OUTER HOUSE, COURT OF SESSION

[2011] CSOH 208

P1136/11

OPINION OF LORD BRODIE

in the Petition of

IGR (AP)

Petitioner;

for

orders under the Child Abduction and Custody Act 1985

Petitioner: Hayhow, Advocate; Wright & Crawford, Solicitors
Respondent: Innes, Advocate; Morisons, LLP

20 December 2011

Introduction

[1] This is a petition for a return order under the Child Abduction and Custody Act 1985 in respect of a child, a boy, E, who was born in Poland on 25 September 2007, who is a Polish citizen and who was removed from Poland and taken to Scotland on 28 February 2009. The petitioner, an Egyptian national resident in Poland, is the father of the child. The respondent, a Polish national currently resident in Scotland together with E, is the mother. The petitioner and the respondent were married on 3 March 2005.

[2] First orders in the petition were granted on 14 October 2011. The petition was served later that day. Answers were received, although late, on 21 October 2011 and the petition continued, in terms of RCS 70.6(5)(c), to what was designated as a second hearing.

[3] The petition came before me for hearing on 24 November 2011. Counsel for the petitioner, Mr Hayhow, confirmed that his motion was for grant of the prayer of the petition which sought an order for the return of E to Poland. He accepted that if the court was minded to make such an order, the specific arrangements for its implement might usefully first be discussed at a By Order hearing. Counsel for the respondent, Miss Innes, conceded that the removal of E from Poland on 28 February 2009 had been "wrongful" in terms of article 3 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention") and had been in breach of the petitioner's "rights of custody" in terms of article 5. Article 12 of the Hague Convention was therefore engaged. Nevertheless, the respondent sought to resist an order for his return. Miss Innes accepted that in these circumstances the onus was upon the respondent, as the party opposing return, to establish a basis upon which the prayer of the petition should be refused. She indicated that she would argue that the petitioner had acquiesced in the respondent retaining E in Scotland; that there was a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; that the child is now settled in his new environment; and that in an exercise of its discretion, the court should not order the child's return.

[4] I heard submissions by counsel under reference to affidavits, an unsworn statement by the petitioner, a letter from the respondent, and the other productions, on 24 November 2011 and the following day. No oral evidence was led. I also had regard

to the terms of a letter from the Social Work Manager Children and Families and Justice, dated 23 November 2011 (based on a visit by an identified qualified social worker to the respondent's home address on 22 November 2011), which had been sent to the court and which was received as number 18 of process. I shall refer to this as "the social work report". The social work report gives an account of certain complaints made by the respondent against the petitioner which, in line with the approach to be taken when considering conflicting affidavits (see *D* v *D* 2002 SC 33 at para 8) standing the petitioner's denial, I cannot regard as proved. In addition there is information, based on the letter writer's own assessment of the position as well as the observations of the social worker who made the home visit, which would indicate that E is currently well cared for.

The facts

Uncontroversial facts

[5] A certain amount appeared to be uncontroversial as between the parties.

[6] The parties married on 3 March 2005. They had met in Egypt when the respondent was there on holiday. The respondent had previously been married and has an eighteen-year-old son by that marriage. He lives in Poland with his father. The petitioner came to reside in Poland in about February 2006. The respondent is a trained teacher but has not worked recently in this capacity. She and the petitioner had a coffee shop business in Poland which got into financial difficulty and had to be closed. The respondent worked subsequently in Warsaw as a product manager.

[7] The respondent left Poland, together with E, and came to Scotland on 28 February 2009. As at that date the respondent, the petitioner and therefore E, were all habitually resident in Poland. Since her arrival she has lived in three addresses in

Airdrie: from February 2009 until March 2010 at the first address, from March 2010 until February 2011 at the second address and thereafter at the third address. There has been telephone communication between the parties initiated by the respondent since the respondent's arrival in Scotland but the respondent has never disclosed her address to the petitioner. The parties have not seen one another and the petitioner has not seen E since he left Poland in February 2009.

[8] The respondent has applied for and been allocated a National Insurance number. She has applied to register under the Accession State Worker Registration Scheme. She has claimed Child Benefit for E. She is currently self-employed. She is a student at Motherwell College.

[9] E has a good command of English. He attends a local nursery. He is also cared for by a local childminder, LCC, with whom he has a good relationship, when the respondent is studying or at work. The assessment of the responsible social work authority is that E is thriving in his mother's care in Scotland.

[10] On 27 October 2011, subsequent to service of the petition the respondent raised divorce proceeding in Warsaw District Court - 7th Civil Registry (Sad Okregowy w Warszawie VII Wydzial Cywilny Rejestrowy) seeking, *inter alia*, orders allowing the child to reside with her and depriving the petitioner of contact. Under cover of e-mail dated 7 December 2011, and therefore after the conclusion of the hearing on this petition, the respondent's agents sent my clerk a copy Decision of what is described in the accompanying translation as the 7th Civil Registry Department of Warsaw Circuit Court dated 28 November 2011 ruling that, as matters stood, the court did not have jurisdiction in the matter of parental responsibility in respect of E. The Decision of the Polish court applies article 8 of Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters

and the matters of parental responsibility ("Brussels II *bis*") which provides that jurisdiction depends on the habitual residence of the child. As the Polish court explains, article 12 of Brussels II *bis* makes provision for prorogation of jurisdiction where all holders of parental responsibility agree and doing so is in the best interests of the child. However, as the divorce proceedings had not been served on the petitioner, jurisdiction on that ground could not yet be established.

