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[06/07/1999; Inner House of the Court of Session (Scotland); Appellate Court]
Donofrio v. Burrell, 2000 S.L.T. 1051

D. v D.

Court of Session

Inner House (Extra Division)

Lord Prosser, Lord Kirkwood, Lord Allanbridge

6 July 1999

Counsel: Act: JJ Mitchell, QC, Balfour & Manson; Alt: Macnair, Digby Brown

LORD PROSSER: The petitioner and the respondent were formerly husband and wife. There are two daughters of the marriage. The petitioner lives in Ontario. The respondent and the children live in Scotland. The petitioner seeks an order for access to the children during half of the summer and Easter holidays in each year, and during the school Christmas holidays in alternate years, the access to be exercised in Ontario. By interlocutor of 5 March 1999, the Lord Ordinary inter alia found the petition to be competent, and on the respondent's motion granted leave to reclaim. On behalf of the respondent and reclaimer, Mr Mcnair asked us to recall that interlocutor and dismiss the petition.

The parties were married in 1988, and divorced in 1993. The two children were born in February 1989 and August 1990. Until March 1997, the respondent and the children lived in Ontario, and it is admitted that the petitioner exercised regular access to his daughters from 12 June 1991 until 25 March 1997. It is also admitted that in terms of an order of the Ontario court, dated 23 October 1991, the petitioner was awarded access in respect of the said children on alternate weekends from Friday at 3 pm until Sunday at 7.30 pm, and that this order remains in force. However, in March 1997, the respondent came to Scotland with the children, and has not returned to Canada. It is common ground that the children are now habitually resident in Scotland.

The petitioner attempted to obtain the return of the children, in terms of the Convention on the International Aspects of Child Abduction (the Hague Convention) and the Child Abduction and Custody Act 1985. However, the removal or retention of the children not being in breach of rights of custody, and thus not being wrongful, the attempt to obtain return was not, and is not, insisted in. However, the present petition, seeking an order for access to the children, is likewise founded upon the Child Abduction and Custody Act 1985, and in particular upon Article 21 of the Hague Convention, as contained in Schedule 1 to the 1985 Act. Correspondingly, the petitioner's position is that this is an "application for access to a child under the Hague Convention" which in terms of Rule of Court 70.5(2) "shall" be made by petition. The petition refers to Rule 70.5(2); and following upon intimation, service and the lodging of answers, parties were allowed a hearing, in terms of Rule of Court 70.6 (3). The interlocutor now reclaimed against followed upon that hearing.

In seeking recall of the Lord Ordinary's interlocutor, and submitting that the petition should be dismissed as incompetent, counsel for the respondent and reclaimer was not of course submitting that there was any fundamental incompetency in the petitioner, as the children's father, seeking an order for access of the type sought in this petition. The alleged incompetency is procedural: any party seeking an order for access to children must do so not by petition, but by action. It is not disputed that the normal procedure, when a party seeks contact with or access to a child, will be by action, not by petition. The question is whether, to what extent and in what circumstances there is an exception to that normal procedure, making it competent, and perhaps obligatory, to proceed by petition where the party seeking the order relies, as this petitioner does, upon Article 21 of the Hague Convention and Rule of Court 70.5(2). Before turning to the terms of Article 21 and Rule 70.5, I think it convenient to summarise the "normal" law and procedure relating to orders for contact or access, in situations where the Hague Convention is in no way in point.

