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[20/07/1993; Inner House of the Court of Session (Extra Division) (Scotland); Appellate Court]
Zenel v. Haddow 1993 SC 612, 1993 SLT 975, 1993 SCLR 872

INNER HOUSE OF THE COURT OF SESSION: First Division

20 July 1993

Lords Allanbridge, Mayfield and Morton of Shuna

Z. v H.

Counsel: For Petitioner and Reclaimer, Davie; For Respondent, Fitzpatrick (Inner House), Dewar (Outer House)

LORD ALLANBRIDGE. On 25 March 1993 the Lord Ordinary dismissed a petition which had been presented to this court by the reclaimer. The petition was presented under Pt. I of the Child Abduction and Custody Act 1985 for return of the child who had been removed from Australia at about the end of November 1992. The petitioner and the respondent had formed a relationship in about December 1987 and there is one female child of the relationship born on 27 June 1991.

As is outlined by the Lord Ordinary, most of the facts are not in dispute and are helpfully summarised by him in his opinion of 25 March 1993. The respondent is a Scot and went to Australia on a 12 month working holiday towards the end of 1987. She met the petitioner in December 1987 and formed a relationship with him. The petitioner is an Australian national and the parties lived together for nearly two years until separating in November 1990. A formal separation agreement was then entered into in terms of which the respondent made over to the petitioner her share of the house formerly occupied by them and he paid her a certain sum in exchange. Subsequently, when she was about six months pregnant, the respondent returned to Scotland in March 1991.

There were then further communications between the parties in the course of which the respondent wrote a letter, dated 14 April 1991, in which she stated that she had been really missing the petitioner, could not wait to see him, and was "looking forward to getting back to Australia as a family." The petitioner came to Scotland for the birth of the child which occurred on 27 June 1991. Following the birth the petitioner was registered as the father of the child and an Australian passport was obtained for the child.

The petitioner then returned to Australia, via America, and some days later he was joined by the respondent and the child who arrived there about 1 September 1991. Thereafter the parties lived together for a period of about 15 months until about 27 November 1992. The respondent, having told the petitioner that she was going to spend the weekend with relatives, boarded an aeroplane and, together with the child, returned to Scotland. About a week previously, the respondent had consulted a solicitor in Melbourne and had been advised, without any reference being made by the solicitor to the Convention on the Convention on the Civil Aspects of International Child Abduction (see Sched. 1 to the 1985 Act), that she had the option of returning to Scotland and immediately applying for a sole custody order through the Scottish courts (see Melbourne solicitor's letter, dated 5 February 1993).

During the parties' 15 month period of cohabitation between September 1991 and November 1992, the Lord Ordinary said he considered that the relationship between them was an uneven one and, in any event, there was clear affidavit evidence to the effect that latterly the respondent had become most unhappy. In her affidavits the respondent maintained that the relationship between the parties was never satisfactory. Nevertheless, the Lord Ordinary accepts that fairly soon after they returned to Australia, the parties purchased a new kitchen and that, at a much later stage, they actively considered selling the house in which they then resided and moving to more spacious accommodation. In addition, in March 1992, the respondent herself obtained temporary employment and, in June 1992, she took up full time employment as a personnel assistant. In her affidavit (no. 16/4 of process) the respondent stated she had begun to think seriously about returning to Scotland in about July 1992 and finally decided definitely to do so a day or two prior to her

departure at the end of November 1992.

At this stage of his opinion the Lord Ordinary then explains there was one important area of dispute between the parties which related to an understanding said by the respondent to have been reached between the parties prior to her return to Australia in September 1991. The petitioner denied that there was any such understanding, and the dispute as to whether it was established in evidence and, if so, what effect, if any, it had on the proper interpretation of the parties' rights under art. 13 of the Convention, lies at the heart of this reclaiming motion. In his opinion, the Lord Ordinary explains that after considering the available evidence he found as a fact (p. 978F, supra) that: "when the respondent returned to Australia in September 1991 she did so as part of an attempted reconciliation with the petitioner and on the express understanding that, if the relationship again failed, she and the child would return and live with her mother in Scotland."

