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[03/03/1999; Outer House of the Court of Session (Scotland); First Instance]
Donofrio v. Burrell

M.D. v A.D. or B.

Court of Session

Outer House

Lord Macfadyen

3 March 1999

Counsel: Act: Davie, Balfour & Manson; Alt: Macnair, Digby Brown

LORD MACFADYEN: This petition bears to be for an order under the Child Abduction and Custody Act 1985 ("the 1985 Act"). In Statement 8 (misprinted as 7) the petitioner avers that the petition is presented "in terms of Article 21 of the [Hague] Convention and Rule of Court 70.5(2)". When the petition came before me for a first hearing in terms of Rule of Court 70.6(3), Mr Macnair, who appeared for the respondent, moved me to dismiss the petition. I heard submissions from Mr Macnair in support of that motion, and from Mrs Davie for the petitioner in opposition to it.

The petitioner resides in Ontario, Canada. The respondent resides in Scotland. They were married on 7 May 1988 and divorced in Ontario on 8 May 1993. They have two children, ALD, who was born on 20 February 1989, and LRD, who was born on 30 August 1990. By an order of the Ontario Court (Provincial Division) dated 23 October 1991 the respondent was found entitled to custody of the children, and the petitioner was found entitled to access:

"every Wednesday from 3 pm until 7:30 pm and every second weekend from Friday at 3 pm until Sunday at 7:30 pm effective October 23, 1991 and continuing on a regular basis thereafter".

The petitioner avers that he exercised regular access to the children from before the date of that order until 25 March 1997, and did so, by agreement, to an extent greater than that provided for in the order. In March 1997 the respondent and the children came to Scotland, initially with the petitioner's consent, to visit the respondent's father, who was in ill health. It is a matter of admission that the respondent failed to return to Canada with the children, and that telephone contact between the petitioner and the children was terminated by the respondent in November 1997.

Initially, after what is (in my view inaccurately) described in the petition as the "wrongful retention" of the children in Scotland, the petitioner sought to procure their return to Canada by proceedings under the Hague Convention, which is set out in Schedule 1 to the 1985 Act and given the force of law in the United Kingdom by section 1(2). The respondent's second husband, DB, took similar proceedings in respect of his daughter, LB, who had also

accompanied the respondent to Scotland. DB's proceedings were successful, and LB was returned to Canada on 8 October 1997. The petitioner's application was unsuccessful, because he did not have "rights of custody" in respect of the children within the meaning of Article 5(a) of the Convention. Mrs Davie indicated that that was the result of an error in the terms of the order of 23 October 1991, which ought to have contained, but did not contain, a provision (which had been included in the antecedent interim order) to the effect that:

"Neither party shall remove the aforementioned children from the Province of Ontario without the written consent of the other party".

Be that as it may, the effect of the actual terms of the order was that the removal of the children from Canada, and their retention in Scotland, was not "wrongful" within the meaning of Article 3 of the Convention, and an order for the return of the children to Canada therefore could not be obtained. The children have remained with the respondent in Scotland.

The petitioner makes averments, in Statement 6 of the petition, in support of the proposition that it is in the interests of the children that he should have access to them in Canada. He then goes on in Statement 7 to aver:

"The Petitioner seeks the assistance of the Court in exercising his rights of access obtained in the Ontario Court as provided for in Article 21 of the Convention . . . In the circumstances where the children are no longer living in Canada the Petitioner seeks access to them for one half of school holidays at Easter and summer [each year] and for the school Christmas holiday every alternate year."

The prayer of the petition echoes that averment. As I have already mentioned Statement 8 of the petition states that it is presented in terms of Article 21 of the Convention and Rule of Court 70.5(2).

Article 5 of the Convention distinguishes "rights of custody" and "rights of access" (ascribing inclusive rather than definitive meanings to the expressions). I do not understand it to be disputed that the petitioner has rights of access in respect of the children by virtue of the order of 23 October 1991, but does not have rights of custody in respect of them. Article 3 of the Convention defines wrongful removal and wrongful retention solely in terms of breach of rights of custody. It is not wrongful, within the meaning of the Convention, to remove or retain a child in circumstances which frustrate the enjoyment of rights of access. Chapter III of the Convention sets out the procedure for securing the return of children who have been wrongfully removed or retained. The procedure involves application to the Central Authority of the Contracting State to which the children have been wrongfully removed or in which they are wrongfully retained for assistance. Provision is made for application, if necessary, to the judicial or administrative authorities of that Contracting State. There is emphasis on expedition. In terms of Article 11 failure on the part of the judicial or administrative authority to reach a decision within six weeks of the commencement of proceedings requires to be explained. In terms of Article 12, which lays duties on the judicial or administrative authorities, there is, within the year following the wrongful removal or retention, a presumption in favour of ordering the immediate return of the children, subject to certain limited exceptions provided for in Article 13.

