Re K (A Child) [2010] EWCA Civ 1546 (25 November 2010)

Case No: B4 / 2010 / 2466

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM PRINCIPAL REGISTRY, FAMILY DIVISION

(MR JUSTICE PETER JACKSON)

Royal Courts of Justice

Strand, London, WC2A 2LL

25th November 2010

B e f o r e :

LORD JUSTICE THORPE

LORD JUSTICE MUNBY

and

MR JUSTICE COLERIDGE

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IN THE MATTER OF K (a Child)

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Official Shorthand Writers to the Court)

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Mr Marcus Scott-Manderson QC and Mr Hassan Khan (instructed by Jones Myers LLP), assisted by an interpreter, Ms Y Swanson, appeared on behalf of the Appellant father.

The Respondent mother appeared in person, assisted by an interpreter, Ms A Boden.

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HTML VERSION OF JUDGMENT

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Lord Justice Thorpe:

The parties to this appeal are Polish and they are the parents of a number of children, the youngest of whom is just eight years of age. Family life in Poland terminated in September 2009 when the mother gave notice to her employers and left for this country with her daughter, Weronika. She had security here since some of the older children had settled here and in particular the eldest child, a daughter, had married and was living and working in Hampshire. So mother and Weronika joined that family and left behind the battlefield of family life in Poland.

The father initially expressed his independence by changing the locks on the door of the family home and then, having discovered that the mother had settled in England and had no apparent intention to return, eventually investigated what proceedings he might bring in Poland. The mother had herself issued divorce proceedings there shortly after her departure, namely on 24 November 2009. The father's investigations in the summer of 2010 led to his issue in this jurisdiction of an originating

application under the 1980 Hague Convention. That of course was through the medium of the Polish Central Authority who he had engaged on 15 June.

The originating summons was first listed before Barron J on the date of issue. She made a location order and adjourned the summons for determination on 14 July. That listing was before Parker J who gave directions for the filing of evidence. The mother filed her case in opposition duly on 27 July. Unfortunately the applicant father failed to respond by the 11 August in compliance with the order of 14 July. Wood J on 18 August extended his time until 3 September but he was again in breach, his first statement being filed on 10 September.

The case was then listed before HHJ Jenkins on 23 September and his order requires more detailed consideration. Paragraph 2 of the order provides for each of the parties to file and serve by 1 October statements of evidence limited to the defence of acquiescence. Those were of course intended to be not only focused statements but also statements in addition to the general statements already filed. That order is preceded by a recital which reads:

"AND UPON the court determining that oral evidence is required from the parties in respect of the defence of acquiescence;"

So by that one order of 23 September the case management decision was for the provision of both additional written statements limited to the issue of acquiescence and also, unusually, for the provision of oral evidence on that same topic. The order additionally provided that the father's oral evidence should be given by way of video link and the listing for late September was relaxed to 6/7 October.

The listing was before Peter Jackson J and he delivered an ex tempore judgment refusing the father's application for a return order. The father's case had been expertly put by Mr Hassan Khan who was opposed by the mother in person. We know that the mother's statement of the 27 July and her position statement of the 29th were settled by a firm of solicitors, D'Angibau, who we are told are a firm of solicitors in Hampshire. At that stage she had public funding. However, by the time she appeared before Parker J public funding had been withdrawn and she appeared in person. All subsequent stages of preparation, and all interlocutory appearances, she thereafter managed without specialist advice or representation.

There is no doubt at all in my mind that Jackson J reached the wrong conclusion. He should not have refused the return order. Rather, he should have ordered the return of the child for this was the plainest case of abduction. The father's only vulnerability was his delay between understanding the extent of the mother's removal and activating the Hague remedy.

That vulnerability had led to the mother's assertion of a defence of acquiescence which she supplemented with the defence of risk of harm and further supplemented with the defence of child's objections. This is all very familiar territory. It is Article 13 of the Convention which by paragraph (a) provides for the defence of consent or subsequent acquiescence in the removal. It is Article 13(b) which provides the defence of grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. It is the next paragraph of the Article which provides that return may be refused if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Now the case of acquiescence rested on really nothing but the husband's dilatory invocation of the remedy. The case of grave risk of harm had an equally slender foundation for the circumstances that would result from return were never said to be the resumption of marital conflict under the marital root but rather that the defendant and Weronika would share home with another married daughter who lived in the next door village.

