



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 55  
P210/20

Lord Malcolm  
Lord Woolman  
Lord Pentland

OPINION OF THE COURT

delivered by LORD MALCOLM

in the reclaiming motion

in the petition

of

W

Petitioner and Respondent

against

A

First Respondent and Reclaimer

and

“X”

Second Respondent and Reclaimer

for an order under the Child Abduction and Custody Act 1985

**Petitioner and Respondent: McAlpine; Morton Fraser LLP**  
**First Respondent and Reclaimer: Scott, Q.C.; Cullen Kilshaw**  
**Second Respondent and Reclaimer: Shewan; Clan Childlaw**

21 August 2020

[1] This is a reclaiming motion against a return order made under the Child Abduction and Custody Act 1985 in respect of a 10 year old female child. The petitioner, the father, lives in Poland. He and the Polish mother lived together till the child was 7 years of age. Thereafter he had contact with his daughter till June 2019 when the mother brought her to Scotland, where they continue to reside. This was a wrongful removal in terms of article 3 of the Hague Convention on the Civil Aspects of International Child Abduction. In March 2020 a petition was lodged in the Court of Session seeking the return of the child to Poland. For various reasons the expected timescale for disposal of the proceedings was exceeded, with a hearing on the substance of the matter taking place in June 2020.

[2] The sole defence presented on behalf of the mother and the child, who is separately represented, was based on article 13 of the Convention. A report had been obtained from a member of the bar which set out the child's objections to a return to Poland. The Lord Ordinary held, and this is not challenged, that she is of an age and degree of maturity as requires her views to be taken into account. As a result he was not obliged to send her back to Poland; rather he enjoyed a discretionary power, to be exercised "at large", to grant or refuse such an order: *Re M and others (Children) (Abduction: Rights of Custody)* [2008] 1 AC 1288, and *Re M (Children) (Abduction: Child's Objections)* [2016] Fam 1, Black LJ at [18].

[3] In addition to the report, the Lord Ordinary was provided with a large amount of written material, including several affidavits, a decision of the Polish Court dated 24 June 2019, and detailed written submissions from the parties. Having decided that the "gateway" test in article 13 had been met, the Lord Ordinary exercised his discretion in favour of a return order.

**The Lord Ordinary's reasons**

[4] The purpose of the Convention is to facilitate the expeditious return of children to the courts of their habitual residence. A few days before the mother left Poland a court refused her application for permission to take the child to Scotland because it would provide no benefit for her, and would destroy her relationship with her father. The mother ignored this and resumed cohabitation with a Polish man whom she had married in Poland. He had moved to live in Scotland and had previously lived with the child for only about 3 to 4 months. The child's objections had to be considered against this background. It was clear that the child had no appreciation of the nature of, and reasons for the Polish court's decision, and in particular that it considered her welfare in respect of both Poland and Scotland, and also her relationship with her father and members of his family. This was a "significant counterbalance" to her stated wish to remain in Scotland. She had expressed her reasons in childish and immature language. They indicated an incomplete understanding of her background, family circumstances, and general wellbeing. She did not appear to appreciate the educational challenges posed by her less than complete knowledge of English. The Lord Ordinary stated that her views were "highly subjective" and failed to take into account material considerations (this term was not explained) in relation to her wellbeing and best interests. He concluded: "Accordingly whilst I have regard to (the views of the child) I consider they are outweighed by other features in this case."

[5] The mother and child had relied upon the terms of article 11 of Council Regulation (EC) No 2201/2003 (discussed below). However the Lord Ordinary made no reference to it. He understood that the mother had raised proceedings in Poland. During the hearing this was described as a misunderstanding on his part. In any event it was something to which he gave little weight.

