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[04/05/2001; Outer House of the Court of Session (Scotland); First Instance]
D. v. D.

D v. D FOR AN ORDER UNDER THE CHILD ABDUCTION AND CUSTODY ACT 1985

[2001] ScotCS 103

OUTER HOUSE, COURT OF SESSION

OPINION OF LORD CARLOWAY

in the petition

E.D.

Petitioner;

against

S.D.

Respondent:

for

An Order under the Child Abduction and Custody Ac t 1985

Petitioner: Sheldon; Skene Edwards, W.S.

Respondent: Wylie; Brodies, W.S.

4 May 2001

1. Legislative Framework

[1] The Child Abduction and Custody Act 1985 (c.60) introduced into domestic law the terms of the 1980 Hague Convention of the Civil Aspects of International Child Abduction.

The Convention, in respect of which both the United Kingdom and Switzerland are contracting parties, provides :

"*Article 3*

The removal...of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person...either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal...; and

(b) at the time of the removal...those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal...

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights...

Article 12

Where a child has been wrongfully removed...in terms of article 3 and, at the date of the commencement of proceedings before the judicial...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...the authority concerned shall order the return of the child forthwith.

Article 13

Notwithstanding the provisions of the preceding article, the judicial...authority of the requested state is not bound to order the return of the child if the person...which opposes its return establishes that-

(a) the person...having the care of the person of the child was not actually exercising the custody rights at the time of removal...or had consented to or subsequently acquiesced in the removal...

(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...".

Rule of Court 70.5 provides that an application for the return of a child shall be made by petition and :

"(1)(c) there shall be lodged with the petition the evidence by affidavits of any witnesses and any documentary evidence...in support of the petition."

Rule 70.6 provides that :

"(4) A respondent shall lodge in process...the evidence by affidavits of any witnesses and any documentary evidence...in support of his answers to the petition at least 3 days before the first hearing..."

This rule also specifies that the Court can continue the case to a second hearing where it requires further evidence by affidavit.

[2] According to the Swiss Civil Code, married parents jointly exercise parental power over children. In the event of a separation, that power remains with the parents until a court decides otherwise (Civil Code Articles 296-297). The power includes the right to determine a child's residence (Article 301). According to the Swiss Federal Office of Justice in Berne (Statement no. 6/4 of process), because of the joint nature of the power, both parents would in such circumstances require to approve of their child's departure from Switzerland to the United Kingdom.

2. Facts

[3] There were three affidavits from each party lodged in process. Certain passages in each party's affidavits did not seem to be entirely consistent with other passages. However, ultimately, there did not seem to be much by way of factual dispute between the parties. There were also short affidavits from the petitioner's girlfriend, M.D., and the respondent's foster parent, C.H., but nothing significant turned on their contents.

[4] The petitioner is aged 42 and a German national. He is a Senior Registrar in cardiothoracic and vascular surgery at the ** Hospitals in Konstanz (Germany) and Kreuzlingen (Switzerland). He was educated in Ireland where his parents lived after his father's retrial as a director of *. He graduated in law from University College, Cork, but did not practice before returning to university in Germany to study medicine. The respondent is aged 36 and Scots. She is a native of Dundee and had a troubled time as a child, being brought up in homes and foster care. She qualified as a nurse in Norwich before going on to obtain an honours degree in media studies at the University of Coleraine. She is a staff nurse in a care home in Dundee. The petitioner has been previously married but divorced in about July 1995.

[5] The parties started living together when they met when working at Belfast Royal Infirmary in September 1994. There is one child of this relationship, namely S.D., born in Bellshill, Lanarkshire, on 19th December 1995. He is now aged 5 and has dual nationality. After a period when they stayed briefly in Germany, they moved from Ireland to Scotland in August 1995. They married at Hamilton on 31st May 1997. They lived in Hamilton and the petitioner worked as a House Officer at Law Hospital. They moved to *, Glasgow when the petitioner obtained employment as a Registrar at the Western and Royal Infirmaries. During this time, when the family were in Scotland, the petitioner also had two spells of employment in Germany, first at Wuppertal and then in Fulda, although the respondent did not move to Germany for any significant time during these periods. Whilst at Fulda, the respondent left the family home in Scotland for a few weeks. This was in about April 1998 when she disappeared and even changed her name before coming back. In November 1998, the respondent spent some time as an in-patient following a suicide attempt.