[11] The petitioner has the necessary permission to work in Poland. He has applied for a residence permit. He has not yet secured it.

Disputed or doubtful facts

[12] The respondent alleges that the petitioner has been violent towards her while they were living together and that she left him after a violent incident on 12 or 13 February 2009. This the petitioner disputes. I am not in a position to determine the truth or otherwise of the respondent's allegations of a history of physical violence towards her but the affidavit of the respondent's friend, B S-M, supports the respondent's account of a row between the respondent and the petitioner on or about 13 February 2009 in consequence of which the respondent left and stayed with B S-M until her departure for Scotland. That is inconsistent with the petitioner's reference to his returning from work on 28 February 2009 to find the respondent and E gone. The respondent disputes that the petitioner was in work at that time.

[13] According to the affidavit of AMK, a Polish national and friend of the respondent with whom she and E lived when they first came to Scotland, E "speaks very good English. He understands Polish words but doesn't speak this language ...He speaks only English". The respondent does not address E's ability to speak Polish in her affidavit. I confess that I would consider it surprising were it to be the case that

the respondent, currently in the situation of a single mother and a native speaker, never uses Polish with her child with the result that E has no command of that language. On available information, I do not accept it as established that E has no fluency in Polish.

[14] The respondent claims that she told the petitioner that she intended to go to the United Kingdom before she left Poland and that two days after her arrival that she telephoned the petitioner and told him that she was in Scotland. Moreover, the respondent's position is that the petitioner had her mobile telephone number which he has used to call her using the United Kingdom national code. The petitioner's position is that telephone calls were initiated only by the respondent and that it was only in February 2011 that he learned that respondent was in the United Kingdom (by reason of a money transfer through Western Union) and in April 2011 that he learned her address (from an internet posting). According to the respondent it was the petitioner who specified the country of destination in the instructions for the money transfer.

[15] The petitioner claims to have been in employment part-time from 28 October 2011 at a monthly salary of zł 2000. The respondent has no knowledge of this. Miss Innes, on behalf of the respondent, expressed scepticism as to whether the documentation apparently supporting the fact that the petitioner was employed was genuine.

[16] The petitioner claims to have secured the tenancy of a small flat at a specified address in Warsaw at a rent of zł 300 which he is prepared to have transferred to the respondent on her returning to Poland. This is contrary to what the respondent states in her affidavit about the petitioner's living arrangements.

The law

[17] Counsel indicated that they were broadly agreed as to what were the main authorities and the principles to be derived from them, the only difference between counsel being one of emphasis.

Legislation

[18] Poland and the United Kingdom are signatories of the Hague Convention and it has had force between the two countries since 1 November 1992. The Hague Convention has domestic effect in the United Kingdom by virtue of the Child Abduction and Custody Act 1985, and, in particular, section 1 (2).

[19] The Hague Convention includes the following provisions:

> "*Article 11*
> The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children....
>
> *Article 12*
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial ... authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. ...
>
> *Article 13*
> Notwithstanding the provisions of the preceding Article, the judicial ... authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-
>
> (a) the person...having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> ...

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

...

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."

[20] Poland acceded to the European Union on 1 May 2004. Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels II *bis*") has effect in Poland and in the United Kingdom. In cases of wrongful removal and retention of children Brussels II *bis* applies the Hague Convention as complemented by the Regulation. Brussels II *bis* includes the following:

"Article 11

...

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

...

Article 60

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

...

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction."

The purpose of the Hague Convention

[21] The Hague Convention provides mechanisms, which include the participation of the designated Central Authority of the requesting state and the designated Central Authority of the requested state, whereby a child who has been removed (otherwise abducted) from his country of habitual residence in breach of rights relating to the care of the person of the child whether attributed to a person, to an institution or to some other body ("the person left-behind") will be returned promptly to the country of habitual residence. The Convention is intended to achieve summary and prompt return unless the abductor can establish that one of the exceptions provided by the Convention applies. The requirement for promptitude is emphasised by the requirement in Article 11 that if the judicial authority has not reached a decision within six weeks from the date of commencement of the proceedings it may be requested to provide a statement of the reasons for delay (in the present case that period of six weeks expired on the second day of the second hearing). Certain aspects of the Hague Convention were recently considered by the Supreme Court in *In re E (Children) (Abduction: Custody Appeal)* [2011] 2 WLR 1326. The opinion of the Court was delivered by Baroness Hale and Lord Wilson. At para 8 they said this about the underlying objects of the Convention:

> "8. ...The first object of the Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there. The left-behind parent should not be put to the trouble and expense of coming to the requested state in order for factual disputes to be resolved there. The abducting parent should not gain an unfair advantage by having that dispute determined in the place to which she has come. And there almost always is a factual dispute, if not about the primary care of the children, then certainly about where they should live, and in cases where domestic abuse is alleged, about whether those allegations are well-founded. Factual disputes of this nature are likely to be better able to be resolved in the country where the family had its home."

Thus, what this court is being asked to do when a petition under the 1985 Act is brought before it, is to send the child to the forum which it is assumed is best able to determine any outstanding issues relating to child's care and custody; this court is not being asked to determine these issues. In what are summary proceedings the underlying assumption is that a wrongful removal should be reversed, save only in the limited circumstances identified in the Convention. Even then, as Miss Innes accepted, an order for return may be made by way of an exercise of discretion.

