FIRST DIVISION, INNER HOUSE, COURT OF SESSION

Lord President
Lady Cosgrove
Lord Johnston

P1431/02

OPINION OF THE COURT

delivered by LADY COSGROVE

in

RECLAIMING MOTION

for

PETITION and ANSWERS

by

P. W.
Petitioner and Reclaimer;

against

A.L. or W.
Respondent;

for

An Order under the Child Abduction and Custody Act 1985

_____

Act: Davie; Drummond Miller, W.S. (Petitioner and Reclaimer)
Alt: Wylie; Balfour & Manson (Respondent): Mundy; Mowat Dean (H.W.)

12 June 2003

[1] The petitioner and respondent were married at Aberdeen on 8 November 1997. There are four children of the marriage, H, born on 4 July 1993 (a child of the

respondent by a previous relationship, and accepted into family by the petitioner), A and D, both born on 14 March 1996, and F, born 3 December 1999.

[2] The petitioner and the respondent emigrated to Australia in April 1998 and lived there together with their children until November 2001, when they separated. On 14 January 2002, following an application by the petitioner to the Family Court of Western Australia, the court of Petty Sessions, Perth, Western Australia pronounced Minute of Consent Orders in terms of which the petitioner was to have contact to the children on two days each week and by telephone every evening. On or about 17 January 2002 the respondent returned to Scotland with the children without having obtained the consent of the petitioner.

[3] In this petition, the petitioner seeks an order for the return of the children to the jurisdiction of the Family Court of Western Australia. That order is sought on the basis of the Child Abduction and Custody Act 1985 and the articles of the Hague Convention on the Civil Aspects of International Child Abduction set out in schedule 1 to the Act. The respondent lodged answers to the petition. A proof took place before the Lord Ordinary on 20 and 21 February 2003. On 25 February 2003 he issued an interlocutor refusing the prayer of the petition. Against that interlocutor of the Lord Ordinary the respondent has now reclaimed.

[4] It was admitted before the Lord Ordinary and this court that the removal by the mother of the children was unlawful in terms of Article 3 of the Convention, and that the petitioner had rights of custody in respect of all four children in terms of Article 5. That being so, it was not disputed that Article 12 applied, and that, unless Article 13 could be invoked successfully, the court required to order the return of the children forthwith to Western Australia.

[5] Article 13 provides:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative 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) …

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

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

[6] Before the Lord Ordinary the submission on behalf of the respondent was that she was willing to accompany the children back to Australia but would be unable to do so: despite considerable efforts made by her, she had been unable to obtain a suitable visa. The children had always been in her care and, in the event of their being returned to Australia without her, there was a grave risk that they would be placed in an intolerable position. It was further contended that the respondent had no accommodation or means of support available to her and the children in Australia. It was separately contended on behalf of the child, H, who is now over 9½ years old, that she did not wish to return to Australia and that she had attained a degree of maturity at which it was appropriate to take account of her views.

[7] In paragraphs 3 and 4 of his opinion the Lord Ordinary expressed the following views on the respondent's defence under Article 13(b):

> "In the circumstances of the present case, where the respondent has cared for the children for nearly all of their lives, I would regard separating the children from their mother as placing them in an intolerable situation. The same would be true if the children were separated from one another; the family unit is clearly of paramount importance, and breaking it up for reasons based on the Convention would be wholly unacceptable. For these reasons, if I had been inclined to order the return of the children to Western Australia, I would not have pronounced an interlocutor ordering their return unless I was first satisfied of two matters. The first such matter is that the respondent should obtain an Australian visa that will entitle her to remain in Australia for the entire duration of the proceedings relating to the custody of the children, however long such proceedings might take. In my opinion it is for the Australian authorities to make a satisfactory visa available; Australia has made a request to the Scottish Executive for the return of the children, and it is for her authorities to ensure that the necessary conditions for the return of the children are met. If, of course, such a visa entitled the respondent to work in Australia, the question of maintenance would be of substantially less importance.
>
> The second matter on which I would require to be satisfied before ordering the return of the children is that the respondent would have adequate means of support in Western Australia."

[8] The Lord Ordinary rejected as inappropriate the submission that he could make an immediate order for the return of the children conditional on the provision by the authorities of a satisfactory visa and an undertaking on behalf of the petitioner to provide suitable maintenance. He then proceeded, without having reached a

conclusion as to whether the art 13(b) defence was established, to consider the separate defence submitted on behalf of the child, H. He found himself satisfied that H objected to returning to Australia and that she was of sufficient age and maturity for her views on this matter to be taken into account. He then proceeded to exercise the discretion conferred on him and reached the conclusion that the present case was sufficiently exceptional for the second of the paragraphs of art 13 to apply to the child. He accordingly gave effect to her wishes and refused to make an order that she be returned to Australia.

