procedurally ancillary to the relief that will be rendered in the court of the home state is made clear by Article 7.3 of the 1996 Hague Convention, which the Supreme Court in *Re J* [2016] AC 1291] held substantially bolstered the operation of the 1980 Hague Convention. That provides:

“So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.”

6 Therefore, the function of this court in determining an application under the 1980 Hague Convention is, as I say, procedural, and it is to do no more than to hold the ring between the parents until the court of substantive jurisdiction in the land of the child’s habitual residence can render its decision. So it is implicit that, where a parent submits an application for the return of a child to the land of her habitual residence, he intends at the earliest opportunity to commence a claim for substantive relief in the court of that child’s homeland, because it is only that court that can render the decision as to what is ultimately in the child’s best interests in terms of her residence and contact with the non-residential parent. Yet the father did not apply in the court of the child’s homeland, namely Germany, for an order for custody of IA or for contact to her, and even to this day, six and a half months later, no such application has been made by the father for substantive relief to the court in Germany.

7 I have commented in a number of cases that it is inexplicable why in case after case that comes before the court, where procedural relief to return the child to her homeland is sought, that people rarely bother to commence the claim for substantive relief until after the Hague 1980 proceedings have been concluded. Indeed, I would make the observation that, Germany being famously efficient in its legal system, had the father made a claim to the German court in early October it would by now have been concluded and this case would have been entirely unnecessary.

8 The fault is not only that of the father, because after his claim under the Hague Convention had been received here and commenced on 31 January 2019, the mother, who had initially defended, spuriously in my judgment, on the ground that IA was habitually resident at the relevant time here, withdrew that line of defence when the matter came before the court on 18 February 2019. She, on that occasion, signified that the scope of her defences would be only acquiescence under Article 13a, and risk of harm under Article 13b. So the mother, therefore, must be taken on that occasion to have accepted that the German court would be making the substantive decision about IA’s long term welfare. That was two months ago. Has the mother made an application to the German for an order for custody in her favour, for an order for permission that IA can live with her as her primary caregiver in this jurisdiction? No, she has not.

- 9 So both parents, in my judgment, are to be criticised for devoting all their forensic energy to fighting this procedural battle whilst at the same time sitting on their hands in relation to the substantive relief that they respectively seek. Had the mother applied on 18 or 19 February 2019 to the German court for an interim custody order in her favour and for interim permission for IA to continue to live with her in this jurisdiction, I daresay that by now that application would have been determined, and had it been determined in her favour this hearing would have been rendered entirely unnecessary. But in the events which have occurred, I have no option under the law but to determine the application as it is placed before me, although I again record my disappointment and dismay that litigants once again devote all their forensic energy to fighting what is, in a sense, a procedural sideshow rather than focusing on the main prize, which is an adjudication of IA's welfare in the court of her homeland.
- 10 Following the father submitting his authority for the return of IA to Germany to the German Central Authority on 27 September 2018, the parties engaged in negotiations. However, the fact that the father had taken this step was not revealed to the mother. On the evening of 22 October 2018 the mother and the father spoke for about 2½ hours on the telephone. The mother in her statement states that they were trying to reach agreement, but it is clear that on that occasion the parties did reach a substantive agreement. There may have been peripheral matters which remained outstanding; there may have been, to speak idiomatically, I's to be dotted and T's to be crossed, but they unquestionably reached a substantive agreement, which provided that IA would remain in the primary care of her mother and would have frequent contact to her father.
- 11 In his statement, written on 5 April 2018, the father says about this, "Following this telephone conversation, I put the Hague proceedings and the police complaint on hold", but he did not in that statement at that time reveal what, in fact, he had told the German Central Authority when he, as he put it, put his application on hold. The email that he sent to the German Central Authority on 23 October 2018 was only produced this morning appended to his third statement. That email was sent by the father to Mr Schubert at 15.58 German time. With the statement that was produced this morning there was a very crude translation derived from Google Translate, but today there have been in my court two translators of the German language who, over the luncheon adjournment, were able to agree a definitive translation of what the father wrote, and it was as follows:

"Dear Mr Schubert

I refer to our telephone earlier today. As agreed, I would like to confirm again in writing and request my withdrawal of my Hague Convention application. As discussed, my wife and I were able to find a very good and mutually agreed solution which is in our daughter's best interests and which we will regularise.