[6] On 1st May 1999 the parties moved to Konstanz (Constance) in Germany when the petitioner joined his current employers. Konstanz is an attractive city situated on the Bodensee (Lake Constance) on the Swiss-German border. Its urban area stretches southwards across the border from Germany to Switzerland, with the Swiss part of that area being called Kreuzlingen. The petitioner is employed on a permanent contract (no. 6/13) to work in two hospitals, both Swiss owned, one in the German part and the other in the Swiss part. Initially the parties lived in one room in the hospital in the German part of the town. In September 1999 they moved to a one bedroom flat in Mainaustrasse, again in the German part.

[7] The respondent did not settle well in Konstanz. She did not learn German. She could not obtain employment. During September 1999, the parties went England. The petitioner was

trying to find work and was offered a job in Oxford. He did not take up this post following another suicide attempt by the respondent. She was in hospital for some weeks during which the child was sent to his paternal grandparents who were then living in Spain.

[8] The marriage became increasingly troubled. In about May 2000, the respondent again tried to kill herself. This was the same month in which the petitioner told the respondent that he was in love with a new girlfriend. Thereafter, he asked the respondent to leave the house. Despite this, on 1st September 2000, the parties moved to a flat at *, Kreuzlingen. This is just over the border in Switzerland. The flat was rented privately by the petitioner. It was bigger and better than the one in Mainaustrasse. The reason for the move across the border was that the petitioner's employers required their employees to be Swiss residents because of the more advantageous employment regime in Switzerland. The petitioner also wished to move for tax purposes, i.e. to avoid double taxation. He obtained the appropriate residence permit for himself (no. 6/12) and this also covered the child but not the respondent. He obtained an authorisation to use his German registered car in Switzerland without paying additional excise duty. The family did not register with a doctor, dentist or kindergarten in Switzerland. The respondent did not obtain any residence permit.

[9] The parties' move to the new flat had the appearance of one to set up a family home. Some furniture was bought, including beds, shelving, a dining room table and other tables and chairs. Despite this appearance, the petitioner perceived the reason for the respondent moving with him into the Swiss flat to be, at least partly, because she had nowhere else convenient to go. By the time of the move, the petitioner saw the marriage as effectively at an end. He thought the marriage had been a sham for some years. He expected the respondent to move out of the new flat at some stage. Various items left in storage in Glasgow and elsewhere were not instantly moved to the new flat. All the petitioner was doing, as he saw it, was permitting the respondent to live in the flat until she could make appropriate alternative arrangements to leave and return, he thought, to the United Kingdom.

[10] On the other hand, the respondent thought that she might be continuing married life with the petitioner as she understood, from what he had told her, that he was still in the process of deciding whether to stay with her or join his girlfriend. One question was what was to happen to the child in the event of a separation. Although the petitioner asserted that he expected the child to stay with him, such an arrangement could have been no more than an expectation. No concrete plans had been made.

[11] On 22nd September, the petitioner left his flat in the Swiss part of town and moved in with his girlfriend in the German part. This was a temporary move in that he assumed that he would eventually return to the Swiss flat once the respondent had left. He returned to the flat occasionally to see Sebastian. On 11th October 2000 the petitioner planned to visit the child along with his girlfriend. This was pre-arranged but, when he arrived there, the respondent had left with the child. It did not surprise the petitioner that she had left but it did that she had taken the child. He had not anticipated that she would do this given what she had said and done in the past. The respondent had not told the petitioner of her intention to leave with the child. She did not tell him where they were going. She did not contact him in any real sense after she left to tell him where she and the child were living.

