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HC/E/UKs 577 [06/03/2003;Outer House, Court of Session (Scotland);First Instance]
J.S. v S.S.

OUTER HOUSE, COURT OF SESSION

OPINION OF LORD CLARKE

In the Petition of J.S. Petitioner; against S.S. Respondent: for AN ORDER UNDER

THE CHILD ABDUCTION & CUSTODY ACT 1985

Petitioner: Loudon; Morisons

Respondent: Davie; Drummond Miller

6 February 2003

Introduction

[1] In this petition the petitioner seeks return of his two children, C.S., born 7 April 1993, and A.S., born 27 November 1995, to the state of Western Australia. The respondent is the petitioner's wife and mother of the children. The application is made under the Child Abduction & Custody Act 1985.

[2] It is not in dispute that prior to 27 November 2001 the two children had their permanent residence in Western Australia. Nor is it in dispute that on that date the respondent removed the children to the United Kingdom, without the knowledge or consent of the petitioner.

[3] On 9 October 2002, the Lord Ordinary, Lord Abernethy, granted warrant for service of the petition on, among others, the respondent. He also interdicted the respondent, ad interim, from removing the children from their temporary place of residence or furth of Scotland. A first hearing was fixed in the matter for 29 November 2002. The hearing was continued until 18 December 2002 when the Lord Ordinary fixed a second hearing in the matter. The case then came before me for the second hearing on 15 January 2003. Counsel for both the petitioner and the respondent invited me to determine the merits of the application on the basis of affidavit evidence together with certain productions which each side had lodged.

[4] At the commencement of the hearing I was advised that the respondent accepted that, at the time of the children's removal, by the respondent, from Western Australia, the petitioner had "custody rights" as that expression is defined in Article 5 of the Hague Convention on the Civil Aspects of International Child Abduction, which Convention contains the relevant law, applicable in the present case, by virtue of its incorporation into Scots Law by the Child Abduction & Custody Act 1985.

Article 5(a) of the Convention provides that:

" '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".

I was referred, by counsel for the petitioner, to 6/4 of process. That is a copy of a letter dated 27 July 2002 addressed to the Scottish Executive's Justice Department, from a senior legal officer of the International Family Law section of the Attorney General's Department of Australia. In that letter it is stated, among other things, as follows:

"I attach a new application under the Hague Convention from J.S. seeking the return to Australia of his daughters, C. and A.. As you will see from the application, the parents are married and no orders have been made. Accordingly, under Australian law, both parents retain parental responsibility for the children. Parental responsibility, which encompasses the Convention concept of rights of custody in Western Australia, is governed by sections 68 and 69 of the Family Court Act 1997 (W.A.).

2. Section 68 defines 'parental responsibility' in the following terms:

'68. In this part, "parental responsibility", in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.'

4. Section 69 established the rights of parents:

'69(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

(2) Sub-section (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or remarrying.

(3) Sub-section (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

5. The effect of sections 68 and 69 is that both parents of a child retain joint parental responsibility for the child until the child reaches the age of 18. Therefore, in this case, the applicant father has rights of custody in relation to his daughters. The mother's removal of the girls to Scotland is in breach of the father's rights of custody within the meaning of Article 3 of the Convention'."

[5] Mrs Davie, counsel for the respondent, informed me that she accepted that, on the basis of what was said in that letter, as just quoted, the petitioner had custody rights under the relevant law of Western Australia at the time of the children's removal. In addition she accepted that the removal of the children was in breach of the petitioner's custody rights. She, moreover, intimated that the respondent was not seeking to resist the order which the petitioner sought, being granted, on the ground that there was, in terms of Article 13(b) of the Convention, a grave risk that the children's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation, notwithstanding that averments on the foregoing lines had been made in the respondent's answers to the petition. By virtue of Article 13(b) of the Convention the existence of such a great risk allows the court to refuse to order the return of a child who had been wrongfully removed in breach of custody rights. Nor, notwithstanding what was averred in the respondent's answers, was the respondent now resisting the application on the basis that the children objected to their return, which may allow the court to refuse to order the return of children notwithstanding their removal was wrongful.

The Issues

[6] The petitioner's application was, I was informed by Mrs Davie, resisted on three bases. The first was that the petitioner did not meet what I will describe as the "threshold requirement" set out in the Convention for establishing that the removal of the children was wrongful. The threshold requirement is to be found in Article 3 of the Convention which provides as follows:

"The removal or the retention of a child is to be considered wrongful where- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention".

The respondent's contention was that, on the evidence before the court, the petitioner had failed to show that at the time of the removal of the children by the respondent custody rights attributable to the petitioner "were actually exercised, either jointly or alone, or would have been so exercised but for the removal". That being so, counsel submitted, the application must fail because one of the necessary preconditions before a removal could be considered wrongful had not been met.

[7] Even if the court were satisfied that the threshold requirement had been met by the petitioner and the removal was wrongful, in terms of the Convention, the court had a discretion by virtue of Article 13(a) not to order the return of the removed children where:

"the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention".