[9] The Lord Ordinary then returned to a consideration of the position of the three younger children and concluded as follows:

> "This clearly has an impact on the position of the three younger children. As I have already stated, I consider the maintenance of the family unit, comprising all four children and also the respondent, to be of paramount importance in the present case. If HW is not to be returned to Western Australia, I am of opinion that ordering the return of the other three children would place both those children and HW in an intolerable situation. Indeed, it was very clear from HW's remarks during her interview that she was closely attached to her brothers and sister and that she would in no circumstances want to be separated from them. In these circumstances, I am of opinion that my refusal to return HW has the inevitable consequence that I must refuse to return DW, AW and FW. I will accordingly refuse the prayer of the petition."

The submissions

[10] Counsel for the petitioner submitted that the Lord Ordinary had erred in law in reaching his decision on the issues raised in this case. In particular, he had erred in his approach to the assessment of whether H had reached a sufficient age and degree

of maturity that her wishes should be taken into account. He had failed to test her maturity and the strength and validity of her objection by reference to her reasons. He had also failed in the exercise of the discretion conferred upon him in deciding whether he should give effect to her wishes. Further, his approach to the art 13(b) defence was flawed. He ought to have considered whether that defence was established in respect of A, D and F before considering the effect of any decision on the family as a whole. It was further submitted that in the event of an application to the appropriate authorities being made by the respondent on behalf of herself and the children, suitable visas for their return to Australia could be obtained. An undertaking was given on behalf of the petitioner that, in the event of the respondent returning to Australia with the children, he would pay a sum of A$875 a week for their maintenance. He was also willing to give an undertaking that he would obtain separate accommodation for them.

[11] On behalf of the child H, who was separately represented both before the Lord Ordinary and this court, it was submitted that the assessment of her age and degree of maturity were matters of fact peculiarly within the province of the Lord Ordinary. The decision he made was one that was open to him on the material before him. Although the decision was not one that depended upon the assessment of the credibility and reliability of evidence given by witnesses, this court should be slow to interfere with his findings in fact, particularly where these had been so materially influenced by his interview with the child which was of crucial importance to his decision. There was nothing in the opinion of the Lord Ordinary to indicate that he had erred in any way in the exercise of the discretion conferred on him in respect of the child H under the second paragraph of art 13. He had examined the reasons given by her at the appropriate stage. Further, he was entitled to decide as he did that the

impact of the decision he reached about H gave rise to a valid objection under art 13(b) in respect of the other three children. The Lord Ordinary's approach to the issues was correct and followed that adopted by the Inner House in the case of *Urness* v. *Minto* 1994 S.C. 249.

[12] On behalf of the respondent, counsel submitted that circumstances beyond her control prevented her from returning to Australia. It was emphasised that this was not a case in which the abducting parent was herself creating the potentially intolerable situation by her refusal to return with the children. The Lord Ordinary was correct to find that he could not reach a decision as to the validity of the art 13(b) defence without being satisfied that suitable visas were available for the respondent and the children. The Lord Ordinary was also entitled to be concerned about the question of maintenance for the respondent and the children should they return to Australia. Although an order was currently in force requiring him to pay A$875 per week, a motion had been enrolled in the Australian court on behalf of the petitioner to have that award reduced to nil.

The Lord Ordinary's treatment of the Article 13(b) defence

[13] The Lord Ordinary did not find that there was any intolerable feature of the children's lives in Australia immediately prior to their wrongful abduction. But he concluded that returning them to Australia without their mother who had cared for them for all of their lives would place them in an intolerable situation. We agree with that view. We consider, however, as was conceded before us, that the Lord Ordinary erred in reaching the view that it was for the Australian authorities to make a satisfactory visa available. The availability of a visa for the respondent which will enable her to return to Australia and to remain there until the conclusion of any proceedings before the Australian courts in respect of custody, residence and contact

have been completed is clearly of crucial significance. It was clear from the documentation before us and, in particular, from a letter from the Australian Department of Immigration and Multicultural and Indigenous Affairs dated 21 May 2003 that there is no power for the Minister to grant a visa to a person where no visa application has been made. That letter also indicated that a particular category of long stay tourist visa may be granted where the purpose of the stay is to attend or pursue court proceedings. The Lord Ordinary could have provided that the execution of any order for the children's return was suspended until the Australian authorities had, on receiving an application from her, provided suitable visas for both the respondent and the children. In that situation, we have little doubt that the Australian Immigration Department considering the application would be mindful of the reciprocal nature of the Convention obligations. It was also open to him to seek a suitable undertaking from the petitioner in respect of the provision by him of means of support for the respondent and the children.