[12] The petitioner did not take any immediate steps to locate the respondent or the child despite his apparent concerns for the child's welfare. After a few days, he received a postcard from the respondent which said that she was in London staying with nursing friends. He thought she was staying in Kensington, London. However, the respondent and the child had long since departed for Scotland. Exactly why the petitioner did not take such steps is not entirely clear but it was partly because he thought he had to be careful in his

dealings with the respondent given her mental health. He therefore waited some weeks to see if she would come back.

[13] On about 19th December 2000, he telephoned the British Embassy in Berne and followed this up with a fax outlining what he understood to be the position. This expressed his concern for the welfare of the child set against the respondent's mental state. It made no suggestion that he was seeking the return of the child. Rather it was a request only to locate him and ensure his welfare was satisfactory. By letter dated 8th January 2001, the Lord Chancellor's Department in England requested solicitors in Brixton, London, to act for the petitioner in an application under the 1985 Act. It had been around this time that the petitioner had received a message from the respondent on his telephone answering system again saying that she was in London. A summons and related orders were issued by the High Court of Justice, Family Division, in England, on 11th January 2001. One of the orders required the Department of Social Security to reveal the whereabouts of the petitioner. As a result of information provided by the Department, it was thought that the respondent was living with her foster parents in Dundee. This surprised the petitioner as the respondent had previously made allegations of sexual abuse against her foster father. The petitioner was aware of her foster parents' address. An application dated 11th February was made by the Swiss authorities to the Scottish Ministers requesting the return of the child to Switzerland. This prompted the current petition. It was thereafter ascertained that the respondent and the child were staying with the respondent's sister at 99 Fintryside, Dundee.

[14] The respondent's mental problems can, at least in part, be attributed to her life with the petitioner which was both unsettled in terms of any long term permanent home and troubled by the petitioner's affairs. Her mental health would be adversely affected if she had, as she herself put it, "to return to Switzerland and stay with [her] husband." Her mental state has now improved (nos. 7/2 and 3). She is no longer depressed.

[15] The case came before the Court for a First Hearing on 13th March but this was continued on the motion of both parties until 23rd March. On that date the case was continued on the petitioner's motion to a Second Hearing on 26th April by which time certain further affidavits were to be lodged. Meantime, the petitioner was able to have some limited contact with the child, who has not kept good health this year, notably on 23rd April, and overnight on 24th April

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3. Submissions

(a) Petitioner

[16] The petitioner maintained first that on the facts the Court was bound to order the return of the child to Switzerland in terms of article 12 unless one of the defences in the answers to the petition had been made out. These were that : (a) the child had not been habitually resident in Switzerland at the time of the removal; and (b) there had been acquiescence in the removal in terms of article 13. Neither defence had been made out here. Secondly, the Court should be reluctant to defeat the purpose of the Convention by finding that a child has no habitual residence (*Re F (A Minor)(Child Abduction)* [1992] 1 Fam LR 548, Butler-Sloss LJ at 555-6). Thirdly, the family, including the child, went and stayed in Switzerland voluntarily with the intention of staying there for some time. That met the test for habitual residence set out in *Dickson* v *Dickson* 1990 SCLR 692, LP (Hope) at 703 albeit that the time spent in Switzerland was short (see also *In re J (A Minor)(Abduction)* [1990] 2

AC 562, Lord Donaldson of Lymington MR at p. 571, Lord Brandon of Oakbrook at p. 578). In that connection it was not necessary to demonstrate an intention to remain in the relevant State permanently or indefinitely (*Cameron* v *Cameron* 1996 SC 17, LJC (Ross) at 24).

[17] The petitioner had a permanent job with a Swiss concern operating the two hospitals from Switzerland, albeit that one was across the border. The contract required him to have a Swiss domicile. He had his Swiss work and residence permits and the appropriate authorisation relative to his car. There was no need for him to have registered with new services in Switzerland because they were already available to him within a three-kilometre radius albeit across the border. The petitioner's departure from the new flat had been a temporary arrangement only and he had returned, as he had intended, once the respondent had left. At the time of the move to Switzerland, the respondent too had wanted to move and, like the petitioner, had also intended that the child move to live in Switzerland.