In terms of sections 8 and 9 of the Family Law Act 1986 the Court of Session has jurisdiction to entertain an application for a "Part I order" if on the date of the application the child is habitually resident in Scotland. A Part I order is defined in section 1(1) of the Act, and in terms of head (b) of that subsection, includes an order with respect to contact with or access to a child, subject to certain exclusions. (It is to be noted that exclusion (vii) is "an order made under the Child Abduction and Custody Act 1985", but I shall return to that matter). The Children (Scotland) Act 1995 deals with parental responsibilities and parental rights, in terms of sections 1 and 2 of the Act, the parental rights including a right in a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, if the child is not living with him, "to maintain personal relations and direct contact with the child on a regular basis" (section 2(1)(c)). Section 11(1) of the 1995 Act provides for an order being made inter alia in relation to parental rights; and in terms of section 11(2)(d), the court may make an order (known as a "contact order") regulating the arrangements for maintaining personal relations and direct contact between a child under the age of 16 years and a person with whom the child is not, or will not be, living. Chapter 49 of the Rules of Court deals with "family actions" which are defined by Rule of Court 49.1(1) and include, in terms of head (j) of that Rule, "an action or application for, or in respect of, an order under section 11 of the Children (Scotland) Act 1995 . . ." subject to an exception which is not here in point. As is implicit in the expression "family action", procedure in such actions is not by petition, but by action: in particular, Part IX of Chapter 49 (which applies to applications for section 11 orders in family actions other than actions of divorce, separation or declarator of nullity) provides at Rule 49.59 for the form of applications relating to section 11 orders, requiring (subject to any other provisions in that Chapter) that an application for a section 11 order "shall" be made in certain specified ways. There is no scope for procedure by petition, and it is clear from the remaining rules in that Chapter that procedure by summons and defences, or by minute in an action, is required.

I turn to the Child Abduction and Custody Act 1985, and the Hague Convention. It is worth noting that the title of the Act, in referring to both abduction and custody, and the preamble, which describes the Act as one to enable the United Kingdom to ratify two international Conventions "relating respectively to the civil aspects of international child abduction and to the recognition and enforcement of custody decisions", reflect the quite separate purposes of Part I of the Act and Part II. Of these, it is only Part I, dealing with "international child abduction" which is concerned with ratification of the Hague Convention. By section 1(2), it is provided that subject to the provisions of that part of the Act, the provisions of the Hague Convention set out in Schedule 1 to the Act are to have the force of law in the United Kingdom. By section 3(1), it is provided inter alia that the functions under the Convention of a "Central Authority" are to be discharged in Scotland by the Secretary of State, and subsections (2) and (3) of that section deal with applications "made under the Convention"

to either the Lord Chancellor or to the Secretary of State, with provision for transmission by the one to the other where appropriate. Such applications to the Central Authority are of course to be contrasted with applications to the courts, and it is worth noting that in section 4 reference is made to the Court of Session as a court "having jurisdiction to entertain applications under the Convention" while section 5 contains the words "Where an application has been made to a court in the United Kingdom under the Convention, the court may, at any time before the application is determined, give such interim directions as it thinks fit . . .". It is thus clear from the terms of the statute that "applications" are envisaged as being made to courts "under" the Convention. Section 10 provides inter alia that an authority having power to make Rules of Court may make "such provision for giving effect to this Part of this Act as appears to that authority to be necessary or expedient".

The provisions of the Hague Convention set out in Schedule 1 to the 1985 Act, which are to have the force of law in the United Kingdom, commence with Article 3. The preamble to the Convention, and Articles 1 and 2, are thus not given the direct force of law in the United Kingdom. Counsel for the petitioner, however, drew our attention to the fact that Article 7 provides that Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children "and to achieve the other objects of this Convention". The "objects" of the Convention are expressly stated, by Article 1, to be (a) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State"; and (b) "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States". It was submitted that by virtue of the reference in Article 7 to the objects of the Convention, it would be proper for this court to have regard to the terms of Article 1(b). To put matters in context, it is also perhaps legitimate to take note of Article 2, which provides that Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention and provides that "for this purpose they shall use the most expeditious procedures available".

The Convention is divided into Chapters. In Chapter I, dealing with the scope of the Convention, Article 3 contains the fundamental provisions defining "wrongful" removal or retention in terms which depend upon a breach of rights of custody. But Article 4 determines the application of the Convention in terms of the child's habitual residence immediately before "any breach of custody or access rights"; and Article 5 defines not only "rights of custody" but also "rights of access". Chapter II deals with Central Authorities and their obligations, and Chapter III, dealing with return of children, contains Articles 8 to 19 inclusive. For present purposes, the most significant of these provisions is perhaps Article 12, which provides that where a child has been wrongfully removed or retained, and at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned "shall order the return of the child forthwith". That obligation to order the return of the child is qualified by various other provisions; but it is to be noted that it is a specific obligation created, and imposed upon judicial authorities, by the Convention itself Chapter IV of the Convention deals with rights of access, and as enacted in Schedule 1 to the 1985 Act contains only Article 21. That obligation is in the following terms:

"An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject".