[14] As we have already explained, what the Lord Ordinary did was to proceed, without reaching a conclusion as to the situation of A, D and F, to consider the separate defence advanced in respect of the oldest child, H. Having reached the view that she ought not to be returned, he then resumed consideration of the situation of her three siblings. In the passage from his Opinion quoted above he concluded that his decision about H clearly had an impact on the position of the three younger children: if H was not to be returned, ordering the return of them would place them in an intolerable situation; and for that reason he refused to return A, D and F.

[15] Counsel for the respondent submitted that the Lord Ordinary's approach was correct. He had to consider the two defences separately. He decided H was not to be returned and then took account of the effect of that decision on the art 13(b) defence.

An intolerable situation for the three younger children arose only once he had decided not to return H; he was entitled to proceed on the assumption, without having any specific evidence on the matter, that the three younger children would be devastated by being separated from her. In reaching his final conclusion on the claim for the return of A, D and F by reference to the paramount importance of maintaining the family unit, he had followed the approach adopted in *Urness* v. *Minto* where, having decided to give effect to the wishes of an 12 year old boy, the court concluded that separation would lead to an intolerable situation for his 9 year old brother who had not achieved the appropriate degree of maturity for his wishes to be taken into account so that neither child ought to be returned.

[16] The approach of the Court of Appeal in the case of *Re T.* (*Abduction: Child's Objection to Return*) [2000] 2 F.L.R. 192, which we will refer to for brevity as *Re T.*, faced with a similar situation involving two siblings, was rather different. There, Ward L.J., who gave the leading judgment, having considered the objection of an 11 year old child and the evidence in support of it, reached the following conclusion "Looking at her case in isolation and without reference to T's [the younger brother], I would not order her return" (page 213). He then proceeded to consider in detail the claim for the return of T who, at the age of 6, was not sufficiently mature for his views to be taken into account. As to whether the question of the respective returns of the two children stood or fell together, his Lordship observed that, in the particular circumstances of that case where the objection to the return of the older child, G, was based on fears expressed not only for herself but also for her younger sibling, it would be odd to infer that if the younger child was of an age and maturity where he had a voice, he would not echo his sister's objection (page 217). His Lordship then said:

> "That said, I recognise that we must now proceed upon a basis that T is too young and immature for his views to be taken into account and that, accordingly, a defence under art 13(b) must be established with regard to him. If it is not, he must be returned. There would then be no discretion to order otherwise. I am also prepared to accept that in that event the fact of his return may be a factor to bring into balance in exercising a discretion whether or not, despite G's objections, she should go back."

[17] We have reached the view that in a case such as the present where the separate defence arises in respect of one child only, a decision to give effect to the wishes of that child ought not to be regarded as necessarily sealing the fate of all the children. The question of their returns ought not to be regarded as necessarily determined by the objection expressed by one of them. We recognise, of course, that children who are the subject of Convention proceedings will inevitably have suffered disruption and distress in their lives and are unlikely to want to face separation from one another. But the Convention requires strict application and imposes a high threshold for justifying the withholding of an order for return. The Lord Ordinary was therefore not entitled, in the absence of any evidence, to proceed on his own assumption as to the effect of his decision about H on the situation of the other three children. On the other hand, so far as H was concerned, he had been told by her that she would in no circumstances want to be separated from her brothers and sister. In that situation, he would, in our view, have been entitled to take the maintenance of the family unit as a factor to be weighed in the balance when exercising his discretion on the separate defence in respect of H.

[18] We consider that the Lord Ordinary ought to have reached a view on the art 13(b) defence before proceeding to consider the separate defence advanced in respect

of H. What the respondent founded on as giving rise to an intolerable situation for the children on their return was the prospect of their being separated from her because she had no visa and because there was a lack of accommodation and means of support in Australia should she be able to accompany them. It follows from what has been said that we consider that the Lord Ordinary erred in his approach to these matters.