[18] There was no material upon which it could be said that the petitioner consented to the removal of the child. On the issue of acquiescence, the facts fell well short of what was required. What was required was a demonstration that, looked at subjectively, the petitioner had agreed to the current arrangement (*In re H (Abduction : Acquiescence)* [1998] AC 72, Lord Browne-Wilkinson at pp. 87-88). The respondent had not been told of the respondent's intention to leave with the child nor had he been told where she was living. There was no reason for him to suspect that she had gone to Dundee given what he had understood to be her relationship with her foster father. There was no conduct which could be said to amount to acquiescence (see also *Re AZ (A Minor)(Abduction: Acquiescence* [1993] 1 Fam LR 682 for the type of circumstances needed).

[19] There was no question of the child's return putting him into an intolerable situation. The psychiatrist's report relied upon did not address the factual situation which would occur if the child were to live with the respondent in Switzerland. If problems did arise then they were ones relating to welfare for the Swiss courts to resolve. The petitioner would be willing to provide accommodation for the respondent were she to return to Switzerland.

(b) Respondent

[20] The respondent's primary position was that the child had no habitual residence at the time of the removal and therefore the Convention had no application. Proof of such residence was required before the Convention could be invoked. Habitual residence was related to the passage of time and required residence not for an indefinite period but for an appreciable period (*Cameron* v *Cameron* (supra), *Dickson* v *Dickson* (supra); *Zenel* v *Haddow* 1993 SLT 975; *Moran* v *Moran* 1997 SLT 541). Lapse of time was an important element (*Nessa* v *Chief Adjudication Officer* [1999] 4 All ER 677, Lord Slynn of Hadley at 681-3; *In Re F (A Minor)(Child Abduction)* [1992] Fam LR 548; see generally Clive : "The Concept of Habitual Residence" 1997 JR 137). Looking at the family unit, the period of time spent as a unit in Switzerland (only three weeks) was too short to establish habitual residence there. Even then, it seems from the petitioner's point of view that by the time of the move to Switzerland, he had not intended the unit to continue anyway. He says that the respondent only went to Switzerland as a temporary expedient. It was difficult to say therefore that she, or the child who was with her throughout, ever had a habitual residence there. She had no permit to reside there. Meantime, the petitioner had actually gone back to live with his girlfriend in Germany whilst the respondent was uncertain as to her future. In all these circumstances it could not be said that there was the requisite settled intent to live in Switzerland.

[21] In any event, the facts disclosed that the petitioner had acquiesced in the removal. He had taken no action for ten to twelve weeks. He knew where the respondent's family lived and could have taken some steps to contact them but did not do so. This is particularly so given that he had thought that when she left she would be going to the United Kingdom. He spoke English and had lived for some time in Scotland and would have had little difficulty in tracing the respondent.

[22] Furthermore, there was a grave risk that his return to Switzerland would place the child in an intolerable situation. The child was aged 5. His primary carer had been the respondent. In terms of the psychiatric reports produced (nos. 7/2 and 3), which could be regarded as evidence just as if their content had been in affidavit form, the return of the respondent to the continent would result in a recurrence of her depression. This in turn would reflect upon the child who would therefore be placed in an intolerable situation (see e.g. *Re G (Child Abduction: Psychological Harm)* [1995] 2 FCR 22, Ewbank J at 27; *C* v *C (Abduction: Rights of Custody)* [1989] 1 WLR 654). It had to be borne in mind that the respondent did not speak German, had no accommodation in Switzerland and had no job in Switzerland such that she could afford to live there.

4. Decision

(a) Habitual Residence

[23] It was not disputed that if the child had a habitual residence in Switzerland at the time of his removal to Scotland then that removal was wrongful in terms of article 3. The first question is then whether such residence has been made out, it being for the petitioner to demonstrate its existence. The stated purpose of the Convention is to protect children from the harmful effects of their wrongful removal from the State of their habitual residence. Behind this general aim are the ideas that: (a) the court which should decide welfare issues relative to the child is normally one in the State in which the child normally lives (*Dickson* v *Dickson* (supra) LP (Hope) at 701); and (b) one parent should not be allowed to take a child away from his home and across international boundaries against the wishes, or without the knowledge, of the other parent without sanction of the court.