Rights of access are dealt with in Chapter IV of the Convention. Article 21 provides as follows:

"An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the

same way as an application for the return of a child. The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, so far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject."

Article 7 provides that:

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities of their respective states to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures -

(f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation to legal counsel and advisers".

In Scotland, the Central Authority is the Secretary of State (section 3(1)(b)), who acts through the Scottish Courts Administration. The judicial authority is the Court of Session (section 4(b)). I understand that the bringing of the present petition has been facilitated by the Scottish Courts Administration on the view that it is obliged to do so by Article 7(f), and that legal aid has been afforded to the petitioner under the special provisions relating to Convention applications, the petition having been certified as being such proceedings by the Secretary of State in terms of regulation 46(2) of the Civil Legal Aid (Scotland) Regulations 1996.

Part II of Chapter 70 of the Rules of Court deals with applications under the Hague Convention. Rule 70.5 provides for the form of applications. Rule 70.5(1) deals with applications for the return of a child, and Rule 70.5(3) deals with applications under section 8 of the Act (for declarator that removal of a child from, or his retention outside, the United Kingdom was wrongful). Rule 70.5(2), under which the present petition bears to be presented, provides:

"An application for access to a child under the Hague Convention shall be made by petition",

and goes on to specify what matters must be covered by averment, and what documents must be produced. The procedure that must be followed in petitions under Rule 70.5 is then set out in Rule 70.6, including provision for a period of notice of four days, requirements as to the parties on whom the petition is to be served, provision for a first hearing within seven days of the expiry of the period of notice, and emphasis on affidavit evidence, with oral evidence only being permitted on special cause shown.

The preliminary point taken by Mr Macnair fell into two parts. The first part was that Article 21 of the Convention conferred no private law rights on the party seeking assistance in connection with rights of access, that there was consequently no such thing as "an application for access to a child under the Hague Convention", that Rule 70.5(2) was therefore devoid of content, that the proper form for any application for access (or contact)

was therefore a family action under Rule of Court 49.1(1)(j), and that consequently the present petition was incompetent. The second part of the point was that, if a claim for access "under the Convention" could competently be presented in the form of a petition under Rule 70.5(2), this was not such a claim, because the access now sought by the petitioner was not the access to which he had been found entitled by the Canadian court, and there were therefore no relevant averments of a Convention claim which supported the prayer of the present petition.

In support of the first part of his argument, Mr Macnair drew attention to the distinction drawn in the Convention between the role of the Central Authority and that of the judicial or administrative authority. Under Chapter III of the Convention, it was contemplated that an application for return of a child wrongfully removed or retained would be made to the Central Authority. That authority was required to take steps to secure the voluntary return of the child (Article 10). Articles 11 et seq then expressly provided for judicial proceedings, and placed on the judicial authority an obligation to order return except in certain carefully limited circumstances. A judicial application "under the Convention" for an order for the return of the child was thus clearly contemplated in the Convention. Chapter IV, on the other hand, made no provision for judicial proceedings "under the Convention". Article 21 concentrated on the obligations of the Central Authority. It placed no obligations on the judicial authority. It conferred no Convention-based right to a judicial order enforcing or supporting an order for access pronounced in another Contracting State.