The child's objections: the proper approach

[19] It is clear from the terms of art 13 that the part which relates to the child's objections to being returned is separate from para (b). It is also clear that art 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. (In the case of *Re R. (Child Abduction: Acquiescence*) [1995] 1 F.L.R. 716 a decision that boys aged 7½ and 6 were mature enough for this purpose was upheld by a majority of the Court of Appeal). It is also well-established that it is only in exceptional cases under the Hague Convention that the court should refuse to order the immediate return of a child who has been wrongfully removed (*Re S. (a minor)(abduction)* [1993] 2 All E.R. 683; and *Urness* v. *Minto*).

[20] None of these matters was in dispute in this case. What was in issue was whether the Lord Ordinary had erred in his approach to the assessment of H's maturity and in the exercise of the discretion conferred on him. In support of her submission that he had erred in both respects counsel for the petitioner referred to the decision of the Court of Appeal in the case of *Re T*. It is unfortunate in our view that the Lord Ordinary did not have the advantage afforded to us of considering the clear and comprehensive examination of the relevant issues which is contained in the judgment of Ward L.J. in that case. Having given careful consideration to that judgment, we find ourselves in agreement with the approach of the Court of Appeal.

We consider, therefore, by reference to that judgment at pages 202-204 and 212-213, that the matters to establish are:

(1) Whether the child objects to being returned to the country of habitual residence. It is also necessary to ascertain *why* the child objects.

(2) The age and degree of maturity of the child. The child has to know what has happened to him or her, and to understand that there is a range of choice available. The child has to have gained a level of maturity at which it can make a decision independent from parental influence.

(3) Once a discrete finding as to age and maturity has been made, it is necessary to decide whether it is appropriate to take account of the child's views. That requires an assessment of the strength and validity of those views.

[21] If the court is satisfied that the child objects to being returned, has attained an age and suitable degree of maturity, and that it is appropriate to take account of its views, it then has to decide whether it is prepared to exercise its discretion to refuse to order the child's return. That there is a discretion is plain from the article itself which provides that, notwithstanding the provisions of art 12 which require in mandatory terms that the child wrongfully abducted is to be returned, the court 'may also refuse to order the return' if there is a valid objection by the child. The child's views are never determinative: the final decision as to return must be the court's own (Sedley L.J. in *Re T.* at page 222). A balancing exercise requires to be carried out, and one of the factors which are to be placed in the balance in favour of return is the spirit and clear purpose of the Convention which is to leave it to the court of habitual residence to resolve the parental dispute.

[22] With this approach in mind, we turn to consider the Lord Ordinary's decision in this case. The evidence upon which he reached his conclusion was an affidavit

from H and two letters, one from the head teacher of the village school which she attends, and the other from her solicitor addressed to the Scottish Legal Aid Board in support of her application for legal aid to enter the process. At the invitation of her counsel, the Lord Ordinary also interviewed H in chambers, in the presence of her solicitor.

[23] In an affidavit, dated 21 January 2003 and signed by her, H stated that she did not want to go back to Australia at all and also that she did not want any contact with her father. She then went on to complain that the petitioner used to chastise her siblings and herself. In particular, he would often hit her brother, D, about the head when he was naughty; and he sometimes hit her on the head as well. She complained that when the petitioner lived at home he was often drunk and that when he was drunk he "got very grumpy". H indicated that if she had to go back to Australia she would run away. She said she was very frightened of her father. In the final paragraph of the affidavit she indicated that she and her two brothers and sister were all very happy living in Scotland and that they all loved living in the house in which they were presently staying with their mother and their granny (the respondent's mother).

[24] The letter from H's head teacher was in the following terms:

> "As H's head teacher I confirm that both her class teacher and myself are of the opinion that H has sufficient capability and understanding to enter into all processes required of her in instructing a solicitor and making a statement. She will be fully aware of the meaning of making and signing a statement."

[25] The school report to which reference is made in that letter indicated that H was initially unsettled and took time to adjust to the new regime. She was very insecure, finding it difficult to establish relationships and respond to the normal exchanges with

her peers. However, a marked improvement had been noted in the nine months for which she had been at the school and she was now very settled and very much a part of the school community. In addition, reference was made to the condition known as dyspraxia from which H suffers and which manifests itself in a lack of co-ordination. She had attended regular sessions to help address this condition and the learning support staff had also been working with her on a regular basis to address certain language difficulties. The results of this were said to be encouraging and H was making significant progress.