[24] The words "habitual residence" are to be given their ordinary meaning. Whether a person is habitually resident in a particular place is a question of fact. Although a person can lose an habitual residence almost instantly, in order to acquire another he will require to spend "an appreciable period of time" in the State concerned and have a settled intention to stay there (*Re J (A Minor)(Abduction)* (supra) Lord Brandon at p. 578). In *Dickson* v *Dickson* (supra) the Lord President (Hope) delivering the Opinion of the Court said (p. 703) :

"It is enough to say that in our opinion a habitual residence is one which is being enjoyed voluntarily for the time being and with the settled intention that it should continue for some time...A person can, we think, have only one habitual residence at one time and in the case of a child, who can form no intention of his own, it is the residence which is chosen for him by his parents. If they are living together with him, then they will have their residence in the same place. Where the parents separate...the child's habitual residence cannot be changed by one parent unless the other consents to the change. That seems to us to be implied in the Convention."

The requisite settled intention is one simply to stay in the chosen State for "some time" and it is not necessary that it be to remain there permanently or indefinitely (*Cameron* v *Cameron* (supra) LJC (Ross) delivering the Opinion of the Court at 24; *Moran* v *Moran* (supra) Lord Prosser at 543). It may be sufficient then if the relevant intention is coupled with residence for an appreciable period. Applying these principles to this case, I am of the

view that the child did acquire a habitual residence in Switzerland and had that residence when he was removed. In these circumstances, I would have no alternative but to order the return of the child to Switzerland unless one of the exceptions in article 13 is made out.

[25] The parties and the child moved to Konstanz because of the petitioner's work. The work was not of a temporary nature but upon a permanent contract as a Medical Registrar. Although there was the strong possibility, perhaps even the probability, that the family would at some time move from Konstanz should the petitioner have obtained another, especially a promoted, post such as that of consultant, the parties did have the settled intention to live in Konstanz. By the time of their move to Kreuzlingen, they had lived in Konstanz, albeit at two different addresses, for an appreciable period of time. They were habitually resident in Konstanz and hence in Germany. When they moved to the flat in Kreuzlingen, they did so for various tax and administrative reasons relating to the petitioner's employment and tax situation and also because the accommodation was bigger and better. It was effectively a substitute residence in the sense that it did not involve any intention to leave the general area in which they were living. On the contrary, the parties were remaining in the same vicinity as they were in already albeit that they crossed an international border. Their settled intention did not change except in so far as it involved the decision to move across that border. When looking at whether an "appreciable" period of time has elapsed, the fact that they were only moving a few kilometres and remaining in what is essentially the same urban conurbation cannot be ignored. The move was a short one in terms of distance but, once the family were settled into their new home in Gartenstrasse (i.e. within a few days of moving in), I am of the view that the period of their residence was enough for them to be classified as habitually resident there. Although this can be analysed as meaning that they acquired habitual residence in Switzerland within days, just what is an "appreciable period" must be a question of circumstances too.

[26] The family had lost their German habitual residence shortly after moving from the flat in Mainaustrasse. It is true that the petitioner subsequently left Gartenstrasse to live in the flat of his girlfriend which was back in Germany. However, this was only a temporary arrangement and he planned to return to the Gartenstrasse flat in the not too distant future. He had obtained his Swiss residency and work permits and all of this points to his continuing to have his habitual residence at Gartenstrasse and hence Switzerland. In relation to the respondent, one peculiarity of the case is that the petitioner was of the view that she would not be staying long in Switzerland but moving out of the flat and going to the United Kingdom. If this had been the understanding of the respondent when she moved to the Gartenstrasse flat then it might have been difficult to fix her with a settled intention to remain in Switzerland "for some time". However, that was not her view. Rather, she looked upon the new flat as replacing the old and in which she might, or might not, continue married life with the petitioner depending on the outcome of his meditations. In any event, given that both parties and the child moved into the flat and remained there together for some time before the petitioner temporarily moved out, in the absence of any plan by the parties that the child was also to leave the Gartenstrasse flat and go to the United Kingdom, it seems reasonable to conclude that this flat had been chosen for him by the parties as his habitual residence in that both parties had a settled intention that he should stay there for some time. In all the circumstances, I must conclude that, despite the short time span involved, the child was habitually resident in Switzerland as at the date of his removal.