It will be necessary to consider, in due course, the relationship or interplay between the requirements of Article 3(b) and the provisions of Article 13(a) just referred to but for the moment it is sufficient to note that the respondent's position was that, on the evidence, Article 13(a) did come into play and the court therefore had a discretion not to order the return of the children which she would invite me to exercise.

[8] The third basis of opposition by the respondent was to the following effect. Even if the court was satisfied that there had been a wrongful removal of the children, the court should refuse to order their return to Western Australia because the petitioner had acquiesced in the removal of the children. In that respect counsel for the respondent was founding on the particular provisions of Article 13(a) of the Convention which are to the following effect:

"Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of a child if the person, institution or other body which opposes its return establishes that- (a) the person, institution or other body having the care of the person of the child ... had ... subsequently acquiesced in the removal ...".

The Factual Background

[9] In moving me to grant the application, counsel for the petitioner, under reference to the pleadings of the parties, and the affidavit evidence lodged on their behalf, took me through the background to the children's removal. Prior to July 2001, the parties lived together with the children, at the matrimonial home at Western Australia, Australia. In his affidavit, 6/6 of process, paragraph 11, the petitioner depones that:

"In or about early June 2001, S. proposed that we separate on a six month trial basis. I stated that I could not deal with the uncertainty of that proposal and that I could only continue on with my life. I felt that S. resented this. On or about 10 June 2001, S. and I separated. She continued to reside in our matrimonial home at Western Australia (the 'matrimonial home') and I rented premises at Western Australia. Shortly prior to the separation I became clinically depressed and was prescribed anti-depressants and Valium. This condition was brought on by the deterioration of our marriage. I have no prior history of mental illness".

The petitioner in her affidavit, 11 of process, places the date of the parties' separation as being 26 June 2001 and attributes it to their relationship becoming increasingly difficult due to the petitioner's behaviour towards her. For the purposes of the present application the discrepancies as to the reason for, and date of, the separation are immaterial. In her affidavit the respondent states, at paragraph 3:

"During the period between June and November 2001, my husband did exercise contact with the children on a fairly regular basis. However, he used to come to the house on an almost daily basis on the pretence of seeing the children but did not pay much attention to them. His reason for being in the house appeared to be to have contact with myself".

In his affidavit at paragraphs 12 and 13, the petitioner refers to his having liberal and regular contact with the children during the period from July to November 2001. He states that he visited the children every afternoon and, on occasions, in the morning, before work. He also refers to weekend contact when the children were taken to visit the petitioner's parents and other relatives. As has been seen in her affidavit, the respondent questions the motives of the petitioner in making this contact. Counsel for the respondent did not, however, seek to rely on any such matter in opposing the application.

[10] The petitioner, in his affidavit, describes at paragraphs 14-21 the events surrounding the removal of the children by the respondent. Both he and the respondent are at one, in their affidavits, that the parties had an argument on 21 November 2001, following which the petitioner attempted suicide, as a result of which he was admitted to a psychiatric hospital as an involuntary patient. The respondent does not give any indication, in her affidavit, as to what the argument was about, but the petitioner goes into some detail in this respect. He states at paragraphs 14-16 as follows:

"At approximately 7.30am on 20 November 2001 I was greatly distressed to receive a telephone answering machine message from S. stating that I would never see the children again. I called her to ascertain the reason for her message and to advise her that I would visit her so we could discuss contact arrangements for the children generally. S.'s message came as a great shock to me considering that up until this time I believed that contact and the separation generally were proceeding smoothly.

15. When I arrived at the matrimonial home, S. denied me access to the premises. During our brief conversation she expressed anger and resentment at my new relationship with S.W. whom I met on 28 September 2001. S. and I had previously discussed the possibility that each of us might form new relationships and at that time she seemed to accept that. Shortly prior to S.'s telephone message I advised her that I intended entering into a new relationship and again she seemed to accept this.

16. S.'s threats to deny me access to the children caused me great stress and anxiety. On the morning that S. advised me that contact would be denied to me I called my employer to say I would not be attending work that day. On the way home from the matrimonial home, I collided with a roundabout and punctured one tyre. In my confused and distressed state I panicked when I could not operate the car jack to change the wheel. I then sought assistance from a resident close to where the vehicle was parked. The person I spoke to was unable to assist me. At this stage I was extremely distressed and disorientated. I decided that I would commit suicide. I then drove approximately 500 metres to a chemist and obtained a box of syringes with the intention of injecting myself with poisons I carried for work purposes in my vehicle. I then drove several kilometres to my home causing the tyre to sheer off the rim. The Police were called to my premises as a result of information received from the resident from whom I sought assistance. The police discovered me poised to inject myself with termitecide poison. I was attempting to commit suicide. I was immediately detained and taken to Heath Campus where I was assessed, sedated and involuntarily admitted to Hospital on 21 November 2001."