Mr Macnair founded strongly on the approach of the English Court of Appeal in In re G (A Minor) (Enforcement of Access Abroad) [1993] Fam 216, [1993] 3 All ER 657. In that case, by a consent order made by a court in Ontario, a mother was permitted to bring her child to live with her in England, subject to a specific award of access in favour of the father. The access was to take place in Canada, and was to be in the form of residential access at holiday periods. The mother, once in England with the child, intimated that she would not comply with the access order. In reliance on Article 21 of the Hague Convention the father sought the assistance of the Lord Chancellor's Department (the English Central Authority). Proceedings were then brought before the High Court for an order that arrangements be made for organising and securing the effective exercise of his rights of access. The judge of first instance, holding that the court would take account of the Canadian order, but would regard the child's welfare as the paramount consideration, directed specific access arrangements to take place initially in England. On appeal, the first issue was whether on a true construction of Article 4 the Convention applied to the child, who was habitually resident in England. It was held that the Convention applied to a child habitually resident in a Contracting State immediately before the breach of access rights, even if the state in which he or she was habitually resident was not the one in which the relevant access rights existed. The second point decided by the Court of Appeal was the one on which Mr Macnair founded his argument in the present case. The court held that the obligations imposed by Article 21 were of an administrative, non- mandatory nature directed to central, not judicial, authorities and might be discharged by the arrangement of appropriate assistance to an applicant such as the introduction to local legal services; but that since Article 21 did not provide for mutual recognition or enforcement of access orders the court, while according proper weight to a foreign order, would apply domestic law and exercise its discretion unfettered by the Convention; that in consequence the father should have applied for a contact order under the Children Act 1989, which required the child's welfare to be the court's paramount consideration; and that accordingly since the judge had applied the correct test the appeal would be refused.

Butler-Sloss LJ said (at 223F):

"In my view the Convention focuses both upon the co-operation between central authorities and the enforcement of the return of a child wrongfully removed or retained outside the state of the child's habitual residence. I do not consider that the Convention visualised that orders from a state which was not the state of habitual residence would continue to govern the affairs and welfare of a child living permanently elsewhere";

at 224C:

"The approach of the Convention to rights of access is undoubtedly more flexible than the approach to wrongful removal or retention";

at 224G-225B:

"Article 21 applies at the administrative level to bring the application to the attention of the central authority of the contracting state. On receiving an application the central authority, the Lord Chancellor's Department, complies with its obligation under article 21 by making appropriate arrangements for the applicant and, in this case, by providing for legal aid and instructing English lawyers to act on behalf of the applicant. This in effect exhausts the direct applicability of the Convention . . .

In a case where the child is habitually resident in the contracting state, being England, before the breach, the Convention does not directly affect the jurisdiction of the English court. The appellant father's lawyers applied to the High Court but were in error in requiring an order to enforce compliance with the Convention. There are no teeth to be found in article 21 and its provisions have no part to play in the decision to be made by the judge. The lawyers should have applied on his behalf for a section 8 order under the Children Act 1989 which is the appropriate way to secure the effective exercise of rights of access"

and at 225G-H:

"(The) exercise of the discretion of the court is not fettered by the Convention.

. . .

The existence of an order of the court where the child was then habitually residing is, however, of crucial importance and is a factor to be given the greatest possible weight consistent with the overriding consideration that the welfare of the child is paramount."

Hoffmann LJ, with whom Butler-Sloss LJ expressed agreement, said (at 228B-229G):

"It is certainly part of the rationale of the child abduction provisions of the Convention that the foreign custody right should be enforced to the extent of returning the child to the jurisdiction from which it has been abducted without regard to the merits. But this is not true of access rights. As Professor AE Anton, chairman of the conference which drafted the Convention, wrote afterwards in 'The Hague Convention on International Child Abduction', 30 ICLQ 537, 554-555:

'The Convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and is so taken deliberately with a view to render the further enjoyment of access rights impossible. It was felt not only that mandatory rules in the fluid field of access rights would be difficult to devise but, perhaps more importantly, that the effective exercise

of rights of access depends in the long run more upon the goodwill, or at least the restraint, of the parties than upon the existence of formal rules. Article 21, therefore, establishes open-textured rules for assisting parties to secure the effective exercise of access rights by seeking the intervention of central authorities.'

For these reasons I consider that article 21 did apply to the plaintiff's claim to enforce his access rights under Canadian law. But the next question is what effect this should have upon the question which the judge had to decide. The Convention imposes certain obligations upon the central authorities which under article 6 each contracting state has to designate. The duties imposed on the central authority are of an executive rather than a judicial nature and in England the designated central authority is the Lord Chancellor's Department. Other obligations are imposed on the 'judicial authorities' of the contracting state. When the convention was enacted as part of English law by the Child Abduction and Custody Act 1985, the obligations imposed upon the English judicial authorities created rights in private law, directly enforceable by parents in English courts. But the same is not true of the obligations imposed on the central authorities . . .