This understanding, if established in evidence, requires to be considered against the background of the statutory provisions contained in arts. 3, 12 and 13 of the Convention. Three matters were originally the subject of dispute between the parties at the hearing before the Lord Ordinary. In the first place it had been averred in the respondent's answers that there was a grave risk that the return of the child to Australia would expose her to physical or psychological harm in terms of art. 13 (b), but during the course of the hearing it was accepted by the respondent that this ground of opposition could no longer be maintained after the petitioner had given an understanding that the respondent and the child would be allowed the free and exclusive occupancy of the house in which the parties formerly resided pending the outcome of custody proceedings in Victoria. In the second place the respondent raised as a preliminary issue the question whether the child was "habitually resident" in Australia prior to her removal from that country within the meaning of art. 3. That matter was decided in favour of the petitioner by the Lord Ordinary who held that the respondent, and therefore the child, was so resident in Australia, and the respondent has not reclaimed against that part of his decision.

In the third place the Lord Ordinary said there was a dispute between the parties as to whether the petitioner had consented to the removal of the child in terms of art. 13 (a). The Lord Ordinary decided this dispute in favour of the respondent and sustained the respondent's fourth plea in law to the effect that the petitioner having consented to the removal of the child from Australia, the prayer of the petition should be refused. The debate before us was solely concerned with the question of whether the Lord Ordinary had been entitled to sustain the respondent's said fourth plea in law.

The submissions put forward by counsel on behalf of the petitioner fell broadly into two main categories. In the first place she argued that the Lord Ordinary had erred in law in his interpretation of the proper meaning of art. 13 (a) as regards the petitioner's alleged consent to the removal of the child from Australia. In the second place she argued that in finding that there had been a prior agreement between the parties on this matter, the Lord Ordinary had erred in holding any agreement in September 1991 established by the evidence and furthermore, even if it was established, he had erred in finding that it was still extant at the time of the actual removal of the child in about November 1992. I think it is convenient to consider first whether the Lord Ordinary erred in arriving at his factual conclusions before deciding whether he erred in law in his interpretation of the provisions of art. 13 (a).

At the beginning of her submissions counsel for the petitioner said she founded very strongly on the fact that when the petition and answers came before the Lord Ordinary on the first day of the hearing on 18 March 1993 no question had been raised in the pleadings as to whether or not the petitioner had consented to the removal of the child. In fact the respondent had admitted in her original answers that she had removed the child without the petitioner's consent. The question of consent was raised by the Lord Ordinary himself on the first day of the hearing. After some discussion between him and counsel for the parties, counsel then acting on behalf of the respondent asked for an adjournment to consider his position as regards amending his pleadings regarding the matter of consent. It was not disputed by counsel who appeared for the respondent before us that the Lord Ordinary had initiated this matter and, having had the opportunity of looking at the minutes of proceedings, I note that on the following day the appropriate minute of amendment for the respondent was allowed subject to the condition that the petitioner, if so advised, could lodge further affidavits by 10 a.m. on Tuesday, 23 March 1993, which was the third day of the four day hearing. On that day counsel for the petitioner lodged a further affidavit from the petitioner, dated 22 March 1993, in which he emphatically denied any suggestion of an agreement between the respondent and himself that she could take the child back to Scotland. Counsel then acting for the respondent lodged four new affidavits. Three of these affidavits were further affidavits from the respondent's mother and two of her friends in Australia, A.M. and A.P., which were dated 22 or 23 March 1993 respectively, and an affidavit from a friend of the respondent's family in Scotland, R.S., dated 22 March 1993. In his opinion the Lord Ordinary indicates that he took into account in reaching his decision on the facts the most recent affidavit of the petitioner, but left

out of account these four affidavits lodged on behalf of the respondent on the third day of the hearing because he agreed with counsel for the petitioner that in the circumstances there could be some doubt as to their spontaneity and reliability (p. 978G-H, supra).