Equally frail were the foundations for the third defence raised by the mother, namely child's objection. For the evidence of that was to be found in the written report of the Cafcass officer supplemented by her very brief oral evidence. That showed that Weronika had understandably strong objection to the prospect of returning as a witness to unceasing conflict between her parents in the final matrimonial home but not to return to the security of her sister's home, albeit in the adjoining village. It was clear from the Cafcass officer's report that Weronika was very well able to distinguish between these two concepts, namely a return to the family home and a return to Poland, the homeland.

So this was a case of plain abduction. The court's obligation to order return was of course heightened, in the sense that this was an inter-European abduction and the Articles of the global Convention are accordingly fortified by the Articles of the regional Regulation, namely Brussels II Revised. I think there is no doubt at all that the judge himself perceived this to be a plain case for a return order because at the conclusion of his judgment he observed:

"If I may say so, this is not a case in which the correct conclusion was evident on a reading of the papers, but my observation of the father and of the mother lead me to the clear conclusion that it would plainly be against V's interests to order her to return…"

Accordingly it is necessary to pose an answer to the question why has this case gone so badly wrong? I would trace the beginning of the process to the father's disregard of the careful orders for preparation made by Parker J and Wood J. Accordingly when the case came before HHJ Jenkins, on what earlier orders had designed to be the final hearing, he felt constrained to order further written statements limited to the defence of acquiescence which had been insufficiently canvassed in the general statements.

Now there are a number of cardinal case management rules that seem to me to have been disregarded on 23 September. First of all oral evidence in Hague cases is very seldom ordered. We have been told by Mr Scott-Manderson that there is an increasing tendency for applications for oral evidence to be advanced at the case management stage. There should be no departure from the well recognised proposition that Hague applications are for peremptory orders to be decided on written evidence amplified by oral submissions.

There are of course rare cases which demand the opportunity for the judge to hear from the parties on a narrow issue that is in contention. Classically oral evidence will be limited to those cases where the issue for the court is whether or not an agreement was reached between the parents sufficient to establish the defence of consent. I would accept Mr Scott-Manderson's submission that there is not the same requirement for oral evidence in a case in which the defence asserted is not consent but acquiescence. Although those two defences have much in common, in the sense that they are divided by the time line of the removal, as Mr Scott-Manderson correctly submits the concept of acquiescence is altogether more nebulous and there will seldom be one distinct conflict of evidence for the determination of which the judge would be dependent upon hearing from the parties orally.

Not only should orders for oral evidence be extremely rare but in my judgment they should never be made in advance of the filing of written statements on the point in issue. Here HHJ Jenkins found himself obliged to reach a decision whether or not to order oral evidence without having seen how the parties put their cases in written statements.

Finally, if there was to be the exceptional provision for oral evidence, it should have been more strongly expressed to ensure that the parties understood that this was not an opportunity to express their cases on the generality. It was strictly limited in its ambit and should have been equally limited in its duration, so that the preparation for the trial from the point of the last case management order and the trial itself should have been disciplined by the clearest restrictions in the order of 23 September.

So where the present case can be seen to have slid finally from the rails was when the parties came to testify. We have a transcript of their evidence. We see that the oral evidence extended to some 24 pages of transcription. We see that the parties testified, not as HHJ Jenkins intended on the focussed issue of acquiescence, but generally over their respective cases. Furthermore, an unscripted witness joined the parties in that the eldest child of the family also gave evidence of a general character without any leave and without any prior written statement.

The impression created by this aberration was plainly very strong. The judge was highly critical of the father both as a witness of truth and also as a parent. He expressed his view in paragraph 20 thus:

"I am sorry to say that the father's evidence was that of a self-centred man who appears to care very little for the true welfare of his child. It appeared to be motivated almost entirely by a sense of his own rights."

The judge was appreciative of the mother's evidence. He said in the following paragraph:

"The mother's evidence, in contrast, I found impressive. She said that she realised that she had removed V unlawfully, but for her own good. While the father seemed hardly to know his daughter, the mother was clearly closely and sensitively involved with her needs. I thought that the strain that the mother showed went beyond the normal effect of giving evidence and presenting her case. I find her to be a parent who had been at the outer limits of her ability to cope, but who has now recovered her balance. I believe that she would be pushed back to the edge by an order that V should return."

Now that is essentially the language of a judge undertaking a welfare investigation and expressing a welfare conclusion. It is not the language of a judge who is focussed on the determination of a single issue for which oral evidence has been provided, namely: did the father acquiesce in the abduction of his daughter?