So, for example, article 12 provides that, if a child has been wrongfully removed or retained and proceedings are commenced less than a year later before the judicial authority, that authority 'shall order the return of the child forthwith.' The article confers a right in private law which is directly enforceable in an English court. But article 21 imposes no duties whatever upon the judicial authorities . . .

[The Hague Convention] left untouched the law of recognition of foreign access orders in the several contracting states and merely provided for executive co-operation in the enforcement of such recognition as the national law allowed. In this case there is no complaint that the central authority has failed to comply with article 21. It has provided the plaintiff with legal aid to pursue his claim to enforce his Canadian access rights. In my judgment, therefore, the provisions of article 21 were exhausted once the plaintiff got to court. They had no part to play in the decision which had to be made by the judge. The Convention provided no independent source of jurisdiction and the originating summons was wrong in apparently seeking compliance by the court with a duty imposed by article 21 upon the central authority. Instead, the application should have been framed as an ordinary application for a contact order under the Children Act 1989. In such an application, the Canadian access order is entitled . . . to 'grave consideration,' but the paramount consideration is the welfare of the child."

Adopting that approach, Mr Macnair submitted that there was no such thing as an application for access under the Hague Convention. Rule 70.5(2) was thus devoid of content, since it made provision for a category of proceedings which did not exist. It was noteworthy that section 10 of the 1985 Act, which authorised the making of rules of court to give effect to the Act, was silent as to claims for access. Any application by the present petitioner for access ought to have been made by seeking a contact order under section 11(2)(d) of the Children (Scotland) Act 1995 ("the 1995 Act"). Any such application should, in terms of Rule of Court 49.1(1)(j), have been made by summons. The present petition was accordingly incompetent. The matter was not one of empty form. Important matters which arose in connection with claims for contact were properly provided for in the context of family actions, but not provided for under Part II of Chapter 70 of the Rules of Court. For example, in terms of Rule 49.8(1)(h), in an action seeking a section 11 order intimation to the child affected is required, but there is no equivalent requirement in Rule 70.6(2). There is no equivalent in Part II of Chapter 70 to the provisions in Rule 49.42 for subsequent variation of a contact order. Moreover, the restrictive provisions of Rule 70.6(4) relating to the presentation of evidence in petition proceedings under Rule 70.5, which were no doubt

entirely appropriate to proceedings for return of a child wrongfully removed or retained, were ill-adapted to suit a case where the issue was whether a parent holding foreign access rights should be found entitled to contact in Scotland with a child now habitually resident here.

The second aspect of Mr Macnair's submission proceeded on the hypothesis (contrary to his first submission) that there could be an application which could properly be regarded as "an application for access to a child under the Hague Convention". In that event, Article 21 was concerned with rights of access obtained in the courts of the foreign jurisdiction, and the institution of proceedings "with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject". An application for access could only be said to be made "under the Convention" if the order sought was one designed to replicate or at lease facilitate the enjoyment of the right conferred by the foreign court. Here the access granted by the Ontario Court was access every Wednesday and every second weekend. In contrast, the prayer of the petition was for residential access during the school holidays each Easter and summer, and at Christmas in alternate years. The petition was therefore not concerned with procuring the enjoyment of the access to which the petitioner had a right by virtue of the Canadian order. What was sought was entirely different from what was contemplated in the Canadian order. There was therefore no relevant claim under the Convention.

Mrs Davie accepted that it was open to me to entertain the respondent's submission on competency, notwithstanding the absence of a plea to that effect, since the issue of competency was pars judicis. She did not submit that she was prejudiced by the point being taken at this stage. She accepted that Article 21 conferred no separate substantive right of action on the petitioner, and no separate ground of jurisdiction on the court. She submitted, however, that the Rule 70.5(2) procedure was the procedure which this court has laid down as the appropriate procedure to be adopted by a party who has the benefit of access rights conferred by the courts of another Contracting State when, having sought the administrative assistance of the Scottish Courts Administration under Article 21, that party requires to take proceedings in Scotland to protect or implement those rights. She accepted that the claim which the petitioner sought to make was one which, but for Rule 70.5(2), would fall to be made by raising a family action under Rule 49.1. There was, however, she suggested, sound reason for having a separate procedure for claims which proceeded on the basis of an existing award of access in another Contracting State. First, such claims were, she submitted, different from domestic applications for a contact order. Although the welfare of the children was in both situations the paramount consideration, an applicant who had an existing order in his favour in another Contracting State had a "head start". The existing order was strong evidence that it had been held by the court which was, at the material time, the court of the children's habitual residence that he was a suitable person to be awarded access, and that access would be in the children's best interest. Secondly, the parties to such an application could, as in this case, be "on opposite sides of the world", and it was therefore likely that there would be difficulty and inordinate expense in having a proof in ordinary form, which made the special provisions in Rule 70.6(5) appropriate. Whatever the force of these considerations might be, the fundamental point in favour of the competency of the present petition was that it was the form of proceedings expressly provided in the Rules of Court for an application of the sort which the petitioner sought to make. The petition therefore could not be held to be incompetent.