In her affidavit, the respondent states that on one occasion when the petitioner was in hospital and she was visiting him he became threatening towards her. She goes on to say, at paragraph 5 of her affidavit, that, on another occasion, while the petitioner was in hospital, he phoned her and demanded that she bring the children to the hospital to visit him. She told him that the hospital was no place for the children at which point he screamed obscenities at her until she hung up the telephone. At paragraph 6 the respondent depones as follows:

"He telephoned back a couple of hours later at which time he appeared calm and said to me in a normal but threatening voice, 'You better get a Restraining Order out because when I get out of here in seven days time, those girls won't have a mother or a father'. I took this threat seriously because of the manner in which it was said and because of my husband's previous behaviour".

The respondent left Australia with the children on 2 December 2001. The petitioner was discharged from hospital on 5 December 2001.

Article 3(b) of the Hague Convention - Meaning and Application

[11] On the basis of the facts that I have just set out, it was contended, by counsel for the respondent, that, at the time of the children's removal, the petitioner's rights of custody were not being actually exercised in terms of Article 3(b) of the Convention and that, accordingly, the removal of the children was not wrongful. The way in which counsel put matters was that by his attempt to commit suicide and his conduct leading up to his detention in hospital, taken together with his condition and conduct while he was so detained, "he was not capable of exercising his custody rights" at the time of the removal. Counsel referred me to a copy letter from the respondent addressed to the petitioner's sister and family, which was attached to the petitioner's affidavit as JGD1. In that letter the respondent wrote:

"Due to your brother's instability and threats I have had to make the difficult decision to leave Perth for a while with the girls. As a mother I am sure you will understand that I couldn't stay here and be a waiting target for him. I need some sort of break and time and space to think and so do the girls, away from this emotional roller coaster". That letter demonstrated, it was contended, the petitioner's state of mind at the time of the removal and the reason for the respondent's removal of the children. Counsel also referred me to the statement of the petitioner, at paragraph 17 of his affidavit, where he depones, after having referred to the respondent's visit to him in hospital, as follows:

"In hindsight I was not in full control of my emotions due to my mental state and due to the medication I was required to take. Accordingly, we did not discuss our separation or arrangements for the children".

That statement, it was contended, amounted to an admission by the petitioner that, while in hospital, he was not capable of exercising his custody rights. Counsel went on to point out that the petitioner did not, apparently, in the event, take any steps until February 2002 to seek advice regarding the return of the children. This suggested, that he recognised that, until that time, he was not in a fit condition to exercise custody rights in relation to the children.

[12] In dealing with this ground of opposition to the application, I require to consider the ambit and effect of the provisions of Article 3(b) of the Convention in relation to the question of "actual exercise of custody rights". In this connection I was referred, by counsel for the petitioner, to the unreported opinion of Lord Wheatley in the petition of O'R 3 May 2002 (unreported). Having decided that the petitioner, in that case, had custody rights for the purposes of the Convention, where she had applied for custody and access to her children to a court in the Republic of Ireland when they had been, before then, removed by the respondent to Scotland, his Lordship had to consider whether the conditions imposed by Article 3(b) before

a removal be treated as wrongful, had been met. The position in the case before his Lordship was that the children had been in the physical custody of the respondent, since the parties separated in 1999, and when the petitioner had applied to the court in Ireland for custody and access. The petitioner had been granted access rights but she had, in fact, been unable to exercise these. His Lordship concluded that having regard to the application by the petitioner to the court in Ireland for custody and access, the court in Ireland, itself, had rights of custody of the children for the purposes of the Convention. His Lordship, in that situation, (at paragraph 16 of his opinion) said:

"In all the circumstances I have concluded that the application before the Irish court was one concerned with both custody and access; that therefore the removal of the children from the jurisdiction in defiance of the court order for access was in fact a breach of the custody rights, which by that time had vested in the court and also in the petitioner; and that the removal of the children from the jurisdiction of the Irish court was wrongful in terms of the Convention".

His Lordship then went on (at paragraph 18 of his opinion) to say as follows:

"There is, however, another aspect of Article 3 which requires to be considered. Article 3(b) provides a further condition which must be satisfied before the removal of a child can be considered wrongful. In particular, it stipulates that at the time of the removal of the child the rights of custody must actually be exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The question of the exercise of custody rights was fully considered in Friedrich v Friedrich 78 F. 3d 1060, a case heard before the United States Court of Appeals for the Sixth Circuit in 1996. The court was faced with an application by a German citizen to have his son returned to Germany from the United States in circumstances where the child's mother had removed the child to America. The court considered the question of common law definition of the word 'exercise' and concluded that any definition or description of that term should be liberal. The reasons for that conclusion was that the court felt unsuited to determining the consequences of parental behaviour under the law of a foreign country, was reluctant to get involved in the decision about the adequacy of one parent's exercise of custody rights, and recognised the difficulties of an alien jurisdiction in assessing the complex issues that arise out of questions of custody and access. The court therefore noted, with approval, the principle that the Convention leaves the full resolution of custody issues to the courts of the country of habitual residence and went on to suggest that a person cannot fail to exercise custody rights under the Hague Convention short of acts which constitute clear and unequivocal abandonment of the child. While it might be going too far to suggest that only clear and unequivocal acts of abandonment may constitute a failure to exercise custody rights to a child in every case, it is I think appropriate that the court of habitual residence at the time of the removal of children should normally be the court that will determine the complex issues of custody and access. As the court in Friedrich indicated, that it is consistent not only with the clear spirit of the Convention but also with common-sense. (It should be noted that in the case of Friedrich the parent guilty of removing the child from the jurisdiction had in fact an award of custody in her favour.) The purpose of the Convention is to prevent the frustration of a court process involved in examining issues of custody and access of children by the simple expedient of removing those children from the jurisdiction of the court. It may well be, as has been pointed out in the past, that such situations will produce difficult and unfortunate consequences, where children require to return to their place of residence as a result of applications such as the present. But it is clear that the Convention recognises that the consequences of a departure from such a principle of protection of the custody rights of parents in jurisdictions covered by the Convention is far more important. I therefore think that it can only be in the most extreme cases that a parent can be said to have failed to exercise his or her custody rights. In considering such a situation, a number of issues will have to be borne in mind. For example, a parent will not be failing to exercise custody rights even though that parent had not made an application to the court. Contact between a parent and children may not have taken place because of the actions of the other parent. Children can be, and frequently

are, manipulated by one parent for the purpose of excluding contact with the other. In all of these issues it is extremely rare for the receiving court to be able satisfactorily to decide where the truth lies." It should be noted that in the case with which Lord Wheatley was concerned, the respondent did not, it seems, seek to go on to resist the return of the children by relying on the provisions of Article 13(b) of the Convention in relation to "actual exercise of custody rights".

[13] I was provided with a copy of the decision in the Friedrich case to which Lord Wheatley referred in his opinion. It contains guidance as to how the provisions of the Convention should be considered and applied. At page 2 of the electronic copy of the judgment with which I was furnished, the court refers to two general principles inherent in the Convention, the first being that a court in the "abducted-to nation" has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute. The second principle is that the Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court. It seems important to me that since the Convention must be construed in a purposive way, it is correct never to lose sight of those two principles when questions of interpretation of particular provisions of the Convention arise. The court in Friedrich went on to point out that the removal of a child from the country of its habitual residence is "wrongful" under the Hague Convention if a person in that country is, or would otherwise be, exercising custody rights to the child under that country's law at the moment of the removal and that the plaintiff in an action for return of a child "has the burden of proving the exercise of custody rights by a preponderance of the evidence". The court, at page 3 of its judgment, observed that the Convention, however, does not define "exercise". While the court could conceive of the court, to which the application for return of the child is made, embarking on a quantitative and qualitative assessment of the activities by the party claiming breach of their custody rights, to enable them to reach a view as to whether or not that person not only had de jure custody rights, but that he was exercising them "sufficiently" to make the removal of the children wrongful, they considered that any such exercise should be avoided. In that regard they said as follows:

"Enforcement of the Convention should not be made dependent on the creation of a common law definition of 'exercise'. The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find 'exercise' whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child".

Later at pages 4-5 of their judgment the court said:

"We therefore hold that, if a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to 'exercise' those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child. Once it determines that the parent exercised custody rights in any manner, the court should stop - completely avoiding the question whether the parent exercised the custody rights well or badly. These matters go to the merits of the custody dispute and are, therefore, beyond the subject matter jurisdiction of the federal courts" (emphasis added).

It seems to me that, with respect, the American court was clearly quite correct in emphasising the risks of embarking in a detailed quantitative or qualitative examination of the way in which custody rights were being exercised by the petitioning parent, at the time of the removal of the children, provided that he had established that he has de jure rights, because to do so almost inevitably would lead to straying into the territory which the court dealing with such applications is not meant to go, namely the assessment of the question as to whether the petitioner is a fit person to have such custody rights. It is to be noted that the court in Friedrich, just as was the position in the case before Lord Wheatley in the petition of O'R, was not, it seems, asked to revisit the question of exercise of custody rights under the provisions of Article

13(a) of the Convention and, accordingly, its remarks are confined to the application of the threshold test under Article 3(b).

[14] Counsel for the respondent drew my attention to what is said in one of the travaux préparatoires of the Convention, namely the explanatory report by Elisa Perez-Vera. That report which has been, apparently, cited, and referred to, in other applications made to other courts, was prepared after the XVIth session of the Hague Conference leading to the Convention and was not approved by the Conference itself (see Beaumont & McEleavy The Hague Convention on International Child Abduction at page 234.) As a result, strictly speaking, it reflects only the interpretation of the reporter. In R v R (Residence Order: Child Abduction) (1995) Fam. 209, Stuart-White J at page 215, said in relation to the report:

"... whilst no doubt the report is a permissible, useful and indeed authoritative aid to the construction of the Convention if the language of the Convention is unclear, on this point (Article 16) it seems to me that the language of the Convention is perfectly clear - indeed distinctly clearer than that of the report".