It is absolutely evident to me that the very strong impressions that the judge derived from the oral evidence influenced his conclusion on two of the three defences advanced. He correctly, in my view, and without elaboration dismissed the mother's acquiescence defence. He said, having cited a paragraph from the judgment of the former President in Re F [2008] 2 FLR 1239:

"I am in very much the same state of mind in relation to this father's position. His behaviour since the mother removed V may not be good parenting, but is not acquiescence…"

His conclusions on the remaining two defences are demonstrably influenced by his conviction that the welfare of Weronika, and the ability of the mother to provide high quality parenting for Weronika, depended on his confirmation of the refuge in this jurisdiction.

The evidence as to Weronika's objection was graphically scaled by the Cafcass officer who asked her to indicate on a scale of one to ten her happiness or unhappiness at the prospect of a) return to father, b) return to her sister's home in Poland and c) her continuing to live with her sister here in Hampshire, the first option scored 1, the second 5 and the third 10. But, as the Cafcass officer made plain in her oral evidence, what she was expressing was simply a preference and that, although she would need reassurance if the judge ordered her return, it was a situation that she would clearly manage.

Now it does not seem to me that the obligation to hear the child under the provisions of Article 11(2) of the Brussels II Revised regulation means that hearing the child, and hearing the wishes and the feelings of the child clearly stressed, almost automatically results in the conclusion that the child's objection threshold has been crossed and that all that remains is for the judge to exercise a discretion. The Convention is clear in its terminology. There must be a very clear distinction between the child's objections and the child's wishes and feelings. The child who has suffered an abduction will very often have developed wishes and feelings to remain in the bubble of respite that the abducting parent will have created, however fragile the bubble may be, but the expression of those wishes and feelings cannot be said to amount to an objection unless there is a strength, a conviction and a rationality that satisfies the proper interpretation of the Article.

I am in no doubt at all that the judge chose the wrong side of the boundary when in paragraph 39 he said:

"In V's case, having considered the information available to me, I conclude, albeit narrowly, that her views are most accurately described as an objection."

That is in my judgment to interpret the Article erroneously and to set the bar at too low a level. I think that conclusion was simply wrong.

I turn now to the judge's finding that the mother had made good her alternative defence. The judge directed himself conscientiously by reference to authority but reached the wrong conclusion, I am persuaded, as a result of his failure to focus sufficiently on the low level of risk that a return to Poland entailed and the available protections against whatever risk existed. The judge in paragraph 47 said :

"…in my judgment, to return V, even in the care of her mother to the home of her sister, would be to compound a situation that was essentially intolerable in the first place."

That seems to me to ignore the fundamental reality that the mother's necessary flight from an unhappy home did not necessarily involve her exit from the jurisdiction. She chose refuge with her married daughter in this jurisdiction but equally available to her was refuge in the home of her other daughter in Poland. It is hard to discern anywhere in her case any significant risk of harm if she removed with Weronika to the neighbouring village rather than to this jurisdiction.

The judge described the undertakings that Mr Khan had proffered dismissively saying that they were minimal. We have been told that they were sketched in Mr Khan's written opening submission and they were then canvassed with his client in oral evidence. They were reasonably conventional undertakings such as not to molest, not to invoke the criminal processes in Poland that might result from abduction, not to seek to separate mother and child but only to seek contact, and to pay for the child's return flight. If the judge felt that they were minimal then he still had an obligation to spell out to Mr Khan the undertakings that he felt were necessary and the undertakings with which he would be satisfied in order to give Mr Khan and his client the opportunity to increase and improve the offer.

However beyond that there is very serious deficit in the judge's reasoned conclusion. For the European Community, by entering into negotiation for the revision of the Brussels II Regulation, had to decide where it stood on the mechanisms in the Hague 1980 Convention for preventing and reversing wrongful removals and retentions. The negotiations between the Member States extended

over a period of 18 months and were extremely difficult but were ultimately resolved in the general acceptance of the scheme contained in Article 11. One of the provisions upon which the Member States agreed was that Article 13 of the Convention should be fortified by binding the courts in a European abduction case not to refuse to return a child on the basis of Article 13(b) unless it is established that adequate arrangements can not be made to protect the child on return. Thus Peter Jackson J, in directing himself as to the law in this territory, should have averted to the reality that he could not refuse return on the basis of Article 13(b) unless it was plain that adequate arrangements were not available to protect Weronika on return.