[26] The relevant passage of the letter from H's solicitor is in the following terms:

> "I have had the benefit of a lengthy discussion with H and also had the benefit of perusing her school reports which accompany this application. … I draw the particular attention of the Board to the recent school reports prepared on H all dated 19 December 2002. H, in my view, clearly understood what it meant to instruct a solicitor. She presented her views to me in a very mature, articulate and unprompted way. I interviewed her outwith the presence of her mother and have since spoken to her at length by telephone and that telephone conversation has left me in no doubt that she is well able to involve herself in these proceedings."

[27] We were told that counsel were not informed of what passed between the Lord Ordinary and H during the interview that took place in chambers in the presence of her solicitor. No record was taken of that interview, and the parties had no knowledge of what was said and did not have the opportunity of making submissions on it.

[28] We have no doubt that the Lord Ordinary's decision to accept her counsel's offer to interview H was prompted by his desire to reach a humane and carefully considered conclusion in this case. We make no criticism of his decision, or indeed of

that of any judge who feels that this is an appropriate course to follow in the particular circumstances of the case. We consider, however, that there are certain difficulties and potential pitfalls inherent in the process of interviewing a child in a case where the defence under the second para of art 13 is in issue. With the benefit of hindsight, it is possible to identify some of these difficulties by reference to the circumstances of this case.

[29] In the first place, since the primary purpose of any such interview is to discover whether the child has a valid objection, it is essential to establish precisely what it is he or she is objecting to. The interviewer must take care to ensure that the child understands that the purpose of going back to the country of habitual residence is not to return him to the care of the other parent but to enable the court in that country to regulate matters concerning custody, residence and access. It is also essential that the child is made aware of the range of choice available. Ordering the return of H on her own to Australia to live in family with her father was not at the time a live issue in this case and yet some of her responses to the Lord Ordinary, as described by him, appear to indicate that she thought that it was. Further, since separation from their mother was essentially the only matter founded on by the respondent as making the lives of the other three children intolerable in the event of their being returned to Australia, there was a distinct possibility that if a visa could be obtained for her, an order for their return would require to be made. The Lord Ordinary indicated that H told him she would, in no circumstances, want to be separated from her brothers and sister; there is no indication, however, that she was ever asked about the implications of that attitude for her objection to returning. Would she be willing to go back if the alternative was to be separated from her

siblings? Her response to such an enquiry would have been a useful test both of the strength and the validity of her objection.

[30] In the second place, if an interview is to serve a useful purpose, it must assist the decision-maker in the assessment of the child's capacity to reach a decision that is rational and independent from the influence of the abducting parent or other relatives and demonstrates that the child is mature enough to understand the implications for his own interests in the short and long term. We are doubtful whether the kind of general appraisal or impression that can be formed in the course of one relatively short interview by a person who is neither trained nor experienced in the techniques of interviewing and assessing children will ever be sufficient, given the stringent test required by the Convention.

[31] Thirdly, in the absence of any record of the interview, the Lord Ordinary did not have the benefit of counsel's comments on it. The only assessment of the child was his own subjective one. He recognised that H had been influenced, at least to some extent, by her mother, but felt confident in his assessment of the boundaries of that influence. In the absence of any detailed account or analysis of what was said, it is impossible for this court to reach a view as to whether that confidence, or indeed his general impression, was well-founded. We observe from the English authorities to which reference was made that the procedure adopted was that a court welfare officer was appointed to interview the child and then spoke to that in evidence, which was subject to cross-examination in the usual way.

[32] In the light of what has been said, we consider that careful consideration will always require to be given to the question of whether to embark upon the process of interviewing a child and, if it is to be undertaken, the most appropriate method of approaching this sensitive task.

The Lord Ordinary's decision

[33] The first question the Lord Ordinary required to decide was whether, as a matter of fact, H objected to being returned to Australia. He concluded that she did and said:

> "In the first place, I am quite satisfied that HW objects to returning to Australia. That is clearly stated in her affidavit. In addition, when I interviewed her, I asked how she would feel if she were made to return to Australia. She stated that she would be 'a bit upset', and that she would miss her family and would be 'a bit scared'. I asked if she would feel the same way if the respondent and her brothers and sister went to Australia with her, and she replied that she would feel the same way. It was clear during this part of the interview that she was very unhappy at the prospect of going back to Australia. I have no doubt that her unhappiness was quite genuine."

[34] It appears from this account that the child's initial response indicated that she thought she was being asked about returning to Australia without her mother and siblings. In the particular circumstances of this case, that ought not to have been a consideration that coloured the child's views about returning. Further, the link between the Lord Ordinary's conclusion that H was "very unhappy" at the prospect of going back and her reported responses is not immediately apparent. Nevertheless, the Lord Ordinary had the advantage of seeing and speaking to H and we are prepared in that situation to accept that he was entitled to find himself satisfied that H had, as a matter of fact, stated a clear and unequivocal objection to returning. The assessment of the strength and validity of that objection is a matter to which we will return later.