Reason not to return: acquiescence in retention

[22] The first of the limited circumstances in which the requested state may decline to order the return of a child which was relied on by Miss Innes was that the petitioner as the person left-behind had acquiesced in the retention of E in Scotland. The relevant provision in the Convention is article 13(a). Lord Browne-Wilkinson addressed what was meant by article 13 acquiescence in *In re H (Abduction: Acquiescence)* [1998] AC 72 at 87G in these terms:

> "What then does article 13 mean by 'acquiescence?' 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?"

Having found support for this approach in decisions of the English, French and United States Federal courts (one of which was *Friedrich* v *Friedrich* 78 F. 3d (6th Cir. 1996), 1996 FED App. 0085 (6th Cir.)), Lord Browne-Wilkinson reiterated the position at 88D:

> "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."

[23] What the abductor therefore must prove is something about the state of mind of the left-behind parent; that he has, as Mr Hayhow submitted, in effect consented to removal of the child. As juries are regularly reminded, one person cannot look into the mind of the other, another's state of mind is a matter of inference to be determined by what they say or do (or do not do), by their "express words" and "outward and visible acts", to use the language of the Lord Justice-Clerk in *M* v *M* 2003 SC 252 at 254C. So it is with proof of acquiescence in the presence of a child in a country other than that of his habitual residence. As Lord Sutherland said, delivering the opinion of the Court in *Soucie* v *Soucie* 1995 SC 134 at 137, acquiescence may be active or passive. Neither in *Soucie* nor in the present case was there or is there an allegation of active acquiescence in the sense of a statement to that effect or some unequivocal act renouncing the left-behind parent's rights, but passive acquiescence may be inferred, as Lord Sutherland went on to explain, from unexplained inactivity on the part of the left-behind parent in circumstances where he is aware that the other parent's act in removing or retaining the child is unlawful. A long lapse of time between date of abduction and date of raising proceedings may of itself imply acquiescence but lack or otherwise of explanation is important. Where apparent inactivity is explained and that explanation is accepted, an inference of acquiescence will not necessarily be drawn. Apparent delay has to be considered in the wider context of the facts and circumstances as a whole: *M* v *M supra* at para 13.

Reason not to return: grave risk of harm to the child

[24] Miss Innes also relied on article 13(b) of the Convention which provides that the requested state is not bound to order the return of the child where the person opposing return establishes that there is a grave risk that his return would expose the child to

physical or psychological harm or otherwise place the child in an intolerable situation. This exception to the duty to return was considered at paras 29 to 37 of the opinion of the Supreme Court in *In re E supra* at para 32 *et seq*. These paragraphs include the following:

> "32. First, it is clear that the burden of proof lies with the 'person, institution or other body' which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.
>
> 33. Second, the risk to the child must be 'grave'. It is not enough, as it is in other contexts such as asylum, that the risk be 'real'. It must have reached such a level of seriousness as to be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.
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> 34. Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or *otherwise* "' placed "in an intolerable situation" (emphasis supplied). As was said in *In re D* [2007] 1 AC 619, at para 52, "'Intolerable" is a strong word, but when applied to a child must mean '"a situation which this particular child in these particular circumstances should not be expected to tolerate"'. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. ... if there is such a risk, the source of it is irrelevant...
>
> 35. Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. ..."

In re E was among the authorities which were before Lord Stewart in *ERG Petitioner* [2011] SCOH 126. At para 22 he provided a succinct statement of what is comprehended by "grave risk" in terms which both counsel before me were agreed were correct:

> "'Grave risk' exists when returning the child puts the child in imminent danger in the period prior to resolution of the custody dispute and adequate protection cannot be provided in the country of habitual residence: *Friedrich* v *Friedrich* 78 F. 3d (6th Cir. 1996), 1996 FED App. 0085 (6th Cir.); *C* v *C (Abduction: Rights of Custody Abroad)* [1989] 1 WLR 654."

The availability of protective measures in the country of habitual residence must not be lost sight of. Some psychological harm to the child may be inherent in cases of abduction, whether the child is or is not returned. It will be the concern of the courts of the country of habitual residence to minimise or eliminate that harm and in the absence of compelling evidence a Scottish court should assume what could be done in Scotland will be done in the country of habitual residence: *C* v *C (Abduction: Rights of Custody)* [1989] 1 WLR 654 at 664B.

[25] Article 13 (b) provides that the requested court is not bound to return the child if that would be to place him in "an intolerable situation". As appears from what was said in *In re* that is to set a high test. For a situation to be "intolerable" means that it is much more adverse than simply disadvantageous. In *Friedrich* v *Friedrich* the United States Court of Appeals for the Sixth Circuit explained:

> "A review of deliberations on the Convention reveals that 'intolerable situation' was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited that in the requested State."

Reason not to return: settlement

[26] Finally, Miss Innes relied on the provision in article 12 of the Hague Convention that even where the proceedings for return have been commenced after the expiration of the period of one year from the date of the wrongful removal or retention of the

child the court shall make an order for return, unless it is demonstrated that the child is now settled in its new environment.

