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[27/04/2000; Outer House of the Court of Session (Scotland); First Instance]
Q., Petitioner, 2001 SLT 243

AN ORDER UNDER THE CHILD ABDUCTION AND CUSTODY ACT; 1985

27 April 2000

Restriction on publication by media

[1] At the outset, counsel for the petitioner moved for a direction in terms of section 46 of the Children and Young Persons (Scotland) Act 1937 as amended and as extended by the Broadcasting Act 1990. He did so because this case involves allegations of sexual abuse by a father of his daughter, and allegations of physical abuse by the father of both daughter and son. Counsel for the respondent did not oppose the motion.

Section 46 provides:

> **"(1) In relation to any proceedings in any court ... the court may direct that -**
>
> **a. no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification of a person under the age of seventeen years concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein;**
> **b. no picture shall be published in any newspaper as being or including a picture of a person under the age of seventeen years so concerned in the proceedings as aforesaid;**
>
> **except in so far (if at all) as may be permitted by the direction of the court.**
>
> **(2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine ..."**

The Broadcasting Act 1990 Schedule 20 provides that section 46,

> **"shall, with the necessary modifications, apply in relation to reports or matters included in a programme service, and in relation to including any such reports or matters in such a service, as it applies in relation to reports or matters published in newspapers and to publishing any matter in a newspaper."**

[2] On the material before me, I was satisfied that counsel's motion was well-founded. Accordingly in terms of section 46 of the Children and Young

Persons (Scotland) Act 1937, as amended and extended by Schedule 20 of the Broadcasting Act 1990, I direct that no newspaper report or programme service of the proceedings shall reveal the names, addresses or schools of, or include any particulars or details calculated to lead to the identification of, the children G (born on 2 April 1994) and B (born on 7 October 1996); and I

direct that no picture shall be published or broadcast by programme service of either of said children.

Child Abduction

[3] This is a petition by a Frenchman P.Q. (aged 37; date of birth 24 January 1963). He seeks the immediate return to France of his two children, a girl G (aged 6; date of birth 2 April 1994) and a boy B (aged 3; date of birth 7 October 1996) in terms of the Hague Convention on the Civil Aspects of International Child Abduction, as incorporated into United Kingdom law by the Child Abduction and Custody Act 1985.

[4] G and B were removed from France by their mother R.S. (aged 32; date of birth 27 April 1967) on 4 December 1999. They were brought to a town in Scotland where they presently reside. R.S. opposes their return to France, on the ground that there is a grave risk that their return would expose them to physical or psychological harm or otherwise place them in an intolerable situation in terms of Article 13(b) of the Hague Convention.

[5] At a first hearing, counsel for P.Q. invited me to determine the issues without hearing evidence. Counsel for the respondent reserved her position in relation to hearing evidence. Both counsel invited me to have regard to affidavits, reports and other productions. I took the view that, when assessing grave risk in terms of Article 13(b) of the Convention, I would derive some assistance from such affidavits, reports and other productions: cf. *dicta* of Lord Coulsfield in *MacMillan* v *MacMillan*, 1989 S.L.T. 350. I accordingly took them into account.

[6] The first hearing was attended throughout by P.Q. and R.S. Also in court were members of R.S.'s Scottish family (her father, two sisters, and brother-in-law). Latterly P.Q.'s sister attended. The family members who sat in court during the first hearing understood that in so doing they were disqualifying themselves from giving evidence at any future stage in the Scottish petition proceedings.

The marriage and its breakdown

[7] The parties, a Frenchman P.Q. and a Scotswoman R.S., were married in Scotland on 5 June 1993. On 2 April 1994 their first child a girl G was born. A boy B was born on 7 October 1996. In 1998 the parties were living and working in France. P.Q. was a bank executive; R.S. worked with a financial company. The matrimonial home was in * in France.

[8] The parties separated on 23 July 1998 when R.S. left the matrimonial home. She alleges misconduct on the part of P.Q. and in particular an incident of serious violence on 29 June 1998. The allegations have not yet been the subject of a proof, and are denied. R.S. had on 27 June 1998 entered into the lease of a two-room apartment in *. When she left the matrimonial home on 23 July 1998, she went to live in the two-room apartment, taking the children with her. She raised divorce proceedings in the Family court, *. She obtained an emergency order which authorised her to keep the children. P.Q. was permitted regular contact with both children, including a two-week holiday beginning on 15 August 1998, at the end of which the children returned to reside with R.S.

Decision dated 24 September 1998 of the Family Court, *

[9] On 11 September 1998, the case came before the Family Court, *, (Judge Martine Lebrun). Both P.Q. and R.S. sought interim orders: both sought residence in relation to the children. The children had been living with their mother R.S. since the date of the separation. The Family Court granted a non-conciliation order, authorising her to live apart from P.Q. - a necessary prerequisite to divorce in France. However, interim residence was awarded to P.Q. thus returning the children to their father and to the matrimonial home. The decision of the court dated 24 September 1998 (translated) stated *inter alia*:

"Regarding the residence of the children:

From the documents produced to the court, it is clear that on 23 July 1998 R.S. obtained authorisation to leave the family home in the context of emergency measures, by asserting serious violence which had occurred at the home on 29 June 1998, recounted in a medical certificate dated 30 June 1998.

However R.S. produced to the court a tenancy agreement taking effect on 1 August 1998 for an F2 (2 room) apartment, the lease for which had been signed on 27 June 1998, that is two days before the domestic incident asserted as grounds for the request for a separate residence.

Accordingly the merits of the petition for divorce must be considered, and it should be noted that R.S. is offering accommodation with only 2 rooms and that the parents have equivalent capabilities of bringing up the children.

Since P.Q. has working hours that are compatible with the presence of young children, one of whom attends nursery school while the other is looked after by a nanny. As his capabilities of bringing up the children are not in question, his request to have the children's residence fixed at his home will be allowed, and R.S. will be accorded the benefit of a very wide right to receive and lodge the children, which she has not asked for, even as an alternative claim, therefore it will be up to the parents to organise this between them in the context of the joint parental authority ...

And ruling on the interim measures:

We authorise the spouses to reside separately from one another.

We award possession and use of the family home to the husband, and R.S. may reside at the address of her choice ...

REGARDING THE EXERCISE OF PARENTAL AUTHORITY:

We rule that parental authority over the minor children shall be exercised jointly by the two parents.

REGARDING THE USUAL RESIDENCE:

We fix the usual residence of the minor children at the father's home.

REGARDING THE RIGHT TO RECEIVE AND LODGE THE CHILDREN

We rule that the mother's right to receive and lodge the children shall be exercised amicably taking into account the fact that R.S. has not asked for the said right, and in view of the joint parental authority..."

[10] Counsel for P.Q. explained that the Family Court in * had taken the view that R.S. might not succeed in establishing the misconduct necessary for a divorce: the Family Court was not necessarily expecting the parties to become reconciled, but *ad interim* was not convinced that R.S. would make out her grounds.

Further Family Court Order dated 12 November 1998

[11] Following upon the court order of 24 September 1998, the children went to live in the matrimonial home with their father. According to R.S., difficulties and concerns immediately

arose: the children were taken away from * to P.Q.'s mother's house in * (some 800 kms or 500 miles from the matrimonial home and from R.S.'s apartment). R.S. was not kept informed of their whereabouts or well-being. The children were kept in * until 4 October 1998. When they were brought back to *, R.S. was able to obtain contact only on 7, 10-11, 14, and 21 October 1998. Moreover when she saw the children, she became concerned about their happiness and well-being: she noted bruises on both children, eczema on B, and thought that the children's behaviour suggested that they were not being well cared for.

[12] A medical report by Dr Delattre dated 8 October 1998 (translated) notes:

> **"I ... certify having examined the child B this day, and to have observed the following: bruise of 1.5cm in diameter under the left eye socket; bruise of 1.5cm in diameter on the lower part of the spinal column; bruise of 1.5cm in diameter opposite the region below the navel. I noticed the presence of numerous patches of eczema - elbows, calves, back of thighs, lower arm, along with associated scratch marks. These bruises are in the process of being re-absorbed and appear to date from around 5 to 6 days previous."**

A medical certificate by Dr Delattre dated 8 October 1998 (translated) relating to G noted numerous bruises on the thighs, calves, front side of shin bones and knees, the bruises being four or five days old. A medical certificate by Dr Meunier dated 10 October 1988 (translated) notes in relation to B:

> **"I noticed a mark in the shape of a ring of around 6cm in diameter. There was light bruising and small burst blood vessels within the mark."**

[13] These are *ex parte* allegations by R.S. which have not yet been the subject of inquiry and proof. They resulted in R.S. making a summary application to the Family Court in * on 16 October 1998, seeking residence, which failing, contact from Tuesday evening to Thursday morning. At the hearing on 29 October 1998, her lawyer drew the court's attention to R.S.'s concerns. P.Q. opposed the application. He requested various orders, a final request being noted as "in the alternative, he asked for a psychological examination of the children and the parents".

