EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 20
P92/24

Lord Malcolm
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LADY WISE

in the appeal

by

FPS

Petitioner and Reclaimer

against

SM

Respondent

Petitioner and Reclaimer: Scott KC; Family Law Matters
Respondent: Aitken; Drummond Miller LLP

26 July 2024

Introduction

[1] This reclaiming motion (appeal) raises questions about the interplay between the 1980 Hague Convention on Child Abduction (1980 Hague Convention), incorporated into domestic law by the Child Abduction and Custody Act 1985 and the 1996 Hague Convention on Jurisdiction, applicable law, recognition enforcement and co-operation in respect of parental responsibility and measures for the protection of children (1996 Hague Convention). In particular the question arises as to the extent, if any, to which a judge

should apply the recognition and enforcement provisions in Articles 23-27 of the 1996 Hague Convention in the context of a 1980 Convention application for the return of children to their state of habitual residence.

Background

[2] FPS is Spanish. He is the father of the two boys involved in this case, who were given the fictitious names of Charles and James by the Lord Ordinary who made the first instance decision ([2024] CSOH 45). Charles is 13 years old and James is 8. SM, their mother, is a British national now living in Scotland. The parties lived together in family, initially in Scotland with Charles and then in Spain from 2013, where James was born. Their relationship broke down and came to an end in January 2022 from which time the boys had their primary home with their father in Spain. In May 2022 SM returned to Scotland but continued to have contact with the children thereafter.

[3] On 12 January 2023, the reclaimer's local court of first instance in Spain made certain orders sought by him (No 6/53 of process). Having recorded that the mother's whereabouts were unknown and that only the father had sought any orders, the court attributed the exclusive exercise of parental authority to the father. No visiting (contact) arrangements were set for the children to see their mother. In December 2023 both children travelled to Scotland with their paternal grandmother to visit SM and her parents. They were due to return to Spain on 19 December 2023.

[4] While at Edinburgh Airport on 19 December with their paternal grandmother, the boys refused to board the flight to Spain. Charles deposited his and James' passports in a rubbish bin. The police were called to take care of the children and contacted SM who came to collect them. Since that date the children have resided with their mother, primarily at the

home of their maternal grandparents. The current proceedings were raised in January 2024, seeking orders for the return of both Charles and James to Spain. It was accepted that they had been wrongfully retained in this jurisdiction but contended that they objected to being returned to Spain. On 23 April 2024 the Lord Ordinary refused to order their return on the basis that both children objected to being returned to Spain, their objections were their own uninfluenced views and that a child-centric approach, with their interest in general welfare at the forefront, supported a conclusion that they should not be so returned.

Applicable law

[5] It was conceded in this case that the retention of the children in Scotland on 19 December 2023 was wrongful under Article 3 of the 1980 Convention. The focus at the hearing before the Lord Ordinary was on Article 13 of that Convention which provides that:

> "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 in maturity at which it is appropriate to take account of its views.
> In considering the circumstances referred to in this article, the judicial and administrative authority shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

[6] The leading authority on Article 13 child objection cases remains that of *In Re M and another (Children) (Abduction: Rights of Custody)* [2007] UKHL 55; [2008] 1 AC 1288. At paragraph 46 of that decision Baroness Hale stated:

> "In child's objection cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: the first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances".

[7] The approach to child objection cases that has developed in England and Wales applies equally in this jurisdiction. In the decision of an Extra Division decision in *W* v A 2020 [CSIH 55] 2021 S.L.T 62 Lord Malcolm confirmed (at paragraph 9) the two stage approach, including the child-centric reasoning at stage two, stating;-

> "In Article 13 cases the age and sufficient maturity test, once passed, is a gateway to the court exercising a discretion, authoritatively said to be 'at large', as opposed to being directed by the Convention to return the abducted child. … In this regard courts are increasingly giving weight to the views of the child. A child centric approach is required, with her interests and general welfare at the forefront. The focus is not on the moral blameworthiness of the abducting parent, nor on notions of deterrence. While Convention considerations will always be relevant, the further one is from the main aim of a speedy return, the less weighty they will be. If a child is integrated in the new community it is relevant to consider the effect of a further, and unwanted, international relocation pending the long term decision."