Counsel for the petitioner made no attack on, or complaint about, the procedure adopted by the Lord Ordinary in this case and I am satisfied that it was reasonable in the circumstances of such a hearing which proceeded on affidavit evidence alone. However, I have noted her point that the question of consent was initiated by the Lord Ordinary in this case. I have also noted that at the time he did so he had two affidavits of the respondent before him which made reference to a discussion and an agreement between the parties before the respondent's return to Australia (see no. 15/1 of process, dated 11 February 1993, and no. 12/2 of process, dated 17 February 1993).

Counsel for the petitioner made a detailed and careful analysis of the affidavit evidence in this case in her submissions to us. She stressed that because this court could look at the affidavits and the other documentary evidence in the same way as the Lord Ordinary had done then this court could equally well asses the credibility of the parties and their witnesses. I do not accept that such an approach is open to this court. It is for the judge at the hearing on the affidavit evidence to assess the weight and effect of that evidence and this court can only disturb his findings in fact if it is satisfied that the Lord Ordinary was so plainly wrong that his conclusion on the facts was one at which no reasonable Lord Ordinary could have arrived. Counsel for the petitioner did not dispute that she required to meet such a test but submitted that she could do so in the circumstances of this case.

I do not find it necessary to detail all the submissions that counsel made in her attack on the credibility of the pursuer's witnesses. I can however quote some examples which she quite properly put before the Lord Ordinary and again put before this court. She pointed out that the Lord Ordinary stated (at p. 978D, supra) that the respondent got clear support for her account of the events in the affidavits of F.M. and A.M. but that the respondent had, in one of her letters, described A. as a person who tends to talk "garbage and tell me to say and do things that I wouldn't think about." Furthermore, counsel for the petitioner said that F.M. could hardly be said to support the respondent on the question of the existence of an agreement because all she said was that when the respondent went to Australia to attempt a reconciliation "there was no doubt in my mind that Rhona intended to come home to Scotland with Brianne if the reconciliation did not work." Counsel also attacked the credibility of A.P. because in her first affidavit she said she first met the respondent in June 1992 whereas in her second affidavit she referred to what the respondent had told her in October 1991 when they were visiting a food shop together. Counsel then said that the fact that these witnesses were unreliable, as demonstrated by the affidavits, reflected on the credibility of the respondent herself as they were her friends.

I have considered all the criticisms of counsel for the petitioner regarding the witnesses and her other comments on the evidence, but I consider these were all matters for the Lord Ordinary to take into account and I am not persuaded that he failed to do so. A close reading of his opinion demonstrates he carefully considered all these matters of credibility, and counsel for the petitioner very properly accepted that, in view of the terms of s. 1 of the Civil Evidence (Scotland) Act 1988, the Lord Ordinary did not require to find corroboration of the respondent's evidence before he could accept her evidence alone as proof of the alleged agreement.

There were two further main submissions by counsel for the petitioner on the evidence. She submitted that it was inconsistent for the Lord Ordinary to find the respondent was "habitually resident" in Australia and at the same time to find that by November 1992 there had not been a reconciliation. The Lord Ordinary had reviewed the facts having regard to the relevant case law as to what is required to establish habitual residence (pp. 978J-979G, supra) and reached the conclusion that in November 1992 the respondent was habitually resident in Australia as at that date. He explains that in the present case the parties had lived together in Australia continuously for 15 months, had installed a new kitchen and had considered moving house elsewhere in the state of Victoria. In addition, the respondent had herself obtained full time employment some five months prior to her departure from the country. As explained by Lord President Hope at p. 703B of *Dickson* v. *Dickson*: "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 shall continue for some time."

In the later case of *Re F (A Minor) (Child Abduction)* [1992] 1 F.L.R. at p. 555G, Butler-Sloss L.J. considered that residence of a period of only a month could be a sufficient period of time in which to acquire the necessary settled intention. In such a situation I consider the fact that the court has found the necessary settled intention established as regards the respondent, does not preclude her from maintaining that a reconciliation had not taken place.