While Article 7 contains the general obligation which I have already quoted, and certain further particular obligations, it does not refer expressly to an obligation to "promote the peaceful enjoyment of access rights"; but it does contain an express obligation on Central Authorities inter alia to take all appropriate measures "(f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access".

Chapter 70 of the Rules of Court deals with applications under the Child Abduction and Custody Act 1985. Part II of that Chapter deals specifically with International Child Abduction (The Hague Convention). The first Rule in that Part is Rule 70.5. Rule 70.5(1) provides that an application for the return of a child under the Hague Convention shall be made by petition, with certain specific requirements as to averments, productions and affidavit and documentary evidence. Rule 70.5(2) provides that "an application for access to a child under the Hague Convention shall be made by petition" and again sets out a number of specific requirements in relation to averments, productions and affidavit and documentary evidence. In terms of Rule 70.6, there is a short four day period of notice for lodging answers and provision is made for service of the petition, and copies of affidavits and documentary evidence lodged with it. Provision is made for an early first hearing, and at the first hearing the court is empowered to determine to what extent, if any, further evidence by affidavit is required and, on special cause shown, to direct that a particular matter should be the subject of oral evidence. Depending on whether further evidence is required, it has power to determine the petition at the first hearing, or to give directions as to the period within which a second hearing is to be held. It is clear that the procedural provisions contained in Rule 70.6, which apply not only to an application for the return of a child under the Hague Convention, but also to an application for access to a child under the Hague Convention in terms of Rule 70.5(2), are not merely substantially different from the procedures applicable to family actions, but are specifically designed to be expeditious.

Having set out the various provisions of the statutes and of the Rules of Court fairly fully, I turn to the submissions of the parties. The primary submission advanced on behalf of the respondent and reclaimer was that Article 21 was not a provision which conferred any private right, capable of being asserted or upheld in the courts, but was concerned with applications not to the courts, but to Central Authorities, imposing obligations upon Central Authorities, and not upon the courts. This was in sharp contrast to a provision such as that contained in Article 12, which conferred powers, and indeed imposed obligations, upon courts, thus giving rise to newly created private rights. That being so, an application to the courts to order the return of a child in terms of Article 12 could correctly be described as an application "under" the Hague Convention, and provided an appropriate reference for the use of such language in sections 4 and 5 of the Child Abduction and Custody Act 1985, and indeed Rule of Court 70.5(1), with its reference to an application for the return of a child "under" the Hague Convention. Such proceedings were indeed brought "under" the Hague Convention relying as they did upon a private right created by the Convention. Similarly, an order made by the court, in disposing of such an application to it, could correctly be described as an order "made under the Child Abduction and Custody Act 1985" in terms of

exclusion (vii) contained in section 1(1)(b) of the Family Law Act 1986. Applications for the return of a child were thus not Part I orders for the purposes of sections 8 and 9 of the Family Law Act 1986; and since the right in issue flowed directly from Article 12 of the Convention, the party relying upon that right did not require to invoke parental rights in terms of the Children (Scotland) Act 1995, nor seek any order in terms of section 11 of that Act. That being so, head (j) of Rule of Court 49.1 did not apply to applications for return of a child under the Hague Convention, and such an application to the court was accordingly not a "family action" within the scope of Rule of Court 49.1, nor subject to the procedural requirements imposed by Rule of Court 49.59. The mandatory provision contained in Rule 70.5(1), providing that an application for the return of a child under the Hague Convention "shall be made by petition" accordingly made sense, and could stand alongside those Rules making different procedural requirements for family actions.

