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[12/12/2001; Outer House of the Court of Session (Scotland); First Instance]
A.Q. v. J.Q., 12 December 2001

OUTER HOUSE, COURT OF SESSION

OPINION OF LORD CARLOWAY

in the petition

AQ, Petitioner;

against

JQ, Respondent:

for

An Order under the Child Abduction and Custody Act 1985

Petitioner: Macnair; Balfour & Manson

Respondent: Davie; Drummond Miller WS

12 December 2001

1. Legislative Framework

The Child Abduction and Custody Act 1985 (c.60) introduced into domestic law the terms of the 1980 Hague Convention of the Civil Aspects of International Child Abduction. The Convention, in respect of which both the United Kingdom and Germany are contracting parties, 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 the 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...

Article 4

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

Article 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

Article 7

Central authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to ensure the prompt return of children...

Article 12

Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of proceedings before the judicial...authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention the authority concerned shall order the return of the child forthwith.

Article 13

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

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

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial...authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and a degree of maturity at which it is appropriate to take account of its views.

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

2. Facts and Reports

The petitioner lives in Weinheim, Germany, ostensibly in the same house, but in a separate flat, as her parents. The petitioner married the respondent in 1989. After the marriage, the parties lived in Weinheim. There are two children of the marriage, both born in Germany, namely a daughter ("N"), now aged 12, and a son ("S"), now aged 10. Both children are currently living with the respondent in Scotland. The parties separated on 14th February 2001. After the separation the children continued to live in the former matrimonial home. They did so with the respondent, the petitioner having left. Initially, after the first night when N had gone to stay with the petitioner, the petitioner had very little contact of any type with the children. On 14th March 2001, the petitioner applied for custody of the children in

the Magistrates Court of the City of Weinheim (Family Division). She was represented by a lawyer as was the respondent, who entered the process.

On 4th April 2001, Mrs. Nollert-Tecl, judge of the Court, pronounced the following decree (No. 6/6 of process) :

"1. An expert opinion is to be obtained on the matter of the bonds the children have with both parents, on the relationship of the children with each other as well as the bond tolerance of both parents...

2. By means of a provisional injunction, the right to make residence provisions for the children...shall be transferred to the Youth Welfare Department of the City of Weinheim."

In a statement of reasons for the decree, the judge said :

"There are indications that the children's father is trying to restrict the contacts between the mother and the children.

On the other hand, the father holds against the mother not to have taken care of the children since the parents' separation. The relationship of [N] at least to the child's mother is currently rather problematic.

Until the furnishing of the expert opinion, the transfer of the right to make residence provisions is to provide the Youth Welfare Department with a flexible instrument to maintain the children's contact with both parents on the one hand and on the other to interrupt the contact upon one child's emphatic refusal."

After the Court hearing, the petitioner had residential contact with the children. This had been arranged through Herr Huber, an official of the Youth Welfare Department. It was supposed to involve the petitioner staying in the matrimonial home with the children for two weeks while the respondent went away on holiday to Scotland. In practice, the children were at the flat in the grandparents' house

On either 19th or 23rd May 2001, prior to the production of the expert opinion, the respondent left Germany and went to Scotland, where he is originally from. He took the two children with him and did not return. He left a note (Pro. 6/15) for the petitioner in the following terms :

"By the time you read this, we - the Family Quinn will be well on our way, away from you and your unwanted lifestyle. If you thought that you could Destroy our life - not yours - but OUR life, and have it easy - Your wrong.

It's plain to see that you think you could walk away and leave behind your Debts and Responsibilities. Therefore I have decided to leave everything in your Hands. You broke it - so you can fix it. I've carried you for 15 years and will no longer. I'm prepared to wait for everything to go to court before I give 1 penny to pay for your Debts.

It's strange but without your presence our family life has become 10 times better. Even the kids have noticed it. See you in Court."

On 3rd July 2001 the expert, Rudiger Noack, Court and Family Psychologist, completed his report (Pro. 6/14) for the Court. The report was based on a number of psychological tests of the children and on interviews with the petitioner and respondent, the children, their maternal grandparents, their teachers and the Youth Welfare Department. It was very

detailed and ran to over seventy pages. In relation to the views of the children, the psychologist wrote :

"If N's statements are summarised, it becomes clear that during the first interview (19th April) she stated very clearly that she would rather live with her mother than with her father. She was equally clear, at the interview on 28th April, that she would rather stay with her father, principally because of her mother's relationship with K."