(b) Acquiescence

[27] In *Re P (GE) (An Infant)* [1965] Ch 568 Lord Denning expressed the view that as a generality one parent could not change the ordinary residence of a child without the other's consent. He continued by expressing the view that six months' delay might well establish

acquiescence but delay of less than three months would not (p. 585). However, whether a parent subsequently acquiesces in the removal of a child is a question the answer to which depends on the particular facts and circumstances of the case and there can be no firm rules on the necessary period of time which requires to elapse before acquiescence can be found proved (*Re F (A Minor) (Child Abduction)* (supra), Butler-Sloss LJ at p. 557). The question is whether looking at all the circumstances it has been established that the petitioner "went along with" the continued presence of the child outwith Switzerland. This is simply affording the word "acquiesce" its ordinary meaning. It involves looking at the subjective intention of the parent during the period before he took action to see what, as a matter of fact, he was thinking (*In re H (Abduction : Acquiescence)* (supra), Lord Browne-Wilkinson at pp. 87-88).

[28] If, shortly after her flight from the flat in Gartenstrasse on 11th October, the respondent had told the petitioner that she had taken the child to an address in Dundee where she intended to remain and the petitioner had thereafter taken no steps until early January to seek the return of the child then I might well have held that such inactivity amounted to acquiescence even although the period fell short of Lord Denning's threshold. This would be because I might well have inferred from the inactivity that the petitioner was "going along with" the child's absence from Switzerland and residence in Dundee. But that is not what occurred. The respondent left with the child and made no contact with the petitioner other than to send a postcard and much later to leave a telephone message both of which would, if anything, mislead the petitioner about the child's whereabouts. Given the respondent's past history, I do not regard the petitioner's decision not to do anything for a few weeks as unreasonable. When nothing happened by way of a return of the child or any significant communication from the respondent about him during that period, he acted with some expedition. In short, I do not consider that the respondent has made out a case of acquiescence in that I am unable to hold that the inactivity here demonstrated that the petitioner was accepting of the child's absence from his former habitual residence in Kreuzlingen.

(c) Intolerable Situation

[29] It is, of course, important to note that as a generality the decision of this court expresses no view upon where the child should ultimately live in either the long or the short term nor does it delve into the question of whether the child ought to live with the petitioner or respondent. Any court order in the petitioner's favour is simply that the child should be returned forthwith to the State of his habitual residence. It would not specify where in Switzerland the child should go to nor with whom he should reside. The point is that these are all questions which the Swiss courts may be asked to resolve. Issues such as the respondent's language problems, lack of accommodation in Switzerland and lack of money with which to support herself and the child are all points which the Swiss courts may wish to take into account in deciding where the child should live in the short or long term or may wish to address by appropriate orders against the petitioner. They are essentially specific welfare issues with which the Convention is not generally concerned and which this court should not address. I have no reason to suppose that the Swiss courts will not address them promptly and properly.

[30] The exception to these generalities is the power of the Court to refuse to grant an order where the child will suffer physical or psychological harm or will be put in an intolerable situation if his return is ordered. The respondent founds upon psychiatric evidence to ground her case that the return of the child would produce a grave risk not of psychological or physical damage but of the child being put in an intolerable situation. The opinion in the report is that prior to meeting the petitioner she was normal and did not suffer from

depression. This changed as a result of her life with the petitioner but returned to normal again when she left him. It then concludes :

"Given what has gone on before, if she returns to the continent with her son, or if her son has to return without her, I can come to no other conclusion but that her depression is very likely to recur, with self-evident repercussions for her ability to discharge her role as mother & primary care-giver."