However, I find it more difficult to answer the related but separate question raised in this case as to whether the particular alleged agreement was still extant at the time the respondent left Australia with the child in November 1992. The Lord Ordinary said in his opinion (pp. 979L-980A, supra) that it did not matter that at the time of the departure the agreement or understanding had been overlooked, ignored, or even forgotten by either or both parties. At first sight I found this to be a somewhat surprising suggestion that if at the time she left Australia the respondent was not doing so in reliance on the agreement, she could still rely on it when she returned to Scotland. It may well be, as suggested by the Lord Ordinary, that both parties had forgotten of the existence of the agreement at the time she left Australia. But on reflection I have come to be of the view that whether the agreement was extant and in force when the respondent left Australia, must be a question of fact to be determined by the judge at the hearing. There is no doubt that he was well aware of the difficulties arising in this particular case and the facts relating to it. He states that he accepted at the outset that there must be some limit as to how far an agreement or understanding of the type in question should remain binding on the parties to it and that, in short, there must surely come a stage when for all practical purposes the parties can be seen as having become wholly reconciled and to have embraced a new life together (p. 979J, supra). That in my opinion is the correct approach and when he said the question was whether that stage had been reached in the present case, he posed the correct question. He answered that question, with some hesitation but after a careful review of the facts, in the negative. Had I been answering the question myself I might not necessarily have reached the same conclusion, but I am satisfied it cannot be said in this case that the Lord Ordinary as the judge of first instance was not entitled to reach the conclusion that he did. It was a matter of fact for him to determine and nothing has been said by counsel for the petitioner that persuades me that the Lord Ordinary was so plainly wrong that this court is entitled to interfere with his decision on this matter.

I am therefore satisfied that the Lord Ordinary was entitled to find that the agreement, which I have already quoted earlier in this opinion, was made between the parties before the respondent returned to Australia in September 1991 and that it remained in force until November 1992 when the respondent took the child away from Australia. Once it is established that such an agreement was made, then whilst it remained in existence the respondent was entitled to remove the child from Australia without seeking the permission of the petitioner to do so. He had already given his consent to the happening of that event whenever it might occur, provided always that the agreement had not come to an end by virtue of the fact that a reconciliation had taken place.

The question remains as to whether the Lord Ordinary erred in law in the interpretation of art. 13 (a) of the Convention. It is true, as argued by counsel for the respondent, that the only question in the grounds of appeal which deals with an alleged error in law by the judge is the first ground of appeal and it failed to raise any question regarding the proper interpretation of art. 13 (a) and when read appears to relate to a matter of fact. That ground states that the error in law by the Lord Ordinary was that he had held there existed, at the date of removal of the child, an agreement between the parties anent removal. I accept at once that there is considerable force in what was said on this matter by counsel, but I am prepared to entertain the somewhat different question argued by counsel for the petitioner for a number of reasons. She was permitted by this court to present her argument without objection and as this matter was canvassed by her on the first day of the appeal and as counsel for the respondent did not address the court until the following day, he could not and did not argue that he was taken by surprise and thus prejudiced by receiving no proper notice of it. Furthermore, counsel for the petitioner insisted that such an agreement was presented to the Lord Ordinary, albeit his opinion is silent on this topic.

Article 13 (a) must be considered in its context in the Convention. There was no dispute between the parties before us that the removal of the child had been wrongful in terms of art. 3 and that, but for the saving provisions of art. 13, the court in Scotland would have required to order the return of the child in terms of art. 12. Article 13 (a) reads as follows: [his Lordship quoted the terms of art. 13 set out supra and continued:]

The argument of counsel for the petitioner was to the effect that the respondent, who was the person who opposed the return of the child, required to establish that the petitioner, who was the person having the care of the child (by virtue of joint custody according to Australian law) "had consented to *the* removal." The use of the word "the" before the word "removal", according to counsel for the petitioner, meant that consent must have been given by the petitioner to the particular removal in question which pre-supposed knowledge on the part of the petitioner of the actual removal at the time so that he could give the necessary consent. Counsel said that this as a clandestine removal by the respondent and she never told the petitioner that she was removing the child in terms of the alleged agreement. Counsel for the petitioner seemed to accept a suggestion made to her from the bench that, if the respondent had wished to exercise such rights in terms of the agreement, she should have gone to the Australian courts which were responsible for matters of custody in Australia, and obtained their agreement to removal of the child, but I consider there is nothing in the

wording of art. 13 (a) which required that to be done.