[27] What is meant by "settled in [a] new environment" was explained by Bracewell J in *Re N (Minors) (Abduction)* [1991] 1 FLR 413 at 417 to 418 in terms which have subsequently been adopted and applied both in England (*Cannon* v *Cannon* [2005] 1 WLR 32) and Scotland (*Perrin* v *Perrin* 1994 SC 45, *Soucie* v *Soucie supra*, *P* v *S* 2002 Fam LR 2):

> "I find that [a] word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability. ... What factors does the new environment encompass? The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, *per se* , the relationship with the mother, which has always existed in a close, loving attachment. That can only be relevant in so far as it impinges on the new surroundings. Every case must depend on its own peculiar facts."

As Bracewell J went on to make clear, her reference to every case depending on its own facts was not an indication that the settlement exception should be opened up in such a way that it would fall to be determined as would a question depending on the child's best interests or welfare. The matter is put in quite strong terms in *Soucie* v *Soucie supra* at 139 C, in a passage with which a differently constituted Division expressly agreed in *P* v *S*:

> "...we consider that the proper question is whether the child is so settled in her new environment that the court would be justified in disregarding an otherwise mandatory requirement to have the child returned. This is another way of saying that the interest of the child in not being uprooted is so cogent that it outweighs the primary purpose of the Convention, namely the return of the child to the proper jurisdiction so that the child's future may be determined in the appropriate place. We agree with the Lord Ordinary that this is not just a balancing exercise between requirements of the Convention on the one hand and the interests of the child on the other. ... It follows in our view that in considering the proviso to art 12 what must be clearly shown is that the settlement in a new environment is so well established that it overrides the otherwise clear duty of the court to order the return of the child."

Discretion

[28] If none of the exceptions permitted by the Convention apply, then the child must be returned to his country of habitual residence. However, it does not follow that if one or other exception is established the court cannot order the return of the child. Although perhaps not immediately apparent on a superficial reading, it has long been recognised that article 18 of the Convention confers a discretion on the court to order return: *Soucie* v *Soucie supra* at 139D, *In re M supra* at paras 15, 26, 29 and 40. At that point a broader consideration of the child's welfare comes into play, as balanced against the objectives of the Convention, but only where the interests of the child require it should the court refuse to order return: *Soucie* v *Soucie supra* at 139E.

Right to family life and best interests of the child

[29] In *ERG Petitioner supra*, at para 37, Lord Stewart records that in the course of discussion before him he had raised, under reference to the decision of the Grand Chamber of the European Court of Human Rights in *Neulinger and Shuruk* v *Switzerland* 41615/07 [2010] ECHR 1053 (6 July 2010) [2011] 1 FLR 122, 28 BHRC 706, the issue as to whether a return order would conflict with the United Nations Convention on the Rights of the Child Article 3(1) (best interests of the child a primary consideration) or violate the Article 8 European Convention on Human Rights (respect for family and private life). As Lord Stewart goes on to explain, *Neulinger* appears to say that Hague Convention return orders cannot be granted automatically and that the best interests of the child must be consulted in each case. In *Neulinger* the European Court held that enforcement of the return order made by the Swiss court would violate the article 8 ECHR rights of both the mother and the child.

[30] Counsel referred me to *Neulinger* but, agreeing with the conclusion that Lord Stewart comes to at para 41 of *ERG Petitioner*, they accepted that any requirement to determine what to make of *Neulinger* had been obviated by the judgment of the Supreme Court in *In re E supra*. At para 52 of that judgment Lady Hale and Lord Wilson provide this summary:

> "52. ... the whole of the Hague Convention is designed for the benefit of children, not of adults. The best interests, not only of children generally, but also of any individual child involved are a primary concern in the Hague Convention process. We agree with the Strasbourg court that in this connection their best interests have two aspects: to be reunited with their parents as soon as possible, so that one does not gain an unfair advantage over the other through the passage of time; and to be brought up in a 'sound environment', in which they are not at risk of harm. The Hague Convention is designed to strike a fair balance between those two interests. If it is correctly applied it is most unlikely that there will be any breach of article 8 or other Convention rights unless other factors supervene. *The Neulinger case* [2011] 1 FLR 122 does not require a departure from the normal summary process, provided that the decision is not arbitrary or mechanical. The exceptions to the obligation to return are by their very nature restricted in their scope. They do not need any extra interpretation or gloss. It is now recognised that violence and abuse between parents may constitute a grave risk to the children. Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be."

Submissions

For the respondent

[31] Miss Innes expressly conceded that the petitioner had rights of custody in respect of E, that respondent's removal of E from Poland on 28 February 2009 had been wrongful, that article 12 of the Hague Convention was engaged, and that therefore the onus was on her to establish one or other of the exceptional circumstances which might entitle the court to decline to make an order for return.

[32] In support of her contention that the petitioner was to be held to have acquiesced in the retention of E in Scotland, Miss Innes referred to what appeared in the affidavits of the respondent; of BS-M, the friend with whom she allegedly took refuge