However, the reference in Rule of Court 70.5(2) to "an application for access to a child under the Hague Convention", while apparently making sense, in fact envisaged and purported to refer to something which simply did not and could not exist. No right to access, of any kind, was created by or flowed from Article 21. No power or obligation was bestowed upon the courts by that Article. Any valid application to the Court of Session, seeking an order for contact or access, must rest upon rights conferred by, or obtained from, some source other than the Convention, as must the court's jurisdiction and power to grant any order in response to such an application. Most obviously, any such application would be for a Part I order, in terms of the Family Law Act 1986, the exclusion contained in section 1(1)(b)(vii) not being applicable, since any order which the court might make would not be an "order made under" the Child Abduction and Custody Act 1985. The proper basis for any such application was to be found in the provisions of the Children (Scotland) Act, and the order sought would be an order under section 11(2)(d) of that Act. Correspondingly, the action would be a "family action" in terms of Rule of Court 49.1(1)(j), with the appropriate procedure being that laid down in Rule of Court 49.59. Rule of Court 70.5(2) therefore not merely lacked any appropriate reference: if one construed it so as to give it some reference, the right which was being invoked would still be a right under the Children (Scotland) Act 1995, and Rule 70.5(2) would be in direct conflict with the procedures laid down in Chapter 49 of the Rules of Court for applications under section 11 of the Act of 1995. The court should hold that Article 21 afforded no legal context or basis for an application to the courts for an order for contact or access; that such an application was therefore not an application "under" the Hague Convention; that the right asserted by the petitioner in this petition was one which could only be asserted in a family action; and that the purported procedural basis for proceeding by petition -- Rule of Court 70.5(2) -- was without content, so that the petition was procedurally incompetent. It should therefore be dismissed.

Approaching the matter in a somewhat different manner, it could be said that Rule 70.5(2) was ultra vires. Even if in some sense there could be an "application for access to a child under the Hague Convention" such an application would necessarily also be an application under section 11 of the Children (Scotland) Act 1995. Neither the court's general rule making power under section 5 of the Court of Session Act 1988, nor the specific power contained in section 10 of the Child Abduction and Custody Act 1985 empowered the court to provide different rules for such an application from those generally applicable to applications under section 11 of the 1995 Act. Any difference in Rules must depend on the nature of the cause, and not upon personal differences between parties bringing causes of the same nature. It is to be noted that the reclaimer's submissions as to the nature and effect of Article 21 of the Convention find support in the English case of In re G (a Minor) [1993] Fam 216, [1993] 3 All ER 657; but on this issue I do not find it necessary to refer in detail to that case, and in so far as it deals with procedural questions, it does not appear to me that in relation to any procedural problem in Scotland the approach of the court in that case can

really be of assistance. Counsel for the reclaimer also referred us to In re T (Minors) [1993] 3 All ER 127, [1993] 1 WLR 1461, but despite possible analogies, it does not appear to me that it is of assistance in resolving any Scottish procedural problem.

In support of the proposition that Rule of Court 70.5(2) was of no effect, counsel for the reclaimer also submitted that it did not really fit with the substantive law. There were a number of difficulties. The procedure under Rule of Court 70 made no provision for intimation to the child itself (in contrast with Rule of Court 49.8); it made no provision requiring the court to give the child an opportunity to express a view (in contrast to Rule of Court 49.20); it contained no provision for obtaining reports (in contrast with Rule of Court 49.22); it contained no provision for variation of orders (in contrast with Rule of Court 49.41 and .42); it contained no provision for a respondent to seek any orders (in contrast with Rule of Court 49.31); and overall, it gave rise to a likelihood that there would be in addition to any petition under Rule of Court 70.5, a separate family action raised by the other party, running at the same time, whenever the respondent sought orders from the court. Moreover, while the strict timetable envisaged in Rule 70.6 was no doubt appropriate where the return of the child to a foreign jurisdiction was required before the merits of a dispute could be looked into, that strict timetable, and the special evidential provisions which went with it, would have no rational basis if the access order which was being sought was simply the kind of access order that might be sought by any parent. There was no justification for a procedural difference, merely because in one case the parent seeking such an order was resident in a Hague Convention State, whereas in another case he was not. These considerations suggested that it was perhaps wrong to construe Rule 70.5(2) as referring to applications for orders such as that sought by the present petitioner.