I have considered closely the terms of art. 13 (a) but can find no support for counsel for the petition's suggested interpretation of it. The words "at the time of the removal" plainly relate to and qualify the preceding words "not actually exercising the custody rights." The use of the word "the" before the word "removal" must mean the actual removal which took place but it does not follow that the consent must be given instantaneously at the time because consent could clearly be given to a removal which would take place at a future and even indefinite date. A person could agree that a child could be removed, for example, when the child came out of hospital and was fit enough to travel. There would be no definite date but consent was being given for a future removal. The use of the past tense in the words "had consented to . . . the removal" demonstrates that at the time of removal the consent had already been given and looks to the past prior to the removal. In other words a person could consent to the removal of a child in the future unless some other event occurred, such as the child not being well enough to travel. The present case is analogous to such an example because the agreement found established by the Lord Ordinary was to the effect that the petitioner would consent to the return of the child to Scotland unless the parties had become reconciled. That consent, given in September 1991 by agreement between the parties, remained in force as a matter of fact in November 1992, as found by the Lord Ordinary. In my opinion that situation, once accepted, clearly satisfies the requirements of the wording in art. 13 (a).

It was finally submitted by counsel for the petitioner that the result of upholding the Lord Ordinary's decision in this case would be to give an opportunity to any person who abducted a child to set up an alleged prior agreement regarding consent and thus defeat the whole purpose of the Convention. That, in my opinion, is not the proper approach. The clear intention of the qualification regarding consent in art. 13 (a) is to give the person removing the child the opportunity to prove that the removal of the child was with the consent of the "person, institution or other body having the care of the person of the child." If such an opportunity is taken and the relevant consent is established, then the judicial authority of the requested state is not bound to order the return of the child as stated in terms in art. 13 of the Convention. The existence of such consent was proved to the satisfaction of the Lord Ordinary in the circumstances of this particular case and I can find nothing in the wording of art. 13 (a) to prevent him reaching the conclusion that he did. I am therefore satisfied that he did not err in law and that the terms of para. (a), properly construed, did not prevent him from finding consent proved and therefore holding that he was "not bound to order the return of the child" and in the circumstances deciding not to do so.

For these reasons I consider that the issues that are decisive in this particular case are issues of fact. The Lord Ordinary was entitled to accept the affidavit evidence led on behalf of the respondent and reject that led on behalf of the petitioner where matters relating to consent were in dispute. In my opinion this reclaiming motion therefore fails and I would refuse the appeal and adhere to the Lord Ordinary's interlocutor of 25 March 1993.

I have had the advantage of reading in draft the opinion of Lord Morton of Shuna. At the end of his opinion he expresses the view that the court should act expeditiously in proceedings for the return of children. I agree with that view. As was stated by Lord President Hope at p. 701B of *Dickson* v. *Dickson*: "Article 11 of the Convention provides that the judicial or administrative authorities of the contracting states shall act expeditiously in proceedings for the return of children. The intention is that proceedings should be conducted as quickly as possible in order to secure the return of the child who has been wrongfully removed from his place of habitual residence with the minimum of delay."

In this particular case the timetable was as follows. On 2 February 1993 the first order for service of the petition was pronounced. On 12 February 1993 a further order was pronounced ordaining both parties to lodge affidavits and on 2 March 1993 a first hearing was fixed for 18 March 1993. The first hearing before the Lord Ordinary lasted for four court days, as stated earlier in this opinion, and was completed on 24 March 1993. The opinion of the Lord Ordinary was issued on 25 March 1993 and on 5 April a reclaiming motion by the petitioner was marked. Thereafter the grounds of appeal were lodged on 11 May 1993 and on 23 June 1993, after legal aid had been granted to the petitioner, a request for an early diet for the hearing of the appeal was made. The hearing before this court was then arranged and took place on 8 and 9 July 1993. In these circumstances there does not appear to have been any undue delay on the part of the court authorities in this case but this is a matter that will no doubt be kept under constant review in the future.