in Poland; of AMK and of LCC. The respondent, said Miss Innes, had required to leave home by reason of domestic violence and threats. It was the respondent's position that while she did not tell the petitioner specifically where she intended to live she did tell him that she was going to the United Kingdom and that he was in any event aware of that by reason of his telephoning her. The petitioner was able to specify the United Kingdom as the country of destination of the Western Union money transfer. There had been regular telephone contact between the parties from 4 December 2009 (this date is taken from the respondent's mobile phone bill), more frequently at her instance. The respondent had been living openly in Airdrie since February 2009 and had the petitioner wished to find her he could have done so. The respondent had applied for a National Insurance number which had been allocated on 20 March 2009. She received an Accession State Worker Registration certificate on 13 October 2009. On 29 September 2009 the respondent received confirmation of an award of Child Benefit for E as from 30 March 2009. The respondent was not someone who had been hiding from the authorities. Turning to the petitioner's statement and affidavits, Miss Innes pointed to what she said was inconsistent information: keeping in contact but withholding telephone numbers, not revealing her whereabouts but giving different addresses; and lack of specification in respect of the respondent's "long searches" for the petitioner. There had been what Miss Innes described as a "long period of inaction" until not long after the petitioner had applied for a residence permit in Poland. The respondent had been required to attend at the Polish consulate to provide information in relation to the petitioner's application. The respondent considered that the petitioner's former position of acquiescence has only changed by reason of his concern over his residence status. His affidavits should accordingly be assessed in the light of their inconsistencies and the likely explanation

of his sudden interest in E. This, Miss Innes submitted, was a case of long acquiescence with a lack of any explanation for the delay.

[33] The grave risk that ordering his return to Poland would expose E to physical or psychological harm or otherwise place him in an intolerable situation arose, in Miss Innes's submission, from the history of financial difficulties and assaults by the petitioner upon the respondent (one incident allegedly involving the child). Miss Innes acknowledged that in his affidavit the petitioner had put forward an offer to accommodate the respondent and E in a flat for which he would pay the rent but would not occupy and that the petitioner had documented his, recently obtained employment with a copy contract. As far as employment was concerned Miss Innes expressed some scepticism. An attempt had been made to contact the employing company by telephone but without success. It had no website. While the rent quoted in the petitioner's affidavit would be affordable, the petitioner would not be able to pay the substantial cost of placing E in a private kindergarten in order to permit the respondent to go out to work. The petitioner's proposals could not be regarded as properly specific and adequate in the sense discussed in *C* v *C (Abduction: Rights of Custody)*. Miss Innes drew my attention to the terms of the respondent's affidavit. If she and E were forced to return to Poland their situation would be "very bad" in that she would have no job and nowhere to live. The economic disadvantage that the respondent would suffer if required to return was relevant, as was the risk that E might be exposed to domestic violence.

[34] The final exception relied on by Miss Innes on behalf the respondent was that more than a year had elapsed from the date of the wrongful removal to the date of commencing the proceedings and that E was now settled in his new environment. E was now four years of age and had been resident in Scotland since arriving here when

he was 17 months old. Accordingly, E has lived in Scotland for most of his life. He has been in the same place in that he has lived in Airdrie since arriving in Scotland. He is registered with a local medical practice. E is familiar with Airdrie, its shops and parks. He had a close relationship with the respondent and with his child-minder, LCC who looks after him between 10am and 2pm on week-days. He has been attending nursery school five afternoons each week since August 2011. Prior to nursery he attended two toddler groups. He speaks perfect English. English is his language of choice over Polish. He is confident and has many friends, including friends from the group cared for by his child-minder. He has a particular friend of his own age. It was the respondent's position that she has kept the petitioner updated on E's progress and that the petitioner had never asked her to return E to Poland. An officer of the social work authority having statutory responsibility for the area where E lived had reported by way of the letter of 23 November 2011. The author of the social work report expresses the view that E is thriving in the care of the respondent and that he integrated into the local community. The respondent herself was settled in Scotland. She worked. She had not been supported by the petitioner. She had never been a "fugitive" or "on the run". She had lived openly and disclosed her presence and her address to the authorities in Scotland. She had established a home for herself and for E which is described by the author of the social work report as furnished and maintained to a high standard and managed to suit E's needs.

[35] Should the court reach the stage of considering an exercise of its discretion by ordering the return of the child notwithstanding the establishment of one or other of the exceptions, Miss Innes accepted that regard was to be had to the purpose of the Convention. In addition, regard had to be had to the circumstances founded on as giving rise to the exceptions and the child's best interests viewed from the perspective

of how his welfare was best to be promoted. The child, as she had already argued, was settled in Scotland, having lived here for some time. He was well cared for, as was clear from the social work report and the affidavits from E's nursery teacher and his child-minder. The respondent had the means to provide accommodation and care for E. This was to be contrasted with what would be available to her in Poland. To be uprooted from Scotland would not be in E's best interests. The petitioner's right to reside in Poland was not at present established.

For the petitioner

[36] Mr Hayhow's motion was to repel the respondent's pleas-in-law and to grant the prayer of the petition. By way of preliminary, he reminded me that, in terms of article 19, a decision on an application for the return of a child shall not be taken to be a determination on the merits of any custody issue. Thus in considering this application the court was not being asked to decide on issues of residence and contact but, rather, simply to apply the Convention, the underlying assumption being that the country of habitual residence was the best placed to consider where the best interests of the child lay. Beyond that, best interests only came into play if one got to the stage of an exercise of discretion. Mr Hayhow also emphasised the consequence of where the onus of proof lay and the approach to be taken to conflicting affidavits: in the absence of extraneous evidence supportive of the respondent's position, the petitioner was entitled to the presumption in favour of return. That was a significant hurdle for the respondent to surmount.