The description of S's views showed him to be less certain of where to live. The psychologist noted that the respondent made negative comments about the petitioner in front of the children. He formed the impression that although the respondent was well intentioned towards the children, he:

"fails to realise that he is causing the children to have a very strong conflict of loyalties when he talks negatively about the children's mother in their presence."

He noted inter alia that :

"There is considerable tension between the parents, to the extent that direct, constructive dialogue between (them) is currently impossible and will probably remain impossible for the foreseeable future. Both children are suffering severely as a result of this tension, and particularly as a result of the attempts to influence them, particularly from their father's side. Both children have been heavily influenced by their father to think - as he does - negatively about their mother and to see her as the "guilty party" in the separation... Both children are firmly rooted in their immediate regional and particularly their social environment, with their friends, grandparents, school etc. and they should remain at home there. The children have been severely damaged precisely because their father has torn them away from their social circle. The expert's impression of Mr [Q] is that his personality structure...is essentially stubborn, self-glorifying and contemptuous of the interests of others, almost to the point of illness."

He concluded that the best interests of the children lay with their living with the petitioner, whose environment was more balanced, peaceful and harmonious. Although he had originally thought that there might be generous contact with the respondent, because of his conduct in removing the children he had formed the view that there should be no initial contact at all until it became certain that he would not "kidnap" them again. He regarded the respondent's actions in that regard as child abuse from the psychological point of view. His report ended :

"Furthermore...Mr. [Q] is in need of intensive psychotherapy, perhaps even psychiatric treatment, because he is currently unable to distinguish right from wrong, and is equally blind to the well-being of the children."

A further hearing took place before the judge, Mrs. Nollert-Tecl, on 27th July 2001 (Pro. 6/2). The petitioner and her lawyer were present and Herr Huber represented the Youth Welfare Department. The respondent was neither present nor represented. At the hearing, the expert's report was considered. On 3rd August 2001 the judge "ordered and decreed" (Pro. 6/3):

"that the parental custody for the children...shall be transferred to the mother alone."

In the reasoning given by the judge, she included the following :

"When it became obvious that both the expert and the Youth Welfare Department were in favour of transferring the parental custody to the children's mother, the father left for Scotland with the children at the end of May 2001. An application to return the children according to the Hague Convention of October 25, 1980 was filed.

The parental custody was transferred to the mother alone pursuant to para. 1671 section 2 No. 2 of the Civil Law Code, as this is best for the welfare of the children in the Court's opinion.

According to the expert's findings, both children tend towards their mother, which with respect to the fact that she mainly took care of them until the parents' separation is not surprising.

Also the Court has no reason to doubt the mother's general suitability to take further care of the children.

In contrast to this, the children's father by his behaviour has shown that for him the children's needs are secondary to his own wishes and ideas. This is why he seems unsuitable to exert parental custody.

Although for him, too, the children's close bonds with their mother were obvious, he tried to drive a wedge between the mother and the children because of his hurt pride (due to the mother's turning to another partner) by forestalling contacts, unfavourably speaking about the mother and by trying to persuade the children that she alone was to blame for the breaking up of the family.

His influence on the children, especially on N, was so strong that they hardly dared to admit that they liked to see their mother, let alone live with her.

When the children's father realised that his intention to estrange the children from the mother and obtain sole custody would not be successful, he recklessly removed the children from their former environment and from the mother by abducting them to Scotland.

Therefore, the Court, the expert and the Youth Welfare Department are of the opinion that due to the father's irresponsible and reckless behaviour he was to be precluded from parental custody."

On 13th and 20th September 2001, the petitioner signed papers (Pro. 6/7, 6/8 and 6/89) authorising the current proceedings. However, the petition was only served on 7th November 2001. By interlocutor dated 14th November the court appointed a reporter with a view to ascertaining the views of the children. The reporter, Miss Poole, Advocate, interviewed the children and their school teachers in Scotland. In relation to N, the reporter said that she was :

"an articulate and confident girl...I formed the impression that she was more than capable of forming views and expressing them."

N described her childhood and events after the separation to the reporter. She expressed strong views about K and said that :

"She didn't want to go back to Germany because of 'that pervert' and 'if he is there...I won't go."