**The parties' submissions to this court**

[6] The submissions for the mother, and those for the child, can be summarised as follows. The Lord Ordinary's exercise of his discretion was flawed. He did not pay regard to the general welfare of the child. This should have been a primary consideration, and necessarily would include a review of the circumstances at the date of the decision. In its place there was an undue emphasis on the decision of the Polish court, which by then was out of date. The import of the Council Regulation, which is preserved in the Brexit legislation, had been ignored, or not understood. Rather than having proper regard to the child's objections, the Lord Ordinary sought to minimise them for reasons which do not withstand scrutiny. He did not appreciate the significance of the passage of time, which meant that the Convention's purpose of speedy return could not be achieved. There was no reference to the child having integrated into her new community, her good progress at school, and her happy and stable home life with her mother and stepfather in circumstances considerably better than those available in Poland. The Lord Ordinary did not address the detriment of an unwanted further international relocation. It would seem that all of this was on the basis that the welfare issues had been weighed up and determined by the Polish court. This court should quash the return order and exercise its discretion by refusing the petition.

[7] For the father, the terms of the Polish decision were emphasised. It had considered the mother to be untruthful and not worthy of trust. She had previously breached a court order by delaying her return from Scotland. It suspected she wanted to move to Scotland to be with her husband who was hiding from the Polish authorities. He had failed to return to prison after a break from a prison sentence. Relocation would destroy the child's

relationship with her father. The Polish court was aware of the mother and child's crowded living conditions when it made its decision. The Lord Ordinary should be taken as having taken into account all relevant considerations, which were set out in the submissions and were evident from the material before him. Regard should be had to all of his note, not just the last few paragraphs dealing with the exercise of his discretion. It can be assumed that the material benefits of the child remaining in Scotland and her stated reasons for not wanting to go to Poland did not persuade him to refuse a return order. He correctly placed weight on the terms of the Polish court's decision, which include maintenance of the father/daughter relationship. The father had offered rented accommodation, and in any event it can be assumed that the Lord Ordinary was not troubled by the likely living conditions for the child in Poland.

[8] The Lord Ordinary's views on the child's objections were open to him. He was not bound to accept affidavit evidence just because there was no contradictor. As to article 11, plainly the Lord Ordinary was of the view that pending any further decision in Poland, the child should be returned. Given the weight attached to the June 2019 decision, that was a reasonable view to take. Any error as to the mother having raised proceedings was not material. If the court was exercising a discretion of new, it should reach the same decision as the Lord Ordinary.

### **The relevant law**

[9] In article 13 cases the age and sufficient maturity test, once passed, is a gateway to the court exercising a discretion, authoritatively said to be "at large", as opposed to being directed by the Convention to return the abducted child. In the present case, given the terms of article 11 of the Council Regulation, the long term decision on residence remains

with the Polish Court. It must be informed of any non-return order and its reasons, and its judgment in resolution of the parental dispute will be directly enforceable in Scotland. This is a key factor. The question is whether in the meantime the child should be returned to Poland pending that decision. In this regard courts are increasingly giving weight to the views of the child. A child-centric approach is required, with her interests and general welfare at the forefront. The focus is not on the moral blameworthiness of the abducting parent, nor on notions of deterrence. While Convention considerations will always be relevant, the further one is from the main aim of a speedy return, the less weighty they will be. If a child is integrated in the new community it is relevant to consider the effect of a further, and unwanted, international relocation pending the long term decision. These matters, including citation of the relevant passages in the leading case of *Re M* [2008] 1 AC 1288, were discussed in detail by this court in *C v N* [2018] CSIH 34, particularly at [57-62], [65], [74] and [79].

### **This court's decision**

[10] The court is not satisfied that the Lord Ordinary exercised his discretion in accordance with settled legal principles. He required to weigh in the balance the child's current circumstances. In *Re M* at [43] Lady Hale referred to the "wider considerations of the child's rights and welfare", and it is evident that these must be assessed as matters stand at the date of the court's decision. By contrast, the Lord Ordinary makes no reference to this, nor as to the implications of the child having been living, apparently happily and well-cared for, in Scotland for over a year, this being a lengthy period for a 10 year old. There is no indication that the potential for harm arising from a further disruption has been addressed. Instead he placed great importance on the decision of the Polish court, and apparently

regarded it as determinative of the welfare issues. That court was considering a different question, with the answer based on the evidence before it, and when the outcome of a move to Scotland could be no more than a matter of prediction and opinion. The Lord Ordinary required to apply his mind to the question before him. In the absence of any direct evidence of such in his reasoning, we are unable to accept the invitation to assume that he did address the relevant issues. It is apparent that the Polish court's concerns as to whether the mother would be able to provide suitable arrangements for her daughter have proved unfounded. It may be that other factors would still have caused a refusal of permission in Poland, but that is irrelevant speculation. The important point is that the Lord Ordinary required to carry out his own assessment on the evidence before him, not simply enforce the Polish judgment. It was an important part of the background circumstances, but not at the expense of other material considerations.