[35] The Lord Ordinary then required to consider whether H had attained an age and a degree of maturity at which it was appropriate to take account of her views. He concluded that she did and said:

> "In the second place, I am of opinion that HW is of sufficient age and demonstrates a sufficient degree of maturity for her views on this matter to be taken into account. That conclusion is supported by a letter from the head teacher of the school that she attends and by a letter from her solicitor to the Scottish Legal Aid Board. In addition, I formed my own impression during the interview that I had with HW; I had no doubt that she understood what was happening and was able to make up her own mind on the issues. While some parts of the views that she expressed had probably been influenced to some extent by her mother's attitude, I was satisfied that most of her fundamental objections were quite independent of anything that her mother might have said. Consequently I have tried to discount the areas where I think that her mother may have had an influence. In stating that such influence may have existed, I am not suggesting improper conduct on the respondent's part. It is obvious that a parent's views may be transmitted to children quite inadvertently, and if a family is involved in a dispute such as the present it is inevitable that there will be some conversation about the dispute. In the course of such conversation, the child is almost certain to become conscious of the parent's views. In the present case, however, I formed the impression that HW did not follow her mother's views blindly; at one point during the interview she stated that she thought her mother had been covering up for her father."

[36] We have already quoted the relevant passages of the two letters to which reference was made by the Lord Ordinary. We do not consider that he was entitled to find that any impression he formed from interviewing H was supported by the content of either letter. The head teacher confined herself to expressing an opinion as to H's capability and understanding to enter into the processes of instructing a solicitor and making a statement. Likewise, her solicitor focused on the child's maturity in the context of her ability to instruct a solicitor and involve herself in these proceedings. Neither the head teacher nor the solicitor offered any view as to whether H was more or less mature than her chronological age. Nor did either of them address the important issue of whether H was mature enough in the context of the Convention provision. It was necessary to be satisfied that she had an awareness and proper understanding of the range of choice available to her and that she was able to make an independent, rational decision that did not depend upon instinct alone.

[37] There was, in this case, no assessment of the child by any person trained or experienced in this area and the Lord Ordinary, in effect, decided this crucial issue on the basis solely of his own impression gleaned during a relatively short interview with the child. We observe in this connection that a school report (a documentary production in the case) contained the following assessment of H for the period March to June 2002, under the heading 'Personal and Social Development':

> "H gives the impression of being much more mature and confident than she really is because her oral language is very advanced."

Further, having considered what was said by her in her affidavit (about which we will say more a little later) we are not satisfied, in the absence of any further specification as to what she disclosed during the interview, that the Lord Ordinary was entitled to reach the conclusion that "most of her fundamental objections were quite independent

of anything her mother might have said". Bearing in mind that H is a child who is at the lower end of the chronological age range at which she can be considered to have achieved sufficient maturity for her views to be taken into account, we are doubtful as to whether there was sufficient material before him to entitle the Lord Ordinary to reach the view he did on this aspect of the case.

[38] In any event, it was necessary for the Lord Ordinary, having made a discrete finding as to age and maturity, then to consider whether it was appropriate for him to take account of H's views. What the Lord Ordinary did was to reach a view as to H's maturity and then turn immediately to consider the question of the exercise of his discretion. It was only in the context of that exercise that he gave consideration to the child's reasons for her objection. We consider that the Lord Ordinary erred in his approach. He ought first to have considered the separate issue of whether it was appropriate for him to take account of H's views. That required an assessment of the strength and validity of those views which, in turn, required consideration of the reasons given by the child for her objection. In our view, the exercise of discretion properly arises only once the court is satisfied, by reference to the child's reasons, as to the strength and validity of her objection (cf. *Re T.* at pages. 204 and 213).

[39] It follows from what we have said above that the Lord Ordinary's decision cannot stand. The matter becomes one for us. We turn now to consider the strength and validity of H's objection by reference to her reasons.

