OUTER HOUSE, COURT OF SESSION

[2011] CSOH 215

P1285/11

OPINION OF LORD GLENNIE

in the petition of

A

Petitioner

for an order under the Child Abduction and Custody Act 1985.

Petitioner: Mr Hayhow; Wright & Crawford
Respondent: Ms Wild; Sheehan Kelsey Oswald

23 December 2011

Introduction

[1] The petitioner is a Spanish citizen. He lives in Spain. He is the father of two children, a boy aged 11 and a girl aged 5. They have been brought to Scotland by the respondent, their mother, a British citizen who comes from Scotland and whose parents still live there. The petitioner seeks an order that the respondent return the two children to Spain in terms of the Child Abduction and Custody Act 1985.

[2] A first order was granted in the petition on 17 November 2011. On 25 November 2011 the court *ex proprio motu* instructed a report by a child psychologist to be agreed by the parties to seek the views of the elder child. Parties agreed upon a child psychologist, who produced a report dated 7 December 2011. A hearing took place before me on 14 and 15 December 2011, at which I had the benefit of that report, and affidavit evidence from the petitioner and the respondent and others. Many of the basic facts are undisputed. Where there was conflicting evidence I considered that I

was bound to follow the approach outlined in *D* v *D* 2002 SC 33 in which it was made clear that where there were conflicting affidavits the court could not prefer one over another unless there was other material enabling it to say that one version was to be preferred. In summarising the evidence I shall inevitably have to refer to allegations made by one party to another. I am not to be taken as accepting that those allegations are true, except where I make it clear that I do. Quite apart from anonymising the parties in this case, I have deliberately not gone into much of the detailed allegations and counter allegations. Should the matter go further, the evidence will be available to any other court hearing the matter.

The facts in outline

[3] The petitioner and the respondent have cohabited in Spain with the children for several years. They are not married, but it is agreed that Spanish law makes no distinction so far as concerns parental rights between married and unmarried parents: see Art.108 of the Spanish Civil Code. It is also agreed that Spanish law confers joint parental authority over the children to both parents: see Arts.154 and 156. The older child was born in the United States of America and has dual United States and Spanish nationality, while the younger was born in Scotland and has dual British and Spanish nationality. The petitioner and the respondent lived together with their children in an apartment in Spain. Until their removal from Spain on 20 June 2011, the children were habitually resident in Spain and attended school there, the elder obviously for longer than the younger.

[4] It is clear that early in 2011 the parties' relationship deteriorated. In about March or April 2011, a decision was made that they should separate. After that decision was reached, they continued to live together in the apartment while they sought to agree arrangements for the children and other practical aspects of the separation.

[5] In about the middle of May 2011, Spanish lawyers began to get involved in the negotiations about the children and other arrangements. In her affidavit, the respondent says that the initiative from this came from her husband on about 17 May 2011. This was, apparently, something which they had talked about previously and there was no problem with it. The next day the respondent received a telegram from the petitioner's Spanish lawyer stating that she could not take the children away from Spain without the written consent of the petitioner. That telegram was produced in evidence. According to the respondent, this was contrary to the tone

of the discussions which she was having with the petitioner at the time, in terms of which it was contemplated that the children would go with her to Scotland. She says that she raised the matter of the telegram with the petitioner that evening, and he told her that he had not instructed his lawyer to send that telegram and that it was just normal practice.

[6] According to the respondent relations between the two of them became difficult, or more difficult, at about that time - she complains that the petitioner was at times aggressive and angry - but they continued to live in the same apartment and it is clear that, both directly and through lawyers, they continue to discuss future arrangements for the children as well as other practical and financial matters. On one particular occasion, according to the respondent, the petitioner said that the children could come to Scotland to live with her, but that he wanted them to be with him for each and every school vacation; and he also indicated that he would pay a certain sum per child per month by way of support, other than for the months during the school holidays that the children were with him. Although the petitioner does not make any admission of having said this, his position as explained by the respondent is consistent with the position adopted for him by his Spanish lawyers as set out in the following paragraphs.