There is discussion in the report, at paragraphs 62-72, of the provisions of Article 3(b) and, at paragraphs 108-110, of the provisions of Article 13. The thrust of what the reporter says at paragraphs 70-72 of the report, as far as I understand it (and I am bound to say that I do not always find its language entirely lucid) is that there is virtually a presumption that if there were in existence, as a matter of law, custody rights they will have been actually exercised by the person to whom they are attributed. That virtual presumption, however, can be overcome by the person seeking to resist the application for the return of the children by adducing evidence to contradict it by virtue of the operation of Article 3(b). It seems to me that the provisions of Article 3(a) and (b) are probably designed simply to ensure that where, for example, a custody order had been granted some time in the past, which had not been revoked formally, subsequent events nevertheless, had, in effect, superseded it so as to make its effects redundant or irrelevant. Having regard, however, to the overall purpose of the Convention, very little is needed, in my judgment, to be shown, by an applicant, to satisfy the provisions of Article 3(1)(b) where a breach of rights in terms of Article 3(a) is established. Such an approach is wholly consistent with what I consider the court said in the case of Friedrich supra. It is also wholly in line with what was said by Lord Brandon in the case In re H. and in R. S. (minors) (Abduction: Custody Rights) (1991) A.C. 476 where his Lordship, in discussing the provisions of

Article 3(b), at pages 500-501, said:

"In my view Article 3(b) must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day to day care and control. If the narrow meaning was adopted, it could be said that a custodial parent was not actually exercising his or her custodial rights during a period of lawful staying access with the non-custodial parent. That, as it seems to me, cannot be right."

The purpose of the test in Article 3(b) can be said, I consider, to be simply to prevent applications being made by persons who have not played any reasonably meaningful role in the life of the children, before their removal. Having regard to the spirit and purpose of the Convention, looked at as a whole, it would, in my opinion, be wrong, for example, by taking too narrow and technical an approach to the provisions of Article 3(b) to hold that a person, who is in hospital, and has left the custody of the children to one of his or her relatives, during the time in hospital, was not actually exercising his or her rights of custody. In the present case, it is accepted, by the respondent, that the statement of the legal position of the petitioner and the respondent under the law of Western Australia, at the time of the children's removal, is as set out in the letter of the Attorney General's Department (no 6/4 of process), is correct. Accordingly, both parties had joint parental responsibility for the children at the time of their

removal, defined as meaning all the "duties, powers, responsibilities and authority, which, by law, parents have in relation to children". It was accepted that those words would include the right to determine the child's place of residence. On the evidence placed before me, I am entirely satisfied that the petitioner cannot be said to have abandoned the exercise of his legal rights or to have ceased the exercise of these during the period that he was mentally ill and compulsorily detained in hospital. Whatever one thinks of the petitioner's reaction, on being told by the respondent that he was not to see the children again, it does not demonstrate that he was not, to use Lord Brandon's words, maintaining the stance and attitude of a parent who had custody rights and wished to exercise them. His request that the children be brought to see him when he was in hospital is also quite at odds with any suggestion that he was not maintaining such a stance and attitude. There was no medical evidence placed before the court from anyone who was responsible for the medical care of the petitioner at the time he attempted to commit suicide and, in particular, when he was in hospital. The respondent produced a letter dated 9 January 2003, No 7/1 of process, that is a few days before the second hearing, in the present case, from a Dr George Winslow of Monikie, Angus, who, it appears, may have a psychiatric qualification. He quite candidly points out that, having been asked for his professional opinion in relation to the petitioner's medical condition at the time of his hospitalisation between 21 November and 5 December 2001, he has had access to no report made by any person responsible for the petitioner's medical care during that time. Nevertheless he makes so bold as to state, at the end of his letter, as follows:

"Despite the absence of a detailed account of the petitioner's period of involuntary hospitalisation, the available information leads me to conclude that, at the time of removal of his children from Australia by his estranged wife, the petitioner was not exercising his parental rights of custody, for reasons of mental illness". I consider this material to be valueless for the purposes of the decision I have to reach.

[15] The other evidence to which I have previously referred, in my judgment, for the reasons I have already given, satisfy me that, at the time of the removal of the children the petitioner was, for the purposes of Article 3(b), actually exercising the rights attributable to him.

Article 13(a) of the Hague Convention - Scope and Application

[16] Before turning now to consider the provisions of Article 13(a) and the role, if any, they play in the present case, I should add this. It seems to me important to observe that, on a plain reading of the wording of Article 8 of the Convention, an application for assistance in securing the return of abducted children may be made by persons other than those who claim that the removal was in breach of their custody rights. That would seem to indicate that it is possible for an applicant to get over the threshold contained in Article 3(b) even if the breach of the rights relied upon is a breach of rights attributable to a person other than the applicant. If this is correct it might point towards an answer to the apparent conundrum that arose in the discussion before me, namely what room is there for a respondent to argue an Article 13(a) case that the custody rights were not actually being exercised at the time of removal, if, by definition, the applicant has already satisfied the requirements of Article 3(b) that his rights of custody were actually exercised at the time of the removal. By virtue of Article 8, while most applications will be brought by a parent with custody rights that is not necessarily so. Moreover, the provisions of Article 13(a) focus on "the person, institution or other body having the care of the person of the child" and the question is whether such a person, institution or other body is exercising the custody rights at the time of removal. The wording of Article 13 therefore provides a focus that may be narrower than the focus in Article 3(a) and (b) where the two things that have to be established are (a) breach of some rights of custody attributable to a person under the law of the State of the habitual residence of the child before the removal and (b) actual exercise of those rights at the time of removal. There may be several persons who have such rights and breach of any of those rights which were being exercised would, it appears, make the removal wrongful in terms of Article 3 and might make an application valid