[37] For a case of acquiescence to be made out, the respondent had to prove the equivalent of consent on the part of the petitioner. While the court should not adopt the approach that delay gave rise to a presumption against return, Mr Hayhow

accepted that it was for the petitioner to show the reason for such lapse of time as pointed to the absence of subjective acquiescence. This he was able to do. The petitioner had no idea where the respondent had taken the child. As appeared from her affidavit, the respondent accepted that she had not told the petitioner where she was going to live and that there had been discussion about her going to Germany (where her mother lived); the respondent wished to conceal her address and had in fact done so. That coloured all submissions about delay. The petitioner had explained how he came to learn about the respondent's whereabouts: by the paper trail formed by the information needed for the money transfer and the respondent posting her address on the internet in connection with an E-bay transaction (downloaded on 6 July 2011). The petitioner had been assisted by an organisation that was concerned with finding abducted children. The respondent claimed to have registered for the purposes of Council Tax, although this had not been documented, but it could not be suggested that this was information accessible to the petitioner, any more than was her having a National Insurance number or being in receipt of Child Benefit. Regard had to be had to the petitioner's circumstances. As an Egyptian living in Poland only because it was his wife's country, he was, as he described himself, a "foreigner in a totally alien country". He had a limited command of Polish. It can readily be seen that he would have faced real and practical difficulty in dealing with the public authorities. As soon as he became aware of E's whereabouts and his entitlement under the Convention he took action and as soon as he had an address he applied to the Polish Central Authority on 19 May 2011. There was communication with the United Kingdom Central Authority in September 2011. The petition was served on 14 October 2011. At no time has the petitioner acquiesced and he should not be held to have done so.

[38] On the question of grave risk of harm to E if an order for return were made, Mr Hayhow emphasised what had been said in *Friedrich* v *Friedrich* and also in *C* v *C (Abduction: Rights of Custody)* and *ERG*. The focus is on the brief period before the Polish court can respond to such danger as there may be. It is to be assumed that the Polish court is both ready and able to do so. Given that the respondent will have exclusive residence in the flat currently rented by the petitioner there is no reason to apprehend that the Polish court will not be able adequately to protect the child from whatever he may be exposed to. However, the risk of violence to the respondent has not been made out. The incidents alleged by the respondent are denied by the petitioner and the respondent accepts that she has never taken any action in relation to such alleged incidents by, for example, seeking medical treatment or reporting the matter to the police. The real reason, according to Mr Hayhow, why the respondent came to Scotland was to improve her economic circumstances and not to flee from the petitioner. That much is apparent both from her affidavit and that of her friend AMK. The respondent's allegations are uncorroborated by any material put before the court beyond a reference to the respondent being frightened of the petitioner, this despite an indication in the social work report that other witnesses were able to speak to the matter. There is no allegation of direct violence to the child. The suggestion of grave risk to the child simply did not get off the ground. While he could only offer support up to his means, the arrangements proposed by the petitioner were sufficient to protect the child from an intolerable situation. Mr Hayhow reminded me that in terms article 11 of Brussels II *bis* a court cannot refuse to return a child on the basis of article 13b of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his return. Here adequate arrangements had been made. It was to be remembered that the respondent had thought it

appropriate to bring E to Scotland at a time when she had no home, no funds, no access to social security benefits, no nursery place, no employment and no command of the language. All this in contrast to her then situation in Poland as a qualified teacher and "lady of ability", whose income had been "not very low", to quote from the affidavits. The respondent had said that if an order was made by this court then she would return to Poland together with E. Mr Hayhow accepted that this was so. There was no evidence to suggest that the Polish authorities could not provide such protection as might be necessary to safeguard the child, particularly where divorce proceedings had already been raised in Poland by the respondent.

[39] Turning to the issue of settlement, Mr Hayhow emphasised that E was only four years old. He had a close relationship with the respondent but that was not in issue. The respondent would return with him to Poland if an order for return was made. Similarly, it was not disputed that E was happy and well cared for but E had only lived at his current address for 9 months and had only recently started nursery school. He had no relatives in Scotland other than the respondent and no history of connection with this country. Neither did the respondent have any such connection. There was no evidence of having Polish expatriate friends, other than AMK. The criteria for settlement enunciated by Bracewell J had not been met. As for the respondent, she may have had economic reasons for coming to Scotland but that was not the same as being settled here. E's sense of security will depend on being with the respondent but his connection with Scotland does not go beyond his mother's residence in this country. There was neither sufficient direct or indirect evidence to establish settlement her. There was not such a need for the child to stay here that it outweighed the purposes of the Convention.

[40] One only gets to the question of discretion, Mr Hayhow reminded me, if the court was against the petitioner on at least one of the exceptions. It was relevant to have regard to the fact that the respondent had raised divorce proceedings in Poland and that the Polish court was accordingly seized of the matter. Thus, the requesting country was to be regarded as the primary forum for disputes relating to residence and contact. The welfare of the child was admittedly relevant, but the question was whether it required that the child remain in Scotland notwithstanding the clear purpose of the Convention which was to facilitate the return of abducted children to their countries of habitual residence. To the extent that the petitioner's immigration status was relevant, he had a current entitlement (in terms of the Law of Foreigners of 13 June 2003) to reside in Poland while his application for a residence permit was being considered. The respondent had made efforts to undermine the petitioner's application, as was apparent from the terms of the respondent's affidavit. These had all been made after service of the petition on 14 October 2011.

