



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 63  
P323/20

Lord Malcolm  
Lord Glennie  
Lord Woolman

OPINION OF THE COURT

delivered by LORD MALCOLM

in the petition

of

M

Petitioner and Reclaimer

against

C

Respondent

for an order under the Child Abduction and Custody Act 1985

**Petitioner and Reclaimer: McAlpine; Morton Fraser LLP**  
**Respondent: Malcolm; Balfour and Manson LLP**

6 October 2020

[1] The parties in this petition under the 1980 Hague Convention on the Civil Aspects of International Child Abduction are UK nationals. Their first son, A, was born in September 2004. In 2007 they left Scotland for Australia. In 2012 their second son, B, arrived. After a short spell in Canada, they returned to Scotland in 2013. In August 2018 they again moved to Australia. The marriage experienced difficulties and they separated in

the course of 2019. In December of that year the mother came to Scotland for a holiday. While here she decided not to return, a decision which seems to have been driven by the older boy's strong desire to stay in Scotland. This was a wrongful retention in terms of the Convention.

[2] The father has petitioned the court for a return order in respect of both children. It was refused by the Lord Ordinary. In a note to this court he has explained that he decided to give effect to A's strong objections. As for B, based to a large extent on his views and on an expert report from a child psychologist, the conclusion was that to return him without his brother would, in terms of article 13(b), create a grave risk of psychological harm or otherwise place him in an intolerable position. The situation was exacerbated by the mother's decision that, if forced to choose, she would stay in Scotland with A, who has Asperger's Syndrome. He is now of an age which takes him beyond the scope of the Convention. The father has reclaimed (appealed) against the non-return order relating to B. It follows that this opinion focusses on him. He is 8 years of age and has spent most of his life in Scotland.

[3] The Lord Ordinary instructed a report from a chartered clinical psychologist who specialises in children and adolescents. She is experienced in providing expert advice to courts. She interviewed the children. With regard to B, he spoke positively of his time in Australia. He misses his father and wants to maintain a relationship with him. However he does not want to return to Australia without his brother. It would make life "too difficult" for him. He was exceptionally clear that he would "never want to be away from mum". He spoke for some time about his anxiety and unhappiness when they are apart. His anxiety levels had improved, but they remain "notably acute for his age". He presented as a child who struggles with anxiety and emotional vulnerability. Personal relationships are

important to him and should be taken into account; in particular his clear dependence on his brother, his difficulty in separating from his mother, and his desire to maintain a relationship with his father. The psychologist's opinion is that to return B to Australia without his brother would be a source of foreseeable psychological harm to him. Initially he would be pleased to see his father, but within a short time he would find it "intolerable" to be separated from his brother.

[4] A large part of the father's case on appeal was that too much weight was placed on the psychologist's report, and not enough on the other material before the court, which includes numerous affidavits from the parties and other relevant people in Australia and Scotland, plus documentation concerning, amongst other things, B's time in Australia. Much of this deals with claims and counterclaims as to the party responsible for the breakdown of the marriage. The father disputes allegations of violence and abusive behaviour. The mother points to a Family Violence Restraining Order obtained from the local Magistrates Court. It is not necessary to attempt to form a view on all of this. There is no suggestion that the father is a danger to the children. He now lives with a new partner and her family, and it seems plain that a reconciliation between the parties is unlikely.

[5] For present purposes it is pertinent to note that there is evidence in this material which provides support for the psychologist's views, and in particular that B can be an anxious child, that he has a close bond with his brother, and that they are both heavily dependent on their mother. It is said that they need a period of stability. For the father emphasis was placed on information concerning B's schooling while he was in Australia. One report states that he was happy, enthusiastic, healthy, and made good progress. However there is also mention of him showing signs of anxiety when dropped at school by his mother, but apparently less so when with his father. The school "made allowances for

his anxiety". The school chaplain gave him support for social and emotional challenges, anxiety, and parental separation/divorce. A report from the local medical centre records that before he came to Australia B was being assessed for autism. It was noted that he was difficult to manage and that three teachers did not know what to do with him. It is to the psychologist's credit that, without access to this material, she picked up much of this from interviewing the child. In agreement with the Lord Ordinary, we see no merit in the proposition that, as this documentation was not provided to the psychologist, her opinion should be set aside or at least treated with considerable caution.

[6] The picture which emerges of B's time in Australia and of his relationship with his father is by no means a negative one. There were many positives and B would happily go back if accompanied by his brother and mother. The difficulty is not that a return to Australia would, in itself, cause harm or be intolerable. The problem is the separation brought about by his brother and mother staying in Scotland.

[7] The Lord Ordinary was criticised for failing to mention any of the voluminous documentation in his note. The court does not conclude from this that he ignored it, though it would have been prudent for him to confirm that he took it into account. The silence is readily explicable in that there is nothing in it which materially contradicts the conclusions reached by the psychologist and then by himself. So far as B is concerned, the issue, though plainly important and requiring careful evaluation, was not particularly complicated. It did not require the kind of exhaustive analysis demanded by counsel for the father.

[8] This court has often stressed the limits on an appellate court interfering with decisions on matters of fact: see, for example, *YS v BS* [2019] CSIH 50 at paragraphs 9/10, another child abduction case. The grounds of appeal, and their elaboration in written and oral submissions, purport to identify errors of law in the Lord Ordinary's approach, failing

which the court is asked to conclude that his decision is outside the range of outcomes reasonably open to him. As is not uncommon, the argument is constructed by articulating every point which can be made in favour of the petition, while putting to one side the factors pointing in the other direction, and then categorising the Lord Ordinary's failure to agree with them as errors of law, or as demonstrative of a "plainly wrong" outcome. At root this appeal amounts to no more than a disagreement with the decision in the court below on issues of fact, coupled with an invitation to retry the dispute in the hope of a more favourable outcome. The court is not persuaded that there is any sound reason to interfere with the Lord Ordinary's decision. On the information before him, which included a report from an experienced expert in these matters, he was fully entitled to uphold the article 13(b) defence in respect of B. His reasoning reveals no error of law, nor anything else indicative of invalidity.

[9] In any event, if the court had quashed the decision and considered matters afresh, it would have reached the same result. There are two limbs to the article 13(b) defence. The second has been authoritatively explained as applying to "a situation which this particular child in these particular circumstances should not be expected to tolerate", see *In re D* [2007] 1 AC 619 at paragraph 52. Children can, and often have to put up with quite a lot. However the court has no real doubt that this description applies in the present case.

[10] For completeness it should be mentioned that both counsel referred to *Urness v Minto* 1994 SC 249. Counsel for the father listed the various differences in the respective factual backgrounds of it and the present case. Nonetheless, while earlier decisions depend on their own circumstances and are not directly relevant, it is of some interest to note that *Urness* is an example of this court refusing to separate siblings even at a time when "highly exceptional circumstances" were required (the Lord Ordinary's opinion at page 261) and in

the absence of evidence that separation would be devastating for the child (page 268). For the avoidance of doubt, the court records that it has had regard to recent guidance from the Hague Conference on article 13. It is of course only advisory, and it recognises that every case is fact specific. It recommends alertness in respect of parental tactics whereby a defence is manufactured, but here there is nothing of that nature. In short the guidance does not contain anything which casts doubt on the court's decision.

[11] For these reasons the reclaiming motion has been refused.