[14] On 12 November 1998 the Family Court (Judge Martine Lebrun) refused to vary the interim residence order, awarded R.S. interim contact every week from Tuesday at 1830 until Thursday at 0800 hours, and ordered a medico-psychological report to be prepared in relation to the children. The decision of the court (translated) stated *inter alia*:

> **"From the elements produced to the court and received at the hearing on 29 October 1998, it is clear that P.Q. knew of the non-conciliation order on 25 September 1998, that the following morning he took his children to the home of his mother who lives 800 kms from the children's usual residence and that they did not return until 4 October 1998.**
>
> **P.Q. does not explain in his submissions the reasons for this hurry to take the children far away suddenly, which caused a break in contact with each of their parents, with their school environment, and their nanny; the only argument put forward was that P.Q. had to get organised! ...**
>
> **From all the information in the file, it is clear that the children's residence had been fixed at the father's home because the outcome of the divorce appeared uncertain and it was necessary to keep the children in stable surroundings that they were accustomed to.**

It should be noted that since the said non-conciliation order was delivered, through their father's actions the children have experienced numerous changes and no arrangements to provide the mother with a wide right to receive and lodge the children have been made, or even proposed by P.Q., and medical certificates certify that B has eczema on his body and that G has withdrawn into her shell.

A medico-psychological examination will be ordered, the children's residence will be kept at the father's home while awaiting the result of the expert's report and R.S. will be granted a wide right to receive and lodge the children ...

(There follow various provisions, including details relating to contact rights, and then the interlocutory part of the decision ...)

Order a medico-psychological expertise procedure:

Appoint Mr. Dumez to carry this out, with the following terms of reference: to interview each of the parents:

- to state which of them appears the most capable of providing for the children's emotional security, and respecting the links with the other parent.

- to examine the children, describe them and indicate what is the parental link for each of them that should be prioritised on an ongoing basis so as to reduce the consequence of the divorce on their present and future development.

Fix at FRF 2,000 the advance that each of the parents must pay to the Office of the Clerk of the Court within a period of one month, as an advance on the expert's remuneration.

Rule that the report must be filed within three months of the said advance..."

Delay in obtaining psychological report and further Family Court Order dated 9 September 1999

[15] Despite the time-limits set by the court's decision of 12 November 1998, a psychological report by Mr Dumez was not considered by the court until 9 September 1999, almost a year after the original non-conciliation order of 24 September 1998. The circumstances giving rise to that delay were as follows: Mr Dumez would not begin his inquiries until he had received a fee in advance. Although R.S. paid her half share of the fee (fixed at FRF 2,000 by the court, to be paid by 12 December 1998), P.Q. did not. R.S. discovered what had occurred, and on 1 February 1999 she paid P.Q.'s half of the fee. R.S. was subsequently refunded that one half of the fee by the court in September 1999. Counsel for P.Q. explained at the first hearing that P.Q. had sent his 2,000 francs to his lawyer in January 1999. His lawyer had paid it into court.

[16] At all events Mr Dumez did not begin carrying out inquiries until April 1999. His report became available on 20 July 1999, just before the court vacation. In his report (translated), he concluded *inter alia* as follows:

"B manifests a considerable psychological suffering that he shows through his agitation, and by crying when he is no longer enveloped by the maternal aura. This is ... quite a common reaction of children separated too early from their mothers. This indicates an extensive internal suffering linked to a lack of contact and physical interactions with the mother. This instability is also linked to the repetitive changes in child minders. Furthermore, bearing in mind the parental separation, it is preferable for the children themselves not to be separated when they are in the care of child minders. All of this can only create an internal feeling of insecurity

that can be relatively controlled at G's age, but that cannot be at B's age. Concerning my advice on measures to be taken, it would be wise to firstly underline that it is necessary for B to regain a strong internal feeling of security, with more sustained exchanges with his mother than at present.

CONCLUSIONS

For a year now, family life has been disrupted with the children being looked after separately which intensifies the effects of the parental separation. G might be able to protect herself as well as she can, but B is obviously suffering in psychological terms due to lack of contact with his mother. Both parents show warmth towards their children and are concerned for their wellbeing. It is preferable for the moment to fix G and B's residence at their mother's home. She appears to be competent, capable of not being overwhelmed and notably able to offer B security. On the psychological level, nothing would indicate that the children should not have regular contact with their father on the basis of visiting rights possibly extended to include Wednesdays."

[17] As a result of the court vacation, the matter did not come before the Family Court until 9 September 1999. Despite the terms of Mr Dumez' report, the court (Judge Claude Butin) confirmed the decision of 12 November 1998 insofar as residence remained with the father P.Q., with contact (as defined in the decision of 12 November 1998) being awarded to the mother R.S. The judge observed that,

> **"it does not appear to accord with the [children's interest] to order a transfer of residence, which would result in aggravating the instability pointed out by the expert [Mr Dumez]".**

An appeal against the Family Court's decision of 9 September 1999 was marked on 5 October 1999. R.S. applied for an emergency appeal procedure, which was refused. The first appeal date available was 27 March 2000, in Versailles.

Circumstances leading to removal of children from France to Scotland on 4 December 1999

[18] Following upon the Family Court's decision of 9 September 1999, life for the children continued as before, i.e. residence at the matrimonial home with their father P.Q., who was assisted by childminders, and contact with their mother R.S. On 30 October 1999 the children went on holiday with their father to P.Q.'s mother's home in *. They returned from holiday on 7 November 1999. That same day they were delivered to their mother R.S. for a period of contact. They were to be returned to P.Q. on 12 November 1999.

[19] Counsel for R.S. stated at the first hearing that the child G, on her return from holiday on 7 November 1999, made disclosures to R.S. indicating that P.Q. had physically and sexually abused her. Reference was made to an Affidavit dated 7 March 2000 by R.S., a supplementary Affidavit dated 13 March 2000, and to various productions.

[20] Counsel for P.Q. in his submissions emphasised that it is no part of this court's function to attempt to ascertain the truth or otherwise of any allegations of physical or sexual abuse in relation to either child. Counsel for R.S. did not dispute this. I accept that it is not for this court to attempt to ascertain whether any physical or sexual abuse occurred. Accordingly whenever reference is made to alleged physical or sexual abuse, it is not intended to represent a finding that any physical or sexual abuse actually took place.

[21] R.S. was shocked by what G had said. Initially she took G to a hospital. After having waited for some time, she was advised that, as there were allegations of sexual abuse, the matter had to be reported to the police before any medical examination could take place. R.S. took G

to * Police Station and reported the matter. At 01.25 a.m. on 8 November 1999, G was examined by Dr. Vie Le Sage, at the * Hospital Centre, * (medico-judiciary unit). What follows are excerpts from the doctor's report (translated):

"Clinical Examination

Complaints/Grievances:

"My Daddy kicked me because I ate sweets" - "My Daddy puts his finger here (shows her sex) and he takes my temperature often."

Vulva: ...

No recent or former traumatic lesions visible.

Hymen: Incisions:

None. The hymen is fleshy, its open edge has an orifice which has a regular aspect around the whole of its circumference, measuring a diameter of around 7 mm. ... [No irritation, oedema, scratching, or bruising was noted.]

Internal surface of vagina and neck of womb:

No trace of traumatic lesions on first centimetres as seen when the hymen was exposed.

Anus and rectum:

Injuries/scars:

Orifice: is `star-like' and compatible with lateral distension of the vascular sphincter fibres

Radiating folds of skin: are enlarged/thickened

Sphincter tonicity: significant lack of tonicity, producing a gape of less than one centimetre in diameter.

Behavioural and somatic effects: ...

Without any holding back, the child clearly confirms the way in which her father is said to put his fingers `in the middle'. The child indicates the vulva with her index finger.

The words used by the child are of a register which is homogeneous with all of her speech. The child's remarks are relative to real things and do not lose touch with reality.

Conclusion

Bruises exist on the child's legs and these (to the child) are spontaneously linked with the kicks that her father is said to have given her.

The examination of the vulva does not show any traumatic abnormalities of recent or previous nature. The hymen is intact and provides insufficient space to allow penetration, even with a finger.