LORD MAYFIELD: On 25 March 1993 the Lord Ordinary dismissed the petition which had been presented to this court by the reclaimer. The petition was presented under Pt. I of the Child Abduction and Custody Act 1985 for the return of a child. The respondent is Scottish and went to Australia on a 12 months' working holiday towards the end of 1987. She met the petitioner in December 1987 and formed a relationship with

him. The petitioner is an Australian national and the parties lived together for about two years until separating in November 1990. There was a formal separation agreement. In terms of that agreement the respondent made over to the petitioner her share of the house formerly occupied by them. Subsequently, when some six months pregnant, the respondent returned to Scotland in March 1991. There was further communication between the parties and the respondent wrote to the petitioner on 14 April 1991 in affectionate terms and looking forward to getting back to Australia as a family. The petitioner visited Scotland for the birth of the child which occurred on 27 June 1991. The petitioner was registered as father of the child and an Australian passport was obtained for her. The petitioner then returned to Australia and some days later was joined by the respondent who landed in Australia on about 1 September 1991. Thereafter the parties resided together for a period of some 15 months until on or about 27 November 1992, when the respondent, having told the petitioner that she was going to spend a weekend with relatives, boarded an aeroplane and again returned to Scotland. She had previously consulted a solicitor who had advised that there was nothing to prevent her from taking the child to Scotland.

In the petition the petitioner seeks an order under the Child Abduction and Custody Act 1985 and the articles of the Hague Convention set out in Sched. 1 to the Act. The United Kingdom and Australia are among the contracting states to this Convention, and the effect of the Act is that so far as Scotland is concerned the Court of Session has jurisdiction to entertain applications under the Convention for the return of a child at the instance of any person who claims that the child has been removed or retained in breach of custody rights, provided that the child was habitually resident in the contracting state immediately before any breach of those rights occurred.

The Lord Ordinary held that while the parties had at no time been married it was accepted that under the relevant Australian law they each shared joint custody of the child in question. The Lord Ordinary held that the relationship between the parties was an uneven one and observed that there was clear affidavit evidence to the effect that the respondent became very unhappy. In setting out his findings the Lord Ordinary has referred to an important area of dispute. The petitioner in his affidavits emphatically denied there was any understanding that if the parties' relationship did not work out the respondent would return to Scotland along with the child. The respondent on the other hand maintained that her return to Australia was part of an attempted reconciliation and it was discussed and agreed in terms that if things did not work out both she and the child would come back to Scotland. The Lord Ordinary considered whether or not there was an agreement. He found as a fact that when the respondent returned to Australia in September 1991 she did so as part of an attempted reconciliation with the petitioner and on the express understanding that if the relationship again failed she and the child would return and live with her mother in Scotland. He reached that conclusion after considering all the facts and circumstances and various affidavits. The Lord Ordinary also found from the facts that the habitual residence of the parties was in Australia. That finding was not disputed before this court, nor was it submitted, as averred in the reclaiming print, that the child would be at grave risk if returned to Australia.

Counsel for the reclaimer submitted that the Lord Ordinary had erred in law in relation to the proper interpretation of art. 13 (a) and in reaching the conclusion that when the respondent returned to Australia in September 1991 she did so as part of an attempted reconciliation with the petitioner and on the express understanding that, if the relationship again failed, she and the child would return and live with her mother in Scotland. She submitted that the Lord Ordinary erred in the conclusions he had reached on the facts. She maintained that there had been no agreement between the parties about the removal of the child. Further, even if there had been an agreement, the Lord Ordinary erred in holding that the agreement was still extant at the date of the removal of the child. Those were the main submissions. It was also submitted and referred to in the grounds of appeal that the Lord Ordinary erred in drawing inferences from surrounding circumstances in order to conclude that the agreement did exist; and that there was insufficient evidence to find that such an agreement existed. He also erred in holding that the affidavit evidence presented by the respondent in respect of an agreement was credible. In my view, even in a case such as this which depended on affidavit evidence, my understanding is that it is for the Lord Ordinary to assess the evidence and the significance of the various factors and the weight to be attached to them. This court cannot interfere in the conclusions on the facts reached by the Lord Ordinary on the evidence provided, of course, that the findings were not perverse or that no reasonable Lord Ordinary could have reached such a conclusion on the facts.

