---

http://www.incadat.com/ ref.: HC/E/UKs 508
[25/03/2003; Outer House of the Court of Session (Scotland); First Instance]
PW v. AL or W

OUTER HOUSE, COURT OF SESSION

OPINION OF LORD DRUMMOND YOUNG in Petition of PW (Petitioner) against AL or W (Respondent)

Counsel for Petitioner: Davie; Drummond Miller, W.S.

Counsel for Respondent: I Wylie; Balfour & Manson

Counsel for HW: Mundy; Mowat Dean, W.S.

25 February 2003

[1] The petitioner seeks an order under the Child Abduction and Custody Act 1985 for return of the four children of his marriage to the respondent, HW, AW, DW and FW, to the jurisdiction of the Family Court of Western Australia. It is not disputed by those appearing for the respondent or for HW, who was separately represented, that the children were wrongfully removed from Western Australia in breach of Article 3 of the Convention on the Civil Aspects of International Child Abduction, as set out in Schedule 1 to the 1985 Act. Nor was it disputed that, in terms of Article 12 of the Convention, the Court of Session would normally be obliged to order the return of the children to Western Australia. Nevertheless, counsel for the respondent and for HW argued, on separate grounds, that the court should not make such an order. Both of those arguments were based on Article 13 of the Convention, which provides as follows:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order of 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."

[2] The argument for the respondent was based on the first of these paragraphs of Article 13. Her counsel submitted that, if the children were ordered to return to Western Australia without their mother, that would separate them from the individual who had cared for them throughout nearly all of their lives, and would break up the family unit. That would place the children in an intolerable situation. If the court were to order the return of the children to Western Australia, however, it was likely, it was submitted, that the respondent would not be able to accompany them, for two reasons. In the first place, despite

considerable efforts to do so, she had been unable to obtain a suitable Australian visa, and it did not appear clear from the information provided by the Australian immigration authorities that there was any suitable form of visa. A tourist visa was limited in duration, and would require her to leave Australia every three months; moreover, she would be unable to work. Other forms of visa, which permitted longer stays and gainful employment, did not appear to apply to persons in the respondent's circumstances. In addition, counsel submitted that it was not clear that the respondent would have any means of support if she were to return to Western Australia with the children. An order for her maintenance had been pronounced by the Western Australian courts, but a motion had been made to reduce the amount of maintenance payable.

[3] In my opinion this argument is clearly correct. In the circumstances of the present case, where the respondent has cared for the children for nearly all of their lives, I would regard separating the children from their mother as placing them in an intolerable situation. The same would be true if the children were separated from one another; the family unit is clearly of paramount importance, and breaking it up for reasons based on the Convention would be wholly unacceptable. For these reasons, if I had been inclined to order the return of the children to Western Australia, I would not have pronounced an interlocutor ordering their return unless I was first satisfied of two matters. The first such matter is that the respondent should obtain an Australian visa that will entitle her to remain in Australia for the entire duration of the proceedings relating to the custody of the children, however long such proceedings might take. In my opinion it is for the Australian authorities to make a satisfactory visa available; Australia has made a request to the Scottish Executive for the return of the children, and it is for her authorities to ensure that the necessary conditions for the return of the children are met. If, of course, such a visa entitled the respondent to work in Australia, the question of maintenance would be of substantially less importance.

[4] The second matter on which I would require to be satisfied before ordering the return of the children is that the respondent would have adequate means of support in Western Australia. The petitioner has undertaken, through his counsel, that he will provide maintenance for her at the level ordered by the Western Australian courts, namely $875 per week, until such time as the Australian court deals with the matter of maintenance. He would, in addition, arrange for rented accommodation to be available for the respondent and the children, although the rent for such accommodation would be payable by the respondent out of the maintenance payments. In principle, I consider that an undertaking along these lines is acceptable. If I were to make an order that the children return to Western Australia, however, I would require to be satisfied that the maintenance arrangements were adequate at the time when I made the order. Questions were raised by the respondent's counsel as to the profitability of the petitioner's business. I was assured that the business is profitable, and has recently obtained a major contract. Nevertheless, if I were to make an order at a future date I would require to be satisfied of these matters at that time. To that end, it might be necessary to see the most recent accounts of the business, to provide assurance that means were available to provide adequate maintenance for the respondent.