[7] The respondent instructed Spanish lawyers on 26 May 2011 to assist in finalising agreement between her and the petitioner. Those lawyers liaised with the lawyers acting for the petitioner. On 31 May 2011, the petitioner's Spanish lawyer emailed the respondent's Spanish lawyer proposing a basis upon which matters could be finalised. A copy of this email was in evidence before me. It is clear that the basic assumption underlying that proposal was that the children would move with their mother to Scotland. The e-mail went on to deal with particular matters requiring agreement. The terms put forward for agreement included the following: that all holidays be spent with the father (in Spain); that the children attend school within a radius of 50 miles from the town in Scotland near which the respondent was to live; that any change of residence or school was to be approved by the petitioner; that the children were to study Spanish language and culture and speak Spanish; that from the age of 12 years they would be free to decide which of the two parties they wished to live with; that the respondent would receive support and a certain amount per month for maintenance and other expenses incurred in bringing up the children, though not during the holiday period when the children were with the petitioner; that the

petitioner would have free physical, telephone, internet and other access to the children at any time, as would the respondent; and that the children should not leave the United Kingdom without the petitioner's approval, except to come to Spain.

[8] The response from the lawyer's instructed by the respondent was to the effect that they were broadly in agreement except as regards holiday periods and as to the amount of financial support. Clearly they made their views known to the lawyers acting for the petitioner. On 1 June 2011 the petitioner's Spanish lawyer e-mailed the respondent's Spanish lawyer. That e-mail was in evidence before me. It showed some movement in the petitioner's position. It was agreed on his behalf that it was "possible" that the question of the allowance was "a bit tight" but the holidays were a sticking point. The respondent was asked to be more flexible about the holiday periods.

[9] There was clearly further communication between the lawyers. On 15 June 2011 the petitioner's Spanish lawyer emailed the lawyer acting for the respondent containing a proposal which he considered to be "quite reasonable and feasible". Again, a copy of that email was in evidence before me. The proposal was that in the school summer term the children would be with the petitioner for two months, but that at Christmas they would be with the petitioner for only 70% of the holiday, with the respondent having them with her for the rest of the time. It was proposed that the cost of the trips betweens Scotland and Spain should be borne in equal shares. And it was agreed that the petitioner would pay maintenance for the children at a slightly higher rate per month than previously proposed, on the basis that it would be paid for every month of the year, including those in which the children were with the petitioner in Spain.

[10] According to the respondent, that evening (15 June 2011) the petitioner was aggressive and angry that they had not reached agreement about maintenance for the children. There was an argument. As a result, she spoke to her solicitor the next morning, 16 June 2011, who advised her that because agreement had been reached about the relocation to Scotland the respondent should simply go ahead with that. The respondent had previously intended to take steps to obtain protective orders against the petitioner; and an application to the court was filed on her behalf on 17 June 2011 seeking, as I understand it, to formalise her position by seeking an order for custody. She then left Spain with the children on 20 June 2011. She says in her affidavit, though I have no independent evidence of this, that, when she left with the children,

her lawyer formally advised the petitioner's lawyer of her contact details and confirmed that the agreement which had been reached between the lawyers was now being implemented.

[11] Since moving to Scotland with the children, the respondent has been living with her parents. The children started school in Scotland in August 2011. It appears that although for a while there was frequent was contact between the petitioner and the respondent and the children, that contact seems to have petered out. Perhaps inevitably, there are disputes about this has happened and who was to blame.

[12] On 22 June 2011, almost immediately after the respondent took the children to Scotland, the petitioner filed a complaint with the Guardia Civil. In that complaint the petitioner asserts that the respondent took the children away from their home whilst he was at work. He says that he thinks they might be in Scotland, where her parents live. He goes on to say that they were talking about the custody of the children, "and continuously, she was threatening about taking away the children from Spain." He goes on in that complaint to say: that his lawyer had warned the respondent about taking the children away without permission; that she had taken the children away before on previous occasions; and that he now wishes to get his children returned to their home in Spain.

The Spanish Court judgment of 8 November 2011

[13] I have already mentioned that the respondent raised proceedings against the petitioner in the Spanish courts. The petitioner made an *interim* application in those proceedings for an order entitling him to have the children reside with him until the final resolution of the custody action commenced by the respondent.