[40] According to the Lord Ordinary, H's reasons for not wanting to return to Western Australia centred around four areas. Firstly, she complained of the petitioner's conduct towards her and her brothers and sister when they lived in Australia. He recorded that she complained in particular of the degree of chastisement inflicted by the petitioner, which included blows to the head of her

brother, D, and in her case on the hand. In her affidavit, H stated that she did not want to go back to Australia at all and also did not want any contact with her father. She then complained of his behaviour towards herself and her siblings while they lived with the petitioner. We observe that in her affidavit, it is not only her brother, D, but also she herself who was hit on the head by the petitioner. In regard to this matter, the Lord Ordinary said:

> "While some degree of corporal punishment may be tolerable, blows to the head must always be serious, and it is clear that the level of punishment inflicted had had a significant effect on HW."

[41] It appears from that comment that the Lord Ordinary accepted *pro veritate* and without reservation what he was told by H. In our view, allegations made by a 9 year old child in the context of what is clearly a very bitter and unhappy dispute between her parents ought not to be assumed, in the absence of any supporting evidence, to provide an entirely unembellished and wholly accurate account of events. In the case of *Re T.* there was independent evidence supporting the child's complaints of her mother's drunkenness, and the court was accordingly able to conclude that there was a solid substratum of truth. In the present case, there was no information whatsoever before the Lord Ordinary or this court to support the view that H's allegations were rooted in reality. Care must always be taken in that situation to consider whether, and to what extent, the views of a child have been shaped or coloured by undue influence, direct or indirect, exerted by the abducting parent. A hint of such influence appeared in the following statement in H's affidavit:

> "I think the only reason he (the petitioner) has taken this case is so that he can stop paying money for us. Mummy has told me that he owes about A$60,000 in money that was supposed to be paid to support us."

[42] It is also important to have clearly in mind that the issue for consideration is not whether H should be returned to the care of her father, but whether she should go back to the country of her habitual residence from which she was wrongfully removed. The whole purpose of the Convention is to ensure that the court of habitual residence can resume its proper role in relation to the child. Counsel for H urged us not to read the word "objects" in art 13 too narrowly. In this connection, he referred to the case of *Urness* v. *Minto* and, in particular, to the passage in the Opinion of the Court delivered by the Lord Justice Clerk (Ross) at page 265 to 266:

> "Moreover, although the present proceedings do not relate to the custody of or access to the children, and this court does not require to consider the welfare of the children as paramount, this does not mean that the court must disregard any objections put forward by the child simply because the objections raise issues which may require to be considered at a later stage by the competent court in the United States of America which will have to determine issues of custody and access."

[43] We have some difficulty with the view expressed in that passage. We recognise that in a case such as the present the child's objection to being returned may be inextricably linked with the objection to living with the other parent. That is why it is necessary to examine the child's reasons. It has to be assumed that if H is returned, her complaints against the petitioner will be fully investigated and that she will be given the maximum possible protection by the Australian court. The petitioner, in his undertaking to this court, has agreed to enable separate accommodation to be provided for the respondent and the children on their return to Australia. In our view, the court of the country to which the child has been wrongfully removed should not reach its decision on the Convention application by

reference to welfare considerations; these ought appropriately to be dealt with by the court of the other country. As we have said, the whole purpose of the Convention is to ensure that the function of the court of habitual residence is not usurped and to leave it to the courts of that country as the *forum conveniens* to resolve the parental dispute.

[44] The second reason mentioned by the Lord Ordinary was H's concern that she and her brothers and sister might be taken away from their mother if they returned to Australia. The Lord Ordinary, rightly in our view, stated that he did not attach great weight to this reason. There was no suggestion that anything had occurred in the past to prompt this fear, and the Lord Ordinary recognised that the reason was not valid as such since the Family Court of Western Australia could obviously be expected to regulate the custody of the children and to make sure that they were not forcibly removed from one parent without the court's authority. We agree with that view.

[45] The third reason mentioned by the Lord Ordinary was that H considered herself well-settled in Scotland and that she greatly valued the contact that she now had with her wider family here. She was said to be very concerned that she would lose that contact if she were made to return to Australia. The Lord Ordinary noted that the great majority of the children's relatives, on both sides of the family, lived in Scotland, and that H appeared very attached to certain of her mother's relatives, including her grandmother and an aunt. He acknowledged that if the point was looked at in isolation, it might well be true that being attached to relatives here could not constitute an exceptional circumstance sufficient to justify a refusal to return a child to the country from which she had been abducted. We agree with that view.