The anal examination shows an irregular anus with a permeability of the orifice compatible with the child's declarations concerning penetrations for "taking my temperature". This taking of the temperature is reputed to happen often and is carried out by the father, without there being any significant pathological reason.

In behavioural terms, there exists no element that could lead us to question the authenticity of what the child is saying.

Recommendations for the immediate future and medical prescription:

An evaluation by a child psychiatrist is knowingly recommended ..."

[22] The doctor assisting Dr Vie le Sage was sufficiently concerned by the findings to telephone the police, even although he was doing so during the early hours of the morning. The police made a note of his telephone call as follows (translated);

"[The doctor] tells us that around the victim's anus there are concrete signs of deterioration/change as well as an abnormal redness. The victim has explained to the doctors that this is due to the fact that her father (she says) takes her temperature often, even if the victim is not unwell.

The victim has indicated verbally that she does not know what her father puts inside her during those moments.

Accordingly to the doctors, the victim's vulva could also have been touched without perceptible evidence appearing on examination."

[23] At 10.25 a.m. on 8 November 1999 G was interviewed by a police commander Marc Maserati and a police officer Natalie Mas. The record of the interview (translated) included the following:

"...QUESTION ON HER DRAWING

Answer: "I drew my Daddy's `willy'. My Daddy touched my `willy' with his finger, he put it in the middle of my `willy', he hurt me."

"He put it in once."

["Daddy gave me punches and kicks on my leg." - omitted by the translator: original reads: "Papa m'a donne des coups de poings et des coups de pied dans ma jambe."]

QUESTION: "Does he do it to you often?"

Answer: "Yes."

QUESTION: "How does Daddy touch your willy?

Answer: "I don't know."

QUESTION: "When Daddy touches your `willy' are you dressed or are you completely naked?"

Answer: "Completely naked."

QUESTION: "And what are you doing?"

Answer: "I am sitting like the Red Indians, I am on a chair."

QUESTION: "Who told you to sit on the chair?"

Answer: "Daddy does. He asks me to do that a lot. And he tells me off when I don't do it."

"Daddy wanted to touch my `willy' with his `willy' - he did it."

About the drawing: "I drew my Daddy's `willy', it was round and pointed."

QUESTION: "Did you see it?"

Answer: "I don't know."

The child appears distracted, her thoughts seem to drift away, so we put an end to the audition ..."

[24] During a further interview with Nathalie Mas at 11 a.m., the following further statements (translated) were recorded:

"My Daddy often hits me when I do really bad things like when I take sweets and he has told me no."

"My Daddy kicks me in the legs and hits me on the arm."

"I live with my Daddy and I sleep with him all the time because I don't have a room."

"I don't want to sleep with my Daddy because he piddles in the bed and my pants were all soaked."

"It's not me who piddles in the bed because I am a big girl, I'm 5."

"I sleep with my pyjamas on. Daddy always sleeps with pyjamas on as well."

"When I put my pyjamas on, my Daddy tells me not to put them on, but I want to because I'm cold."

"When I put my pyjamas on Daddy screams at me so I don't put them on, I'm in my pants and T-shirt."

"When I have my pants on my Daddy tells me to lie down on the bed."

"He sits down next to me on the bed and smokes a cigarette."

"He takes my pants off and after that I don't know what he does to me."

"Also, sometimes I sit on a chair like the Red Indians (cross-legged), I am naked and Daddy touches my `willy' with his finger and he puts his finger in the middle of my `willy'."

Question to G: "WAS IT SORE WHEN DADDY PUTS HIS FINGER IN THE MIDDLE OF YOUR `WILLY'?"

Answer: "Yes it hurts me". "

[25] A drawing which G made of her father, her brother, and herself, is attached to the record of the interview, and the notes of interview further state:

> **"When asked the question what she had drawn between her Daddy's legs she told us that it was her Daddy's `willy' and that Daddy's `willy' was rounded and pointed..."**

[26] On 9 November 1999, R.S. met with the Deputy Public Prosecutor, Mr Modat, at *. Having spoken with R.S., Mr Modat verbally authorised her to keep the children meantime. On 12 November 1999, Mr Modat issued an 8-day order to R.S., entitling her to keep the children, despite the orders of the Family Court of * granting residence to P.Q. According to R.S., she telephoned P.Q. to advise him that she was keeping the children and to explain about the 8-day order. P.Q. then arrived with police officers, to reclaim the children and to take them back with him to the matrimonial home. The police officers came to R.S.'s door. They knew nothing of the 8-day order. R.S. showed them the order. After considerable questioning, the officers finally accepted the terms of the order and did not insist that she hand over the children.

[27] The 8-day order, having been granted on 12 November 1999, was to come to an end on about 20 November 1999. R.S. was obviously concerned about protective measures for G, pending the outcome of any investigations. On 15 November 1999 she wrote to the prosecutor, advising of some further disclosures from G concerning P.Q. allegedly hitting her on the bottom with a clenched fist; allegedly licking her private parts while holding her by the neck; and allegedly talking about making love. She asked what would happen in the future. In particular she wrote:

> **"For the attention of Mr. Modat (Department of Public Prosecution, Pontoise)**
>
> **Dear Sir,**
>
> **Concerned by a conversation that I had with my daughter yesterday afternoon, I am anxious to let you know that I came to the Court this morning to inform you of the contents of that conversation.**
>
> **I would like to explain the facts in this letter ... [there follow details of the alleged further disclosures].**
>
> **This morning the Clerk of Court told me that I should wait for the inquiry to be returned to you. I cannot however wait without doing something, it is beyond me - I have to help my children and understand what is going on.**
>
> **Today I am taking G and B to * hospital to see Doctor Zamet (Pediatrics). ..."**

[28] On 18 November 1999 P.Q. attended the police station. He was detained for 24 hours. At 10.35 a.m. he was interviewed. In brief, he denied any abuse, attributed any bruises on G's legs to her bike, denied that G ever slept in his bed stating "each one of us has our own room", and agreed that he had "had to take her temperature a few times when she was unwell". At 13.50 p.m. he accompanied police officers to the matrimonial home where they searched the premises, and noted that G and B each had a bedroom. The police concluded "Since our search has not produced any element likely to help us move forward with our investigation, we return to our offices after having locked the house." At 3.30 p.m. P.Q. was allowed to leave the police station.

[29] On 18 November 1999, the police also interviewed Paola Casanobe who had acted as the children's nanny from August 1997 to October 1998.

[30] As R.S. explained in her affidavit, the prosecutor did not extend the 8-day order, nor did he make a fresh order to provide interim protection for the children. On 19 November 1999, R.S. telephoned the prosecutor's department and was told that the police investigation was not yet concluded. She was told to take the children back to P.Q. when it was his turn to have them again (22 November 1999). R.S. took legal advice. She decided not to return the children to P.Q. meantime. On 22 November 1999 she took both children to see a paediatrician, Dr. Scalbert. He volunteered to send his report to the prosecutor. His report (translated) includes the following:

> **"After my discussion with G's mother, I interviewed G on her own. After some general conversation, among other subjects we talked of G's school, I asked G if she was happy to see her Daddy again, to which she replied "No, he kicks me on the legs and on the arms". I asked her why? - "Because I wanted to eat sweets after eating my meal." I asked her if that had happened on other occasions and if there was anything else that had happened and she replied: "Yes", and she withdrew into herself. At that, I decided to put an end to our conversation. I was then able to talk to B to whom I asked some questions as he sat on his mother's knee. I asked: "Are you going to see your Daddy soon?" He replied: "Yes, with the kicking." I asked: "Do you have a room of your own at Daddy's house or do you sleep with G?" "No", he replied, "she sleeps in Daddy's bed."**

[31] On 24 November 1999, the prosecutor advised R.S. that there was to be no criminal prosecution of P.Q. as there was insufficient evidence to secure a conviction. On the same date, the prosecutor referred the case to the Juvenile Court (or "Juvenile Justice", "Juvenile Judge", "Children's Court", "Children's Judge"), at *, as some form of "educational assistance" might be required. Counsel for both petitioner and respondent explained that such a referral was equivalent to a report being made to the Children's Panel in Scotland, and that a variety of orders (some equivalent to the Scottish Place of Safety Order) might follow. "Educational assistance" could therefore take the form of some sort of interim care order, or interim supervision order, or an order for supervised contact, having as its goal the protection of the children *ad interim*, pending inquiries. The Juvenile Court was provided with the whole police file, including transcripts of the police interviews quoted above and Dr. Vie le Sage's report of the medical examination. It is not known whether the Juvenile Court also received R.S.'s letter of 15 November 1999, or Dr. Scalbert's report dated 22 November 1999.

