

Re F (Abduction: Child's Wishes)
[2007] EWCA Civ 468

Appeal:errors of advocates and
Appeal:intervenor, by
Appeal:notice of, time for filing
Child abduction:child's views, need to establish
Child abduction:time limit for determining proceedings
Procedure:child abduction and child's views
Procedure:notice of appeal

Court of Appeal

CA

Thorpe, Smith LJJ and Munby J

27 March 2007

Abduction – Obligation to hear the child – Obligation to conclude proceedings within 6 weeks – Practice developments

Following a turbulent relationship with the Spanish father, the English mother left the matrimonial home in Spain with the child, now aged 7, and moved to live nearby. It was agreed between the parents that the mother and child would have Christmas with the maternal grandmother in the North-East of England and would return to Spain on 9 January 2006. In the event the mother returned alone and the child remained with her grandmother and settled into a local school. There was doubt surrounding the date at which the father became aware of the wrongful retention and, in November 2006, he applied under the Hague Convention on the Civil Aspects of International Child Abduction 1980 and Brussels II Revised (Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (2003) OJ L 338/1). During that period of delay the mother returned to the UK to care for the child. The father's application was heard in December 2006 and it was conceded that he had rights of custody and that the retention had been wrongful. The mother's defences – acquiescence under Art 13(a) and the grave risk of physical or psychological harm to the child in the event of return, and/or the intolerability of the situation to which she would be returned under Art 13(b) – were rejected by Macur J who did not order an immediate return but required the father to obtain a mirror order in Spain as a trigger to return. However, the final paragraph of the mother's defence, stating that the child must be given an opportunity to be heard, was not focused on by either practitioners or judges and accordingly there was no inquiry as to the child's wishes and feelings (although some sense of the child's view had been gleaned from an interview with her for the purposes of the unsuccessful application for leave to intervene (see *Re F (Abduction: Joinder of Child as Party)* [2007] EWCA Civ 393, [2007] 2 FLR (forthcoming)). The mother applied for permission to appeal and extension of time. The present court granted permission, treating the case as an appeal on the basis of the judge's failure to hear the child, and implicitly extended time.

Held – allowing the appeal and remitting the case for further consideration by the judge on issues, a time and a venue, to be discussed with counsel –

(1) Failure to hear the child had been a fundamental deficiency. The obligation of the court to hear the child, ordinarily interpreted as an enquiry into the child's wishes and feelings, arose from Art 11(2) of Brussels II Revised. However, it did not override the obligation in the same Article to conclude the proceedings within 6 weeks. It was implicit in the two obligations that the obligation to hear the child would be fulfilled within the 6-week duration of the litigation.

(2) Consequently, the question of how and when the court would hear the child must be considered at the first directions appointment in future, in order to ensure that that central ingredient of the case was never out of the spotlight. It may be that the amendment of the Family Proceedings Rules 1991 currently in progress would need to provide for the court's consideration of its Art 11(2) obligation in a very detailed way. Practice developments should not be limited to European cases brought under the Regulation, given the observations of Baroness Hale of Richmond in *Re D (Abduction: Rights of Custody)*, and the question should be raised equally in global abduction cases.

(3) The case illustrated a general observation in relation to fresh cases raised in the Court of Appeal either by an intervenor who could distance him or herself from decisions taken during the trial stage or by litigation teams who had not appeared below. First, counsel who applied for leave to intervene by the child were free to criticise the manner in which the respondent's case had been conducted below, and those not involved in the trial process did not have to answer for decisions taken there for which they had no responsibility. However, cases in which counsel failed to run a case which might or should have been run below were likely to be rare and the court must scrutinise assertions that those who were responsible for the presentation of the respondent's case at trial were blind to or neglected their opportunities.