Now we know that the mother had herself invoked the jurisdiction of the Polish courts by the issue of her divorce petition in November 2009. The Polish courts were therefore seised. What protection she needed against the father's temper or his tendency to drink was there to be provided by the divorce court. If the judge had any misgivings then of course the protective shield could be initiated here through protective undertakings.

The argument below presented by Mr Khan did not make any specific reference to the provisions of Article 11(4) of the Brussels Regulation and Mr Khan has very responsibly accepted that he may have contributed to this omission from judgment.

It is very important to emphasise that our obligations internationally under the 1980 Convention are particularly due to Member States of Europe who are entitled to rely upon our courts to give full force and effect to the European policy that sought the fortification of the global Convention in the ways that found expression in Article 11.

I wish to conclude by expressing my real concern at the fact that the respondent has been obliged to litigate in this jurisdiction effectively as a litigant in person throughout. She had only the aid of an English lawyer at the very outset and we have been told that her public funding was withdrawn on the basis that she has a share in a property in Poland.

The Legal Services Commission must recognise that the issues raised by an originating application under the Hague Convention are not issues that are within the field of domestic family law. The issue of the application engages international family law which requires specialist expertise, both in the

tribunal that decides the case and in the practitioners who present the case. If a foreign national, albeit an abductor, is obliged to present a case involving specialist issues of international family law before a court in this jurisdiction without any legal representation, and perhaps, as here, without any of our language, it is very hard to see that there is the necessary equality of arms and thus the Article 6 rights to a fair trial.

In the court below the judge decided the issue in favour of the unrepresented defendant. However in this court the appellant has the advantage of a specialist solicitor, who has been approved for inclusion on the Central Authorities panel, he has a specialist junior in Mr Khan and he has a specialist leader in Mr Scott-Manderson. Against that array of highly skilled expertise the mother has no guide, only a any skilful and sympathetic interpreter. She made her submission to us with great dignity and with brevity. It may well be that even if she had had Mr Scott-Manderson to put her case he would not have been able to say any more than she said for herself. However those who take these difficult decisions as to how public money should be spent in family law cases should ask themselves whether they have got the balance right in giving so much to the left behind parent, without any investigation of means or merit, and in withdrawing public funding for the defendant, on the ground that she may have an interest in a property in another jurisdiction, that may have value but which could not possibly be utilised to provide immediate funding for urgent litigation.

So we have looked into this case with great care, we have spent much longer in our investigation than would otherwise have been necessary had the respondent to the appeal been represented. As is so often the case, what is intended to be an economy turns out to be an extravagance. It would have been a much better use of public money had both parties been represented below and it may well be that in those circumstances an appeal would have been avoided.

But all that said I would simply allow the appeal and make the return order which the judge refused. Obviously the implementation of that order requires very careful consideration and I understand that negotiations are already underway between Mr Scott-Manderson and his team and the mother in person.

Lord Justice Munby:

I agree with my Lord.

So far as concerns the appeal itself I am driven to agree that the appeal must be allowed for the reasons that Thorpe LJ has set out. There is nothing I can usefully add in relation to that. I do however wish to associate myself expressly with the more general observation which my Lord has made on the topics of practice in matters of this kind.

First, so far as concerns recourse in this jurisdiction to oral evidence, it remains the practice, and if it is not the practice at present it should revert to being the practice, that oral evidence is very much the exception rather than the course. There will be cases, few in number and exceptional in circumstance, where oral evidence is appropriate. The typical example is perhaps, as my Lord has mentioned, a case where there is an issue as to consent or acquiescence but where, as I would emphasise, it is apparent from an examination of the written evidence that there is some narrow focussed crux upon which the defence will in all probability turn and the illumination and resolution of which may be assisted by brief oral evidence. If for example there is acute controversy as to what was or was not said or agreed on some particular occasion then it may be appropriate for a judge to hear oral evidence in relation to that event in order better to come to a view as to whether or not the defence is made good.

If in the context of a defence of acquiescence it can be seen from an analysis of the written evidence that it all turns, for example, on some conversation, then similarly I accept that brief oral evidence may be appropriate. But for my own part, and having regard to practice as it was when until fairly recently I was regularly sitting in the Division, outside such a narrowly defined and discrete point, it seems to me that oral evidence is inappropriate and, as the present case unhappily illustrates, not merely inappropriate but calculated to cause confusion. In particular it would not as it seems to me be appropriate to have oral evidence generally in relation to an issue of acquiescence. And I find it difficult to imagine that outside a very small and unusual category of cases it would be appropriate to have oral evidence on any issues other than consent and acquiescence.