[14] That application was heard on 20 September 2011. The hearing was what we, in Scotland, would call an *inter parties* hearing. It was an application by the petitioner in an action commenced by the respondent. The Spanish court clearly had jurisdiction, and this was confirmed before me by counsel for the parties. Both parties were represented by Spanish lawyers. The problem, so far as the respondent was concerned, was that she was in Scotland. She says in her affidavit that her Spanish lawyer had requested that the hearing be adjourned to a later date to allow her to put in evidence, for documents to be translated and for an interpreter to be present. She says that the lawyer told her that she did not have to attend court at that time - she had a doctor's appointment in Scotland for that day. However, it appears that the judge in

Spain refused to adjourn the hearing. Evidence was heard from the petitioner and from the headmistress of the school in Spain which the children had attended. After that hearing the court issued its decision on 8 November 2011.

[15] A copy of the Spanish court's judgment was in evidence before me. That judgment is of some importance. In summarising it I shall, for consistency in this Opinion, continue to refer to the father as the petitioner and to the mother as the respondent. The judgment narrated that the respondent, through her lawyer, had raised a petition against the petitioner concerning the care and custody of the children; and that, in answer to that complaint, the petitioner had requested that precautionary measures be adopted

> "... alleging that the mother has taken [the children] from his side and brought them to Scotland without his knowledge or consent".

The judgment went on to expand on this. It narrated that the petitioner alleged that:

> "... the mother had brought the children to live in Scotland without the father's knowledge or consent, thus depriving them of their regular and constant relationship that they had had with their father".

Since the respondent did not appear at the hearing to deny them, a confession by her to such allegations was considered implicit. The judgment then goes on to refer to the Hague Convention, and states:

> "The mother, by her actions, has deprived the father of his right to custody, as she has deprived him of looking after his children and deciding on their place of residence, and she has also deprived him of his right to visit, or at least she has made it very difficult, given the distance between the father's place of residence...and the minors' current place."

The judgment quite properly asks: what is in the best interests of the children? It recognises that the court's obligation is always to protect their interests. It proceeds, however, upon the basis that:

> "The mother...has violated the most fundamental rights inherent to this responsibility [*viz* joint parental responsibility], as she has unexpectedly deprived the children of a regular and constant relationship with their father...".

It goes on to say that although, in considering whether to make an order to return the children to Spain, it recognised that the children were now being schooled in Scotland

and were presumably adjusted to their new situation, with the result that returning to Spain could imply another change for them and result in them encountering problems in having to adjust to another environment. Nevertheless, it said,

> "... this change will be no more traumatic than their unexpected journey to Scotland was in June 2011; thus, if they could cope with that move, which was decided upon unilaterally by their mother, they could cope with another for the purpose of once more enjoying their father's presence."

The judgment then goes on to refer to evidence from the head teacher at the school in Spain, which the older child, at least, attended, commenting that the elder child was well integrated into the school and well liked both by class mates and teachers. Having referred to the probability that the elder child would re-integrate anew if he returned to Spain, and that it was likely that the younger child would also re-integrate in the same way, it says this:

> "The fact is that the risk of moving, with the school year having already started, and the necessary adaptation to being in Spain once more, above all by [the younger child], would be much less damaging than the harm done to the children through not having a relationship with their father and through condemning them to the fact that said relationship, given the distance between the addresses, would be restricted to the school holidays. *Therefore, it is decided that, in the procedure for provisional measures, the care and custody of the minor's must be assumed by their father, owing to the mother unexpectedly and unjustifiably depriving the minor's of their father's presence, resulting in the children's emotional damage; thus, their greater interest calls for the restoration of said father-child relationship; hence, the immediate restitution of the minor's to Spain is ordered.*" [emphasis added]

The judgment then sets out in detail the order for the return of the children who, it is stated, must remain in the company of and under the care and custody of the father, with both parents sharing parental rights. None of this was to affect the mother's right to visit the children and communicate with them and so on.

[16] It is clear that the effect of the Spanish court order was to award the care and custody of the children to the petitioner. On 17 November 2011 the Spanish court ordered the respondent to appear before it to effect compliance with its interim order of 8 November 2011.