N is particularly upset because she is under the impression that the petitioner has not attempted to telephone her or even send her a card on her birthday. She is under the impression that this means that the petitioner does not care about her. She also thinks that the petitioner does not love her because the petitioner had left her alone during the period when she stayed with her after the separation. She expressed the view that she wanted to stay in Scotland even if K was not associating with the petitioner. As noted by the reporter :

"N said that the best thing in the world would be if her mum and dad were together again. The next best was to live with her dad in Scotland and see her mum as often as possible, but 'without him' (K)."

S was described by the reporter as :

"very different from his sister. He is a much quieter and less confident boy."

He said that he wanted to stay with the respondent but to live somewhere hot. He also expressed strong feelings about K. The reporter noted that :

"S was mostly, but not always, consistent that he wanted to live with his dad if he had to choose between his parents...I asked him if he knew that there was a petition in court for him to be sent back to Germany. He said "Bad idea". He said he had no reasons for saying that...He said he wanted to see his mum..."

In her summary, the reporter concluded that both children were capable of forming views for themselves. Both children thought that the ideal would be to live with both parents in Germany but otherwise to live with the respondent in Scotland. Both children missed the respondent and wanted contact with her. The reporter was also of the opinion that there had "undoubtedly" been "some influence exerted by the respondent over the children's views". They did now, however, actually hold the views expressed and would be upset if ordered to return to Germany.

The respondent lodged a report obtained from Brenda Robson, chartered psychologist, dated 4th December 2001 (Pro. 7/3). Dr. Robson had seen the earlier reports and also spoken to the children. This report recorded the expressed views of the children not to return to Germany and the main reason for this being the children's attitude to K. The report also narrated that the views of the children reflected the influence which the respondent has had over them during the last six months. Nevertheless, both children missed their mother. The report continued :

"Both children said that they would like to go to Germany to stay with their mother over the Christmas holidays, in the context of a contact visit. Both children said that they could, in the longer term and more permanently, return to live in Germany with their grandparents as their grandparents have played a large part in their lives and they miss their grandparents...Both children also said that they could return to live in Germany with their mother on condition that K did not also reside with their mother. They both understood that if they did this, their father would remain in Scotland and they would see him at holiday times.

On the surface, and certainly in the initial stages of discussions with the children, they stated that they wanted to stay with their father, but as the discussion went on and I asked them to look a bit more deeply at their situation and their relationship with their mother, it is apparent to me that they have a very strong pull towards living in Germany and miss their grandparents and mother...

I certainly do not have the impression that the children would be exposed to psychological or physical harm should they have to return to Germany. The children are still very young. It was noted in reports that S is an immature child and I would certainly agree with this. He does not present as a mature ten year old and his views are very much influenced by N's views. N is a chatty, confident girl but she too is still young and I believe that she genuinely loves both parents and is not sure which parent she would wish to reside with, except that she detests K

I am obviously not making a recommendation concerning a Residence Order and the German Court may, or may not, have reached the correct conclusion in awarding residence to [the petitioner]. In terms of the Hague Convention, I do not feel that there is a particularly strong case for refusing to return the children to Germany, where they were brought up and where they are missing their friends and family..."

Dr. Robson raised a point concerning the education of the children and them being a year behind here because of language difficulties. However, I was told that they were also a year behind in Germany although I was not able to ascertain definitively whether that was correct or not.

3. Disputed Material

(i) The Petitioner's version

According to the petitioner, after the separation the respondent would not allow her to see the children. At the hearing on 4th April, the petitioner maintained that the judge had wanted "joint" parenting but had not said anything about the respondent having sole custody. During the time when she had the children, she would only leave them alone for half an hour while she walked the dog (Affidavits Pros. 27 and 29). This was in the flat at the grandparent's house. On the respondent's return from Scotland after the two week holiday, the arrangements for the handover of the children were as agreed by the parties and Herr Huber.

The petitioner avers that the respondent had the permission of the Youth Welfare Department to take the children to Scotland but only temporarily to enable the boy to take his first communion. He was supposed to return with the children on 4th June.

The petitioner maintains that she is still involved with K but does not live with him (Affidavit Pro. 23). She maintains that she lives in the flat in her parents' house. She maintains that she has repeatedly tried to contact the children by telephone and letter. She says that she has sent them cards on the appropriate days (Affidavit Pro. 27). One card was returned because the address was incomplete.