Moreover, as my Lord has mentioned and I agree, it does seem to me vital that in those cases where there is a direction for oral evidence that decision is not taken until the case management judge has been in a position, which unhappily HHJ Jenkins in the present case was not, to evaluate the state of the contentions as set out in the written evidence. Moreover, where such an order is made it seems to me to be not merely good practice but highly desirable that the order should spell out explicitly that the oral evidence is to be confined to an identified issue or issues and, furthermore, should indicate that, subject of course to the overall discretion of the trial judge, such evidence will be time limited. In

the kind of case in which in my experience oral evidence may be appropriate, very often no more than 30 or 45 minutes of evidence from each of the protagonists is required to enable justice properly to be done.

The second matter relates to the question of the protective measures, adequate arrangements, to use the language of Article 11.4 of Brussels II Revised, in cases arising under Article 13(b). It is conventional in such a case for undertakings to be proffered and accepted. It seems to me that in any case where a defence is being raised under Article 13(b), and more particularly in a case where Article 11.4 of Brussels II Revised applies, and especially in a case such as this where the defendant appears in person, to be desirable that the claimant at the outset of the final hearing should be able to produce, formulated in writing, those protective measures, including such undertakings as are proffered, as are being relied upon by the claimant as meeting the defence under Article 13(b) or as meeting the requirements of Article 11.4. I do not criticise those involved in the present case who may have taken a different course; and certainly my recent experience would suggest that very often what is said is that the claimant is amenable to offering appropriate undertakings. That may be a well understood form of words if the defendant has the advantage, which this defendant did not have, of representation, though it might be thought helpful to defendants generally, vital in the case of an unrepresented defendant, and in any event good practice for the measures which are being relied upon and the undertakings which are being proffered to be formulated in writing at the outset of the final hearing so they can be considered both by the court and more particularly by the defendant.

The third matter in relation to which I share my Lord's grave concern is the fact that this mother has been left to represent herself, both in the court below and in this court, without the benefit of legal assistance. Typically in a Hague Convention case an unrepresented defendant suffers a triple disadvantage. First, the claimant is without exception represented by highly expert lawyers, very familiar with and highly experienced in these particular cases. Second, the jurisdiction under the Hague Convention, and all the more so in a case to which Brussels II Revised applies, is highly technical and from the perspective of an unrepresented mother or father is not, counter-intuitively, concerned primarily with the welfare of the child. The consequence is that whereas a litigant in person is able, relying upon common sense, to represent themself with at least some degree of adequacy if the court is concerned, for example, with a straightforward case under Section 8 of the Children Act 1989, it is in reality quite impossible, because of the complexity of the subject matter, for any litigant in person adequately to represent themself in a case under the Convention Third, and of course the present case is a characteristic example, the defendant frequently suffers the grave disadvantage of not speaking and in many cases not understanding the English language in which the proceedings are conducted.

My comments are not intended in any way as a criticism of those who represent, or those who obtain the support from the Legal Services Commission which has been made available to, the father. But the

fact is that the Legal Services Commission has funded before this court today not merely leading counsel and junior counsel but also a solicitor who has had to travel from Leeds (and who therefore has no doubt incurred and will incur during the course of today a significant number of hours of travelling time as well as his other appropriate fees) and on top of that the cost of providing an interpreter, so that if instructions needed to be taken from the father that could be done with the use of an interpreter. On the other side the mother has nothing, apart from an interpreter provided by the court.

Any dispassionate observer sitting in this court might be forgiven for thinking that there is unfairness in that state of affairs and something very far from the equality of arms which is supposed, consistently with Article 6 of the European Convention, to underlie proceedings of this sort as indeed all proceedings. Justice, as was memorably observed so many years ago, must not merely be done but must be seen to be done. Although I am confident that, despite the mother's forensic disabilities, justice has been done, I am much less confident that any dispassionate observer having watched these proceedings today would think that justice has been seen to be done, given the disparity in the resources which the State has made available to the one litigant and not to the other.

These matters said, and as I have already mentioned, I agree that this appeal must be allowed. For my part however I would wish to hear in due course from Mr Scott-Manderson with precise details of the arrangements which he proposes should be put in place before the mother and her daughter return to Poland, just as I would wish to hear from him in due course with his precise proposals as to when that return should take place.

Mr Justice Coleridge:

I agree entirely with the judgments of both my Lords and would wish to add nothing and I too would allow the appeal.

Order: Appeal allowed