***206 Cameron v Cameron (No 2)**

Outer House

Lord Hamilton

9 February 1996

Parent and child—Custody—International child abduction—Whether grave risk that return of children would expose them to psychological harm or place them in intolerable situation—Whether child of sufficient age and maturity to warrant taking account of her views—Child Abduction and Custody Act 1985 (c 60), Sched 1, art 13 .

The parents of three children separated and entered into a separation agreement to regulate custody of their two daughters. In terms of the agreement the daughters were to live with the father in France, with various provisions for access by the mother and with a provision for review after six months. After about three months the father came to England to visit his relatives, bringing the girls with him. On that visit it was arranged for the mother to have access to the girls. The mother did not return her daughters to their father at the end of the access period but instead took them to Scotland. The father petitioned the Court of Session for an order for the return of his daughters to France on the ground that their mother had wrongfully retained them in Scotland.

After a proof on the petition and answers the Lord Ordinary refused the prayer of the petition on the basis that it was not established that the two children were habitually resident in France. The father reclaimed successfully, the Second Division holding that the girls had become habitually resident in France. The case was remitted back to the Lord Ordinary before whom further evidence was led at a second proof. At the conclusion of evidence it was submitted on behalf of the mother that the elder daughter, who was seven years old, was of sufficient age and maturity that her objection to being returned to France should be taken into account and the court should exercise its discretion in refusing to return her to France, and that returning the younger daughter alone would place her in an intolerable situation. The mother further submitted that returning either or both daughters would expose them to psychological harm, and the court thus not being bound to order their return should refuse to do so.

(1)that while the elder child was articulate and confident, there was no basis for attributing to her a maturity greater than her seven years, thus she had not attained the age or degree of maturity at which it would be appropriate to take into account her objection to being returned to France and therefore no discretion to refuse the order arose (p 208I and L);(2) that while returning the children to France might result in resumed exposure to parental conflict increasing the risk of psychological damage, it was not established that their return would present a grave risk of exposure to the severe degree of psychological harm demanded by art 13 (pp 209L and 210C-D); and prayer of the petition *granted* and respondent *ordered* to return the children.

that while the court would have been disposed to require the petitioner to give certain undertakings with regard to his dealings with the children until the French court had an opportunity to consider the matter, the competency of such a course was questionable (p 210F-I).***207**

Petition under the Child Abduction and Custody Act 1985 (Reported 1996 SLT 306).

Robert Craig Cameron presented a petition in terms of the Child Abduction and Custody Act 1985 for an order that his wife Fiona Morag Leah or Cameron return the parties' two daughters, Rachael Hannah Cameron and Sasha Morag Cameron, to France and to the jurisdiction of the court of Charente.

After a proof and reclaiming motion on the question of the habitual residence of the children (reported 1996 SLT 306), the petition and answers came before the Lord Ordinary (Hamilton) for proof.

Statutory provisions The Convention on the Civil Aspects of International Child Abduction , set out in Sched 1 to the Child Abduction and Custody Act 1985 , provides:

" *Article 13*

"Notwithstanding the provisions of the preceding Article [return of child wrongfully removed], the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that — … (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

"The judicial or administrative authority may also refuse to order the return of the child if it finds that 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."

Cases referred to

• A (Minors) (Abduction: Custody Rights), Re [1992] Fam 106; [1992] 2 WLR 536; [1992] 1 All ER 929 .
• B v K (Child Abduction) [1993] 1 FCR 382 .
• C v C (Minor: Abduction: Rights of Custody Abroad) [1989] 1 WLR 654 ; [1989] 2 All ER 465 .
• McCarthy v McCarthy, 1994 SLT 743 .
• MacMillan v MacMillan, 1989 SC 53; 1989 SLT 350 .
• S v S (Child Abduction) (Child's Views) [1993] Fam 242; [1993] 2 WLR 775; [1993] 2 All ER 683; [1992] FLR 492 .
• Urness v Minto, 1994 SC 249; 1994 SLT 988 .