These propositions bring me to the reclaimer's second main submission. This was to the effect that even if the expression "an application for access to a child under the Hague Convention" could be seen as having some meaning in some circumstances, those circumstances must still be identified by reference to Article 21 of the Convention. An application to the court could not be described as "under the Hague Convention" if Article 21 had not in fact been used: a party who had never presented an application to or received help from the Central Authorities was in no sense and at no stage doing anything "under" Article 21. Moreover, the application would have to have been an application "to make arrangements for organising or securing the effective exercise of rights of access". And once the Central Authorities received such an application, what they were bound to do was again described in Articles 7 and 21. What was clearly envisaged was a party who already had "rights of access" and it was with such existing rights of access that the Convention was concerned. The Convention only applied if there had been a breach of existing custody or access rights (Article 4). Subsequent references to the exercise of rights of access, or to the enjoyment of access rights, or to the fulfilment of conditions to which the exercise of those rights might be subject, or to obstacles to the exercise of such rights could not simply be references to notional or potential or future or different rights of access. Any application to the courts must accordingly be an application in which the subject matter was the existing (breached) rights of access, seeking an order conform to them from the Scottish courts which might make them more effective, or some ancillary order which might help to achieve the purposes which underlay any application to the Central Authority for assistance.

The present petition, it was submitted, was not of that kind at all. It sought a completely new type of access order, entirely different from, and apparently in substitution for, the existing order pronounced by the court in Ontario. It was understandable that the petitioner would now want a quite different form of access suited to the fact that the children were now habitually resident in Scotland. But if that was what he wanted, he should use the ordinary mechanisms for obtaining access to children who were thus habitually resident in Scotland.

In relation to access, the Convention did not adopt the strong measures which were introduced to deal with wrongful removal or retention. But it was nonetheless concerned with respect for existing orders, as was clear from Article 1 and the supportive role given to the Central Authorities. The Convention was concerned with Canadian rights. And it was in relation to these Canadian rights that Article 21 provided a means of assistance through the Central Authority.

Counsel for the petitioner and respondent emphasised that this court was not concerned with the merits of the access question. He submitted that the decision on the merits would be the same, whether the procedure adopted was that of a family action, or that of a petition in terms of Rule 70.5. Under either procedure, the relative importance of the original foreign order would vary infinitely. It might be effectively stale, so that the whole issue of access required consideration de novo. Or at the other extreme, it might be very recent and, although breached, might require little or no alteration. Moreover, petition procedure being very flexible, the absence of various mandatory provisions, founded upon by the reclaimer as creating difficulties, would not in fact create difficulties: petition procedure was flexible, and if any "family action" procedures were seen as desirable, they could be adopted. The difficulty lay at a different level. Having adopted the mandatory procedure laid down by Rule 70.5(2), the petitioner was faced with an argument that his procedure was incompetent, having regard to the equally mandatory terms governing family actions. But if he had brought a family action, he might well have been told that that was incompetent since, in the circumstances, his application was one for access under the Hague Convention. We were informed that the problem was not an unusual one: world-wide, perhaps 10% of applications under the Hague Convention procedures were concerned with access rather than return of children. Elsewhere, it was claimed, courts had no problem in treating applications for access as properly made on the basis of the Hague Convention. It was important that this court should similarly acknowledge that there were such applications, and that they required expeditious disposal.

So far as the reclaimers primary argument was concerned, counsel for the petitioner and respondent submitted that in accordance with ordinary principles of construction, Rule 70.5 (2) must be given even a strained meaning, rather than no meaning, ut res magis valeat quam pereat. The Rule was not concerned with access under the Hague Convention. It was concerned with an application (for access) under the Hague Convention. The fact that the Convention conferred no private right to access was therefore neither here nor there. The question was whether the application made by the present petitioner could properly be seen as made under the Convention. Just as there could be an application under the Convention, so also there could be an order (concerning rights of access) under the Convention, issued by a judicial authority. Reference was made to Article 26, and also to Article 29, which showed not only that Article 21 was concerned with breach of access rights, but also that the Convention envisaged the possibility of a party "applying directly to the judicial or administrative authorities" "under" the provisions of the Convention or otherwise. The fact that the Convention did not force a party to invoke it, even if claiming a breach of rights which could justify invoking it, perhaps meant that Rule 70.5(2) was not ideally expressed. And it left a party in a quandary as to which procedure might be treated as incompetent. The Lord Ordinary had been correct in holding that it was not stretching the meaning of the phrase "application for access to a child under the Hague Convention" too far to conclude that it must mean an application for access (or contact) in which the parent seeking the assistance of the court holds an order for access pronounced in the courts of another Contracting State, in which the child was habitually resident at the time of the order, that the parent had sought assistance from the Central Authority in a way contemplated in Article 21 and that the remedy sought from the court was sought with a view to enabling the applicant to exercise access to which the foreign order related. Despite the silence of the