[32] At about this time, R.S. made inquiries directed to raising a private prosecution against P.Q. ("partie civile" procedure).

[33] On 25 November 1999, R.S. received a letter from the Juvenile Court, advising *inter alia* (as translated):

> **"I am pleased to inform you that concerning:**
>
> **G and B ...**
>
> **and in application of article 375 of the Civil Code and its sub-articles relative to Educational Assistance, a file has been opened in my chambers.**
>
> **You will be summoned by myself shortly to discuss this.**
>
> **You are authorized by the Law to choose a lawyer...**
>
> **Please quote the reference 699/0228 in any correspondence with the Court concerning this affair.**

THE CHILDREN'S JUDGE"

[34] On 2 December 1999, R.S. took a short-term let of a furnished flat in Paris. She moved in with the children. The final days of the children's residence in France are described by R.S. in her Affidavit dated 7 March 2000 as follows:

> **"59. On Friday 3 December I received a phone call from my lawyer who said that in fact, instigating the "Partie Civile" procedure was going to take longer than she had thought and she recommended that I take the children to a safe place. She told me that the best thing to do was to leave France as soon as possible, take the children to an environment they are familiar with (my parents' house for example). She also suggested that I seek legal advice in Scotland or at a European level in an attempt to better protect the children.**
>
> **60. On Saturday 4 December I duly left Paris with my friend, *. She drove myself and the children all the way to * [a town in Scotland]."**

[35] The children are currently living with their mother R.S. at her parents' home in *, Scotland.

[36] On 9 December 1999, P.Q. went to the children's school and found that the children had not attended school since Monday 8 November 1999. He travelled to Scotland, and on 11 December 1999 had a confrontation with R.S.'s father. He knew by then that the children were in R.S.'s parents' home. He went to police headquarters in *, and stated that he wished to get his children back. He was advised to contact the French consulate in *.

[37] On his return to France, P.Q., acting jointly with the public prosecutor, proceeded to file a criminal complaint against R.S. in respect of her wrongful removal of the children. On 17 December 1999 he paid a deposit of 5,000 francs in connection with the criminal complaint.

[38] On 6 January 2000, the Juvenile Court in * held a hearing relating to G and B. It was attended by P.Q. and his lawyer, Maitre Camus. There was no appearance for R.S. The Juvenile Court had before it the referral from the public prosecutor together with the police file, including the transcripts of the police interviews and Dr. Vie le Sage's medical report. The Juvenile Judge was also made aware that the children had been taken to Scotland by their mother, and that P.Q., who held the order of residence in his favour from the * Family Court dated 9 September 1999, was attempting to bring about the return of the children to France (and ultimately to his care) with the assistance of the Hague Convention. The hearing was fairly short, about ten minutes in length. About two weeks later, the Juvenile Judge issued a decision in writing, quoted below.

[39] On 19 January 2000 P.Q. authorised the Central Authority for the Hague Convention to act on his behalf in respect of his request that the children be returned to France.

[40] On 21 January 2000 the Juvenile Court dismissed the case concerning G and B, thus bringing to an end for the time being any possibility of the French equivalent of a Place of Safety Order being granted. The decision (translated) stated *inter alia*:

> **"We, Claire Estevenet, Juvenile Court Judge at the * High Court,**
>
> **In view of articles 375 to 375-8 of the Civil Code, 1181 to 1200-1 of the New Code of Civil Procedure relative to educational assistance,**
>
> **In view of the Educational Assistance procedure followed with regard to:**

G and B ...

Having heard P.Q., assisted by Maitre Camus, solicitor at the Val d'Oise bar, in their explanations and noting the absence of R.S., having as solicitor Maitre Sylviane Mercier, and children at our hearing on 06 January 2000.

In view of the request of the state prosecutor dated 24 November 1999,

From hearing the parties, it appears that the development of the situation concerning G and B no longer requires educational measures,

In the absence of risk to the children's health, safety or morals or the compromise of its educational conditions, it is appropriate, therefore, to close our educational assistance procedure.

FOR THESE REASONS:

Pronouncing judgement in chambers and in first resort:

We state that there is no requirement for intervention in terms of educational assistance and we order the closing of this procedure with regard to G and B ...

We order the provisional execution of this decision. ..."

Notification of this decision was sent to *inter alios* R.S.'s French lawyer, Maitre Mercier.

[41] On 24 January 2000, the French Ministry of Justice requested the assistance of the Scottish Courts Administration, Edinburgh, in achieving the return of the two children to France in terms of the Hague Convention. A petition on behalf of P.Q. was presented to the Court of Session. Answers were lodged, as were affidavits and productions. On 10, 13 and 17 March 2000, the first hearing took place. A Children's Hearing in Scotland, arranged for 16 March 2000 as a result of grounds of referral submitted by the Reporter on the basis of information provided by R.S., was cancelled because the matter was before the Court of Session.

[42] The current state of proceedings in France is as follows: on 28 February 2000, R.S. filed a private prosecution against P.Q. in Nimes, France. The appeal in the French Family Court was to have taken place in Versailles on 27 March 2000. The hearing in Pontoise Family Court of the parties' divorce is still to take place.

Further disclosures which may not have come to the attention of the Juvenile Court

[43] G made further disclosures which, unlike those quoted above, may not have come to the attention of the Juvenile Court. In particular, R.S. in her letter dated 15 November 1999 advised the prosecutor that G had described being naked, lying on her back, opening her legs, and being held by P.Q. by the throat while he licked her private parts. G had also described P.Q. hitting her on her bottom with his clenched fist. G had spoken about "making love". It was not clear at the first hearing whether the letter dated 15 November 1999 had been passed on to the Juvenile Court.

[44] Further in her Affidavit dated 7 March 2000, R.S. stated:

> **"51. I spent the weekend of 20/21 November with * and her family not far from home. This was when G started her obsessive cleaning of her Barbie dolls with cream and cotton wool. She would undress them, split their legs, and then clean them between the legs. I wrote to my lawyer on this subject (letter dated 21/11/99) ...**

> **62. Since G made her initial disclosures, she rarely talks about her father. However on two occasions, she has mentioned that other untoward events took place. Shortly after Christmas, she told me (and my parents) how her father had one day punched her in the eye (pointing to her right eye). I asked her to describe her eye, and she said it was "purple", and that the mother of one of the French nursery school friends had put something in her eye to make it better. Then on Sunday 20 February, G told me over lunch how her daddy wants to piddle everywhere. The children were eating frankfurters and it seemed to trigger things in her mind. I asked G if she knew what her daddy's willy was like when he piddled everywhere and she said "it's all red", pointing to the end of the frankfurter. G also said that when daddy piddled everywhere she had to go and wash her hands because his piddle was poison. She also said that daddy had "two willies" and that one was curled - she drew circles in the air. G then told me that her father had piddled in her hair. I asked her why he had done that and she replied "because I wasn't telling the truth about mummy". G also went on to tell me that she had seen her dad drinking B's piddle from his willy, while holding B around the throat and saying to B "Tu vas mourir (you're going to die). G said it in French."**

[45] The Juvenile Court in * did not have the additional information contained in the Affidavit.

Affidavits from French lawyers

[46] Both parties lodged and referred to affidavits from French lawyers, Maitre Chauveau (instructed by P.Q.) and Maitre Mercier (instructed by R.S.). The following are excerpts:

[47] ***Maitre Chauveau, dated 8 March 2000 (as translated):***

> **"19. Upon appeal of the mother [against the decision of the Family Court of 9 September 1999], she was denied an emergency appeal. The final hearing is set for 27 March 2000. While the appeal is pending, the order dated 9.9.1999 is fully enforceable. Due to the final hearing of the appeal pending at short notice, it would appear difficult to obtain an interim variation of the order for residence before the hearing in the Court of Appeal. Until the Court of Appeal has reached a decision, no judge of the first instance may be asked to vary an order. Nevertheless an application may be done with Juvenile Justice. Any order made by the Juvenile Justice on the children would supersede any civil order made either by a family judge or the Appellate Court.**
>
> **...**
>
> **24. ...if no emergency appeal has been granted, it may well be on the grounds that the First President of the Court did not find any merits to the request for emergency appeal.**
>
> **...**
>
> **28. On or about 12 November 1999, R.S. came to the office of Mr. Modat, public prosecutor of *, France. On or about the same day the public prosecutor made in her favour a very temporary custody on her child (based on the evoked danger only). This type of order can only last 8 days.**
>
> **26 (sic). The article 375-5 of the French civil code states:**
>
> **'As a temporary step, and subject to appeal, the Juge may, pendente lite, either order that the minor be put in custody with a shelter or orientation centre, or order one of the measures as in article 375-3 and 375-**

The public prosecutor, in case of emergency, has the same power, being stated that he has the duty to ask the judge with jurisdiction within eight days, this judge having the sole power to maintain, modify or cease the measure ordered.'