On 9 February 1996 the Lord Ordinary *granted* the prayer of the petition and *ordered* the return of the children to the jurisdiction of the French court.

LORD HAMILTON.

On a reclaiming motion the Inner House held that as at 12 April 1995 the children Rachael and Sasha were habitually resident in France. The petition was remitted to the Outer House for consideration of the issues raised by the respondent's third and fourth pleas in law. Following that remit the respondent adjusted her pleadings and introduced a fifth plea in law on an ancillary aspect. The outstanding issues all arise under art 13 of the Convention on the Civil Aspects of International Child Abduction , set forth in Sched 1 to the Child Abduction and Custody Act 1985 .

After further evidence had been adduced, counsel for the respondent, who had been ordained to lead at this further proof, made two principal submissions, the first of these having two subheads. The two subheads of the first submission were as follows: (i) that Rachael objects to being returned to France and has attained an age and degree of maturity at which it is appropriate to take account of her views; the court is entitled to refuse to order her return to France and should in the exercise of its discretion so refuse; (ii) that if Rachael were not returned, there is a grave risk that the return of Sasha without her would place Sasha in an intolerable situation; that being so, the court is not bound to order Sasha's return to France and should in the exercise of its discretion refuse to do so.

The second principal submission was that, in any event, there is a grave risk that the return of either or both of Rachael and Sasha to France would expose the returned child to psychological harm or otherwise place such child in an intolerable situation; that being so, the court is not bound to order the return of either child and should, in the exercise of its discretion, refuse to do so.

These submissions were made against the background of the facts established at the earlier proof and those submitted to have been established at

the further proof. For the primary facts established at the earlier proof (including the family history to April 1995) I refer to my opinion dated 18 July 1995; notwithstanding the reversal of my conclusion as to habitual residence, I did not understand my findings on the primary facts to be disputed.

At the further proof Rachael was adduced as a witness by the respondent. At an earlier procedural hearing the petitioner had opposed any inquiry being made into Rachael's views on the ground that she, as a child under eight, could not have attained an age and degree of maturity at which it was appropriate to take account of her views. Having regard to the terms of reports by two psychologists (which suggested that the child was both confident and articulate) I declined to decide the outstanding issues without further inquiry. On the morning of the proof and with the agreement of counsel, I saw Rachael privately in chambers. I satisfied myself that, provided maximum informality and privacy were arranged, there was no reason why Rachael should not, subject to testing her competency as a witness, give evidence in court.

Rachael sat at the clerk's table beside her maternal grandfather. Counsel and I, all informally dressed, sat at the same table. The court was closed to members of the public. I suggested to the parties that it might bein the child's interests if they voluntarily absented themselves while she gave her evidence; neither party ***208** adopted that suggestion. The child was positioned with her back to her parents, though she was aware of their presence. I examined Rachael as to her capacity to distinguish between truth and falsehood. She plainly could.

In the course of her evidence Rachael was asked how she would feel about going back to France quite soon. She said she would not want to go. She indicated her reasons as being that she could speak the language here but had difficulty with French, had a bedroom of her own, liked her house and loved her school. She liked her teacher at Tarbert Old Primary School and had lots of friends there. She did not like her teachers in France who pulled the children's hair and ears. She said she felt strongly about staying here and not going back to France. When first asked about France her demeanour became somewhat subdued but this soon passed.

The word “objects” in art 13 is to be read without importing any gloss to the word (S v S (Child Abduction) (Child's Views) per Balcombe L J at [1992] 2 FLR, p 499) and should not be read too narrowly, preferences for the existing arrangements being relevant to an objection to being returned (Urness v Minto per the court at 1994 SLT, p 998).