The interim nature of the proceedings here and in Spain

[17] It is important to note the stage reached in proceedings in Spain and the nature of the present application in Scotland.

[18] As is clear from the terms of its decision, the order of the Spanish court was an *interim* order. The underlying custody proceedings (if I may call them that) in Spain were commenced by the respondent just before she left Spain of 20 June 2011. Through her counsel, the respondent accepted before me that the Spanish court had jurisdiction to make a final decision on all questions concerning parental rights and responsibilities. The respondent could hardly contend otherwise, since she had commenced the proceedings in Spain. No date has, as I understand it, been fixed for the determination of those issues, though the court has, I am told, decided that the children should be assessed by a child psychologist in February 2012, as one of the steps in the process leading to a decision. Counsel explained, and this is, I think, clear from the terms of the judgment, that the decision of the Spanish court made in November 2010 was *interim* only, in the sense that it was simply designed to regulate the position pending that decision on the merits. It was not itself a decision on the merits of the custody issue. Parties were, however, not agreed as to whether, this being only an interim decision, it was open to the parties to return to the Spanish court to seek to change that order or to seek a new order varying its terms.

[19] Similarly, the present application in Scotland is also an application which seeks to regulate the question of custody only on an *interim* basis, in that both sides recognise and accept that the final decision on the merits will be made by the Spanish courts; and that what is in issue here is the question of where the children should live (and with whom) until the decision on the merits is finally arrived at in Spain.

The Hague Convention

[20] Spain and the United Kingdom are both signatories of the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). The Hague Convention is given effect by s.1 of the Child Abduction and Custody Act 1985, which provides that it shall have the force of law in the United Kingdom. So far as is relevant, it provides as follows:

> "CHAPTER I-SCOPE OF THE CONVENTION
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> *Article 3*
> The removal or the retention of a child is to be considered wrongful where -
>
> > (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in

which the child was habitually resident immediately before the removal or retention; and

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

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

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. The Convention shall cease to apply when the child attains the age of sixteen years.

Article 11
The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. ...

Article 12
Where a child has been wrongfully removed or retained in terms of Article 3 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.
The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
Where the judicial or administrative authority in the requested state has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13
Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of

removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14
In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable. ...

Article 16
After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17
The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18
The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19
A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

[21] The Hague Convention is concerned with the situation where a child has been wrongly removed (abducted) from his country of habitual residence in breach of rights relating to the care of that child. The Convention requires the prompt return of the child to the country of habitual residence unless one of the exceptions provided by the Convention applies. The burden is on the party seeking to resist such an order to show that one of those exceptions does apply and that in such a case it would be right, in the exercise of its discretion, for the court to refuse to order the return of the child. The Supreme Court recently considered the Hague Convention in *In re E (Children) (Abduction: Custody Appeal)* [2011] 2 WLR 1326. At para.8, Baroness Hale and Lord Wilson, giving the judgment of the court, said this about the object of the Convention:

> "8. ...The first object of the Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there. The left-behind parent should not be put to the trouble and expense of coming to the requested state in order for factual disputes to be resolved there. The abducting parent should not gain an unfair advantage by having that dispute determined in the place to which she has come. And there almost always is a factual dispute, if not about the primary care of the children, then certainly about where they should live, and in cases where domestic abuse is alleged, about whether those allegations are well-founded. Factual disputes of this nature are likely to be better able to be resolved in the country where the family had its home."

See also para.52. As Lord Brodie said in *IGR, Petitioner* (unreported, 20 December 2011),

> "what this court is being asked to do when a petition under the 1985 Act is brought before it, is to send the child to the forum which it is assumed is best able to determine any outstanding issues relating to child's care and custody; this court is not being asked to determine these issues. In what are summary proceedings the underlying assumption is that a wrongful removal should be reversed, save only in the limited circumstances identified in the Convention."