(ii) The Respondent's version

According to the respondent (see Affidavit Pro. 7/1, and Supplementary Pro. 7/4)), the separation was caused by the petitioner commencing an affair with his best friend ("K"). On the day of the separation, the petitioner had admitted the affair and left the flat by arrangement. N had gone with her but had returned the next day upset that her mother was having an affair with K. The respondent maintains that the petitioner made no arrangements to maintain contact with the children, who were thereafter looked after by him and, while he was at work, members of his family from Scotland. On 5th March, the petitioner had requested contact when the children were on a two-week holiday in Scotland. This had resulted in the respondent being arrested for kidnapping and spending a night in a police cell.

By the time of the decree in April, the respondent had grown alarmed with the view of a Herr Huber. He thought that Herr Huber was biased against him. Although the Court had been inclined to award him custody, it was Herr Huber's intervention on 4th April that had prevented this in favour of obtaining the expert's report.

During the period when the children were with the petitioner, the respondent spoke to them every day and composed a detailed diary of events following concerns about their welfare, notably that they were actually living at the flat in the grandparents' house and were being left alone in that flat. Upon his return home, he had found the children alone and with no food.

He did take the children to Scotland because of his son's planned communion. He had not requested the permission of the Youth Welfare Department. However, because of his concerns about that Department's impartiality, he had discussed the whole issue of custody with the children whilst in Scotland and they had said that they did not wish to return to Scotland. As he avers in his answers :

"In light of his concerns about the German approach to the case, the Respondent took the view that he should not return the children to Germany."

He took the view that the German Court had decided custody without reference to the children's wishes. The children were now settled in Scotland and wished to remain here. Although he had encouraged contact between the children and the petitioner, N had told the petitioner that she could not write to her because she (the petitioner) was not living at the flat in the grandparents' house. N would be very distressed were she to be forced to return to Germany to live with her mother and K, whom she previously knew as a close family friend.

4. Submissions

(i) Petitioner

The petitioner maintained that it was not disputed that at the date of their removal from Germany in May 2001, the children were habitually resident in Germany. They remained so resident given the absence of any consent by the petitioner to any new habitual residence (Robertson v Robertson 1998 SLT 468). At the time of their departure from Germany, the right to determine the place of residence of the children had been vested by the Court in the Youth Welfare Department in terms of the court decree of 4th April 2001. That body had rights of custody in terms of article 5 of the Convention. At the very least the Court in Weinheim had custody rights once the petitioner had made her application. The removal or retention was in breach of these rights (In re H. (a Minor)(Abduction : Rights of Custody) [2000] 2 AC 291, Lord Mackay of Clashfern at 302 allaying the misgivings of Lord Prosser in Seroka v Bellah 1995 SLT 204). Either the children had been removed without that Department's or the Court's permission (the respondent's position) or they had been retained against its will (the petitioner's position). In both cases the removal or retention was wrongful (In re S. (a Minor)(Custody : Habitual Residence) [1998] AC 750, Lord Slynn of Hadley at 767). The Court required to order the return of the children under article 12 unless one of the elements in article 13 was made out by the respondent. These matters had not been made out. In the circumstances here, where the respondent had said that he would not return with the children to Germany in the event of that being ordered, the appropriate decree was one ordering delivery of the children to the petitioner in Scotland to enable her to take them back (Starr v Starr 1999 SLT 335 OH, Lord Abernethy at 340).

There had been no acquiescence in this case of the type described by Lord Browne-Wilkinson in In re H (Abduction : Acquiescence) [1998] 2 AC 72 at 88. The petitioner had

not "gone along with" the removal or retention. Mere delay could amount to acquiescence but there would have to be not only no outward signs of effort but no actual effort on the part of the petitioner to do something about the situation. The question was whether the petitioner had accepted that the children should remain in Scotland. Her actions in pursuing the German court action were inconsistent with this. According to counsel, an authorisation to the Youth Welfare Department from the petitioner to start Convention proceedings had originally been signed on 16th July and sent to the Scottish Executive on 7th August. He had drafted a petition but it had not been proceeded with because the Department was not eligible for legal aid. In any event, by that time it was the petitioner who had formal custody and so it was decided to raise the petition in her name. The authorisation and other paperwork did not reach the Scottish Executive until 5th October. A further petition was drafted but further documentation, such as affidavits, was needed before it could be lodged.