Rachael expressed an objection to being returned to France. I am satisfied, after some hesitation, that her objection was genuine in the sense of expressing her own present view on the matter. My hesitation does not arise from any doubt about the child's truthfulness but rather from a concern that she may have been influenced to express herself as she did. There was no evidence that she had been directly tutored, but a child may be concerned to adopt a particular attitude because she feels that those relatives to whom she is presently closest may expect it of her. Rachael adhered to the position that she would not wish to return to France, even in a situation where her mother, her sister and her brother were all to go there leaving her behind. That might suggest that she had come to court determined that she was, come what may, going to say that she did not wish to go to France. In the end, however, I took the view that this consideration went more to the issue of maturity than to that of the genuineness of her objection.

Counsel for the petitioner contended initially that, having regard to the lapse of time since the abduction, it was inappropriate to decide whether the child objected by reference exclusively to the time when the court decided the issue. I was unable, having regard to the tenses used in the relevant part of art 13 and to MacMillan v MacMillan , to accept that contention; it was ultimately departed from. Counsel for the petitioner accepted that, while lapse of time is relevant to evaluation of the objection, the existence

or otherwise of an objection is to be determined at the date of the court's decision on that issue. I find that Rachael at this time objects to being returned to France.

The issue whether Rachael has attained an age and degree of maturity at which it is appropriate to take account of her views is more difficult to resolve. In one sense it is always important to listen (directly or indirectly) to what a child has to say about matters which affect it and for the listener to have regard to what he hears. The importance of doing so has increasingly been recognised in recent times. However, the scheme of the Convention is that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return (S v S at p 501). The Convention prescribes no minimum age for attainment of the relevant maturity but the terms of art 13 import that a child may genuinely object to being returned yet not have attained an age and degree of maturity at which it is appropriate to take account of its views. By "its views" the Convention must mean its views on whether it should or should not be returned. Thus, while it will be right to listen to what a child may have to say, its views about the essential question (namely, whether it should or should not be returned) may not be those of a person of sufficient age and maturity to warrant taking those views on that matter into account.

I have come on consideration of the whole evidence to the conclusion that Rachael has not attained the relevant age and degree of maturity. She is an articulate, confident and engaging child. She answered direct questions with direct answers. Yet there is no basis for attributing to her a maturity greater than her seven and three quarter years. It is not surprising that she is happy, indeed enthusiastic, about many of the things that she has recently experienced in Scotland. She is a friendly child and has made many friends in Scotland at the local school. She plainly likes her teacher there. She enjoys her present home. She and Sasha share a pony which they both enjoy riding. Yet, being friendly, she also made friends in France, found her home there "OK" and immediately prior to the abduction, had the prospect of a pony there. Although I find that she has a genuine apprehension now of returning to a French school and endeavouring to cope with a foreign language, she was, while in France, making reasonable progress both linguistically and academically. While it will be more difficult for her in a French school, and she will not, at least in the shorter term, be as happy there as she is at her present school, her perceptions are, in general, those of a child of her years, more comfortable with the immediate security of existing arrangements, than of a more mature child able to weigh on a broader balance the advantages and disadvantages of returning or not returning to France. I accordingly find that Rachael has not, within the meaning of the Convention, attained an age and degree of maturity at which it is appropriate to take account of her views.

In light of the foregoing finding, no discretion to refuse to order Rachael's return arises. I should, however, state briefly what my attitude would have been had I found that a discretion was vested in me. The issue then to be determined would be whether in all the circumstances decisions in relation to ***209** Rachael's upbringing should be made by the French or by the Scottish courts (Re A (Minors) per Donaldson MR at [1992] 1 All ER, p 942). I would have required to have had regard to the policy of the Convention, to the cogency or lack of cogency of Rachael's reasons for not wishing to return and to any other material considerations. A material consideration in the present case appears to me to be that of language. Neither of the parties speaks fluent French; nor do any of their children. A satisfactory investigation of the nuances inherent in any issue of custody of children seems likely to be handicapped by such a language barrier. This, when combined with Rachael's relatively tenuous physical connection with France, amounts in my view to an indicator in favour of not ordering her return. However, the policy of the Convention is strongly in favour of a return to the jurisdiction of the habitual residence. Rachael's reasons, while perfectly understandable, are not in my view of substantial weight. They are not of the persuasive character

of those expressed by the child John in Urness v Minto . I apprehend that, on the returnof the girls to France with their mother, there will be disharmony between their parents leading to a measure of unhappiness to the children. Provided however that final arrangements for their future are settled with reasonable dispatch, such unhappiness will not be of a degree to give concern in the longer term. I would, on balance, have exercised my discretion by ordering Rachael's return.