even though not brought by the person whose rights are claimed to be breached. When one comes to Article 13, however, the Article 13 "defence" only applies where the person having "the care of the person of the child" was not actually exercising his rights at the time of the removal. Applying the provisions of Article 13a on that basis to the facts of the present case, it appears to me that it can be said that both the petitioner and the respondent had, under the relevant law "the care of the person of the child" and were exercising their custody rights at the time of the removal. Even if the phrase "the care of the person of the child" is confined to the person having the physical care of the person of the child, at the relevant time, that was the respondent in the present case and she was clearly exercising her custody rights. On that basis, the Article 13(a) defence is not made out in the present case. In any event, even if I am wrong in seeking to resolve, in this case, the apparent conundrum which may arise from the provisions Articles 3(b) and 13(a) in the foregoing way and the question is simply one of a shifting of onus (and possibly different evidential weight applying as between the two provisions as appears to be the view of Elisa Perez-Vera in her report at paragraph 71), in the present case, where the applicant is a person who is holding the rights which have been allegedly breached, I am satisfied that the respondent has not discharged the onus upon her to make out an Article 13(a) case that the person having the care of the person of the child was not actually exercising the custody rights at the time of the removal. In my judgment, on the evidence, as I have already said the joint holders of the custody rights, namely the petitioner and respondent were exercising them in actuality, at the time of the removal of the children. There is no room, therefore, for the court, in my judgment, to exercise its discretion under Article 13(a) not to order the return of the children on that ground, where the removal was wrongful.

Article 13(a) - Acquiescence - Meaning and Application

[17] The respondent, nevertheless, as I have noted above, sought to oppose the return of the children on the separate ground that the applicant had subsequently acquiesced in the removal of the children. That opposition was based on the provisions of Article 13(a) which I have quoted above. This branch of the law was examined by the House of Lords in the English case of In re H. & C (minors) (Abduction: Acquiescence) (1998) A.C. 72. The approach to the question of acquiescence under Article 13(a), of the Convention, set out in the leading speech of Lord Browne- Wilkinson, has subsequently been applied in Scottish cases, e.g. the unreported decision of Lord Carloway in A. Q. petitioner 12 December 2001. Until the decision in the case of In re H., the courts in England, and following them the courts in Scotland, had drawn a distinction between "active acquiescence" (in respect of which the uncommunicated, subjective intention of the wronged parent would normally be irrelevant) and "passive acquiescence" (in relation to which such subjective intention would be relevant). The House of Lords in the case of In re H. swept that distinction aside. In doing so, Lord Browne-Wilkinson in his speech, at page 87, began by stating that the distinction came from domestic English law concepts of acquiescence. These, he said, had no direct application to the proper construction of Article 13. He then posed himself the question "what then does Article 13 mean by 'acquiescence'?" His response, at page 87, was as follows:

"In my view, Article 13 is looking to the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted?"

In a later passage in his speech His Lordship, at page 88 reformulated the proper approach, in the following way.

"In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions".

His Lordship continued:

"Once it is established that the question of acquiescence depends upon the subjective intentions of the wronged parent, it is clear that the question is a pure question of fact to be determined by the trial judge on the, perhaps limited, material before him". Lord Browne-Wilkinson reconfirmed the subjective nature of the exercise when, in dealing with the way in which a trial judge should approach this fact-finding exercise, said:

"He can infer the actual subjective intention from the outward and visible acts of the wronged parents. That is quite a different matter from imputing to the wronged parent an intention which he did not, in fact, possess".

Lord Browne-Wilkinson went on at pages 89-90 to identify what he described as an exception to that general approach to the issue of acquiescence under Article 13(a). This arises from a principle which he considered was common to all developed systems of law namely that:

"There are circumstances in which one party, A has so conducted himself as to so mislead the other party, B as to the true state of facts. In such a case A is not allowed subsequently to assert the true facts as against B. In English law this is typically represented by the law of estoppel but I am not suggesting that the rules of English law as to estoppel should be imported into the Convention. What is important is the general principle to be found in all developed systems of law"

Accordingly, His Lordship said that there may be cases "in which the wrong parent, knowing of his rights, has so conducted himself vis-à-vis the other parent and the children that he cannot be heard to go back on what he has done and seek to persuade the judge that, all along, he has secretly intended to reclaim the summary return of the children. After having referred to examples of circumstances where the exception might come into play, His Lordship said:

"It is only in cases where the judge is satisfied that the wrong parent did not, in fact acquiesce, but his outward behaviour demonstrated the contrary that this exceptional case arises".