Discussion

[41] This is a case of the wrongful abduction of a child, E, by the respondent. In any other than exceptional circumstances it is therefore the duty of this court, on an application being made to it, to order the return of E to the country from which he was abducted, which is Poland. The respondent argues that there are exceptional circumstances. The question therefore arises: has this been established?

[42] First, the respondent says that the petitioner has acquiesced in or, to use Lord Browne-Wilkinson's words in *In re H (Abduction: Acquiescence)*, "gone along with" the wrongful abduction. She does not, however, allege active acquiescence in the sense of a statement to that effect or some unequivocal act on the part of the

petitioner renouncing his rights. Rather, it is passive acquiescence in the sense of unexplained inactivity in circumstances where the petitioner was aware that the respondent's act in removing and retaining the child was unlawful. I have not been persuaded that such a case has been made out. It is true that a very significant length of time, more than two years and seven months, has passed between 28 February 2009 when E was removed from Poland and 14 October 2011 when these proceedings were initiated. As was explained in *Soucie*, a lapse of time may become so long that the inference of acquiescence may become inescapable, but even then apparent delay has to be considered in the wider context of the facts and circumstances as a whole. I do not find it established that the petitioner was aware of the country where the respondent was living until February 2011. The most information that she claims the petitioner had as to her whereabouts was her mobile telephone number, and that to contact her it was necessary to use the United Kingdom country code (the petitioner denies even knowing this). Notwithstanding the reference in the petitioner's statement to the respondent having "given different addresses" and it being accepted by both parties that they have been in touch by telephone, the respondent does not claim to have disclosed an accurate address to the petitioner. It does not sit well with the contention that the petitioner has acquiesced in the retention of E that the respondent accepts that she was concealing her whereabouts from him. This may not be a case where it would be appropriate to describe the respondent as "a fugitive" or "on the run" but it does not follow from the fact that the respondent has disclosed her presence to the public authorities for the purposes of being permitted to work and to receive benefits, that if he had wanted to find her, the petitioner could have done so, as Miss Innes suggested. He claims not to have known that she was in the United Kingdom until recently and, as Mr Hayhow reminded me, as a "foreigner in a totally

alien country" with a limited command of the language it is not difficult to imagine that he may have had difficulty in obtaining official assistance in Poland, as he claims to have had. It would appear from the translation of the Request for Return form addressed to the Polish Central Authority (but not, admittedly, from his affidavits or statement) that the respondent was attempting to persuade the respondent to return to him. In the circumstances I am satisfied that the petitioner has provided a reasonable explanation for not taking earlier action to secure E's return to Poland and that accordingly he is not to be taken to have acquiesced in the retention of the child in Scotland.

[43] The respondent alleges that there is a grave risk that his return would expose E to physical or psychological harm or otherwise place him in an intolerable situation. Put shortly, she founds on a history of domestic violence towards her and the economic disadvantage and consequent hardship associated with her being required to return to Warsaw. As far as the history of domestic violence is concerned, I do not find it established on the evidence before me. That is not to say that I entirely discount what the respondent alleges. I certainly cannot say that it is not true. I accept that a child may and indeed probably will suffer psychological harm if he witnesses one parent being violent towards the other. Thus, given that I cannot say that the respondent's allegations are not true, it follows that there would be a degree of risk to E were he and the respondent to be required to live with the petitioner. That is not to say that there is a "grave" risk of harm in the event of an order being made for the return of E, as is required by the Convention if the requested court is to decline to return the child. The petitioner does not contend that the respondent and E should be required to live with him. Rather, he proposes that he vacate the flat that he is renting and make it available to the respondent and the child. Moreover, and critically, I take the Polish

court, supported by the relevant authorities, to be as well able to make orders for the protection of the respondent and E as a Scottish court would be in equivalent circumstances. While the competent Polish court has declined jurisdiction in respect of parental responsibility for E, it is likely that it would revisit that question in the event of E being present in Poland or the petitioner being willing to prorogate jurisdiction, which I assume he would be advised to do. Accepting that return to Poland may result in economic disadvantage to the respondent and a degree of hardship for her and E, again I do not consider that this factor, either alone or taken with allegations in relation to domestic abuse, amounts to grave risk of harm to E or would otherwise place him in an intolerable situation. It has to be borne in mind that, in terms of article 11.4 of Brussels II *bis*, a court cannot refuse to return a child on the basis of article 13(b) of the Hague Convention if it is established that adequate arrangements have made to secure the protection of the child after his return. In my opinion, in the event of grave risk or an intolerable situation consequent upon return being alleged in response to a request for return, the effect of article 11.4 is to turn attention to the available protective measures. These will include practical arrangements proposed by parties and the formal steps that may be taken by the judicial and administrative authorities in the requesting state. In the case of an European Union member state, such as Poland, it is to be assumed that the relevant authorities will be able and willing to take such steps as may appear to be necessary and that they will be effective, but were there to be any doubt about that, the matter can be explored through the Polish Central Authority with the assistance of parties' legal advisers. Accordingly, I do not find the article 13 (b) exception to have been made out.

[44] I now turn to the question as to whether E is to be considered as settled in his new environment.