[22] It might be thought that the existence of the Spanish court judgment of November 2011 ordering that the petitioner should have custody of the children until the final decision on the merits would preclude any argument against a return order such as the petitioner seeks in these proceedings, particularly since, as I have said, it is

accepted that that court is a court of competent jurisdiction and is the appropriate court to make a final decision on the merits. But though Mr Hayhow submitted that respect should be given to the Spanish court judgment, neither party submitted that that judgment was decisive of the application before me, and rightly so in my opinion. Under the Hague Convention, the starting point is that children who have been wrongly removed in terms of Article 3 should be returned. It is for the person resisting an order for their return to bring him or her self within the terms of the exceptions in Article 13 and to persuade the court that the discretion should be exercised against making a return order. The judgment of the Spanish court on an *interim* application does no more, in my opinion, than reinforce or confirm that starting point. It sets the bar no higher than it already is. But I should also observe that no consideration was given, as I understand the Spanish judgment, to the exceptions in Article 13 of the Hague Convention, so that it cannot be said that that decision was a decision on the same points as arise here. Nor, for that matter, was the opinion of the children sought, contrary to Article 11.2 of Brussels II *bis* (referred to in the next paragraph, below). That is a factor which points towards non-recognition of the Spanish judgment in terms of Article 23 of Brussels II *bis*.

Brussels II bis

[23] By virtue of both countries being member states of the European Union, Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, commonly known as "Brussels II *bis*", has effect both in Spain and in the United Kingdom. Article 11 of Brussels II *bis* provides as follows:

> "*Article 11*
>
> **Return of the child**
>
> 1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the [1980 Hague Convention], in order to obtain the return of the child that has been wrongly removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.
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> 2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the

proceedings unless this appears inappropriate having regard to his or her age or degree of maturity. ...

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. ..."

Article 23

Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

(a) ...

(b) if it was given, except in case of emergency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought; ..."

Wrongful removal

[24] It was not disputed that the removal of the children to Scotland was a wrongful removal in terms of Article 3 of the Hague Convention. That is so even if the removal was with the consent of the petitioner.

[25] In those circumstances an order should be made for the return of the children unless one of the three exceptions in Article 13 are made out and the court is persuaded that it should exercise its discretion to refuse to make such an order. So far as applicable to this case, those three exceptions can be focused in the following propositions:

(a) that the petitioner consented to the removal of the children to Scotland (Article 13(a));

(b) that there was a grave risk that to return the children to Spain would place them in an intolerable situation (Article 13(b)); and

(c) that the children object to being returned, and have attained an age and degree of maturity at which it is appropriate to take account of their views (Article 13, further exception).

I heard submissions on each of these points and I propose to deal with them in turn.

[26] It is important to note that these are only gateway or threshold tests. Unless the court finds that one or other is made out, it must order the return of the children. If it

does make such a finding, however, that does not automatically mean that the application for a return order must be refused; it simply opens the door to an argument (which would otherwise be impermissible) that the court should not, as a matter of discretion, order the children to be returned.

Consent

[27] It is clear that the onus is on the respondent to show that the petitioner consented to the removal of the children from Spain to Scotland on 20 June 2011: see *C* v *C* 2003 SLT 293 at para.[8] and *KT* v *JT* 2004 SC 323 at para.[14]. As the Lord President (Cullen) said in that passage in *KT* v *JT*,

> "Proof is on the balance of probabilities, the cogency of the evidence required depending on the degree of improbability that consent has been given."

He added that, citing English authority:

> "The consent has to be real, positive and unequivocal."

This may chime with Lord Macfadyen's opinion in *C* v *C* at para.[8] that

> "... a case of consent [has] to be clearly established. Having regard to the aim of the Convention, it would in my view be wrong to make a finding of consent on equivocal evidence."

I propose to follow that guidance.

[28] It is argued for the respondent that in April/May 2011 the petitioner agreed that she could take the children with her to Scotland. It is clear, however, that whatever measure of common ground was achieved between them personally, they both recognised the need for a legal agreement to be drawn up by lawyers. There were issues to be resolved, concerning, amongst other things, where the children would spend their school holidays and what level of financial support the petitioner would give the respondent to assist her in bringing up the children. The more powerful argument for the respondent is that the negotiations between lawyers, which I have set out in some detail in paras.[7]-[10] above, resulted in a concluded agrement, with all those small but important details having been agreed.