[46] We turn now to consider the fourth reason, which is one that was considered by the Lord Ordinary to be 'exceptional in nature'. That was that the child appeared

to be anxious to continue at school in Scotland. The Lord Ordinary noted that she attended the village school where she appeared to be happy and to have a number of friends. He also noted that she suffers from a condition known as dyspraxia, which affects her motor activity and manifests itself in co-ordination difficulties; she requires a degree of remedial education. The Lord Ordinary also noted that in Western Australia H had attended schools in the Perth Metropolitan area, latterly the local Montessori School. The Lord Ordinary then said:

> "I formed the impression, based partly upon the documentary evidence and partly upon HW's own statements to me, that she was doing better at the village school than she had in Australia. While this may have been due to the better diagnosis of her complaint, a feature that may simply be a matter of good luck, there is no doubt that she has special educational needs and that these are being well met at present. I accordingly consider that this reason for HW's wanting to remain in Scotland is exceptional in nature."

[47] Counsel for the petitioner submitted that the Lord Ordinary's conclusion on this matter was not supported by any of the documentary evidence before him. He appeared to have relied, at least to some extent, on what H told him, but there was no reference in the pleadings or the affidavit to any problem experienced by her when at school in Australia. Exception was also taken both to the reference by the Lord Ordinary to "the better diagnosis" of H's complaint in Scotland and the conclusion that she was "doing better" at the village school. There had been information before him that the diagnosis of H's condition was made when she was still living in Australia and that a decision had been reached shortly prior to her departure to remove her from the school she was then attending so that her problem could be better addressed. This was supported by the 'Pupil Transfer Report' dated 17 October 2001

from the Education Department, Western Australia, which was a documentary production in the case. The Lord Ordinary had had no information about the approach to her condition or the treatment for it in Australia and was therefore not in a position to say that there had been a better diagnosis in Scotland.

[48] A letter from the head teacher of the village primary school she was attending, and a school report, both dated 19 December 2002, indicated that H had made significant progress and was attending regular sessions with an occupational therapist to help address her dyspraxia. While it is certainly apparent from that letter that H had settled well and is happy and making very good progress, we are not satisfied that her stated wish to continue at school in Scotland can, in the circumstances be regarded as an exceptional reason for giving effect to her wishes. There is, in our view, no evidential basis for concluding that the educational system in Scotland is better suited to her needs, or that she will not receive appropriate assistance in Australia with her condition and with the other areas of her school work, with which, according to the most recent report, she is still experiencing some difficulty.

[49] We do not consider that the reasons advanced by H for objecting to going back are of sufficient validity and strength to cross the high threshold and take us to the conclusion that it is appropriate to take account of the child's views. It follows that the application for her return must be granted.

[50] Had we reached a different conclusion it would then have been necessary to consider the exercise of our discretion. At that stage the court requires to consider whether there are any 'countervailing factors' which require the child's wishes to be overridden (In *Re R. (Child Abduction: Acquiescence)* [1995] 1 F.L.R. 716, per Millett L.J. at page 734). The main factor in favour of H's return would be to give effect to the spirit and purpose of the Convention. We consider that it may also have

been appropriate to give weight at that stage to the maintenance of the family unit and to consider whether the child's objections should be overridden to remove any intolerability her siblings would face returning to Australia without her.

The result

[51] This court has received an undertaking on behalf of the petitioner through his counsel in the following terms:

1. Pending any further Australian court order, the petitioner will comply with the order of 19 December 2001 in so far as it relates to the period from the return to Australia of the respondent.
2. That the petitioner will not seek to reduce the order of 19 December 2001 before the respondent returns to Australia and is able to be represented in court in any such application.
3. That payment of aliment will commence on the return of the respondent to Australia weekly and in advance at the rate of A$875 per week.
4. That the petitioner will pay aliment as per the order of 19 December 2001 in respect of the period of 4 weeks prior to the return of the respondent to Australia so that she can use the money to meet initial housing costs and will leave said monies (A$3,500) in the hands of Messrs Gibson & Gibson, Lawyers, 190 St Georges Terrace, Perth, Western Australia 6000 so that it is immediately available to the respondent on her return and at her request.
5. That the respondent shall receive from Messrs Drummond Miller 48 hours prior to her departure for Australia confirmation that the sum of A$3,500 is in the hands of the said Messrs Gibson & Gibson and available to be uplifted.

[52] In that situation, and for the reasons we have given, we will allow the reclaiming motion, recall the interlocutor of the Lord Ordinary, grant the prayer of the

petition and pronounce an order for the return of H, A, D and F to the jurisdiction of the Family Court of Western Australia. Execution of that order will be suspended until the respondent has been issued with a visa enabling her to return to Australia and to remain there until the conclusion of any proceedings relating to the children. The case will be put out By Order on a date to be afterwards fixed.