

SMITH v SMITH 2001 (3) SA 845 (SCA)

Headnote : Kopnota

The Hague Convention on the Civil Aspects of International Child Abduction 1980 acquired the force of law in South Africa by virtue of s 2 of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. A party seeking the return of a child under the Convention is obliged to establish that the child was habitually resident in the country from which it was removed immediately before the removal to or retention in another country and that the removal or retention was wrongful in terms of art 3. Once this has been established the onus is on the party resisting the order to establish one or other of the defences referred to in art 13(a) and (b) or that the circumstances are such that a refusal would be justified having regard to the provisions of art 20. If the requirements of art 13(a) or (b) are satisfied the judicial or administrative authority in the country to which or in which the child was removed or is being retained may still in the exercise of its discretion order the return of the child. (Paragraph [11] at 850I - 851B/C.)

One of the defences provided for in art 13(a) is that the party seeking the return of the child 'had consented to or subsequently acquiesced in the removal or retention'. The acquiescence referred to in art 13(a) involves an informed acceptance of the infringement of the wronged party's rights. It does not, however, require full knowledge of the precise nature of those rights and every detail of the guilty party's conduct. What the wronged party should at least know is that the removal or retention of the child is unlawful under the Convention and that he or she is afforded a remedy under the Convention. (Paragraph [16] at 852G - I/J.)

Article 13(a) requires no more than that the person seeking relief should have acquiesced. Once he has done so the requirement is satisfied and the fact that he subsequently changed his mind does not alter the situation. (Paragraph [17] at 852J - 853A.)

There is no justification for importing into art 13(a) a distinction between active and passive acquiescence: acquiescence is a question of the actual subjective intention of the wronged party, not of the outside world's perception of his intentions. The true enquiry is simply whether the wronged party had consented to the continued presence of the child in the country to which it had been removed or had been retained. However, where, although the Court is satisfied that the wronged party had not in fact acquiesced, his outward conduct was such as to lead the other party to believe that the wronged party would not insist upon the summary return of the child, it would be unjust to allow the wronged party to go back on such stance. (Paragraphs [18] and [19] at 853B/C - I/J.)

In this instance the appellant and respondent, both South African citizens, had moved to the United Kingdom in 1996 when the appellant was seconded there by his employer. By the time the second of their two children was born in September 1998 their marriage had all but disintegrated. In January 1999,

when the children were 18 months and four months old respectively, the parties had agreed that the respondent and the children would spend a two-month holiday in South Africa and return to the UK on 21 March 1999. By 17 March 1999 the respondent had resolved that the marriage had come to an end and on that date informed the appellant that she and the children would not be returning to the UK. She also instituted divorce proceedings in the High Court in Cape Town. The appellant immediately consulted a solicitor who advised him of his rights under the Convention. On 19 April 1999 the appellant deposed to an affidavit in support of an application to the Lord Chancellor's Department under art 8 for assistance in securing the return of the children. The appellant travelled to Cape Town on 2 May 1999. Before and during his stay he consulted three attorneys, all of whom advised him that a Court would not grant custody of such young children to a father. He thereupon instructed his attorney to inform the family advocate (the central authority in South Africa designated to discharge the duties imposed upon the State by the Convention) that he would not proceed with his application under the Convention. His attorney advised both the family advocate and the respondent's attorneys of the appellant's instructions. The appellant returned to the UK, consulted another attorney and on 4 June 1999 instituted fresh proceedings under the Convention for the return of the children. Among the grounds upon which the respondent opposed the application was that the appellant had acquiesced in the children's remaining in South Africa. The respondent argued that there had been no proper acquiescence as he had been misled as to his rights under the Convention by the incorrect advice given to him by his South African legal advisers.

Held, that the appellant had been aware of the Convention and that the respondent's retaining the children in South Africa was unlawful. He had been aware, too, that the Convention afforded him a remedy. Armed with this knowledge he had nonetheless instructed his attorney to withdraw his application under the Convention. Those facts clearly justified the inference that, with knowledge of his rights, the appellant had in fact acquiesced in the wrongful retention of the children in South Africa. His conduct would certainly have led the respondent reasonably to believe that he was not insisting on their summary return. (Paragraph [19] at 853J - 854B/C.)

Held, further, that it was doubtful that, in the circumstances of this case, it was even open to the appellant to put in issue the correctness of the advice he had received: it was unfair to the respondent, who bore the onus, to establish what had or had not been said in the course of privileged conversations between the appellant and his legal advisers. (Paragraph [20] at 854C/D - D.)

Held, further, assuming without deciding that it was permissible in the circumstances to enquire into what the appellant had been told by his legal advisers, that it was important to bear in mind that the appellant and all three of the attorneys he had consulted had been aware of his rights under the Convention. There was no reason for accepting that their advice had been anything other than an informed expression of opinion as to the appellant's prospects of success. It was in any event clear that his advisers had considered it highly unlikely that, given the age of the children, he would

ultimately obtain custody. That advice could hardly be categorised as incorrect or unreasonable and whether or not the appellant would ultimately succeed in custody proceedings would have been a vital consideration in deciding whether it was worth persisting with the application under the Convention. The appellant had therefore not been misled by his legal advisers. (Paragraph [20] at 854D/E - I.)

Held, accordingly, that the respondent had discharged the onus of establishing that the appellant had acquiesced in the wrongful retention of the children in South Africa. (Paragraph [20] at 854I/J.)

Held, further, as to whether the Court should, in the exercise of its discretion, nonetheless order the return of the children to the UK, that the Convention envisaged a prompt restoration of the status quo ante so that questions of custody or access could be determined by the courts of the country from which the children had been removed. In this instance more than two years had elapsed between the children's arrival in South Africa and the finalisation of the matter. It was unlikely that either child had any recollection of having lived in the UK and, whatever the reason, their home was with their mother in Cape Town. There was thus no sense in sending them back to the UK for the question of custody to be determined there. (Paragraphs [21] at 855B and [22] at 855F/G - H.)

The decision in the Cape Provincial Division in *Smith v Smith* confirmed but for different reasons.