In this way, we both mutually accept as parents that we have clarified questions of child custody, decisions regarding our child and contact in an out of court agreement. The condition for this is my withdrawal of my criminal complaint to avoid my wife's concerns about criminal proceedings and an international criminal record, so that she suffers no disadvantage regarding her future child custody rights and her work. Should you have any questions, please call me.

Many thanks"

- 12 The terms of that email show categorically that the parties had reached a substantive agreement. As I say, there may have been outlying or peripheral matters which remained to be agreed and, as I have said, there may have been, to speak idiomatically, I's to be dotted and T's to be crossed, but there was no doubt a substantive agreement. In the sphere of family relations, the law recognises substantive agreements which might not be regarded as contractually perfectly formed. In this regard I refer to the famous case of *Xydhias v Xydhias* [1999] 1 FLR 683.
- 13 That the parties reached a substantive agreement is put beyond any doubt by the fact that the day after the father spoke to and wrote to Mr Schubert of the German Central Authority, he was sent by the mother a draft parenting agreement, which was prepared by her and which states that the matters were agreed on 22 October 1988. It is true that the agreement bears the watermark 'Draft', which would suggest that there were perhaps some outlying or peripheral matters yet to be agreed, but there can be no doubt, having regard to the terms of the father's email to Mr Schubert, that the headlines were clearly agreed and they were as follows:

"KA shall be IA's primary custodian and will reside in the United Kingdom with her mother.

Both KA and CA will share parental responsibility.

KA will continue to facilitate the process of CA being able to speak to IA regularly.

CA will make every effort to speak to IA a minimum of four times a week by video calling.

CA will ensure that his new accommodation has suitable furniture for IA's overnight and extended stays.

Both parents will rotate the visits each month between the United Kingdom and Germany."

Then there are provisions about how visitation is to be financed.

- 14 In my judgment, these words appearing in this draft agreement, when taken with the mother's evidence in her statement and, most significantly, the terms of the father's email to Mr Schubert show clearly that the father had, in the words of Lord Browne-Wilkinson, "consented to the continued presence of IA in the jurisdiction in which she had been retained." I, therefore, find as a fact that the father's state of mind was that he did so consent, and that acquiescence in the terms of Article 13.1(a) is proved.
- 15 I have already explained that where proof of acquiescence is made, that does not establish an absolute defence, rather it opens the door to a discretionary power in this court, which is not really a discretionary power at all, but is a value judgment to be made by this court as to whether nonetheless the child should be returned to Germany. In that regard I place significant emphasis on the matters I have already mentioned, which is that Germany is the court of primary jurisdiction. It seems to me, having regard to that fact, having regard to the inexplicable failure by each of the parents to have instituted any proceedings at the present time in Germany, and having regard specifically to the terms of Article 7.3 of the 1996 Hague Convention, that it would be precipitate for me to order the return of IA to Germany. Rather, it is my clear judgment that respect is paid to the primacy of the German court's

jurisdiction if I were to leave that decision to the German court. It may well be that the German court decides that *ad interim* IA should be returned, but that is a decision which is to be made only by the German court and not by me, it seems to me, as a matter of principle.

- 16 If I am wrong about that, and I do have to conduct some kind of welfare inquiry myself, I do not believe that it would be in IA's interests for her to be uprooted and to be exposed to the risk of 'ping pong', to use a phrase, returning her to Germany now in circumstances where the mother must have a strongly arguable case in the German court to be granted permission to relocate with IA to this country.
- 17 I decline, therefore, to exercise my discretion to order a return of IA to Germany. So the application is dismissed.

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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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**\*\* This transcript has been approved by the Judge \*\***