Counsel for the respondent relied on affidavit evidence to the effect that the French court might decline jurisdiction. However, the legal opinion relied on is expressed tentatively and is, in my view, irrelevant to the present issue. The French court, it must be assumed, will have jurisdiction to entertain proceedings relative to children physically present within its territory who were habitually resident there at the date of their abduction. On being seised of such jurisdiction it may decide that substantive decisions on the children's future should be made by the Court of Session where divorce proceedings with conclusions for custody have, it appears, already been instituted. It may also direct or permit the return of the children to Scotland. These, however, are matters for the French court as the court of the habitual residence.

The second subhead of counsel for the respondent's first submission does not now arise for decision. I should, however, briefly state what my findings and conclusions would have been in relation to Sasha had I found that I was entitled to refuse to return Rachael and had decided not to return her.

Rachael and Sasha have lived together throughout their joint lives. When separated from their mother, these children have always been together. They are of the same sex and are close in years; they have shared many activities. Although they may quarrel from time to time, they are mutually supportive, particularly the elder of the younger child. According to Dr Furnell's report (which I accept on this aspect) Sasha regards Rachael as "a kind big sister" . To send Sasha, now aged five and a half, to France without her sister to support her, particularly in an essentially strange educational and linguistic environment, would, if her mother were not with her, place Sasha, in my view, in an intolerable situation. On the other hand her difficulties would be materially alleviated if her mother were living with her in France. That arrangement might well create other difficulties for Sasha in that there is a real prospect of acrimonious confrontation in France between her parents. Such confrontation, though making life more difficult for Sasha, would not, in my view, place her in an intolerable situation. While she will no doubt have an awareness that such confrontations involve her and her future, neither that nor her separation in the meantime from her sister and brother would, in my view, cause the child to be "devastated" (B v K (Child Abduction)) or amount to a situation equivalent to that facing the child Kevin in Urness v Minto .

Were it to be necessary for the respondent to decide whether or not to return with Sasha leaving Rachael and Hamish [the parties' son, born 3 February 1993] in Scotland, that would no doubt be a difficult decision for her. She has not, it appears, made any decision on that hypothesis. As, however, an intolerable situation for Sasha in France would in that event arise only if the respondent chose not to accompany her there, I am unable to find that a return of Sasha to France would place her in an intolerable situation.

In support of her second principal submission, counsel for the respondent relied upon the evidence of Dr Boyle, consultant psychologist. The burden of his evidence was that both Rachael and Sasha had already been exposed to a substantial amount and degree of parental conflict and were at risk of psychological damage in the form of alienation from both parents and, possibly, behavioural problems. A resumed exposure to such conflict, which was likely to be the result of the return of the girls accompanied by their mother to France, would increase that risk. Such exposure in France, where the children had previously been for a relatively short time and where they were

isolated linguistically and geographically from the support systems which they had known in recent months, would, together with separation from their brother, be likely to heighten that risk. Counsel for the respondent also relied on evidence to suggest that this family was in need of help either from a child and family psychiatry unit or from a therapist.

In approaching this issue it is necessary to bear in mind that art 13 is expressed in very demanding language (McCarthy v McCarthy, per Lord Prosser at 1994 SLT, p 747I-J). The psychological harm of which there must be a grave risk is psychological harm of a severe degree (C v C (Minor: Abduction: Rights of Custody Abroad)per Donaldson MR at [1989] 2 All ER, p 473). Some harm may be inevitable by a return just as some harm may be inevitable from an abduction. It will be the concern of the state to which the children are returned to minimise or eliminate that ***210** harm. As Dr Boyle recognised, children can be resilient and much will depend on whether the conflict to which they are exposed is chronic or short lived. In the end the differences between Dr Boyle and Dr Furnell, a psychologist led by the petitioner, were matters of emphasis. Insofar as there were differences I preferred the evidence of Dr Furnell.