Initially, I was under the impression from the opening speech of counsel for the reclaimer, as was counsel who appeared for the respondent, that her criticisms of the Lord Ordinary's opinion were confined to his conclusions on the facts. However, while having some sympathy with counsel for the respondent, who submitted that no question of interpretation of art. 13 (a) had been raised in the reclaimer's first ground of appeal, the court decided that it was appropriate that the matter of interpretation of the relevant articles be considered. She submitted that the alleged agreement occurred 15 months before removal of the child at the

date of removal. As stated earlier the law is such that this court is obliged to accept the Lord Ordinary's conclusion was that the petitioner both in form and in substance "'consented' to their doing so within the meaning of art. 13 (a) of the Convention in question" (p. 979L, supra). He accepted that a stage might arise after an agreement had been entered into when the parties could be regarded as having become wholly reconciled and to have embraced a new life together. The conclusion he reached was that that stage had not been reached. He explained his reasons for reaching that conclusion. He then stated that once it had been accepted that such an agreement or understanding was entered into it was in the circumstances still extant and the application must be refused.

There are three articles which are relevant to this case. Article 3 states: [his Lordship narrated the terms of art. 3 and then art. 12 set out supra and continued:]

The critical article, however, in my view is contained in art. 13, which states: [his Lordship quoted the terms of art. 13 set out supra and continued:]

Counsel for the reclaimer laid considerable emphasis on the finding of the Lord Ordinary that he had found the habitual residence (referred to in art. 3) to be in Australia. She maintained that there was an inconsistency in the opinion of the Lord Ordinary in that he had found the habitual residence to be in Australia but had also reached the conclusion that by November 1992 there had not been a reconciliation. I do not myself consider that "habitual residence", which can be established after a short period, is inconsistent with the Lord Ordinary's finding that reconciliation had not taken place. Counsel for the reclaimer submitted that the respondent had to establish that the petitioner had consented to *the* removal. As I understood her submission, that meant that the consent by the petitioner must have been given by the petitioner to the actual removal and at the time of the removal. Consent applies to the particular removal. She also stated that the respondent should have gone to the Australian court in Victoria and obtained their agreement to the removal of the child.

I am not able to accept counsel for the reclaimer's contentions.

While the words "the removal" in art. 13 (a) refer to the actual removal which took place it does not in my view mean that the consent must be given at the time of removal. The words "had consented to . . . the removal" are not consistent with that view. In my view there is nothing in the article which bars consent to the removal sometime in the future. Nor do I accept the submission that if the Lord Ordinary was upheld it would provide an easy opportunity to others to avoid the provisions of the Convention by merely claiming that there had been an agreement such as the one found by the Lord Ordinary in this case.

My understanding of the position is that the object of the provision in art. 13 (a) is to give the party, in this case the respondent, the opportunity to establish or satisfy the Lord Ordinary that the removal of the child was with the consent of the other party. On the facts of the present case the Lord Ordinary has held as a fact that there was an agreement and that the agreement was in force at the time of removal and that the consent still stood. The Lord Ordinary recognised that such an agreement and consent did not subsist for all time. In this case, however, after careful consideration he found that the agreement remained in force. In that event he was not bound to order the return of the child because he was satisfied on the facts that the petitioner had consented to the removal. In these circumstances the reclaiming motion should be refused.

LORD MORTON OF SHUNA: I wholly agree with your Lordship in the chair on every point except on the matter of statutory interpretation and in particular on the meaning of the words "had consented . . . to the removal" in art. 13 (a) of the Convention enacted in Sched. 1 to the Child Abduction and Custody Act 1985.

The Lord Ordinary's finding that the child was habitually resident in the state of Victoria and the acceptance by both parties that by the law of Victoria the petitioner and the respondent had joint custody of the child means that the removal of the child was wrongful under art. 3, and under art. 12 the court in Scotland is required to order the return of the child unless under art. 13 the respondent establishes that: "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."