pleadings, it appears from the Lord Ordinary's opinion that the Central Authority has facilitated the bringing of this petition, legal aid having been afforded to the petitioner under special provisions relating to Convention applications. I am content to proceed upon the basis that that aspect of the matter is not therefore a problem. And I agree with the Lord Ordinary that the terms of Rule 70.5(2), while they might bear a meaning of the type contended for by the reclaimer, will in fact bear the meaning contended for by the respondent. Upon that basis there is a category of applications which are applications "under" the Convention.

Counsel for the petitioner and respondent contended that the order sought would not always entail variation of the original access order. It was therefore understandable that the Rule contained no automatic leave to apply for variation. But where that was foreseen, there would be no problem in the court reserving leave to apply. Moreover, if there were other orders sought which did require a family action, that was a minor, and not a major complication, and should not be taken into account in considering whether the generally expeditious procedures provided by Rule 70.5 were valid for the special category of applications with which they dealt. The "difficulties" invoked by the reclaimer were therefore of no assistance in the problem of construction. I am myself satisfied that these "difficulties" do not really point to any different or preferable construction of either the Rule or Article 21.

Since some applications might require no departure from the original order, and might merely be seeking some ancillary order, one has an obvious example of the category of application to which Rule 70.5(2) could apply. But counsel for the petitioner submitted that the category was not limited to these cases which involved no change in the original order itself. While he stopped short of submitting that the references in the Convention to rights of access meant merely some general or hypothetical right of access, counsel for the petitioner submitted that, consistently with the language of the Convention, applications under the Convention could take the form of a request for rights of access different from those already in existence. To hold otherwise would be to deprive the Convention of all its most probable usefulness, since after removal of children from the country where the order was made, it was unlikely that the original order would still be practicable. It was clear that a court could make an order for something within, but less than, the original order. Variation was thus possible at least in that instance. In principle, given the realities of such situations, one would expect it also to be possible to allow variation to a more effectual type of access, even if this meant that the new order was technically "different". The child's interests would in any event be the paramount consideration, and with that as a yardstick, the court would necessarily be looking at matters de novo. It would be strange if the decision could not reflect that. The details of any existing order could be seen as merely means to an end, or mechanisms reflecting a perceived right of access. It was not departing from that perceived right to change, say, the particular day or days upon which access might be exercised. Nor was it departing from that perceived right to alter the practical mechanisms more substantially, as was sought by the petitioner in the present case.

Counsel suggested that once the general competency of such petitions was acknowledged, it was essentially a question of relevancy whether what was sought represented too great a departure from the original order. In any event, in matters of this kind, what was originally sought might be very different from what was eventually granted, and it was the competency of the grant which mattered. Moreover, in practical terms, if in petition procedure the court made an order which theoretically ran beyond the proper limits of such procedure, the court would not be straying into a field where it had no power to make orders: it would merely be moving into a field where its powers would exist, but would normally be exercised under different procedural rules. Since the criteria for decision would be the same in both

procedures, it would be totally artificial and unrealistic to force a party who had adopted petition procedure to go back to the beginning, start all over again with a family action, and eventually receive precisely the order which he had originally sought in the first procedure. Such proceduralism would be particularly inapposite, given the court's duty, under either procedure, to consider what was best for the child. The court should be slow to hold that the Hague Convention was only concerned, when dealing with access, with protecting a situation which ex hypothesi would almost never be the real one.