27. In this case, the public prosecutor, pursuant [to] article 375-3 has temporarily order[ed] residence with the mother, pursuant [to] part 1) of the said article (law no. 87-570 dated 22 July 1987):

'If it proves necessary to take the child away from his usual residence, the judge may decide to affix his residence at 1) to one of the parents who did not have parental authority or who was not beneficiary of a residence order ...'

...

37. As stated above, upon request of the public prosecutor dated 24 November 1999, a Juvenile Judge was appointed (Mrs. Estevenet, Juge pour enfants) and an order for educative assistance been made on 24 November 1999. At that time, the order for temporary custody to the mother had ceased as it had not been renewed by Juvenile Justice and can only last eight days.

38. This assistance was terminated on 6 January 2000. The Juvenile Justice did put an end to the Educative assistance also as the mother did not come to the hearing at the Juvenile Justice set on 6 January 2000 [although] R.S. and her lawyer had been properly advised of the hearing. The Juvenile Justice did proceed to a full examination of the reasons why the children would be endangered and obviously did not find any grounds.

39. If the respondent returns to France with her children, she would be able to [restore] the proceedings before the Juvenile Justice and could ask that the children be put in her care in the interim. The decision lies with the Judge....

41. [This paragraph states, incorrectly, that the Juvenile Justice decision of 21 January 2000 to put an end to the educative assistance was intimated to R.S. by letter dated 25 November 1999.]

...

46. Mr. Cornec, [a French lawyer advising R.S.] in his letter states that R.S. would have filed a "plainte avec constitution de partie civile" on the basis of rape against P.Q. If she has really, and if she paid the "consignation" (down payment to [guarantee] that the plaintiff is serious), the criminal examining juge (juge d'instruction) has the power to forbid P.Q. to see his children or to order that he only sees them supervised. Such an order could be made as a matter of urgency.

47. French law offers a large choice of protective measures to the Juvenile Judge, pursuant to the law of 1945 and subsequent modifications. Any of the parents, believing that the child may be in danger, may request the appointment of a Juvenile Justice. The Juvenile Justice may either decide to appoint a social worker to survey the education of the child, put the child into custody of a third party or educational school, or alternatively take any steps required for the protection of the said child. It is possible for either parent to file a request for educational assistance with the Juvenile Justice as the order to close the case, made on 6 January 2000 is not putting an end to the case, the protection of children could need a new procedure.

48. The order made by a foreign court for the return of a child being in no means an order on custody or access, both parents have freedom to file a request also with the Family Judge of the place of habitual residence for modifications of previous orders.

[In paragraphs 49 to 52, Maitre Chauveau expresses the view that R.S., on her return to France, would be unlikely to be imprisoned as a result of having wrongfully removed the children.]

53. If P.Q. was to accept by undertaking before the Court of Session to wait for a week between the arrival of the children and his enforcement of previous orders for residence, this would give sufficient time to the mother R.S. to introduce requests for protective steps either in the Juvenile Justice or the criminal procedure."

[48] ***Maitre Mercier, dated 8 March 2000 (as translated):***

Maitre Mercier expresses a personal view that the operation of the French legal system, including the police, the state prosecutor, the Children's Judge, the Family Court, and the Appeal Court, may not be able to offer G and B protection *ad interim* pending a full inquiry into the facts. The concluding paragraphs state:

"Therefore, from the point of view of the acts of maltreatment that your two children have complained of at the hands of their father, there exists no short-term guarantee that they may be protected by a French judicial decision.

The Appeal Court of Versailles' decision on the appeal against the Interlocutory Order ("Ordonnance d'Incident") certainly has a possible influence on the decision of Pontoise High Court, ruling on the divorce and the ensuing measures for the children.

However, the principle is that the Judges are independent and the High Court of Pontoise can very well take a radically different decision to that of the Appeal Court of Versailles on an order from the Judge in Charge of Pre-trial issues ("Ordonnance du Juge de la Mise en Etat"), which is an intermediary decision in the course of the divorce proceedings themselves.

I can personally testify on my oath that similar proceedings exist and that they have followed this course over a long period of time without effective protection for the child who is caught up in the conflicting and uncoordinated roles of the Examining Magistrate, the Family Affairs Judge, and the Children's Judge."

[49] ***Maitre Chauveau dated 9 March 2000 (as translated, commenting on Maitre Mercier's affidavit dated 8 March 2000):***

"... (ii) Whereas the public prosecutor had not taken the decision to have an examining judge appointed, this did not automatically preclude the Juvenile Justice to pursue an educational assistance order. Juvenile Justice and criminal judges have a different aim: the first have the duty to protect the children, the second the duty to prosecute violations of the criminal law. Therefore and contrary to what is written [by Maitre Mercier], if the Juvenile Justice had grounds for educational assistance, even in the absence of a criminal prosecution, he/she would have done it. My experience in this field is contrary to the assertions of Mrs. Mercier, and everyday Juvenile Justice take protective orders for children in due absence of any prosecution (i.e. domestic violences or else).

(iii) paragraphs 6 & 7 of her letter (1st page): Mrs. Mercier refers to the "presumption of innocence":

This does not preclude a Juvenile Justice, nor a family judge to make an order such as: variation of residence, supervised contact, or no contact at all, pending the inquiries of the examining judge ...

(v) ... the orders made by a Juvenile Justice prevail [over] the orders made by a family judge.

(x) Paragraph 8 page 2: Reading "there is no reason why the Children's judge would consider there to be a cause to intervene":

On the contrary and if R.S. brings in evidence that her children are in danger, I see no objections for the Juvenile Justice to see a cause. This only relies on her lawyer's ability to present evidence for the Juvenile Justice to do so.

By law, the procedure in the Juvenile Justice may be [reinstated] any times, even about the same facts, if new evidences are brought. In this particular case, the due presence of R.S. [who] could then be interviewed by the judge would make a difference with the previous procedure when she did not appear.

(xi) Last paragraph of page 2: contradiction in order between the Court of Appeal and the Court of Pontoise:

The Court of Appeal is NOT seized of an appeal of the divorce but only of the preliminary decisions regarding mainly the children. If the circumstances change, and with regards to children, this may well be, the decision of the Court of Pontoise may be different, or not. Trying to estimate what is going to be the orders made by either the Court of * or the appellate court is highly risky without knowledge of the merits, not in my possession. ..."

[50] In addition to the information contained in the affidavits from French lawyers, counsel were agreed as follows:

Standard of proof in French civil and French criminal proceedings: **parties were agreed that, although neither affidavit dealt specifically with this matter, the standard of proof was higher in French criminal proceedings than in French civil proceedings, similar to the difference in Scottish law between proof beyond reasonable doubt in criminal proceedings, and proof on a balance of probabilities in civil proceedings.**

Period on remand in French criminal proceedings**: parties were agreed that in France, there is no "110-day rule", and accordingly where a person as yet untried for an offence is refused bail and imprisoned on remand, that person can remain in prison for long periods, possibly extending to years. Bearing that in mind, it would be a fairly extreme measure to imprison P.Q. on remand on the basis of G's disclosures, pending a full inquiry if necessary by criminal trial.**

Juvenile Court and Family Court**: parties were agreed that the orders of the Juvenile Court took precedence over any order made in the course of the divorce proceedings in the Family Court.**

Joint Opinion of Child Psychiatrist and Child Psychologist

[51] A joint report dated 29 February 2000 prepared by Dr. Joanne Barton, Child Psychiatrist, and Ms. Christine Puckering, Clinical Psychologist, both of the Royal Hospital for Sick Children, Yorkhill, Glasgow, was referred to by counsel for R.S. The report stated *inter alia*:

"...In preparing this report we have interviewed R.S., B and G on two occasions at the Department of Child and Family Psychiatry at the Royal Hospital for Sick Children, Yorkhill, Glasgow (17 January 2000 and 9 February 2000). In addition we have had access to a number of translated documents [listed] ...

1. HISTORY OF INVOLVEMENT WITH R.S. AND THE CHILDREN ... We agreed to undertake an assessment of the children's psychological status. We have subsequently undertaken two assessment interviews with R.S., B and G together for this purpose. There follows a summary of our findings in relation to the children's psychological adjustment. In view of the children's ages, R.S. has been the main informant in our assessments ...