The circumstances in which Dr Lees, the children's general practitioner in Tain, had referred them to the department of child and family psychiatry at Raigmore hospital, Inverness, remained somewhat obscure. However, on the whole evidence, including that of the children's stable psychological state as evidenced at school, I am not satisfied that these children are at particular risk if they are sent with their mother to France. The latter has said that she will go with them in the event of the court ordering their return. There was some evidence to suggest that the petitioner had, or sought, a relationship with his daughters of a closeness which might be described as unhealthy — in particular, that he sought to exclude the girls from a loving relationship with their mother. It is unnecessary for present purposes to determine that matter which is essentially pertinent to the best arrangements for them in the longer term. The respondent is in the meantime to be with the girls in France.

In these circumstances I am not satisfied that the return of Rachael and Sasha to France would present a grave risk of either of them being exposed to psychological harm. Nor am I satisfied that such return would present a grave risk of otherwise placing either of them in an intolerable situation. In these circumstances I am bound to order their return. Had I concluded that there was a grave risk of either kind, I would have exercised my discretion by not returning them.

The petitioner tendered to the court certain undertakings. These are in the following terms:

"(1) The petitioner will allow the respondent and the children to have the use of 'Chez Troubat' were the children to be returned to France. He is prepared to move into alternative accommodation.

"(2) He is prepared to support the respondent and the children pending a hearing on the question of custody in the French courts.

"(3) He undertakes to raise a custody action in France at the earliest date possible."

I for my part regard these undertakings as vague and less than satisfactory, but, insofar as they go, they are accepted and will be recorded in the minute of proceedings. They are more satisfactory than those which until recently the petitioner was prepared to give. The respondent's position was that she had no confidence that they would be observed — should that be the case, it will be open to her to bring this to the attention of the French court whose jurisdiction can be invoked at her instance.

I would have been disposed to impose more rigorous and extensive undertakings. I drew to the attention of counsel that in C v C the English Court of Appeal had apparently required certain undertakings of the father which went beyond those he had offered. I had in mind

that it might reduce the risk of distress to the children if the petitioner was required to undertake not to seek to enforce in France any right or claim to custody or access other than in furtherance of an order of a French court of competent jurisdiction. The petitioner is a person of determined character and may suffer from a sense of frustration in relation to the access allowed to him over the last nine months. Insistence by him brevi manu on rights or claims to see or be with the children seemed to me to be against their best interests.

Counsel for the petitioner submitted that it was incompetent for me to insist on any such undertaking. Counsel for the respondent felt unable to support the court making any such requirement. With regret I desist from making such a requirement, designed as it would have been to regulate matters until the French court was in a position duly to control them.

For the foregoing reasons I shall repel the respondent's third, fourth and fifth pleas in law and grant the prayer of the petition by ordering the respondent to return the children Rachael Hannah Cameron and Sasha Morag Cameron to France and the jurisdiction of the court of Charente in terms of the Child Abduction and Custody Act 1985 and the Convention, within such period as the court may determine of this order. As agreed, the case will be put out by order for determination of that period. [On 10 July 1996, folowing various applications in relation to implementation of the order of 9 February 1996, the Lord Ordinary ordained the respondent to deliver the children into the custody of the petitioner for the purpose of their being returned the jurisdiction of the French court having erroneously dismissed the petitioner's application to it as inadmissable, the Lord Ordinary recalled the order of 10 July on the basis that the purpose for which it had been pronounced had not been fulfilled and that the future of the children would otherwise be uncontrolled by any judicial process. The order of 9 February, being a final order which had not been reclaimed against, stood.] C A G M

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