I am not persuaded that the problem of choosing between family action and petition procedure, because of the conflict between the two rules and the risk of a plea to competency in either event, is quite as real as counsel for the petitioner suggested. If a family action were brought upon an apparently sound statutory basis, it does not appear to me to be likely that a plea to competency, based on the terms of Rule 70.5(2), would be upheld. Nonetheless, I do not think that a party should be forced into using that procedure if his application is indeed an application under the Hague Convention and a different procedure is provided for such applications. It does not appear to me that the mere fact of an existing order, coupled with a request for, and perhaps the grant of, assistance from a Central Authority, means that all and any future applications for access by a party are to be seen as applications under the Hague Convention. The provisions of the Convention appear to me to be intended as provisions supportive of existing rights. And while there may be cases in which it is evident that particular details of access are merely mechanisms, expressing rather than defining an existing right of access, I am also satisfied that some orders for which application might be made would be so different from the original order that the court could only properly treat the matter as essentially a new one, the Convention no longer being really in point. I agree with the Lord Ordinary that Rule 70.5(2) is probably unhelpful to the satisfactory conduct of such applications, and that at least usually, in relation to access, there will be no call for unusual expedition, beyond that which is appropriate in any case concerning children. I accordingly agree with him that there is a strong case for reconsidering the need for, and desirability of, the special procedural provisions contained in Rule of Court 70.5(2).

My view that special provisions are not normally necessary in order to handle applications by persons who have existing rights of access granted elsewhere corresponds with my view as to the scope of Article 21 itself. Quite apart from the fact that it is essentially concerned with providing assistance from the Central Authority (which one would not expect on a long term basis once children are settled in Scotland) the whole language of the Convention, and in particular of Article 21, seems to me to show that what is envisaged is urgent action, soon after breach, to maintain the status quo on a relatively short term basis. It is no doubt true that in many cases maintaining the status quo will not be sensible or practicable. But where that is the position, it appears to me that the Convention could well be leaving the matter intentionally to the ordinary law and procedures of the country where the children have become habitually resident.

I do not see the real problem as essentially a legal one. I think it is a practical and circumstantial one, ill-suited to legalistic categorisation. I do not think it possible to define the extent to which departure from the original order may be legitimate, although I think it is true that in some cases one will be able to differentiate between the fundamental right granted and the details of a particular award. For the future, I see no reason why there should not be a single procedure, in which a party could rely both upon Article 21 (for short term purposes, for which there might be special procedures) and also upon the ordinary law, if and when major changes in rights are sought, effectively replacing the original foreign order. The problem appears to me to relate more to our own Rules of Court than to the Convention. Like the Lord Ordinary, I am content to see Rule 70.5(2) as effectively (although perhaps ill-advisedly) creating an exception to the provisions of Chapter 49. And

while I have very considerable misgivings as to whether the order sought by the petitioner can be regarded as within any possible scope of the applications which are appropriate under the Hague Convention, I do not feel forced to dismiss the petition and oblige the petitioner to start all over again with a family action. There may be cases where that would be appropriate. But this matter having proceeded thus far, it seems to me that one can allow it to proceed, as the criteria for decision appear to me to be the same under either procedure, and any risk of a technical incompetency in the eventual order will be an incompetency only in terms of our own Rules. Whatever order is made will not in itself be an incompetent order in terms of Scots law. Nor will it be in any way in breach of the provisions of the Convention. In the whole circumstances, I would refuse the reclaiming motion and remit the matter to the Lord Ordinary's By Order roll.

Lord Allanbridge: I have had the advantage of reading the opinion of your Lordship in the chair and, for the reasons given therein, I would refuse the reclaiming motion and dispose of the case as suggested by your Lordship.

Lord Kirkwood: I have had an opportunity of reading the opinion of your Lordship in the chair and I find myself in full agreement with it. In the particular circumstances of this case I do not consider that it would be right to dismiss the petition, on the basis of the procedural arguments advanced on behalf of the reclaimer, and make it necessary for the petitioner to raise a family action in its place. At the same time I share your Lordship's view that the procedural provisions contained in Rule of Court 70.5(2) will merit reconsideration. I agree that the reclaiming motion should be refused and the case remitted to the Lord Ordinary's By Order roll.

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