Mrs Davie further submitted that the application should not be held to be irrelevant simply because the petitioner sought access in a different form from that which had been awarded by the Canadian court. Article 21 contemplated that the Central Authority would provide assistance whenever a party holding rights of access in one Contracting State wished to

make those rights good in another Contracting State. The petitioner had, in principle, been found entitled to access to the children by the Ontario Court. The specific order was incapable of being implemented while the petitioner was resident in Canada and the children were resident in Scotland. The petitioner's enjoyment of that order, which had continued for over five years, had been brought to an end by the respondent's retention of the children in Scotland. Nevertheless, his access rights in general might be secured by this court making an order for different periods of access which took proper account of geographical considerations. Such a course was not outwith the scope of the sort of assistance which Article 21 contemplated.

In my respectful opinion the analysis of the Hague Convention undertaken by Butler-Sloss and Hoffmann LJJ in In re G is sound. There is a very clear distinction between the ways in which rights of custody and rights of access are respectively treated in the Convention. The approach to rights of custody is to give priority to the law and the courts of the state in which the child was habitually resident immediately before being removed to or retained in another Contracting State. Where the removal or retention is wrongful, ie in breach of rights of custody enjoyed in the state of the child's habitual residence, the objective is to secure the immediate return of the child to that state, so that any outstanding issues about custody may be decided by the courts and in accordance with the law of that state. In order to achieve that objective, the courts of the other Contracting State are placed by Article 12 under an obligation, if called upon to do so within a year of the wrongful removal or retention, to order the return of the child. It is only in the particular circumstances set out in Article 13 that the court may refuse to order immediate return. Article 12, made part of the law of Scotland by section 1(2) of the 1985 Act, provides both (i) ground on which the parent whose rights of custody have been infringed may seek a remedy from the Scottish courts, which remedy is separate from any that might otherwise be available under the domestic law of Scotland, and (ii) ground on which this court must exercise a jurisdiction which it would not otherwise have to order the return of the child to the state of his pre-removal or pre-retention habitual residence. An order for the return of a child is made by this court because the court has held that in the circumstances that is what Article 12 of the Convention requires. In contrast, in matters of access, the Convention gives no priority to the law or the courts of the state in which the child was habitually resident before his removal to or retention in another Contracting State. It makes provision in Article 7 for the co-operation of Central Authorities, including, in a proper case, making arrangements for organising or securing the effective exercise of rights of access. It makes provision in Article 21 for the party possessed of rights of access to present an application for assistance to the Central Authority, and for the Central Authority to take steps to remove obstacles to the exercise of rights of access and to initiate or assist in the institution of proceedings with a view to organising or protecting rights of access and securing respect for the conditions to which the exercise of these rights may be subject. But the provisions of the Convention about access rights stop at that point. There is no obligation placed on the judicial authorities of the other Contracting State. The Convention enables the parent holding rights of access to enlist the help of the Central Authority in the other Contracting State to facilitate his making application to the courts of that state. But once he is before those courts, he has no additional rights or remedies attributable to the Convention. The courts will no doubt accord appropriate weight to the order of the foreign court by which the rights of access were constituted as a relevant circumstance, but they are not required by the Convention to implement those rights.

It follows, in my view, that in dealing with an application such as that made by the present petitioner this court is exercising the same jurisdiction, and is obliged to apply the same substantive law, as it would do if it were entertaining an application for a contact order by a pursuer resident in Scotland. The existence, in the present case, of the Canadian access

order in favour of the petitioner is in my view clearly relevant, but it is relevant as a matter of fact; it does not alter the substantive law which is applicable to the issue. The weight which will be accorded to the foreign order will be a matter of the circumstances of the particular case. It is not appropriate that I should at this stage say anything about the weight which ought to be accorded to the order of the Ontario Court in the present case. What is significant, for present purposes, is that there is no difference in the substantive law applicable to the case attributable to the fact that it is brought by a party holding a foreign access order in his favour.