In relation to the objections of the children, it was conceded that N was of an appropriate age and maturity for her views to be taken account of. The same concession was not made in relation to S and it was submitted that there was insufficient material upon which to base a finding that he had reached the appropriate age and maturity. In any event, what he said was not an objection given the reported inconsistencies. The court required to make discrete findings on the age and maturity element as well as the objections themselves. In relation to what was being objected to, it was accepted that the realities had to be looked at and not simply whether the objection was to returning to the country as distinct from the person in it (In re S (Abduction : Custody Rights) [1993] Fam 242, Balcombe J at 250-1; Urness v Minto 1994 SC 249 Lord Justice-Clerk (Ross) at 265). In this case, the petitioner accepted that the Court should not simply look for an objection to a return to Germany but at objections to a return to the care of the petitioner in Germany.

In deciding the manner in which to exercise its discretion, the Court had to have regard to the policy of the Convention (P v S, Extra Division, 2nd June 2000, unreported; In re S Abduction : Custody Rights)(supra); In re R (Child Abduction : Acquiescence) [1995] 1 Fam LR 716, Balcombe LJ at 730, Ralph Gibson LJ at 737, cf Millett LJ at 735; Marshall v Marshall 1996 SLT 429, Lord Justice-Clerk (Ross) at 433). It also had to look at any general welfare considerations (Singh v Singh 1998 SC 68; P v S (supra), In Re T (Abduction : Child's Objections to Return) [2000] Fam CR 159, Ward LJ at 188)

The views of the children had been influenced to a considerable degree by the respondent over many months. The court ought to have regard to Herr Noack's analysis as well as those of the other two independent reporters on that matter.

(ii) Respondent

The respondent's contention was that there had been no wrongful removal or retention. The decree of the court in Weinheim was simply for the purpose of enabling the expert to carry out his functions and that purpose had been exhausted by the time the children had left Germany. The reality had been that the Youth Welfare Department had allowed the children to reside with the respondent with the petitioner exercising contact only. It was known that the respondent and the children were going to Scotland at the end of May for the purpose of S's first communion so it could not be said that there had been a wrongful removal. The petitioner had no right of custody at that time. The respondent did not assert any right of custody at that time either. Neither the Youth Welfare Department nor the court in Weinheim had rights of custody. All the court had done was make a temporary order. This was not sufficient to give the court such a right (In Re W (Minors)(Abduction : Father's Rights) [1999] 1 Fam 1, Hale J at 7,9, 19; Seroka v Bellah (supra)). There was no evidence that the German courts would assert a right of custody in these circumstances or

that German law permitted either parent such a right. Once in Scotland, the respondent was entitled to take the decision to remain. The habitual residence of the children had then changed.

The respondent next maintained that the removal or retention of the children had been acquiesced in. The present petition had been raised only on 7th November, albeit that there had been informal intimation of the intention to raise it on 19th October. Other than that, there had been silence from Germany apart from the odd telephone call. It had been said that there had been an earlier petition proposed by the Youth Welfare Department but the respondent was unaware of that. No explanation had been proffered for the delay. The procedure here was summary and the petitioner had a duty to act with alacrity if she expected the court to afford her the remedy sought (In re K (Abduction : Child's Objections) [1995] 1 Fam LR 977, Wall J at 985-6; In re R (Child Abduction : Acquiescence) (supra), Balcombe LJ at 725-727; In re H (Abduction : Acquiescence) (supra), Lord Browne-Wilkinson at 88). There had been almost no communication after it must have been clear that the respondent did not intend to return with the children. She had not sought contact nor had she attended the hearings in Scotland.

The respondent did not maintain that there was a grave risk that the return of the children would expose them to physical or psychological harm. However, he did submit that each child objected to being returned and had attained an age and a degree of maturity at which it was appropriate to take account of their views. Because of this, their return would place them in an intolerable situation. The views of the children as set out in the reports were that they did not wish to return to Germany and their mother's care. In N's case there were valid reasons for this. First, there was her primary reason, namely her dislike of K. Secondly there was her notion that her mother had not shown any interest in her after the separation. This was despite the absence of any objections to contact by the respondent. Thirdly, there were the incidents where she had been left alone in the flat at the grandparents' house (see the respondent's diary Pro. 7/5). In relation to S, he was very close to N and his relationship with his sister was of crucial importance.