(4) Filing a notice of appeal 10 days late was significant in terms of Art 11 of Brussels II Revised. The present court was able to list an application or appeal very quickly, but the application for permission should clearly be made to the trial judge. If refused, a date must be set for notice of appeal and the 21-day period may be extended or reduced by the trial judge. Seven rather than 21 days should be the norm in any case in which an application for permission to appeal was made to the trial judge and refused. That would provide a better chance of concluding the litigation within the 6-week period.

Per Munby J: it would be appropriate for advocates in abduction cases, irrespective of the instructions from the clients, to bring to the attention of the judge the imperative obligation imposed on the court by Art 11(2) in an oral submission, not merely written in a document (see para [31]).

Statutory provisions considered

[Family Proceedings Rules 1991 \(SI 1991/1247\)](#)

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1:Art 11(2)

Hague Convention on the Civil Aspects of International Child Abduction 1980:Art 13(a)

Hague Convention on the Civil Aspects of International Child Abduction 1980:Art 13 (b)

Family Proceedings Rules 1991 (SI 1991/1247)

Hague Convention on the Civil Aspects of International Child Abduction 1980, Art 13(a), (b)

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Art 11(2)

Cases referred to in judgment

Baxley v Bull (unreported), Aust HC

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

Henry Setright QC for the appellant

Marcus Scott-Manderson QC for the respondent

James Turner QC for the child

THORPE LJ:

[1] This is an appeal from the judgment of Macur J given on 31 January 2007. To be more precise, it is an application for permission and an application for an extension of time. We have effectively treated this morning's hearing as though it were an appeal and it follows that we have implicitly extended time and granted permission.

[2] The family history is simple enough. The judge was concerned with a little girl, J, who is 7 years of age. Her father is Spanish, her mother English. They met in 1998 and had a turbulent relationship with a period of separation in 2002. A reconciliation at the end of that year or the beginning of the next endured until the middle of 2005, when the mother and J left the final matrimonial home in Spain and accommodated themselves separately in the vicinity. Arrangements were made between the parents for the mother and J to have an English Christmas with the maternal grandmother in the North-East of England.

[3] The agreement was that they would return for the start of the school term on 9 January 2006. However, in the event, the mother returned alone on 11 January and J remained behind with her grandmother and settled into a local school. There is some doubt surrounding the date on which the father became aware of the wrongful retention. Certainly he knew by the end of January 2006 but his application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 and the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) was not signed until 6 November 2006. That was a most unfortunate delay, in that it enabled J to put down roots here and, no doubt, to assume that she had become, as it were, a thoroughly English girl.

[4] During this period of delay, the mother had something of a psychological breakdown in March and returned to this country and resumed the care of J. The application, signed by the father in Spain on 6 November, matured into an originating summons in this jurisdiction issued on 22 November 2006. The case was listed before Sumner J on 7 December, essentially on an application without notice for a location order. He adjourned the case over to 18 December and in that interim the mother's defensive position was professionally marshalled. That the father had rights of custody was conceded; so, too, was the wrongful retention.

[5] However, the mother developed a hard fought case within the remaining dimensions of the Hague Convention. Her defence, which was settled by Mr Perkins, counsel with a good deal of specialist skills in this area, was dated 15 December and its essential reliance was on the father's acquiescence (Art 13(a)); the grave risk of physical or psychological harm to

J in the event of return, and/or the intolerability of the situation to which J would be returned (Art 13(b)).

[6] The final paragraph of the defence, para 16, was headed in bold: 'Opportunity for the Child to be Heard'. Under that heading the paragraph read:

'The defendant asserts that, pursuant to [Brussels II Revised], Article 11(2) the child must be given an opportunity to be heard.'

[7] That, well founded, defensive submission was not reflected in the affidavit filed by the mother on 18 December, either immediately before or immediately after the directions hearing, which was conducted by Holman J. The defensive line, foreshadowed by the defence of 15 December, was extended when the mother challenged the father's paternity and it was further suggested that she might seek to raise an additional or an extended case by reliance on her own medical records. Accordingly, by consent, directions were given by Holman J for DNA testing and also for the disclosure of the medical records. The case was adjourned, to be listed again on 18 January 2007. It is to be noted that in the consent order of Holman J there is no reflection of para 16 of the mother's defence.