[45] The test articulated in *Soucie* is that for the proviso to article 12 to apply what must be clearly shown is that settlement in the new environment, in both its physical and psychological sense, is so well established that it overrides the otherwise clear duty of the court to order the return of the child. Of obvious relevance is the length of time that the child has been in the requested country: eg *Perrin* v *Perrin supra* at 51E to 52C, *J* v *K* 2002 SC 450 at para 52. Here, E had been in Scotland for more than two years and seven months before the commencement of proceedings for his return to Poland. That is a significant length of time on any view, but that is particularly so when regard is had to the age of E. He was born on 25 September 2007. Accordingly, he is just over four years of age, having attained his fourth birthday shortly before service of the petition in these proceedings. More than half of his life has been spent in this country. That half has been at what is an important developmental stage for any child, when he is gaining language skills and beginning to be a social being in the sense of someone integrated within a wider society beyond his immediate family. No doubt E's sense of security is essentially founded on his relationship with the respondent whose competence as a mother is not in question. That has to be left out of account because it is a given, wherever E should be located. The respondent is committed to returning with E to Poland should she be required to do so by an order of this court and she will therefore be available to provide a mother's care wherever E is resident. However, on the information available to me it seems reasonable to infer that E is a child who is, according to the social work report, thriving, in part because of his relationship and integration with a variety of elements within his new environment and that these elements include those identified by Bracewell J in *Re N*

(Minors) (Abduction): place, home, (nursery) school, people, friends, activities and opportunities.

[46] For what it is worth, the social work report offers the view that E is integrated into the local community and, at least in a broad sense, that proposition gets support from the affidavits of AMK, LCC and (in the particular context of his nursery school) LC. As far as place and people are concerned, it is true, as Mr Hayhow submitted, that E has no relatives in Scotland other than the respondent and no history of connection with this country. It is also true that E has only lived at his current address for nine months (having previously lived at two other addresses) and has only recently started nursery school. That said, Airdrie is not a very large town. I would not see moving from one address to another within the town to be likely to be particularly disruptive for a young child. I therefore consider it more appropriate to give weight to E having lived in Airdrie for the last two years and seven months than to his having lived in his present home for the shorter period of nine months, although that is not that short a period of time in the life of a four-year old. E is described by AMK as having many friends. He has two particular friends, DJ and CM. E has been looked after by his child-minder, LCC, since he was 22 months old for some 6 hours a day, mixing with the other children looked after by LCC. When younger he attended two toddler groups. I would see all this as pointing to him being settled in Scotland.

[47] Then there is the degree of settlement of the respondent. It has to be stressed that the primary issue is the settlement of the child not the abducting parent. However the intentions and degree of settlement of the abducting parent are not entirely irrelevant: *P* v *S supra* at paras 41 to 43; *Cannon* v *Cannon supra* at paras 53 to 57; *C* v *C* 2008 Fam LR 28 at para 31 *et seq*, upheld in *NJC* v *NJC* 2008 SC 571 at paras 44 and 45. An influential factor in these cases was that the abductor had an only transient

relationship with the requested country because he or she was to be regarded as a fugitive or "on the run". Here, although she does not have family in Scotland (other than E) and has no history of connection with this country other than some Polish friends, I would accept on the information before me that the respondent has established that she is settled in Scotland. Admittedly, as I have already mentioned, if this court were to order the return of E to Poland, she would accompany him. However, I do not see the respondent's residence in Scotland as merely transient. She has secured permanent accommodation. She has registered under the Accession State Worker Registration Scheme. She has, as I understand it, established a business. She is undertaking further education. She speaks English. She is on the Electoral Roll. She has claimed benefits.

[48] On the view that I take of the facts I am therefore not obliged to order the return of E to Poland. However, equally, I am not obliged to refuse to make such an order. I have a discretion in the matter. That discretion is at large. It is not necessary to import any further requirement for the case to be exceptional if the discretion is to be exercised against an order for return. The matter is discussed by Baroness Hale in *In re M supra*. Given the length of time that E has been in Scotland, the objective of the Convention in promoting a swift return of an abducted child to its country of habitual residence cannot be achieved. While Poland was E's country of habitual residence when he was abducted that is no longer so. Poland no longer provides the forum which is clearly best placed to determine issues of parental responsibility: *In re M supra* at para 47. Once the discretion opens up, the primary focus comes to be the welfare of the child; the objectives of the Convention are no longer overriding. While the fact that E is thriving in Scotland does not mean that he might not equally thrive in Poland, I see it as an important consideration that he is apparently so well provided

for in his present environment. The social work report describes the home that the respondent has established for herself and E as furnished and maintained to a high standard. E appeared to the visiting social worker to be a happy, lively child who, according to his nursery teacher is immaculately presented and developing to his potential. Whereas E has a nursery place in Scotland, it seems accepted that the equivalent would only be available in Poland at a not insignificant cost. Given E's age, and his life experience to date it is difficult to avoid the conclusion that requiring him to return to Poland would be disruptive and a cause of unhappiness. I recognise that not returning E to Poland has the adverse consequence that it will be more difficult for the petitioner to have contact with E, whether as a result of agreement with the respondent or in terms of the order of a Polish court. The respondent will have gained what can be seen as the illegitimate forensic advantage, which the Convention was designed to avoid, of obliging the petitioner to litigate in a forum with which he is entirely unfamiliar. However, given my conclusion on settlement and the evidence which led me to it and all the circumstances of the case, I take the view that E's welfare is more likely to be promoted by a refusal to return him to Poland than by an order requiring his return.

Decision

[49] I shall accordingly repel the first and third pleas-in-law for the respondent, but sustain the second plea-in-law for respondent and refuse the prayer of the Petition reserving all questions of expenses.