His Lordship then explained that:

"These exceptional circumstances can only arise where the words or actions of the wronged party show clearly and unequivocally that the wronged parent is not insisting on the summary return of the child: they must be wholly inconsistent with a request of the summary return of the child."

While His Lordship recognised that it might be suggested that the admission of such an exception was to re-introduce, by the backdoor, the distinction between active and passive acquiescence, he refuted this, at page 90 and summed up the position in the following way:

"The important factor to emphasise is that the wronged parent who has in fact never acquiesced is not to lose his right to the summary return of his children except by words or actions which unequivocally demonstrate that he was not insisting on the summary return of the child".

[18] In opening her submissions in relation to this chapter of the case, counsel for the respondent, made it clear that she was relying on the operation of the exception discussed in In re H. In so doing she had to accept that the position was that, in fact, the petitioner had never acquiesced because, as Lord Browne-Wilkinson said at page 89G: "It is only in cases where the judge is satisfied" (or, I would add, where it is conceded): "that the wronged person did not in fact acquiesce that the exercise can arise". Mrs Davie recognised this by conceding, in express terms, that the petitioner, in this case, has "at all times been clearly stating that he wanted his children back". Her position, was, however, as I understood, that words or actions of the

petitioner showed clearly and unequivocally that he was not insisting on the summary return of the children or that he was going to assert his right to the summary return of the children and that these words and actions were inconsistent with such return. She accepted that the exception could not come into play until after February 2002. The reason that counsel for the respondent accepted that there could be no operation of the exception until after February 2002 was that it was only then, by a letter, which is No 6/5 of process, addressed to the petitioner, that the respondent told him that she would not be returning to Western Australia with the children. Mrs Davie said that by his actings (or perhaps rather by his inaction) after his receipt of that letter, and before July 2002, the exception fell to be applied against the petitioner. How then stands the evidence in relation to this question? In his principal affidavit, No 6/6 of process, at paragraph 24, the petitioner states that in or about February 2002 his sister provided him with the respondent's contact details. He goes on to say that, at that time, he contacted the Commonwealth Attorney General's Department in Canberra to obtain advice on the matter and that he was advised that under no circumstances should he try to contact the respondent because she might disappear if he did so. At paragraph 27 of his affidavit he depones that he sought legal advice on the matter on 25 February from the Northern Suburbs Community Legal Centre and that that office assisted him with the preparation of "this application". The affidavit itself, in which he makes it perfectly clear that he wanted to effect the return of the children to Australia was deponed by him on 23 July 2002. In a supplementary affidavit, No 10 of process, sworn on 7 January 2003, the petitioner explains that he made an application for divorce in the Family Court, Western Australia on 25 November 2002, that divorce was granted and that it was due to become absolute on 26 December 2002. He goes on to depone that he did not seek orders in relation to the children of the marriage in those proceedings due to the fact that they are currently outside of the jurisdiction and that the Family Court of Western Australia would not be able to make orders in relation to the children pending a determination of the application for their return to Australia. In the supplementary affidavit he also refers to the fact that he was in hospital again for two weeks in July 2002, following another suicide attempt by him which he attributes to depression because of his children's abduction. He states that on his release from hospital he attended counselling for eight weeks and sought a psychiatric assessment from a Dr John Booth on 18 September 2002. Of some significance, in the circumstances of the case, in my judgement, is the letter No 6/4 of process from the Attorney General's Department to which reference has already been made. It is headed:

"Australian Commonwealth Central Authority

Hague Convention on the civil aspects of International Child Abduction".

It is addressed to an individual at the Scottish Executive Justice Department in Edinburgh. It is sub-headed "Hague Convention on the civil aspects of International Child Abduction - C. and A.S.". It commences as follows:

"I attach a new application under the Hague Convention from J.S. seeking the return to Australia of his daughters, C. and A.."

It then goes on to explain, as previously narrated, the relevant Australian law in relation to custody rights. After having done so it states:

"The mother's removal of the girls to Scotland is in breach of the father's rights of custody within the meaning of Article 3 of the Convention".

At paragraph 6 of the letter it states:

"Attached is a document outlining services available to parents returning to Western Australia with children under the Convention. Please ensure this document is given to the respondent mother with this application".