The respondent was highly critical of the report of Herr Noack, especially in relation to the more extreme statements made in connection with the potential damage allegedly done to the children by the respondent's removal of them from Germany. It was said that there was no evidence of any such damage. This report had suggested that the children should have no contact with the respondent upon their return to Germany. It said that the children were frightened of the respondent but there was no evidence of that either. There was also no evidence to support the view that the respondent had been deliberately influencing the children against the petitioner. One problem in the case was that the German court had made up its mind on the custody issue based upon this extreme report. On the other hand, the children were reasonably well balanced and their views should be respected.

Once it was demonstrated that a child objected to being returned and that the child had attained the requisite age and maturity, it then became a matter for the court's discretion whether the child ought to be returned albeit that the policy of the Convention had to be borne in mind (S v S (Child Abduction) [1992] 2 Fam LR 492, Balcombe LJ at 500-501; Urness v Minto (supra), Lord Penrose (Ordinary) at 258-260; Marshall v Marshall (supra)). In this case, it was also important to notice that the return was not simply to the state but to the petitioner. That reality could not be ignored (The Ontario Court v M and M (Abduction : Children's Objections) [1997] 1 Fam LR 475, Hollis J at 481 quoting Balcombe LJ in In re R (Child Abduction : Acquiescence) [1995] 1 Fam LR 716 at 729). The overriding factor in many of the cases has been that the child's views must be genuine and validly held (In re HB (Abduction : Children's Objections) [1998] 1 Fam LR 422, Thorpe LJ at 427; In re

M (Abduction : Child's Objections [1994] 2 Fam LR 126, Butler-Sloss LJ at 136). The Court could look at all the circumstances and determine whether, in light of their objections, the return of the children would be intolerable from their viewpoint.

The respondent accepted that if the court were to order the return of the children to Germany then it would be appropriate to make an order for delivery in Scotland in view of the respondent's unwillingness to go to Germany.

5. Decision

(i) Wrongful Removal and Retention

I am satisfied here that there has been either a wrongful removal of the children or at least a wrongful retention. In the absence of either pleadings or proof to the contrary, I would have assumed that German law was the same as Scots law to the effect that, in the absence of a court order varying the situation, both parents would have rights of custody (i.e. general parental responsibilities and rights) in respect of the children. These rights would include, but would not be confined to, the right to determine place of residence. In this particular case, there had been a court order dated 4th April 2001 transferring the right to determine the residence of the children to the local Youth Welfare Department. That order had not been rescinded nor had its purpose been achieved. That purpose certainly included the obtaining of the opinion from the expert. Although the expert may have carried out some of his investigations, his report had not been completed at the time of the removal or retention of the children. Furthermore, the court order was also intended to resolve any problem stemming from the respondent "trying to restrict the contacts" between the petitioner and the children by regulating such contact. In these circumstances, at the time of the removal of the children from Germany, the petitioner herself retained parental rights other than that relating to residence. The specific parental right to determine residence had been and remained vested in the Youth Welfare Department by the Court. Indeed, it could probably also be said that the Court had parental rights too for Convention purposes (In re H. (a Minor)(Abduction : Rights of Custody), (supra) Lord Mackay of Clashfern at 302).

The terms of the letter left by the respondent for the petitioner might be thought to suggest that, despite the terms of his pleadings and affidavit, the respondent left Germany with the children without any intention of returning. However, I am conscious of the need to avoid the resolution of apparent conflicts between the terms of affidavits without adequate material upon which to do so. Nevertheless, it can also be said that, on the respondent's own version of events, he had not obtained any permission from the Youth Welfare Department or the Court to go to Scotland with the children and certainly not to remain there after the stated purpose of doing so had been achieved. As soon as he decided that the children were to remain in Scotland, which must have been in early June 2001 at the latest, that retention was contrary to the rights of custody and wishes of the Youth Welfare Department, the court and the petitioner. It was wrongful in terms of the Convention.

Indeed, it should be borne firmly in mind that at the time of the removal or retention of the children, there were active proceedings for "parental custody" of the children in the court at Weinheim. In that case, in which both parties were initially legally represented. The respondent states that when he decided that the children should stay in Scotland, his reasoning was at least partly that he considered that the German authorities would decide the case in favour of the children living with the petitioner. The retention or removal was therefore deliberately to thwart any potential decision of the Court of the habitual residence of the children. That residence was Germany and remains so in the absence of any agreement or order to the contrary. On the face of these events, this is therefore perhaps a

more extreme example of wrongful removal or retention than the cases where no court process is extant.