[8] The case was listed before McFarlane J on 18 January and some progress was made in that it was conceded on the mother's part that the disclosed medical records did not require any extension of her defensive position. However, the results of the DNA test were not available on that date and McFarlane J, accordingly, adjourned the case again to be listed on 30 January.

[9] The DNA results appeared on 22 January and removed that potential trump card from the mother's defensive hand. Accordingly, before the judge on 30 January, the case was hard fought on the two defences; one reliant on Art 13(a) and the other on Art 13(b). At the end of oral evidence, the judge rejected the mother's two defences.

[10] Provision for oral evidence had been made by McFarlane J, although he had left the ultimate discretion to the judge before whom the case would be listed on 30 January. Of course, oral evidence in these summary return applications is rare, but a defence reliant on Art 13(a) and acquiescence is one of the few defences that, not uncommonly, calls for oral evidence since its resolution depends on a finding, or may depend on a finding, of the applicant's subjective state of mind, as well as his communications in response to knowledge of the wrongful removal or retention.

[11] The judgment of Macur J is relatively brief. She considered the mother's oral evidence in support of her Art 13(b) defence and, perhaps wisely, declined to make any very specific findings, given that the areas of evidence covered by the mother essentially related to events and conditions in Spain which were likely to be considered by the Spanish judge investigating welfare issues. So, she simply confined herself to the conclusion that the mother had not proved her case and she drew attention to three factors which inclined her against an acceptance of the mother's quite florid allegations.

[12] The mother's case in relation to acquiescence was essentially a case of acquiescence by inference. She pointed to the fact that a period of at least 9 months had elapsed between the date of the father's discovery of the

abduction and his signing of the appropriate form in Spain. The mother was not able to point to any communication, act or admission on the part of the father that could strengthen or act in substitution for the inference. So, the oral evidence in relation to the Art 13(a) defence was crucially the oral evidence of the father, who sought to explain the 9 months of delay by asserting that he had made frequent visits to the Spanish lawyer, regularly asking for news and progress, always to be told that these international cases take a long time.

[13] The judge recorded the father's evidence in para 17. She observed that if that was what the Spanish lawyer had said, it was fundamentally erroneous, but she must implicitly have accepted the father's oral evidence, since in para 24 she said plainly:

'I am satisfied that the father does not acquiesce to J remaining in the United Kingdom.'

[14] She did not order an immediate return because she was anxious to establish prior protective measures in Spain. She required the father to obtain a mirror order in Spain, protecting the mother from any possibility of violence or harassment on return, and said that the production of a mirror order was an essential trigger to the operation of the return.

[15] When the application was issued in this court an application for stay was made, but refused on the grounds that the order below remained indefinite in setting a deadline for exit. Subsequently, after the production of evidence of a mirror order in Spain, an application for a stay was made to Singer J. In the face of a demand from the husband's advisors that she should agree a date of return, given the production of the mirror order, Singer J simply held the ring until the hearing in this court today.

[16] So that is the history of the litigation. What enables me to characterise this case as unusual, indeed exceptional, is that at all stages after the filing of the mother's defence of 15 January 2007, no-one, either practitioners or judges, focussed on the final paragraph of her defence. Accordingly, there was no enquiry as to J's wishes and feelings, which is the ordinary interpretation of the court's obligation to 'hear the child'. It was not a case in which the child's wishes and feelings had been projected into the centre of the stage by a reliance on the child's objection to return. But a clear distinction has to be drawn between obligations that flow from a pleading of the child's objections and the court's obligation, quite apart from anything that may be pleaded, in all cases to hear the child, unless that necessity is excused by reference to the child's age and understanding.