2. WHAT EVIDENCE OF ABUSE HAS BEEN PRESENTED

The evidence presented has been in the form of R.S.'s report of G's disclosure to her. We have also had sight of the transcript of G's interviews by the Regional Minors' Brigade on 8 November 1999. In addition we have seen the transcript of the interview with R.S. on 7 November 1999 at * Police Station. We have also seen the report of the physical examination undertaken at the Medico-Judiciary Unit on 8 November 1999.

3. DISCLOSURE INTERVIEWS

We have not undertaken any disclosure work with G or B. It was our opinion that G had already undergone an appropriate disclosure interview. We were also aware that the Reporter to the Children's Panel and the Social Work Department had become involved with the children and had undertaken some interviewing. We were concerned that undertaking further disclosure interviews might distress G. Also, we were concerned that it might be construed that by repeatedly interviewing G about the alleged abuse, she was in some way being rehearsed in her description of events and that this might discredit her evidence.

1. **EVIDENCE FOR THE LIKELIHOOD OF ABUSE**

It is our opinion that, from the evidence presented in terms of the account by R.S. of her children's reports to her and also the transcript of G's interview by the police in France, there is evidence that G has been exposed to inappropriate sexual behaviour by her father. The evidence is less convincing that B has been exposed to abuse of any kind as the information presented is largely about G ...

1. **THE EFFECT OF SEPARATING G AND B**

G and B are used to being together and it is our opinion that their psychological and emotional wellbeing would be adversely affected were they to be separated. R.S. reported that they were distressed in the past when they were separated from each other. She also reported that both children were unhappy when the changes in their childcare arrangements resulted in them being placed with different childminders. The presence of their brother/sister has been a source of continuity during a period of uncertainty and they should not now be separated.

SUMMARY

G has consistently reported that she has been exposed to inappropriate sexual behaviour on the part of her father. She shows an inappropriate level of sexual knowledge for a child of her age, including details consistent with penile arousal. She reports her experiences in language consistent with her development, e.g. that

her father `piddles' in the bed. The evidence as presented suggests a cohesive picture consistent with sexual abuse and possibly physical aggression ..."

Medical report by Consultant Paediatrician dated 1 March 2000

[52] Counsel for R.S. referred to a medical report dated 1 March 2000 by Dr Jean Herbison, consultant paediatrician. That report stated *inter alia*.

"... I have been asked, mainly, to consider the various statements as listed and various medical reports and to provide my opinion on them in relation to the possibility or otherwise of previous abuse of the child/children ... [On considering the report of the medical examination by Dr Vie le Sage on 8 November 1999]: The most significant fact in the doctor's conclusion appears to be that 'In behavioural terms there exists no element that could lead us to question the authenticity of what the child is saying'.

Further in the doctor's conclusion he describes that anal examination showed an 'irregular' anus. This could still be within normal limits, but nevertheless as the doctor states, could be consistent with statements from the child, but not necessarily additionally supportive of penetration of the anus.

It is well described that penetration of the anus usually, and in fact in almost all cases, leaves no physical trace.

It is rare to find marked irregularity of a significant degree or scarring of skin which would be considered supportive of findings of penetrative anal abuse. In relation to the hymenal findings, various studies internationally have now confirmed that approximately 62% of children who have been digitally penetrated will present with a normal hymen.

David Muram's study ... stated that 29% of children penetrated by penis who were examined under full magnification and illumination had normal hymens on examination. (These were cases where there appears to have been independent history by a child and confirmatory independent history taken by the suspected perpetrator in custody.)

<u>Summary</u>

There have been very clear, specific, age appropriate statements provided by this child to more than one independent source, confirmed by an examining doctor to be 'relative to real things and to not lose touch with reality'. The level of apparent sexual knowledge of the child is described in an appropriately child-like way.

It is well documented in research literature that such specific clear histories must be considered very seriously indeed and can shift the decision making process by professionals and legal people in relation to whether sexual abuse may have occurred or not. ... This provides information on the differential shift on balance of probability in such cases, dependent on clear specific histories given by children.

The Royal College of Physicians Guidelines on Physical Findings in Child Sexual Abuse also states that "There will be no physical findings in greater than half of cases where sexual abuse has occurred". ...

<u>Conclusion</u>

> **I consider the history provided by this child to professionals to be of a very concerning nature.**
>
> **The normality of the genital findings is neutral medical evidence, and is not in itself in any way dismissive of the history provided by the child and, in fact, can be consistent with such a history.**
>
> **The entire decision as to the likelihood of whether this child may have been sexually abused appears to my mind, not to have been fully considered in any appropriate manner to date and cognisance seems only to have been given as to whether there is enough evidence beyond reasonable doubt to obtain prosecution.**
>
> **This appears rather unusual as, for example, in Scotland, Child Protection Procedures would usually be embarked upon to investigate the matter, not in relation to potential prosecution, but rather in relation to the potential need for protection of the child - this does not appear to have occurred in France in this particular case.**
>
> **It is well known that in most cases of child sexual abuse the decision, in terms of potentially protecting a child, must be taken on the basis of balance of probability and not in relation to the criminal investigative gold standard of beyond reasonable doubt.**
>
> **It would appear that this child, on the basis of information to date, could have been at considerable risk and every detail of the child protective issues must be reassessed and considered in an appropriate court setting."**

The Hague Convention and the defence of grave risk (Article 13b)

[53] The United Kingdom and France are signatories to the Hague Convention on the Civil Aspects of International Child Abduction. The Convention was incorporated into the law of the United Kingdom by the Child Abduction and Custody Act 1985, section 1(2) and Schedule 1.

[54] Counsel for R.S. accepted that G and B had been wrongfully removed from France in terms of Article 3 of the Convention. In such circumstances, Article 12 applies. Article 12 provides:

> **"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."**

[55] Standing the decision of the French Family Court in * dated 9 September 1999, counsel for R.S. accepted that G and B should *prima facie* be returned to France forthwith in terms of Article 12. However counsel invoked Article 13(b), which provides:

> **"Notwithstanding the provision 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 ... [who] opposes its return establishes that ... (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."**

[56] It was submitted that the issue for the Court of Session was not an investigation into the veracity or otherwise of the allegations, but a decision firstly, whether a defence of grave risk in terms of Article 13(b) had been made out (the onus being upon R.S.); and secondly, in the event

that the court was satisfied that there was grave risk, whether or not the court should exercise its discretion by refusing to order the return of the children to France.

[57] Counsel for R.S. referred to *Friedrich v. Friedrich*, 78 F.3d 1060 (1996), a decision of the United States Court of Appeals which has been cited with approval in Scottish decisions such as *Starr v. Starr*, 1999 S.L.T. 335 and *D.I. petitioner*, 21 May 1999 (Lord Abernethy, unreported). *Friedrich* has considerable persuasive force bearing in mind the *dicta* of Lord Browne-Wilkinson in *In re H and others (Minors) (Abduction: Acquiescence)* [1998] A.C. 72 at p.87 ("An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states.") At p.1068 of *Friedrich*, the court notes:

> **"... we acknowledge that courts in the abducted-from country are as ready and able as we are to protect children. If return to a country, or to the custody of a parent in that country, is dangerous, we can expect that country's courts to respond accordingly. Cf. *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir.1995) (if parent in Mexico is abusive, infant returned to Mexico for custody determination can be institutionalised during pendency of custody proceedings). And if Germany really is a poor place for young Thomas to grow up, as Mrs. Friedrich contends, we can expect the German courts to recognize that and award her custody in America. When we trust the court system in the abducted-from country, the vast majority of claims of harm - those that do not rise to the level of gravity required by the Convention - evaporate.**
>
> **The international precedent available supports our restrictive reading of the grave harm exception [There follows a review of authorities.]...**
>
> **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 victimization, 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. ...**
>
> **... Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g. returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. Psychological evidence of the sort introduced in the proceeding below is only relevant if it helps prove the existence of one of these two situations. ..."**

[58] Counsel also referred to *C* v *C (Abduction: Rights of Custody)* [1989] 1 W.L.R. 654; [1989] 2 All E.R. 465, in which Lord Donaldson observed:

> **"It will be the concern of the court of the state to which the child is to be returned to minimise or eliminate [any psychological 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 ... can resume their normal role in relation to the child."

[59] Counsel referred to further authority, including *Re A (a minor) abduction* [1988] 1 F.L.R. 365 at p.372; *MacMillan* v *MacMillan*, 1989 S.L.T. 350; and *Urness* v *Minto*, 1994 S.C. 249.