Whether that be so or not, since I have held that there has been a wrongful removal, or at least a wrongful retention, article 12 requires the return of the children forthwith unless one of the matters set out in article 13 is established.

(ii) Acquiescence

Whether a parent has acquiesced in the removal or retention of a child depends on the particular facts and circumstances of the case. There are no firm rules on the necessary period of time which requires to elapse before acquiescence can be found proved. The question is whether looking at all the circumstances it has been established that the petitioner "went along with" the continued presence of the child outwith Germany. This is simply affording the word "acquiesce" its ordinary meaning. It involves looking at the subjective intention of the petitioner during the period before she took action to see what, as a matter of fact, she was thinking (In re H (Abduction : Acquiescence) (supra), Lord Browne-Wilkinson at pp. 87-88).

In this case I do not consider that there is any material basis for a successful plea of acquiescence. It was early June 2001 before the petitioner realised that the children were not returning to Germany. Not surprisingly, she continued with the case already in the German courts until it was concluded in early August after a hearing in late July. It was the respondent who failed to appear at that hearing. Although it was maintained that he had received no intimation of the date of that hearing, he had initially instructed lawyers to represent him in the process and, had he wished to do so, the respondent could have kept himself informed of that process. By the time of the resolution of the case in the German courts there seems to have been some form of attempt by the Youth Welfare Department to make an application under the Convention, hence the reference to it in the Weinheim court order of 3rd August 2001. For reasons not fully documented, that application did not reach the stage of a petition being lodged. Although I have no reason to reject counsel's explanation of what was going on, in the absence of the documents referred to by him I do not feel that I am in a position to make any positive findings about the matter in the absence of any concession by the respondent. In any event, the petitioner authorised the current proceeding in mid September 2001 albeit that it took almost two months to get a petition into Court.

I am satisfied that the petitioner has acted with reasonable speed in all the circumstances and has done nothing to demonstrate that she was "going along" with the children remaining in Scotland. On the contrary, her actions have been designed throughout to secure their return not only to Germany but also to her care.

(iii) Children's Objections

In S v S (Child Abduction) (supra) Balcombe LJ set out (at 500) his views on the facts necessary to "open the door" to a respondent under article 13. These were first, that the child objected to being returned and secondly that the child had reached the appropriate age and maturity at which it was appropriate to take account of his or her views. In this case, the children are now aged 12 and 10. It is not disputed that the older child meets the criteria in the article. Although the younger child is described as immature for a 10 year old, the general consensus of the reports is that he is capable of forming a view of his own. I would have been surprised if a child of that age, even if immature, was not so capable. In the circumstances, I consider that both children have attained the appropriate age and maturity when their views can be taken into account.

In looking at the objections, as accepted by counsel for both parties, I will consider the objections in the context of being returned not only to Germany but to the care of the petitioner (see In re R (Child Abduction : Acquiescence) (supra), Balcombe LJ at 730). Both children have expressed their objections to being returned to Germany (i.e. to the sole care of the petitioner and/or the petitioner and K) in the manner and for the reasons detailed above in the extracts from the two reports from Miss Poole and Dr. Robson. This is so even in the case of S whose objection seems to be very much weaker than N's.

Given that I have found that the children object to being returned and are of an appropriate age and maturity, whether they should be returned to Germany becomes a matter for the court's discretion. In exercising that discretion, the court can take account of a wide number of factors. These should no doubt include the general policy of the Convention that, subject to certain exceptions, children should be returned once a wrongful removal or retention is established (P v S (supra) Lord Prosser at paras. 23 and 25; Marshall v Marshall (supra) Lord Justice-Clerk (Ross) at 433; S v S (Child Abduction) (supra) Balcombe LJ at 501). In this case I do take that into account. It is an important matter in a case such as this where the children were removed or retained during the existence of a court process and when the residence of the children was being supervised in terms of a court order made in a defended process.