[17] The obligation of the court, as the defence rightly pleaded, arises from Art 11(2) of the Brussels II Revised Regulation. Mr Setright QC, who did not appear below, has presented the mother's appeal with his characteristic skill and experience. He says: well, the judge is not really to be blamed because nobody directed her attention to the need to hear J, the mother never suggested it, the father never suggested it. Mr Setright reminds us that it can be something of a dangerous development in a Hague Convention case since the child, when heard, may easily negate a defence that has been raised or developed by the abductor. So, it might be said that this was a strategic decision on the part of each of the parties: but the court is not concerned and certainly not ruled by the litigation strategy of either of

the parties. It has an obligation, imposed by Art 11(2) of Brussels II Revised, to hear the child, whatever may be the consequences. So, naturally, Mr Setright submits that the judge unwittingly fell into a fundamental error and, accordingly, the case must be remitted to her to enable her to discharge her obligations under the Regulation.

[18] He has, as a second submission, sought to demonstrate that the judge fell into some misdirection in her rejection of the mother's defence of acquiescence. I will not extend this judgment by a detailed analysis of his submission or my response to it; enough to say that I am perfectly satisfied (particularly with the aid of Mr Scott-Manderson QC's written skeleton on this point and the authority to which he refers, namely the judgment of Kay J in the Australian case of *Baxley v Bull* (unreported)) that the judge directed herself perfectly properly in determining the mother's acquiescence defence and made perfectly sufficient factual findings which are not open to criticism.

[19] Mr Setright's appeal rests square on the judge's failure to hear the child. Mr Scott-Manderson, who also did not appear below, has made a brave attempt to say: well, this is really a borderline case. The child is only just within the chronological range where the obligation is transparent. This is clearly an area in which the judge had discretion and if we have regard to the factors in para 25.3 of his skeleton and the developments in the trial process set out in para 27 of his skeleton, it is quite unnecessary to allow the appeal or remit. That submission does not begin to convince me that the deficiency emphasised by Mr Setright can be ignored. It is a fundamental deficiency and it cannot be shored up or papered over.

[20] Curiously, this court does now have a fairly extensive idea of what J would wish to say when heard. During the course of the preparation of an unsuccessful application for leave to intervene, Mrs Hutchinson interviewed J in a very sensitive way, in the presence of a potential next friend, and in a suitable environment not far from her home. Mrs Hutchinson then filed an affidavit recounting in detail the conversation and the nature of the anxieties which J expresses at the prospect of returning to Spain. They are entirely natural anxieties not hard to predict, given the extent of the mother's determination to resist the processes of return and given the likelihood that, consciously or unconsciously, she has communicated the strength of her determination to her daughter.

[21] Neither counsel suggested that that evidence is sufficient to satisfy the Art 11 obligation. Each has suggested that a Children and Family Court Advisory and Support Service (CAFCASS) officer from a specialist team at First Avenue House should have a meeting with J, should discuss the future, and report to the court on J's wishes and feelings. There are divergences thereafter as to how the case should proceed and over the adjournment we have made enquiries as to what the options are. There must be further submission and further discussion between the court and the Bar on those practicalities at the conclusion of this judgment.

[22] But before I conclude, it does seem to me that there are lessons to be learned from this case. First, I am surprised that the novel obligation imposed by Art 11 of Brussels II Revised, and highlighted by the relatively recent decision of the House of Lords in the case of *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2007] 1 FLR 961 decided in October 2006, has not focussed more attention on steps

that need to be taken to ensure that in every case the Art 11 obligation is not overlooked.

[23] I suppose that generalisation may be difficult. What of the unopposed applications? What of the applications initially opposed that subsequently deflate? What about a written statement from the child expressing his or her wishes and feelings? Must the interviewer always be the CAF/CASS officer? What about the judge directly hearing the child, given that this is a European instrument?