[60] Counsel for R.S. accepted that the test was a stringent one, but contended that the second branch of the *Friedrich* analysis had been made out in the present case. Under reference to the Answers, the affidavits, and the productions including the transcripts of police interviews, the medical report by Dr. Vie le Sage, the expert French legal opinion of Maitre Mercier, the opinion of Child Psychiatrist Dr Barton and Child Psychologist Ms. Puckering, and the opinion of Dr Herbison, consultant paediatrician, counsel contended that a *prima facie* case of serious physical and sexual abuse of G had been made out. The matter had been placed in the hands of the courts in France, but despite the involvement of the Family Court (*), the police, the public prosecutor, and the Juvenile Court (*), once the 8-day order came to an end on 20 November 1999, no order had been put in place to provide some sort of protection for G pending an investigation of the allegations. G's case appeared to have "fallen through the net". As from 21 November 1999, the person against whom the allegations of abuse were being made (whether truthfully or falsely) could, in terms of the Pontoise Family Court decision of 9 September 1999, reclaim G and take her into his care. In such circumstances the courts of habitual residence had demonstrated either an unwillingness or an incapacity to give the child adequate protection. To return G to France, even with some sort of undertaking (limited in time) given by P.Q. would result in a grave risk that her return would expose her to physical or psychological harm, and would place her in an intolerable situation. In relation to B, counsel submitted that there was some evidence that he had been physically abused, but in any event it was clear from the reports that professional opinion was that the two children should not be separated: cf. *Urness* v *Minto*, 1994 S.C. 249. A further difficulty if the children were returned to France, and R.S. accompanied them, was the possibility that R.S. might face imprisonment for having wrongfully removed the children.

[61] Counsel for P.Q. argued forcefully that both children should be returned to France forthwith. Further decisions relating to residence, contact, parental authority, and protection of the children would be made by the French courts. It was not for the Court of Session to attempt to ascertain the truth or otherwise of the allegations which had been made. The only issue which was properly before the court was whether R.S. had made out a defence in terms of Article 13(b) of the Convention, which she had not. Reference was made to a considerable number of authorities in which courts had emphasised that signatories of the Convention had to have faith in each other's legal systems, and to trust that children requiring protection would receive the appropriate protection from the legal system in the "abducted-from" country (to use the terminology from *Friedrich*). In particular reference was made to *In re H (Abduction)* [1998] A.C. 72 at p.87; *N* v *N (Abduction: Article 13 defence)* [1995] 1 F.L.R. 107, at p.112; *Starr* v *Starr* 1999 S.L.T. 335; *D.I.,* May 21, 1999 (Lord Abernethy); *Friedrich* v *Friedrich, cit. sup.*; *Re E* [1999] 2 F.L.R. 642; *Cooper* v *Casey* [1995] F.L.C. 92-575; *Re F* [1992] 1 F.L.R. 548; *Robertson* v *Robertson*, 1998 S.L.T. 468; *MacMillan* v *MacMillan*, 1989 S.L.T. 350; and *Re L* [1999] 1 F.L.R. 433. To adopt any other position would be to undermine the purpose of the Convention. It was accepted that no precedent had been cited which was precisely in point with the present case, i.e. no precedent which involved allegations of sexual abuse of a child by his or her father, where the mother had, from the start, brought the allegations to the attention of the authorities and the courts in the abducted-from country. For example, in *Starr* v *Starr, cit. sup.*, the abducting parent had not attempted to place her concerns about possible sexual abuse in the hands of the authorities or the courts in the abducted-from country. Nevertheless the cases cited vouched P.Q.'s right to the immediate return of the children to France, where the French

courts would provide appropriate protection and dispute resolution. There was little risk that R.S. would be imprisoned. Even if there were a risk, the French courts would take the children's interests into account when dealing with her: cf. *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 F.L.R. 433. Counsel for P.Q. offered to give such undertakings as might be thought necessary, for example, not to seek to enforce the Pontoise Family Court decision of 9 September 1999 for a period of seven days following the children's return to France (or for a longer period, if necessary) to enable R.S. to apply for orders in the French courts.

[62] Counsel for P.Q. did not dispute that, on the basis of the allegations as they appeared on paper, there were questions requiring investigation. He did not suggest that the allegations could be ignored as being fictitious or fabricated. Nor did he dispute that, on the termination of the 8-day order, no protective order was in place. He accepted that the letter dated 25 November 1999 from Pontoise Juvenile Court intimating that a file had been opened did not amount to a protective order. His contention was that, following well-recognised authority, there was no reason to believe that the courts of the abducted-from country would not respond appropriately. The *tempus inspiciendum* for this court's assessment of the capacity and willingness of the French legal system was the time at which the matter came before the Scottish court: *MacMillan* v *MacMillan*, 1989 S.L.T. 350 at p.355. R.S. would be able to present to the French courts all the information which she now had, including her letter dated 15 November 1999, Dr. Scalbert's report, the report by Dr. Barton and Ms. Puckering, and the report by Dr. Herbison. The very presence of R.S. in the French court would make the hearing significantly different from the Juvenile Court hearing on 6 January 2000, when she had not attended. The decision of the Juvenile Court dated 21 January 2000 had not made the matter *res judicata*. R.S. would be able, during the seven days or longer period consented to by P.Q. in his undertaking, to apply for all emergency orders necessary to protect the children. In order to succeed in her Article 13(b) defence, R.S. would have to satisfy the Court of Session that, if she were to return the children to France, and if she were to place the appropriate information and arguments before a competent court, that court would not give the children protection in this case. R.S. had not demonstrated that this would occur. Finally, on any view, an Article 13(b) defence had not been made out in relation to P.Q.'s son B.

Whether defence of grave risk made out

[63] Applying the principles outlined in the authorities cited by counsel, the following propositions might be formulated in relation to a court in a Hague Convention country faced with allegations of sexual abuse by one parent of a child abducted by the other parent.

> **(1) On the basis solely of information such as that contained in the police interviews and the medical report by Dr. Vie le Sage, the court would find it difficult, without some further inquiry, to exclude the possibility that G's allegations were true, either in whole or in part. The fact that a criminal prosecutor in France had concluded that there was insufficient evidence upon which to secure a criminal conviction does not exclude the possibility that a civil court, operating on a lower standard of proof, might find some of the allegations proved, or might simply conclude that it would not be safe (whether *ad interim* or otherwise) to leave the children in the unsupervised care of the alleged abuser. Accordingly the court would require further investigation into the allegations, and meantime could not but acknowledge the possibility of a risk to the child if the child were to be allowed to be in the unsupervised company of the alleged abuser.**
>
> **(2) Pending further investigations and inquiries, and in recognition of such a risk (even if it were ultimately proved to be unfounded), the court would require to be satisfied that some sort of interim protection**

order was in place, such that, *ad interim*, the child would be prevented from coming into the unsupervised company of the alleged abuser. The interim protection could take a variety of forms: for example placing the child in care in a residential home, or with foster parents, or with the other custodial parent, or with grandparents; or providing close supervision for the child; or (as an extreme option) keeping the alleged abuser in custody on remand - not a very feasible option in France where there appear to be few limits on periods spent on remand. The interim protection could be instigated or imposed by a person or agency other than the court, provided that the court was satisfied that some protection was in place so that any risk to the child was eliminated *ad interim*. In the event that the allegations were established after appropriate inquiry, more permanent protection would be required.

(3) *Prima facie*, one Hague Convention country court can assume that another Hague Convention country court will be able and willing to provide adequate protection, whether interim or final.

(4) In normal course therefore, there is no reason to assume that the courts of the other Hague Convention country will not have either the ability or the willingness to provide adequate protection. Indeed so to assume would be "presumptuous and offensive": cf. *Cooper* v *Casey cit. sup*., quoting from the case of *Murray*.

(5) Accordingly, a court in one Hague Convention country can return the child who has made allegations of sexual abuse against the custodial parent to the courts in another Hague Convention country (the country of the alleged abuser), assuming that the latter courts will provide adequate protection at all stages.

(6) Thus at the time of the child's return from one Hague Convention country to another Hague Convention country, there is no grave risk to the child, because it would be inconceivable, or alternatively "presumptuous and offensive" (*Cooper* v *Casey*, citing the case of *Murray*) to suggest that the other country's courts might fail to provide adequate protection at any stage, thus possibly allowing the child to be left alone in the company of the alleged abuser.

[64] On such an analysis, the defence of grave risk would not be made out, and any petition for the return of the child to the country of the alleged abuser should be granted forthwith: cf. *Friedrich* v *Friedrich cit. sup*. and the other authorities cited by counsel.