If that analysis of the Convention is correct, there would appear to be substance in Mr Macnair's submission that there is no such thing as an "application for access to a child under the Hague Convention". If that is so, then Rule 70.5(2) can be said to have no content, in the sense that it purports to lay down a procedure for a non-existent category of case. If that is correct, it follows that the present petitioner's application ought to have been made by summons in accordance with Rule of Court 49.1(1)(j), concluding for a contact order in terms of section 11(2)(d) of the 1995 Act.

I do not consider, however, that I can accept Mr Macnair's submission. Rule of Court 70.5 (2) clearly contemplates the existence of a category of application to which the description "application for access to a child under the Hague Convention" can be applied. It makes provision for procedure by petition in cases within that category. The question must therefore be asked: what is the category of case to which the rule refers, and therefore applies? The fact that the Convention confers no separate rights or remedies in relation to access to children which are enforceable by judicial proceedings means that there is a sense in which no application to the court for access to a child can be made "under the Hague Convention". But that cannot be the sense in which the phrase is used in the rule. It is not, in my view, stretching the meaning of the phrase "application for access to a child under the Hague Convention" too far to conclude that it must mean an application for access (or contact, to use the terminology now adopted in the domestic context) in which (i) the parent seeking the assistance of the court holds an order for access pronounced in the courts of another Contracting State in which the child was habitually resident at the time of the order, (ii) the parent has sought the assistance of the Scottish Courts Administration as the Central Authority in a way contemplated in Article 21, and (iii) the remedy which is sought from this court is sought with a view to enabling the applicant parent to exercise access to the child to which the foreign order relates. I do not express a concluded opinion that each and every feature which I have enumerated is essential if an application is to come within the scope of Rule 70.5(2). Those are, however, the features which I identify as present in this case, and which I regard as sufficient to show that the present application is within the category to which Rule 70.5(2) was intended to apply. The result is, in my opinion, that although an application of the sort made in the present petition is an ordinary application for a contact order under section 11(2)(d) of the 1995 Act, and although such an application ordinarily falls to be made in a family action under Rule 49.1(1)(j), Rule 70.5(2) has made an exception which provides a different procedure when, in the sense I have described, the application for access is made "under the Hague Convention".

Although I am driven to that conclusion by the very existence of Rule 70.5(2), I am left with a strong impression that that rule was unnecessary, and is probably unhelpful to the satisfactory conduct of such applications. It is clear that a summary and very speedy procedure is necessary to deal with applications for return of a child under Article 12 (and also to deal with applications for declarator of wrongful removal or retention). Rule 70.5(1) and (3) deal with those cases, and the subsequent procedure under Rule 70.6 for a short period of notice, the early lodging of affidavit evidence on each side, an early first hearing, close judicial control of procedure and a presumption against the admission of oral evidence,

all seems clearly to be designed to facilitate adherence to the six week timetable set as a target in Article 11. All of that makes sense in the context of a jurisdiction the primary purpose of which is to return children summarily to a state in which they were habitually resident and from which they have been abducted, so that the merits of any issue as to their future care may be determined without delay by the courts of that state. On the other hand, I see no strong justification for applying the same procedure to an application for access. In such an application the applicant either does not have or has chosen not to invoke a right to have the children returned under Article 11. The children will in all probability have acquired or be in the course of acquiring a new habitual residence in Scotland. The Scottish courts will therefore be the courts with primary jurisdiction to adjudicate on the sharing of parental rights and duties in respect of the children. There is no call for unusual expedition, beyond that which is appropriate in any case concerning children. There is a normal procedure by way of summons under Rule 49.1 for bringing disputes about access or contact before the court. There is no compelling reason, it seems to me, to lay down a separate procedure for dealing with those few cases in which the applicant for contact has the benefit of an order for access from the courts of a jurisdiction in which the children were formerly habitually resident, and in which he has perhaps sought the assistance of the Central Authority. I do not regard the practical considerations relied upon by Mrs Davie as having significant weight. The fact that the applicant holds an award of access from the foreign court seems to me to be no more than a factual consideration, which may have more or less weight according to the particular circumstances of the case. It does not give rise to a need for a special procedure. Nor does the mere geographical distance of the applicant's place of residence from Scotland by itself justify having a separate procedure in which emphasis is placed on affidavit evidence. The degree of geographical separation will vary from case to case, and it is in any event easy to figure a case in which a parent resident at the other side of the world, but with no existing order for access in his favour, would have the same logistical difficulties in pursuing Scottish proceedings but would not have the "benefit" of the application of Rule 70.6(5). On the contrary, it seems to me that the practical considerations identified by Mr Macnair are weightier. I do not regard them as rendering Rule 70.5(2) unworkable, since ad hoc provision can in my view be made, but it is in my view difficult to see any rationale for the absence from the procedure applicable to petitions under that rule of such matters as provision for intimation of the application to the children and provision for subsequent variation of any order on a change of circumstance. The emphasis on affidavit evidence in Rule 70.6 seems to me to be entirely understandable in the context of Rule 70.5(1) or (3) applications, but if under Rule 70.5(2) the court is exercising the same jurisdiction as it exercises in domestic applications for a contact order, with the welfare of the child the paramount consideration, the rationale for that emphasis in the latter context is unclear. In my opinion there is no real need for the special provision made by Rule 70.5(2), and such a case as the present would be more satisfactorily processed as an ordinary claim for a contact order in a family action. There is, in my respectful view, a strong case for reconsidering the need for, and desirability of, the special procedural provisions contained in Rule of Court 70.5(2).