[24] One thing that is clear to me is that the obligation to hear the child must not override the obligation in the same Art 11 to conclude the proceedings within 6 weeks of issue. It must be implicit in the juxtaposition of the two obligations that the obligation to hear the child will be fulfilled within the 6-week duration of the litigation, particularly since in the majority of Member States the judge hears a child directly at the final hearing. But to ensure that there is no repetition of the unfortunate development in the present case, it seems to me to be necessary that in the future the question of how and when the court will hear the child, in discharge of its obligations under Art 11(2), must be considered at the first directions appointment and any subsequent directions appointment to ensure that that central ingredient of the case is never out of the spotlight.

[25] It may be that the amendment of the Family Proceedings Rules 1991 that is currently in progress will need to provide for the court's consideration of its Art 11(2) obligation in a very detailed way. Practice developments should perhaps not be limited to European cases brought under the Regulation, given the observations of Baroness Hale of Richmond in the course of her speech in *Re D*. Plainly, it may be prudent for that question to be raised equally in what I would call global abduction cases.

[26] The second general observation that I would wish to make is in relation to fresh cases raised in this court, either by an intervener who can easily distance him or herself from decisions that were taken during the trial stage or by litigation teams that did not appear below. This case illustrates both: first of all the application for leave to intervene by the child. Mr Turner QC, who made that application, was free to criticise roundly the manner in which the respondent's case had been conducted below: so also, to a lesser extent, Mr Setright and his instructing solicitor, who were not involved in the trial process, and therefore do not have to answer for decisions taken there for which they had no responsibility.

[27] Of course, there will be cases where specialist counsel fail to run a case which might have been, or which perhaps should have been run below. But I think that, in my view, those cases are likely to be rare and the court must scrutinise assertions that those who held responsibility for the presentation of the respondent's case at trial were in some way blind to an opportunity or neglected their opportunities. There may have been very good reasons why a case was not run at trial which is subsequently suggested to be important at an appellate level. We do not know what instructions counsel were given. Beyond that, we do not know the range of information available to counsel who then held responsibility, which may have influenced a strategic decision not to deploy a possible line of defence.

[28] My third and final observation goes to the application for extension of time. The notice of appeal in the present case was due by 21 February 2007. It was filed some 10 days late. In many cases that would not be

regarded as being of much significance, but in Hague Convention and Brussels II cases it is significant. The terms of Art 11 of Brussels II Revised and of the matching provision in the Hague Convention are equivocal. Is the 6-week period inclusive or exclusive of the appellate stage? The specialist administrative and judicial resources in this court enable us to list an application or an appeal very quickly after issue but the application for permission should clearly be made to the trial judge. If it is refused by the trial judge, he should set the date by which the notice of appeal must be lodged. Although the general rules of this court allow the applicant 21 days, that period may be either extended or reduced by the trial judge. I would suggest that 7 days rather than 21 should be the norm in any case in which an application for permission to appeal is made to a trial judge and refused by him or her. That will enable this court to get onto the case that much more quickly and give us a better chance of concluding the litigation within the 6-week period.

[29] However, all that said, I would allow the appeal and remit the case for further consideration by the judge on issues and at times and at a venue which we will discuss with counsel.

SMITH LJ:

[30] I agree.

MUNBY J:

[31] I also agree. Can I add a very brief observation in relation to practice. My impression as a judge who regularly sits as an urgent applications judge in the Family Division is that Art 11 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) has not had the prominence which it might be thought it should. I hope for the future that that deficiency will be remedied. It is all too easy if one is sitting in a very busy court with a very heavy press of business to overlook a matter of this sort. It seems to me that it would be appropriate for the advocates in these cases, irrespective of the instructions they have from their clients, to bring to the attention of the judge, to remind the judge, of the imperative obligation imposed upon the court by Art 11(2). Bearing in mind what may have happened in this particular case, before Holman J on 18 December 2006, I suggest it would be very helpful to the judges of the division if that gentle reminder from counsel could be made orally and not merely written in a document which may or may not be prominent in the mind of the judge when he comes to make his decision.

Order accordingly.

Solicitors: *Wilkin* for the appellant
Brethertons for the respondent
Dawson Cornwell for the child

PHILIPPA JOHNSON
Law Reporter