[29] I regret that, on the present state of the evidence, I am unable to find that such an agreement was ever finally concluded. Though the respondent says in her affidavit

that her Spanish lawyers told her that they had sent an e-mail on 15 or 16 June 2011 accepting the last offer from the petitioner's lawyers, and later says that, when she left Spain on 20 June 2011, her lawyer formally advised the petitioner's lawyers of her contact details and confirmed that the agreement which had been reached between the lawyers was now being implemented, neither from her Spanish lawyers purporting to accept the offer nor the e-mail or letter allegedly sent on about 20 June 2011 were put in evidence before me. There was, it is true, a declaration from the respondent's Spanish lawyer deposing to the fact that the offer had been accepted, but this was contradicted by Mr Hayhow on instructions received from the petitioner's Spanish lawyers. It should, as I suggested during the hearing, not have been difficult to have had any such communications sent across by e-mail during the hearing had they existed - I was simply left to understand that they could not be found. For the petitioner, Mr Hayhow made the point, which appears to have some force, that had there been any such concluded agreement the petitioner's Spanish lawyers would have been bound to have brought it to the attention of the Spanish court.

[30] In those circumstances, given the summary nature of the procedure and the impossibility of resolving conflicts of evidence in the absence of some compelling material, I cannot find that agreement was reached between the parties and therefore I cannot find that the petitioner consented to the children being removed from Spain to Scotland.

[31] I should, however, note, and this is a point to which I shall return later, that just as I would have expected the petitioner's Spanish lawyers to have drawn the attention of the Spanish court to any agreement reached between the parties consenting to the removal of the children to Scotland, so I would have expected them to make it known to the court that, even if no binding agreement had been reached between the parties, the discussions had proceeded upon the understanding that the petitioner was agreeable to the children living with their mother in Scotland provided that the important details, including holidays and financial support, were satisfactorily resolved. It seems to me that the Spanish court was encouraged to proceed on the false basis that it was not only unexpected that the children should have been taken from their father but also that it was inconceivable that he and they should be separated.

Intolerable situation

[32] Again, it is clear that the onus of proof lies on the person resisting a return order. He or she must prove, on balance of probabilities, the existence of the grave risk contemplated by Article13(b): see *In re E (Abduction: Custody Appeal)* [2011] 2 WLR 1326 at para.32.

[33] It is wrong to take the expression "intolerable situation" in Article 13(b) as though it stood on its own. The context is important. Article 13(b) applies where

> "... 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 context in which the words "intolerable situation" appear make it clear, in my opinion, that they involve something of the same degree of seriousness as "physical or psychological harm" with which they are placed.

[33] That was the view which, as I understand it, was taken in the United States Court of Appeals for the Sixth Circuit in *Freidrich* v *Freidrich* 78 F 3d 1060 (1996) where the court said this at the end of section III:

> "This provision was not intended to be used by defendants as a vehicle to litigate (or re-litigate) the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an *intolerable* [their emphasis] situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.
>
> A review of deliberations on the Convention reveals that 'intolerable situation' was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an 'intolerable situation' is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimisation, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm."

The case of *Q, Petitioner* 2000 SLT 243 was a paradigm case, concerning allegations of sexual abuse. But that is not to say that the categories of "intolerable situation" are limited to sexual abuse or the like. A very different example of "intolerable situation" arose in *C* v *C* 2003 SLT 293, where the court refused to order the return to the

United States of a breast-feeding child who would, in all likelihood, on her return have been unable to be with her mother.

[34] In *In re E (Abduction: Custody Appeal)* [2011] 2 WLR 1326 the Supreme Court considered the proper interpretation of Article 13(b). The decision of the Court was given by Baroness Hale and Lord Wilson. In paras.33 and 34 they said this:

> "33. Second, the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.
>
> 34 Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or *otherwise* " placed "in an intolerable situation" (emphasis supplied). As was said in *In re D* [2007] 1 AC 619, at para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e g, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child."

The use of the phrase "rough and tumble" is perhaps unfortunate, conveying as it does an image of boisterous play. Nonetheless, it is clear what the Supreme Court is saying. The line to be drawn may vary from case to case, depending on the particular child, but it has to be recognised that the court cannot refuse to make a return order simply because return to the country in question would involve discomfort and distress. The word "intolerable" shows that something stronger than that is required.