I am unable to find a basis in the report for the conclusion that the mere fact of the respondent returning with her son to the continent, and not even Switzerland in particular, would result in a recurrence of the depression. A return to somewhere in Switzerland need not involve her returning to any form of domestic relationship with the petitioner, far less one which is said to have produced her previous mental problems. In these circumstances, I am unable to accept the conclusion which I have quoted. I hold, on the contrary, that the respondent has not demonstrated that an order for the child to be returned to Switzerland poses any risk to her mental health or that the resultant situation would be intolerable for the child.

[31] With regard to the child, the respondent has the option of herself returning to Switzerland with the child or coming to some other arrangement for his return, which may or may not directly involve the petitioner. She also has the option of requesting the Swiss courts to make such orders in relation to the child's welfare as she deems appropriate, including no doubt one that would give her the care of the child and be able to return to Scotland. Again, I have no reason to doubt that the Swiss courts would deal with any requests properly and efficiently.

[32] In all the circumstances, therefore, I do not feel that either of the exceptions pled have been made out. I conclude, therefore, that I have no option in law but to order the return of the child to Switzerland in terms of the Convention.

(d) Procedural Concerns

[33] Apart from the merits of the case, I should add that during the course of the submissions, a number of procedural points were raised by the parties. First, it was said that certain affidavits and productions were late in terms of the rules and interlocutors. I allowed the various affidavits and productions to be received. As I read them, the rules provide that certain affidavits and documents must be lodged at certain stages in the procedure. However, it may be possible to relieve a party from the consequences of the rules (RC 2) where circumstances require it in order that justice is done and seen to be done. In cases of urgency, as cases of this type often are, where documents may be coming from some distance and where there can be language difficulties too, there may be many situations where such documents ought to be permitted to be lodged even after the time specified in the rules albeit subject to appropriate conditions to ensure that the proceedings remain fair to both parties. In this case I allowed all the late documents and affidavits to be lodged.

[34] Secondly, certain documents were said to be of no value and could not be taken into account as they were not translated or certified in terms of rule 70.2. This is a valuable and important rule which will normally require to be followed if the terms of a particular document are to be taken into account. However, if the document can be understood as being of a particular nature (in this case, a residence or work permit) then I think that such a nature can be taken into account albeit that the precise terms of the document may not be understood by the Court and therefore cannot be considered. Furthermore, it is again always possible to relieve a party from the consequences of a failure to comply with the rules

and in certain circumstances, especially in cases of this type, it may be legitimate to rely upon an informal translation.

[35] Thirdly, the respondent maintained that, having regard to the content of the rules, in reaching a decision, I could only have regard to the evidence as it existed in the form of affidavits and documentary productions, which she said would include an expert report. I could not, therefore, take into account, for example, any additional facts given by way of explanation or gloss by a party upon the content of the affidavits and productions even if these attempted to clarify ambiguities and inconsistencies in that evidence. The petitioner submitted on the contrary that, as the procedure was summary in nature, the Court was entitled to take into account the content of ex parte statements albeit that if they were not supported by a sworn affidavit then less weight might be attached to it.

[36] Applications under the Convention are proceeded with under petition procedure because of its summary and expeditious nature. The rules concerning the admission of affidavits, which remain unusual in Scots practice, are intended to avoid, if at all possible, the need for oral evidence because of the potential delay that the receipt of such testimony can cause. It will usually be possible for the Court to reach a view on the essential facts of the case by looking solely at the content of the affidavits and the productions. I have found that to be the situation in this case. Where there is a conflict between the affidavits, the Court may be able to resolve these conflicts by, for example, determining which version is the more inherently probable or is supported by extraneous evidence (see *Re F (A Minor)(Child Abduction)*(supra) Butler-Sloss LJ at 553). If, however, the Court wishes clarification or expansion on certain points in the affidavits or productions then I can see no prohibition in the rules preventing it from taking into account ex parte statement. It may deem it appropriate to obtain a further affidavit or even order oral testimony on a point in certain cases but in the normal case, the Court should be able to reach a view with expedition rather than delaying matters for the production of formal proof. If it can reasonably and fairly do so, in a summary procedure, by taking into account what is said at the Bar then it should do so, albeit that it may have to take some care when assessing the content of what is said where it is not supported by affidavit or other evidence and even more care if it is contradicted by such evidence.

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