Nevertheless, since the Rules of Court make the provisions which they do for applications for access to a child under the Convention, and since the phrase "under the Hague Convention" must in my view receive the interpretation which I have indicated, I reject Mr Macnair's submission that the present petition is incompetent.

That leaves for consideration Mr Macnair's second submission. It is in my view certainly easier to recognise as an application for access under the Convention one in which the applicant holds from the foreign court an order which he is seeking to put into effect. If it can be said that the order sought in this court is wholly different from the existing order of the foreign court, there appears at first sight to be merit in the proposition that even the

loose meaning of "under the Hague Convention" which I have held must be intended in Rule 70.5(2) cannot be applied. Mrs Davie sought to argue that the difference between the order held and the order sought did not matter because what was sought to be enforced or implemented was not the specific order of the foreign court but the petitioner's "rights of access" in a general sense. I do not consider that that is right, but it does not follow from my rejection of that argument that the petition is irrelevant. I am of opinion that one way in which judicial proceedings in Scotland may be deployed to achieve the objective which Article 2l enjoins the Central Authority to facilitate is by seeking, in effect, a decree conform from this court; in other words, the petitioner may, on the strength of a specific order for access pronounced in the foreign court, seek from this court an order in identical terms. But there are other possibilities. For example, it seems to me that a parent holding an order entitling him to two weeks residential access in Canada each summer might make an application under Rule 70.5(2) seeking from this court, not a repetition of the access order as such, but an order on the other parent to make specific arrangements for the child to travel to Canada so that such access might be enjoyed. Nor in my view would it be appropriate to regard any discrepancy between the order held and the order sought as taking the application out of the scope of Rule 70.5(2). I note that in In re G, the application seems to have been expressed in general terms echoing Article 21, for protection and implementation of the father's access rights, and the order made by the judge of first instance and upheld by the Court of Appeal was for access in England, whereas the Canadian order was for access in Canada. It seems to me that the extent to which the order sought in this court will correspond with the order held from the foreign court will vary according to circumstances. Here the order which the petitioner holds is virtually incapable of being given effect according to its terms now that the children are resident in Scotland, since it provides for weeknight and weekend access. What he seeks is a substitute for that access in residential form. Although that is, in a sense, wholly different from the order which he holds, he nevertheless seeks to rely on the fact that he holds the Canadian order as part of the basis on which he asks this court to make the substitute order. It would not be appropriate for me to express a view at this stage, without having heard any evidence, on the weight which ought in the circumstances to be accorded to the existence of the Canadian order in the context of the different order which the petitioner seeks from this court. I am not satisfied, however, that it would be appropriate to hold as a matter of relevancy that this cannot be regarded as an application for access under the Convention simply because the order sought from this court is different from the order which the petitioner holds from the Ontario Court.

I am therefore not prepared to dismiss the petition at this stage on either of the grounds argued by Mr Macnair. At the hearing it was common ground that if I took that view, I should put the case out By Order to give parties a further opportunity to address me on future procedure in light of the views which I took of the preliminary points. The petition will accordingly be put out By Order for that purpose.

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