[35] In the present case the respondent has suggested in her affidavit that the children, and the elder child in particular, have been subject to some physical and psychological abuse from their father, though I should emphasise that there is no suggestion of sexual abuse. In this she has some support from the elder child in his account to the child psychologist. Those allegations are strenuously denied by the father, who says

that he and the children have a good relationship. It is difficult in a summary process without oral evidence or cross-examination to reach any firm conclusion on this. At worst the abuse complained of, if it exists at all, appears to be intermittent and the result of outbursts of temper rather than any calculated desire to inflict pain. All physical and emotional violence against a child is to be deplored, but the abuse alleged here stops short of the sort of abuse (sexual or otherwise) which would make a court reluctant to return a child under the Convention even if uncertain as to whether or not it has in fact occurred: see *Q, Petitioner* 2000 SLT 243 at para.[65]. I have come to the conclusion in this case on the evidence before me that the allegations of abuse are neither sufficiently serious nor sufficiently well vouched by the evidence to entitle this court to say that the children would be placed in an "intolerable situation" if they were forced to return to Spain.

[36] Another matter relied upon is the children's physical and emotional dependence on their mother, particularly the latter. On this aspect the evidence is, in my view, compelling. It does appear that the elder child has a particularly close bond with the respondent, making an enforced absence from her intolerable in the sense in which that word is used in Article 13(b). The same is undoubtedly true of the younger child too, both because of her age and because of her closeness to her brother. If an order for them to be returned to Spain would be likely to involve a severance of realtions between the children and the respondent, in the circumstances I am satisfied that that would put them in an intolerable situation.

[37] The difficulty, however, is that steps can be taken to redress this. Article 11.4 of Brussels II *bis* provides that a court cannot refuse to return a child on the basis of Article 13(b) of the Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. Here the respondent says, with some force, that the protective measures put in place by the Spanish court in its order of November 2011 not only do nothing to address this point but in fact compound the difficulty by giving *interim* custody to the petitioner. The respondent does not have the means to live out in Spain separately from the petitioner and near to the children, so that any offer by him of access to them, in accordance with the order of the Spanish court, is therefore ineffective to ensure that the children are not in fact separated from their mother. It is true that the petitioner has made an offer to pay for a hotel for the respondent near to the children in Spain for a few days

should they be returned, but I do not regard a few days as sufficient to address the problem.

[38] The Hague Convention, particularly when read with Brussels II *bis*, emphasises the trust to be placed in the courts of the country to which the child is returned to put in place appropriate protective measures to deal with any difficulties which the children may experience on their return. The decided cases point in the same direction: see *In re E (Abduction: Custody Appeal)* [2011] 2 WLR 1326 at paras.35-37. In *C* v *C (Abduction: Rights of Custody)* [1989] 1 WLR 654, the Master of the Rolls made these observations in the last paragraph of his judgment:

> "It will be the concern of the court of the state to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, i.e., the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country - Australia in this case - can resume their normal role in relation to the child.

See also *Q, Petitioner* 2000 SLT 243 at para.[65]. In light of these observations, Mr Hayhow urged me to make an order for the return of the children to Spain and trust the local courts to make the appropriate orders to make sure that in practice as well as in theory the children are not separated from their mother.

[39] There was some discussion as to whether it was open to the respondent at this stage to apply to the Spanish courts for any further order, possibly varying the terms of the order made in November so as to make provision for financial and other arrangements such as might make contact between the children and their mother a practical possibility. I had no information from Spanish lawyers on the point. The petitioner could, of course, have assisted his cause by offering undertakings to ensure that if the children were returned he would assist both financially and with practical arrangements to ensure a continuity of contact between mother and children. No undertakings were forthcoming. In those circumstances, I cannot as yet be satisfied in terms of Brussels II *bis* that adequate arrangements have been or can be made to secure the protection of the children after their return.

[40] The court is required under the Hague Convention to make its decision promptly. But for that I could have continued the hearing for further enquiries to be made. As matters stand, if that had been the crucial matter, I would have been minded to refuse

the application *in hoc statu*, leaving the petition in play, thereby allowing the matter to be re-visited if and when further evidence was available, satisfactory undertakings had been offered, or the Spanish court had had an opportunity of considering the matter further. Both counsel assured me that it would have been competent to make such a disposal. However, because of the conclusion I have arrived at under the next heading I do not in fact propose to adopt this course.