[65] In the present case, propositions (1), (2) and (3) can be applied without difficulty. However when proposition (4) is examined, the history of the present case and the sequence of events from July 1998 to January 2000 have to be taken into account. The facts speak for themselves, and in the rather unusual circumstances of this case, I consider that there is indeed reason to assume that the courts in France might not, for whatever reason, be able or willing to provide adequate protection for G and B (cf. *Friedrich cit. sup*.) I have reached this view for the following reasons:

(a) In my opinion, the information contained in the police interviews and the medical report by Dr. Vie le Sage was more than enough to alert any court to the *possibility* that G might be telling the truth. Even without expert evidence from child psychologists or psychiatrists or paediatricians, and even without the further detail said to have emerged subsequently, the initial information

appears to comprise a child's way of describing unacceptable sexual behaviour exhibited towards her by her father.

(b) Despite the fact that the information contained in the police interviews and the medical report was made available to the police, to the public prosecutor, and to the Juvenile Court, no protection order was put in place following the termination of the 8-day order. The letter dated 25 November 1999 from the Juvenile Court merely stated that a file had been opened, and that there would be further communication. Such a letter would have provided no protection if, for example, P.Q. had attended with police officers and demanded that G be delivered to him in compliance with the order granted by the Family Court, *.

(c) Accordingly at any time after 20 November 1999, the alleged abuser, who held a court order entitling him to residence, could lawfully have re-acquired sole care of G. Thus a child who had made allegations of sexual abuse naming P.Q. as the alleged abuser could have been lawfully re-delivered into the sole and unsupervised care of that alleged abuser.

(d) As was emphasised in *Friedrich* v *Friedrich, cit. sup*., the reason for any apparent lack of ability or willingness on the part of a Hague Convention court to provide adequate procedures or remedies is irrelevant. The explanation might be a *lacuna* in the legal system itself (which is unlikely in view of the highly-developed and sophisticated system existing in France), or it might simply be the personal view or judgement of someone operating within the system, or some other reason. I do not consider that it is necessary for R.S. to establish whether the lack of protection resulted from the court system itself or from the actings or decisions of particular office-bearers within that system or from some other source. Applying the test in *Friedrich* v *Friedrich*, ("when the court in the country of habitual residence, *for whatever reason*, may be incapable or unwilling to give the child adequate protection"), it is unnecessary in my view to identify or to explain the reason for any apparent incapacity or unwillingness to provide adequate protection.

[66] Turning to proposition (5), bearing in mind the history of the case and the sequence of events from July 1998 to January 2000, I do not accept that the Court of Session in Scotland can return G to France assuming that the French courts will provide adequate protection for her, for the reason that the French courts apparently did not do so upon the termination of the 8-day order, despite having the information contained in the police interviews and the medical report by Dr. Vie le Sage. As Maitre Chauveau was careful to explain in para.39 of her Affidavit dated 8 March 2000: "If [R.S.] returns to France with her children, she would be able to [restore] the proceedings before the Juvenile Justice and could ask that the children be put in her care in the interim. *The decision lies with the Judge* ...". There is therefore no guarantee that on G's return a protection order of some sort will be put in place. On the contrary, if past events are taken as a guide, there is at least a possibility or a risk that a French court or equivalent authority might not put such an order in place.

[67] Turning finally to proposition (6): I am satisfied that in the exceptional circumstances of this case, R.S. has made out the defence of grave risk in terms of Article 13(b) in that there exists at least a possibility or a risk that the French courts will react to the information contained in the police interviews and the report by Dr. Vie le Sage in the way in which they did previously - even if that information is further elaborated and enhanced by the detail and comment contained in R.S.'s letter dated 15 November 1999, her Affidavit dated 7 March 2000, the report by Dr. Barton and Ms. Puckering dated 29 February 2000, the report by Dr. Herbison dated 1 March 2000, and any other additional material which is put before the court.

Where such a possibility or risk exists, then there is a concomitant risk that the child who has disclosed alleged sexual abuse might be lawfully re-delivered into the unsupervised care of the alleged abuser, to be alone in his company. Such a risk is in my opinion "more than an ordinary risk or something greater than would normally be expected on taking a child away from one parent and passing [her] to another ... the risk [is] a weighty one" (Nourse L.J. in *Re A (A Minor) (Abduction)* [1988] 1 F.L.R. 372. The risk amounts in my view to "a grave risk that [G's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." In relation to B, bearing in mind the further disclosures by G narrated by R.S. in paragraph 62 of her Affidavit dated 7 March 2000, relating not merely to alleged kicks administered to B, but also to alleged behaviour involving "drinking B's piddle from his willy, while holding B around the throat and saying to B `Tu vas mourir" (you're going to die)", I have also concluded that it is difficult for this court to assume at this stage that there is no truth in these allegations; and that bearing in mind the approach adopted by the French legal system towards G during November and December 1999, there is a related risk that B, a child who *may have* been subjected to some sort of physical and/or sexual abuse by P.Q., would be lawfully re-delivered into the unsupervised care of the alleged abuser, to be alone in his company. Such a risk amounts in my opinion to "a grave risk that [B's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

[68] I should add that counsel for P.Q. submitted that any *lacuna* occurring after the termination of the 8-day order was entirely attributable to R.S. It was said that R.S. should have made an application to the Juvenile Court. I do not agree. R.S. had done everything within her power to bring serious allegations of child sexual abuse to the attention of the appropriate authorities. She had obeyed court orders and co-operated with the authorities. Yet from 20 November 1999 onwards, no protective measures were put in place. On the contrary, the Juvenile Court, having on 6 January 2000 considered the police file including the interviews, and the medical report of Dr. Vie le Sage, and in the knowledge that P.Q. was actively seeking the return of the children to France (and ultimately to his care) with the assistance of the Hague Convention, closed the file stating "In the absence of risk to the children's health, safety or morals or the compromise of its educational conditions, it is appropriate ... to close our educational assistance procedure."

Conclusion

[69] Both counsel agreed that, in the event that the court formed the view that a defence in terms of Article 13(b) had been made out, the court has a discretion whether or not to order that both or either of the children should be returned to France.

[70] In exercising that discretion, I had regard *inter alia* to the following factors:

> **1. In none of the official assessments of the parenting capacities of the parties to date has there been any suggestion that R.S. is not a good parent, well able to look after the children. Accordingly, as there are at present unresolved, uninvestigated allegations of sexual abuse of G (and possibly B) naming P.Q. as the alleged abuser, it is a safe and convenient solution meantime to entrust the children to the care of the other parent, R.S., pending full investigation and inquiry. R.S. has the support of her parents and her sisters.**
>
> **2. The divorce proceedings in the Family Court, *, can in my opinion proceed without the physical presence of the children in France. The merits of the divorce can be explored. In relation to the children, there are many adult witnesses able to give the court evidence about the children, their health, and welfare: for example, the parties themselves, members of their families, * (one of the childminders), Dr. Delattre, Dr. Meunier, Dr. Vie le Sage, the police**

officers Marc Maserati and Nathalie Mas, Dr. Scalbert, Dr. Barton, Ms. Puckering, Dr. Herbison, and many others. In addition, there appears to be a video of a police interview of G. Bearing in mind the ages of the children, it may well be that nothing could be added by a judge in France attempting to interview the children.

3. The inadvisability of separating the children is mentioned in several productions: in particular -

(i) The decision of the Pontoise Family Court on 9 September 1999 (in the light of Mr. Dumez's recommendation that "in view of the parents' separation it is not desirable either that the children themselves should be separate when they are looked after by nannies"): "... it should be ordered that the children not be separated while taken care of by a nanny ..."

(ii) The report of Dr. Barton and Ms. Puckering dated 29 February 2000:

"8. THE EFFECT OF SEPARATING G AND B: G and B are used to being together and it is our opinion that their psychological and emotional wellbeing would be adversely affected were they to be separated. R.S. reported that they were distressed in the past when they were separated from each other. She also reported that both children were unhappy when the changes in their childcare arrangements resulted in them being placed with different childminders. The presence of their brother/sister has been a source of continuity during a period of uncertainty and they should not now be separated."

[71] In all the circumstances, in the exercise of my discretion, I have concluded that neither G nor B should be returned to France in terms of Article 12 of the Hague Convention as incorporated into United Kingdom law by the Child Abduction and Custody Act 1985. Accordingly I shall refuse the prayer of the petition insofar as it seeks that the respondent be ordained to return G and B "to France and the jurisdiction of the French Courts all in terms of the Child Abduction and Custody Act 1985 within forty eight hours or such other period as to the court shall seem proper; and failing such delivery for warrant for messengers at arms to search for said children and take possession of them and deliver them to the petitioner; and for warrant to open lockfast premises". I shall reserve the question of expenses to enable parties to address me on that matter.

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