That letter reflects the fact that, under the Convention, it is provided by Articles 6, 7 and 8 that each contracting State shall designate a central authority to discharge the various duties which are imposed by the Convention upon central authorities. Those duties are, broadly speaking, duties of co-operation with other central authorities in bringing about the return of abducted children, which may or may not ultimately require the institution of judicial proceedings. The central authorities are directed by Article 7(c), in the first instance to seek to secure the voluntary return of the child or to bring about an amicable resolution of the issue. What, accordingly, appears to have happened in the present case is that, in late February 2002, the petitioner sought legal advice about the return of the children. He must, thereafter, have then contacted the Attorney General's Department in Australia as the central authority for the purposes of the Convention, who then took up the matter on his behalf by virtue of their letter of 22 July 2002. (I cannot say if the reference in that letter to a "new application" for the petitioner implies that there had been an previous application made on his behalf or not.) Any efforts of the central authorities in Australia and Scotland clearly did not effect an amicable resolution of the issue between the parties and, in particular, did not result in the return of the children. The present petition was brought before this court for the first time on 9 October 2002. I can see nothing in this history of matters which could, by any stretch of the imagination, be said to amount to words and conduct by the petitioner showing clearly and unequivocally that he was not insisting on the summary return of his children. It has, in this connection, to be borne in mind that Article 12 of the Convention provides that:

"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".

Those provisions clearly, in my opinion, recognise that it may take some time before all the steps envisaged in Article 7 of the Convention are exhausted and before judicial proceedings are either necessary or concluded, after an application to the central authorities has been made. To reinforce this point Article 12, goes on to say that the judicial or administrative authorities, even where the proceedings have been commenced:

"after the expiration of one year referred to in the preceding paragraph, shall order the return of the child, unless it is demonstrated that the child is now settled in its new environment".

Counsel for the respondent, in her submissions regarding acquiescence, emphasised, on a number of occasions, the words "summary return" as they appear in the Convention. The word "summary" however qualifies the word "return" and does not require for an application to succeed that legal proceedings have been raised summarily though, of course, the less time that lapses before the issue is resolved the better.

[19] I have reached the view that, having regard to the steps taken by the petitioner, in this case, and the time-table under which they were taken, there is no room for the application of the exception discussed in the case of In re H., on the facts of this case. It was drawn to my attention, by counsel for the respondent, under reference to the petitioner's supplementary affidavit and certain medical reports placed before me, in particular a letter JGD3 from a doctor in Australia, that the petitioner continued to suffer from mental illness, to a greater or lesser extent, up until July 2002 and that he sought and obtained medical treatment during that time. She characterised the petitioner's position during that period as being one where he was seeking medical help to get his children back and that he wanted medical support in that

respect. In her words "he wanted the children back, but not quite yet". I do not accept that that is a fair characterisation of the petitioner's position on my reading of the material relied upon. There was no inconsistency between an understandable desire on the petitioner's part to get better, and a continuing wish to have the children return to the jurisdiction of the Australian court (whether to his physical custody or not). To this point I have been focusing entirely on the conduct of the petitioner but it has to be recalled that, in any event, it is not possible for the "exception" to operate "in the air", as it were. Not only must the words or action of the petitioner be such as to show that he is not asserting his right or is not going to assert his right for the summary return of the children for the exception to operate, but as Lord Browne-Wilkinson said at page 90 in the case of In re H., the words or actions in question must "have led the other parent to believe that the wronged parent is not asserting or is not going to assert the right". In her affidavit, at paragraph 7 the respondent deponed: "In early September 2002 I received notification of a Divorce Action which J. had raised at the Family Court of Western Australia in Perth. In that application under the section headed 'Other Court Proceedings and Orders' my husband has completed that he was 'making application under Hague Convention'. This was the first notification I had of any intention to seek return of me and the children to Australia".

That is a far cry, in my judgment, from the respondent pointing to unequivocal words or conduct on the petitioner's part which had led her to believe that the petitioner was not asserting or going to assert his right to the summary return of the children. For that reason, also, I, therefore, consider that the respondent has totally failed in establishing acquiescence, by the petitioner for the purposes of Article 13(a) of the Convention.

Result and Post-Script

[20] It follows from the foregoing that I consider that no proper basis for any opposition to the summary return of the parties' two children to Western Australia has been made out by the respondent and I consider that it is appropriate to grant the prayer of the petition.

[21] Before leaving the matter finally, I would wish to make the following point. A considerable amount of time, in the hearing before me, was taken up by counsel for the respondent pointing me to the medical reports and other evidence in this case which she said, at the very least, put a question-mark over the petitioner's fitness as a person to make decisions in relation to his children. To take but one example, she drew my attention to a card that the petitioner had sent his children in August 2002 which contained sexually suggestive remarks. It has to be stressed, again, that in proceedings under the Convention, it is quite inappropriate to embark on such questions which may, in due course, be very relevant to the ultimate determination of what, if any, custody rights to the children the petitioner may have. The proceedings under the Convention are, however, ultimately concerned with one question and one question alone and that is where is the forum where custody rights should be determined. In reaching a conclusion about that question the court is, on the whole, engaged on a much more clinical or cerebral exercise than what might be involved in a protracted and emotionally charged custody dispute. It is as well, in my judgment, that practitioners should be reminded of that distinction which was so well explained in the case of Friedrich.

[22] Both sides of the bar invited me, in the event that I was minded to grant the prayer of the petition, to have the case put out By Order in order that appropriate arrangements for the return of the children to Western Australia might be discussed I shall accede to that request and have the matter put out By Order.

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