[5] Counsel for the petitioner submitted that I could make an immediate order for the return of the children conditional on the provision of a satisfactory visa and satisfactory maintenance. In my opinion such a course would not be appropriate. As matters stand at present, I am not satisfied that there exists an adequate form of Australian visa for circumstances such as the present. Consequently, I think that it would be necessary to delay the making of any order until I was satisfied that an adequate visa existed. I would be particularly anxious to avoid a situation where the respondent went to Australia with the children but her visa expired before the conclusion of the proceedings. In this connection, it

is irrelevant that proceedings at first instance may normally be concluded rapidly; appeals may be marked, and it is impossible to be certain that proceedings will be completed within any definite time.

[6] The argument for HW was based on the second of the paragraphs of Article 13 quoted above. The parties were agreed that three matters required to be considered under that paragraph. In the first place, the court must be satisfied that HW objected to returning to Australia. In the second place, the court must be satisfied that she was of sufficient age and degree of maturity to form a view on the matter. In the third place, the court required to exercise a discretion, and in doing so it required to bear in mind that it is only in exceptional cases that it should refuse to follow the normal scheme of the Convention, which is to return a child who has been wrongfully removed from a country to that country. The latter approach was supported by Urness v Minto, 1994 SLT 988, per Lord Penrose at 993, Marshall v Marshall, 1996 SLT 429, per Lord Justice Clerk Ross at 433, and Re S (a Minor) (Abduction), [1993] 2 All ER 683, per Balcombe LJ at 692. It further appears from these authorities that, in considering how the court's discretion should be exercised, it will usually be necessary for the judge to discover why the child objects to being returned: see Urness v Minto at 993 per Lord Penrose, following Re S (a Minor) (Abduction). If the only reason is because the child wants to remain with the abducting parent, and that parent asserts that he or she is unwilling to return, then that would be a highly relevant factor when the judge came to consider the exercise of his discretion.

[7] I was referred to an affidavit signed by HW, and to a number of productions dealing with her intellectual ability and the progress of her education. In addition, at the invitation of her counsel, I interviewed HW in chambers, in the presence of her solicitor. On the basis of all of the above material, I reach the following conclusions.

[8] In the first place, I am quite satisfied that HW objects to returning to Australia. That is clearly stated in her affidavit. In addition, when I interviewed her, I asked how she would feel if she were made to return to Australia. She stated that she would be "a bit upset", and that she would miss her family and would be "a bit scared". I asked if she would feel the same way if the respondent and her brothers and sister went to Australia with her, and she replied that she would feel the same way. It was clear during this part of the interview that she was very unhappy at the prospect of going back to Australia. I have no doubt that her unhappiness was quite genuine.

[9] In the second place, I am of opinion that HW is of sufficient age and demonstrates a sufficient degree of maturity for her views on this matter to be taken into account. That conclusion is supported by a letter from the head teacher of the school that she attends and by a letter from her solicitor to the Scottish Legal Aid Board. In addition, I formed my own impression during the interview that I had with HW; I had no doubt that she understood what was happening and was able to make up her own mind on the issues. While some parts of the views that she expressed had probably been influenced to some extent by her mother's attitude, I was satisfied that most of her fundamental objections were quite independent of anything that her mother might have said. Consequently I have tried to discount the areas where I think that her mother may have had an influence. In stating that such influence may have existed, I am not suggesting improper conduct on the respondent's part. It is obvious that a parent's views may be transmitted to children quite inadvertently, and if a family is involved in a dispute such as the present it is inevitable that there will be some conversation about the dispute. In the course of such conversation, the child is almost certain to become conscious of the parent's views. In the present case, however, I formed the impression that HW did not follow her mother's views blindly; at one point during the interview she stated that she thought her mother had been covering up for her father.

[10] That leaves the question of the court's discretion. I have not found this an easy issue, but I have come to the conclusion that the circumstances of the present case are sufficiently exceptional for me to give effect to HW's wishes and to refuse to return her to Western Australia. In reaching this conclusion, I have had regard to the reasons that she gave up for not wanting to return to Australia, which I discuss below. In addition, I have attached considerable importance to the strength of feeling that she expressed about not wanting to return. In dealing with the attitude of a child, I consider that it is wrong to adopt a strictly analytical approach to the child's reasons for his or her wishes. A nine-year-old such as HW will in all probability be unable to express the reasons for a conclusion with the precision of an adult, and consequently a fairly broad approach must be taken towards the statement of those reasons. If, however, the conclusion expressed by the child is quite definite, and is clearly strongly felt, that is in my opinion an important factor in the court's exercise of its discretion. The fact of a strongly felt objection is of significance in itself.