The Lord Ordinary has held that the agreement entered into when the respondent returned to Australia in September 1991 was to the effect: "that if the relationship again failed she and the child would return and live with her mother in Scotland", and that by entering into that agreement: "the petitioner, both in form and in substance, 'consented' within the meaning of art. 13 (a) of the Convention" (pp. 978F and 979L, supra).

In my opinion it is quite clear that art. 13 (a) is providing only for consent to or acquiescence in a particular act or removal or retention. The first part of art. 13 (a), with its reference to a person not actually exercising custody rights at the time of removal or retention, is clearly referring to the particular act of removal or retention in question and in my opinion the phrase "or had consented to or subsequently acquiesced in the removal or retention" clearly is referring also to the particular removal in question. If one deals only with consent to a removal, the wording of art. 13 (a) would be "or had consented to the removal." This interpretation appears to me to be the natural meaning of the words in the article and to fit with what I understand to be the purpose of the Convention. It is, I consider, clear that a main purpose of the Convention is that the court of habitual residence should be the court to decide any issue relating to custody of a child, with a discretion given to the court of a state to which the child may have been removed to refuse to order the return if there has been consent to the removal or for any of the other reasons permitted by art. 13. To hold that a consent to subsequent removal can be given before habitual residence has begun, and remain in force throughout the period of habitual residence, and, so far as I could understand from the submissions of counsel, could not be withdrawn by the petitioner, seems to me clearly not the type of consent which was contemplated in art. 13 (a). The modern concept of the rights and duties involved in custody of children is that the best interests of the child should be paramount. An irrevocable consent to a possible future removal of a child from a situation which might be very different from that contemplated when the consent was given is difficult to fit in with the concept of the best interests of the child being paramount. However if the consent under art. 13 is confined to a particular removal contemplated by the other party having custody rights it is more easy to understand that the consent, if given, is given in the best interests of the child, and after consideration of the situation at the time of removal.

In my opinion it is quite clear that when the respondent decided that she could no longer live with the petitioner, the appropriate court to decide any dispute between the parties as to the custody of the child was the appropriate court in the state of Victoria in Australia. The respondent should have gone to that court and sought custody of the child and authority, if that is what she wished, to take the child to Scotland. She could, in that court, have founded on the agreement between herself and the petitioner as an argument in favour of granting permission for that course. The court in Australia, where both parents were living and where the child had lived for most of her life up to the date of the separation of the parents, was clearly in a far better position to reach an informed conclusion on a dispute about custody. The effect of the Lord Ordinary's decision would be that any dispute about custody of the child will require to be decided by a Scottish court on evidence largely from Australia. Instead of going to the court in Australia the respondent clandestinely removed to the opposite side of the world the child when, at that time, both the petitioner and respondent had custody rights to her. That removal appears to me to be precisely the type of action which the Child Abduction and Custody Act 1985 and the Convention sought to prevent or at least discourage. I would have allowed the reclaiming motion and ordered the return of the child to Australia. However as your Lordships have reached a contrary conclusion I must respectfully dissent.

It is, I consider, most unfortunate that this action has taken so long in the Scottish courts. The petition was first in court in February 1993 and the Lord Ordinary issued his opinion on 25 March 1993. The reclaiming motion was heard on 8 and 9 July 1993. Article 11 of the Convention provides that: "The judicial or administrative authority of the contracting States shall act expeditiously in proceedings for the return of children."

The article continues with a paragraph that suggests that a decision should be reached within six weeks. In this case the proceedings have so far taken five months. In England it appears that a decision usually takes much less time, even if appealed. For example in *Re F (A Minor) (Child Abduction)* the summons first came before a judge on 16 July 1991, a hearing took place on 18 July and the judge on 19 July ordered that the child be returned. An appeal was taken to the Court of Appeal and was refused on 31 July 1991. That timetable appears to me to be an exemplary example of expedition. It is very unfortunate that this case, and especially the reclaiming motion, was not treated with the expedition required by the Convention.

Statutory provisions

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

"*Article 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 16 years.

"*Article 5*

"For the purposes of this Convention -- (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence. . . .

"*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. . . .

"*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."

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