[11] This is a child objections case and one would expect the judge to engage with the stated reasons for the child's concerns, with due weight afforded to them, all as part of the "child-centric" approach suggested by Lady Hale. There is no sense that such an approach was adopted. The Lord Ordinary's discussion focussed only on factors thought to minimise their significance. We do not rule out a case where the manner in which objections are expressed, or their nature, are such as to render them of little weight in the overall balancing exercise; but we cannot place this child's account as spoken to by the reporter as falling into this category. The reporter assessed them as authentic and independent, and we see no reason to disagree. In any event, once the "gateway" is passed the relevant considerations extend well beyond any concerns, whether merited or otherwise, as to childish expressions, inability to understand legal decisions and issues, or other perceived omissions in the child's necessarily subjective assessment; and that all the more so in the case of a 10 year old child.

[12] While we are not encouraging lengthy judgments in cases which require to be made expeditiously, in the circumstances of the present case we are driven to the conclusion that the Lord Ordinary viewed the Polish court's decision, and the mother's immediate defiance of it, as eliding any need to address other factors. This is an error in law, and thus we will quash his decision. We would also expect him to have addressed the implications of article 11 of the Council Regulation which confirms that the current exercise is essentially one of interim regulation of matters until a hopefully speedy decision is made by a court in Poland.

[13] In view of the Lord Ordinary's error of law it follows that this court has a discretionary power to either order or refuse the child's return to Poland. The reporter stated that the child was capable of expressing her views. She objects to a return to Poland. She prefers being in Scotland, where she has everything she wants, including her mother, a house, her own bedroom, a happy school life and friends. In Poland her living conditions were "mega-crowded". She did not want to spend time with her father. She had various complaints about him and her contact visits with him which need not be recorded in this opinion. If returned to Poland she thought she would not be allowed to come back to Scotland. She is "really happy" in Scotland. The reporter found no evidence of her views being influenced (intentionally or otherwise) by her mother. They were her own. She had no understanding of the purpose of a return to Poland, nor of the respective functions of the courts of the two jurisdictions.

[14] Though not determinative, the court places considerable weight on the child's views. It has no particular comments on the way in which they are expressed, nor as to her lack of understanding of certain matters. The evidence establishes that her current circumstances are more than satisfactory in terms of her education, home environment, and general

welfare and wellbeing. She has lived in Scotland for well over a year and has integrated well into her new community. A return to Poland pending a long term decision on her future would disrupt all of this for no obvious benefit, and in all probability she would again be in cramped and over-crowded living conditions.

[15] The decision of the Polish court, which was subsequently upheld on appeal, is entitled to full consideration and respect. Its terms have been carefully considered. When it was issued, the parties were resident in Poland. The court's doubts as to the child's prospects and the ability of the mother to provide for her in Scotland have proved to be unfounded. The evidence does not suggest any malign influence from her stepfather, despite his background as detailed in the Polish judgment. The court was concerned about preserving the father/daughter relationship. It will have an opportunity to revisit that issue in due course; and likewise in respect of the mother's character and trustworthiness. In June 2019 the Polish court was unpersuaded as to the main purpose of the application before it, namely that a move to Scotland would improve the circumstances of, and prospects for the child. Indeed it feared that the UK social work authorities would become involved. Plainly matters have moved on since then, and the Polish court will have the opportunity to assess the child's best interests once more in the light of current circumstances.

[16] There may have been a time when disapproval of the mother's wilful defiance of the Polish court's order would have so prejudiced her position that a return was always going to be the likely outcome. But now the focus is on the best interests of the child at the heart of the proceedings, not least since this is the core value running through the Convention. The above considerations have persuaded this court that, pending resolution of the parental dispute, she should remain in Scotland. The reclaiming motion will be upheld, the return

order quashed, and the prayer of the petition refused. The court will make a non-return order authorising the child to remain in Scotland.