[11] It is also important, however, to have regard to the child's reasons. HW's reasons for not wanting to return to Western Australia centred around four areas. In the first place, she complained of the petitioner's conduct towards her and her brothers and sister when they lived in Australia. She stated that she and her brother DW, who is three years younger than she is, had regularly been hit by him, in DW's case on the head and in her case on the hand. She accepted, however, that this had happened when she or DW had been "naughty". That suggests that the blows in question were intended by way of discipline. While some degree of corporal punishment may be tolerable, blows to the head must always be serious, and it is clear that the level of punishment inflicted had had a significant effect on HW.

[12] In the second place, HW was concerned that she and her brothers and sister might be taken away from their mother if they returned to Australia. This was clearly an important factor, and it was obvious that it caused her genuine upset. HW expressed the fear that, in Australia, the petitioner might "steal" her and her brothers and sister, taking them away from their mother so that they would never see her again. It is obvious that this reason is not valid as such; the Family Court of Western Australia can obviously be expected to regulate the custody of the children, and to make sure that they are not forcibly removed from one parent without the court's authority. Nevertheless, the strength of HW's feelings was clear. In all the circumstances I did not attach great weight to this reason except to the extent that it supports the strength of HW's feelings.

[13] In the third place, it is clear that HW considers herself well settled in Scotland, and that she greatly values the contact that she now has with her wider family here. She was very concerned that she would lose that contact if she were made to go to Western Australia. I was informed that the respondent's uncle and his three sons lived in Western Australia, and that she and her children had seen them on occasion when they lived there. It was obvious, however, that the great majority of the children's relatives, on both sides of the family, lived in Scotland, and HW appeared very attached to certain of her mother's relatives, including her grandmother and an aunt. The petitioner's counsel submitted that being well settled in Scotland and being attached to relatives here could not constitute an exceptional circumstance sufficient to justify a refusal to return a child to the country from which he or she has been abducted. If the point is looked at in isolation that may well be true. In the present case, however, HW's attachment to her home circumstances and family in Scotland must be considered along with other matters, including the strength of her feelings about returning to Australia, her concern about her father's past conduct, and her feelings about her education.

[14] In the fourth place, HW appeared to be anxious to continue at school in Scotland. She attends a village school, where she appears to be happy and to have a number of friends. She

suffers from a complaint that was ultimately diagnosed as dyspraxia, and consequently she requires a degree of remedial education. Otherwise she appears to be of above average ability. The necessary remedial education was in place at the village school. In Western Australia she had attended a number of schools in the Perth metropolitan area, latterly the local Montessori school. I formed the impression, based partly upon the documentary evidence and partly upon HW's own statements to me, that she was doing better at the village school than she had in Australia. While this may have been due to the better diagnosis of her complaint, a feature that may simply be a matter of good luck, there is no doubt that she has special educational needs and that these are being well met at present. I accordingly consider that this reason for HW's wanting to remain in Scotland is exceptional in nature.

[15] Ultimately I must exercise my discretion on the basis of the totality of circumstances disclosed in the affidavits and productions and in the interview with HW. I have had particular regard to the strength of her feelings about returning to Australia, and I have also had regard to her reasons for that view to the extent that they relate to her father's past conduct, to her life and family in Scotland, and to her educational needs. In all the circumstances I consider that the present case is sufficiently exceptional for the second of the paragraphs of Article 13 quoted above to apply to HW. I will accordingly give effect to her wishes, and refuse to make an order that she be returned to Western Australia.

[16] This clearly has an impact on the position of the three younger children. As I have already stated, I consider the maintenance of the family unit, comprising all four children and also the respondent, to be of paramount importance in the present case. If HW is not to be returned to Western Australia, I am of opinion that ordering the return of the other three children would place both those children and HW in an intolerable situation. Indeed, it was very clear from HW's remarks during her interview that she was closely attached to her brothers and sister and that she would in no circumstances want to be separated from them. In these circumstances, I am of opinion that my refusal to return HW has the inevitable consequence that I must refuse to return DW, AW and FW. I will accordingly refuse the prayer of the petition.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]
