4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

Re K (A Child) (2010)

[2010] EWCA Civ 1546

25/11/2010

Barristers
Private: Hassan Khan

Court
High Court

Practice Areas
International Children Law

Summary
When dealing with originating applications under the Hague Convention on the Civil Aspects of International Child Abduction 1980 oral evidence should be permitted only in exceptional cases.

Facts
The appellant father (F) appealed against a decision that his eight-year-old daughter (D) should remain in the United Kingdom with the respondent mother (M). M and F had lived as a married couple in Poland. The marriage broke down. M took D to the UK to live with other members of their family. Approximately one year later, F issued proceedings in the UK seeking an order for D's return under the Hague Convention on the Civil Aspects of International Child Abduction 1980. D stated that she would prefer to stay in the UK. M represented herself at the hearing, as her public funding had been withdrawn, and relied on the defences of acquiescence, risk of harm and D's objection to return. The judge made a case management order requiring the parties to file and serve statements limited to the defence of acquiescence and attend the hearing to give oral evidence on that issue. However, at the hearing the parties' oral evidence was not limited to that issue but covered the case generally. M and F's eldest daughter was also allowed to give evidence in support of M, even though she had not served a statement prior to the hearing.

Held
(1) The instant case was a plain case of abduction and the judge should have ordered D's return to Poland. M's defence of acquiescence rested on nothing but F's dilatory invocation of a remedy. The defence of grave risk of harm had an equally slender foundation, as did the defence of D's objection. The courts should not refuse to return a child on the basis of art.13(b) of the Convention unless it was established that adequate arrangements could not be made to protect the child on return. In addition, there had to be a very clear distinction between a child's objections and the child's wishes and feelings. A child who had suffered an abduction would often wish to remain in the bubble of respite that the abducting parent had created, however fragile that bubble might be. However, the expression of those wishes and feelings could not be said to amount to an objection unless there was a strength, a conviction

and a rationality that satisfied the proper interpretation of the Regulation 2201/2003 art.11(2) (see paras 7, 9-10, 24, 29 of judgment). (2) The instant case had gone badly wrong because a number of cardinal case management rules were disregarded. The judge should not have made an order for oral evidence. There should be no departure from the well-recognised proposition that Hague applications were for peremptory orders to be decided on written evidence amplified by oral submissions. In rare cases a judge might need to hear from the parties on a narrow issue that was in contention, for example where the issue was whether an agreement was reached between the parents to establish the defence of consent. The same requirement for oral evidence was not present where the defence of acquiescence was asserted. The concept of acquiescence was more nebulous and there would seldom be one distinct conflict of evidence for determination. Furthermore, orders for oral evidence should never be made in advance of the filing of written statements on the point in issue. Finally, if, exceptionally, oral evidence was to be given, it should be made clear to the parties that it was strictly limited in its ambit and was not an opportunity to express their views on the case generally (paras 13-16). (3) The Legal Services Commission should recognise that the issues raised by an originating application under the Hague Convention were not issues that were within the field of domestic family law. It involved international family law and required specialist expertise, both in the tribunal that decided the case and in the practitioners who presented the case. If a foreign national was required to present such a case without any legal representation, and perhaps without much knowledge of English, it was very hard to see how there could be the necessary equality of arms and thus the right to a fair trial under the European Convention on Human Rights 1950 art.6 (para.34)