The children's objection

[41] Article 13 of the Hague Convention goes on to say that the court 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. I am concerned with two children, the younger of whom, at the age of five, has clearly not attained an age and degree of maturity at which it is appropriate to take account of her views. But neither party suggested that the children should be split. It was accepted that the views of the elder child should be ascertained.

[42] At the prompting of the court a child psychologist was jointly instructed by the parties to ascertain

(1) whether the elder child objected to being returned to Spain for the purpose of allowing the Spanish court to decide matters about his welfare;

(2) if he does object, why does he object;

(3) to what extent his views, if any, are influenced by other people; and

(4) whether he has attained sufficient maturity to make it appropriate for the court to take his views into account in this case.

She produced a helpful and very detailed report dated 7 December 2011 after a lengthy interview with the elder child. Her conclusions were, in short: that he did object; that he had a number of grounds for objecting; that he views were substantially his own (albeit that some influence by others could not be avoided); and that he had attained sufficient maturity for his views properly to be taken into account.

[43] Mr Hayhow very properly accepted that the elder child did object and that he was of an age and maturity such that his views should be taken into account. He pointed out that one or two of the reasons given by the child for not wanting to return (such as a concern about the impartiality of the Spanish courts) could not sensibly be taken into account. I agree about that matter, but that left many other grounds of objection which appeared to me, and I did not understand him to dissent from this, to be

legitimate matters for the child to be concerned about. His main criticism, however, was that, as he put it, the psychologist had underestimated the extent to which the views of the child were influenced by other people. I do not accept this criticism. The report is very detailed, and points out clearly a number of matters which gave the psychologist cause to consider whether certain of the views expressed by the child were influenced by his mother and family. In some respects she accepts that they were so influenced. But her overall conclusion is that the views expressed by the child are very much his own views and are very firmly held. It is a carefully balanced and nuanced report and I accept its conclusions.

[44] On that basis, I am satisfied that this court has a discretion to refuse to make a return order. How should that discretion be exercised?

Discretion

[45] The exercise of the court's discretion in cases under the Hague Convention was discussed at some length in the speech of Baroness Hale in *In re M and another (Children) (Abduction: Rights of Custody)* [2008] 1 AC 1288 at paras.32-48. I do not propose to set out those passages at length. I should, however, quote from paras.42-44, where it was emphasised that, in a case where the Convention itself confers a discretion on the court, the discretion is at large. There is no automatic primacy required to be given to the objectives of the Convention; those objectives are to be considered alongside the other factors affecting the exercise of the discretion in any particular case.

> 42 In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states.
>
> 43 My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word "overriding" if it suggests that the Convention objectives should always be given

> more weight than the other considerations. Sometimes they should and sometimes they should not.
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> 44 That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. ..."

Baroness Hale, with whome the other members of the judicial committee agreed, went on in para.46 to consider the range of considerations affecting the exercise of the discretion in the case where the discretion arose because of the child's objection to being returned. She said this

> "46 In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

[46] In this case I am satisfied that the elder child has attained an age and degree of maturity at which it is appropriate to take account of her views; and that his views are strongly held, are supported by legitimate concerns, and are authentically his own. I consider that his objections are entitled to carry great weight.

[47] However, I do not base myself simply on that. I have already mentioned, in the context of considering the question of consent, that even though final agreement was not reached on the terms on which the children might be allowed to go with the respondent to Scotland, there was never any doubt in those discussions that that was

where they were to go. The issues, which were close to resolution, concerned holidays and finance and other practical arrangements. Having regard to the e-mail exchanges between the lawyers, there is no doubt that both parties intended that the children should go with the respondent to Scotland. Even though that understanding may not have reached the stage of formal agreement, I am entitled to take it into account in deciding whether, as a matter of discretion, to give effect to the clearly expressed objections of the children to being made to return to Spain.

[48] I am persuaded that I should exercise my discretion in favour of the wishes of the children by refusing to make an order returning the children to Spain.

Disposal

[49] For the reasons set out above, I shall refuse the prayer of the petition.