The objections made by the children must also be weighed in the balance. In this case this applies especially to N given her age and maturity but also, albeit to a lesser extent, to S. However, I note that in S v S (Child Abduction) (supra) Balcombe LJ said (at 501) :

"...if the court should come to the conclusion that the child's views have been influenced by some other person, e.g. the abducting parent...then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention...On the other hand, where the court finds that the child or children have valid reasons for their objections to being returned, then it may refuse to order the return."

In considering the weight to be attached to the objections, I had three reports from independent persons analysing the views of the children, albeit that the first chronologically related to the situation prior to the removal of the children from Germany. All three reporters made the assumption that the views of the children in relation to returning to their mother's care had been influenced by the respondent. In each case, their observations and experience entitled them to reach that assumption. In the case of Herr Noack, he appears to have observed the negative comments by the respondent about the petitioner in the presence of the children at first hand. Miss Poole describes the influence as "undoubted" but inevitable given the time that the children have spent with the respondent over the last few months. As Miss Poole also comments, however :

"If he has not been encouraging contact with the petitioner...then he is also influencing N (and to some extent S) in thinking their mother does not care for them".

Dr. Robson reached the more positive view that the respondent had been providing N with negative information about her mother.

In examining the validity of the children's objections, I noted that there was no indication in any of the evidence that the respondent had done anything material by way of encouraging the children to maintain contact with the respondent. There is a conflict of evidence as to whether or not he has actually prevented the children from contacting the petitioner and vice versa which I am unable to resolve purely upon documentary evidence. Suffice it to say, I am not satisfied that the petitioner has being doing anything other than taking reasonable

steps to maintain contact with the children. For whatever reason, her efforts have not met with success. I am also not satisfied on the material presented that the petitioner left the children alone for any material periods during the time when they lived with her after the separation. In that regard, I was not impressed with the diary produced. Although the children have expressed a dislike for K, I am further not at all satisfied that this view has derived from their own thinking as distinct from being adopted from the expressed, and perhaps in his case to a degree understandable, views of the respondent.

In short, although the children no doubt currently hold the expressed views, I do not consider that there is substance in the merits of the views. They are not views which are valid in fact. They have been produced to a large extent as a result of the respondent's influence over the children since the separation. For these reasons, I do not attach great weight to the expressed objections in the circumstances. I do accept, however, that because the views are currently held, there will be a degree of upset to the children as a consequence of an order for their return to Germany and I weigh that in the balance.

I have also had regard to the general welfare of the children (Singh v Singh (supra), Lord Prosser at 72). I understood both parties to submit that I could treat the reports in the case as evidence from which I could find certain facts established albeit that I could not resolve conflicts between affidavits at least in the absence of independent material. I had the advantage of a report from psychologist appointed by the Court in Germany. This report was subjected to considerable scrutiny and criticism by counsel for the respondent. It is perhaps fair to comment that the form of language used in the report (read in translation at least) would not accord with what the courts are familiar with from psychologists in this jurisdiction. However, that is not, of itself, a sound reason for rejecting much of the substance of the report. The report explained that the children had, prior to the separation, been cared for mainly by the petitioner. It expressed the view that the petitioner provided a more balanced, peaceful and harmonious environment. The children were firmly rooted in their environment in Germany, where they had lived all of their lives. Although counsel made a valiant attempt to demonstrate that there was no evidence to demonstrate that the removal of the children from that environment had caused them any psychological trauma, I would be very surprised if such damage had not occurred. The expert's ultimate conclusion was that the children would be best in the care of the petitioner. The court in Germany agreed, albeit without the advantage of having the respondent's then current position before it. That ultimate conclusion was one which, based on the material in that report, it is difficult to resist. Having regard also to the comments of Dr. Robson relative to the attachment of the children to their mother and Germany, I am of the view that the general welfare considerations also point to the interests of the children lie in their being returned to the care of the petitioner in Germany. I should add that I have also weighed in the balance the respondent's position that he does not wish to return to Germany and that, if the court in Weinheim follows Mr. Noack's recommendations, he may not have contact with the children initially. However, resolution of that and indeed all future residence and contact matters are best dealt with in the court of the children's habitual residence. From all of this, it also follows that I do not consider that, in going to Germany contrary to their present wishes, the children will be exposed to an intolerable situation.

In these circumstances I will repel the respondent's pleas-in-law and ordain the respondent to return the children N and S forthwith to Germany and that by delivering them to the petitioner in Scotland within seven days. I will attach the usual ancillary warrants to that order.

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