On the issue of the relationship between an existing decree (in that case from a Polish Court) and the exercise of discretion on a 1980 Convention return order Lord Malcolm expressed the view (at paragraph 16) that :

"There may have been a time when disapproval of the mother's wilful defiance of the Polish court's order would have so prejudiced her position that a return was always going to be the likely outcome. But now the focus is on the best interests of the child at the heart of the proceedings, not least since this is the core value running through the Convention."

[8] No argument under the 1996 Hague Convention was advanced before the Lord Ordinary. The relevant articles of that Convention on which the reclaimer now relies insofar as relevant are in the following terms:

"Article 23
(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

(2) Recognition may however be refused –

a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;

b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;(emphasis added)

c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;

e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;

f) if the procedure provided in Article 33 has not been complied with.

…

Article 25
The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction."

Article 26
(1) If measures taken in one Contracting State and enforceable there require enforcement in another Contracting State, they shall, upon request by an interested

party, be declared enforceable or registered for the purpose of enforcement in that other State according to the procedure provided in the law of the latter State.
(2) Each Contracting State shall apply to the declaration of enforceability or registration a simple and rapid procedure.
(3) The declaration of enforceability or registration may be refused only for one of the reasons set out in Article 23, paragraph 2.

Article 27
Without prejudice to such review as is necessary in the application of the preceding Articles, there shall be no review of the merits of the measure taken."

The Lord Ordinary's decision

[9] In his opinion, the Lord Ordinary explains that the sole basis of resistance to return before him was the objection of the children. He appointed a child welfare reporter. Her report (number 24 of process) records her discussions with Charles and James. These are set out in some detail at paragraphs [16] and [17] of the Lord Ordinary's opinion. In essence, both children stated an objection to returning to Spain and to their father, giving reasons for that. The reporter explained in her report that prior to her visit she did not think that either child appreciated that return would be "to allow a Spanish court to make decisions about their future." She concluded, however, that both children were old enough and sufficiently mature to object to a return. It was difficult to regard views expressed as dramatically as theirs had been at the airport as anything other than their own uninfluenced objections to a return. Charles had asked the reporter to convey his views using capital letters in her report to emphasise his strength of feeling.

[10] In submissions for FPS counsel at first instance had suggested that the children's objections were not at a level that should give rise to the court exercising its discretion to refuse return. He contended also that there were significant welfare concerns in what was described as the children's "chaotic" residence in Scotland as compared with the settled and stable life they had enjoyed in Spain. The existence of an order of the local Spanish court of

January 2023 was said to be particularly relevant. It was contended that the court should respect the Spanish order and return the children. The submissions for the respondent at first instance were to the effect that the court could be satisfied that both children objected to a return and were old enough and mature enough for their views to be taken into account. In the balancing exercise required thereafter, the nature and strength of the children's objections were highlighted, in particular their actions at the airport. Further, the children had expressed negative views of their father's behaviour, particularly his alleged drinking and driving, leaving them unaccompanied in the house, and anger exhibited towards the children who had they said been left frequently in the care of their paternal grandparents. There was also information suggesting that the children were settled and happy in their new environment in Scotland. So far as the Spanish court action was concerned counsel for the respondent had submitted that the order appeared to have been obtained without the respondent's knowledge and on the basis of misrepresentations made by FPS. A translation of the Spanish court order had been lodged (number 7/3 of process). It recorded that the whereabouts of the mother were unknown to the Spanish court whereas the evidence suggested that the petitioner had known her whereabouts throughout the relevant period. No confirmation of service had been produced.

[11] In his decision and reasons, the Lord Ordinary accepted that the children had objected to being returned and were both of an age and maturity where account should be taken of their views. In exercising his discretion, he took into account the nature and strength of their objections. He considered that their views were authentically their own and that there were other considerations relevant to their welfare which required to be balanced against the general policy of the 1980 Convention. He considered the terms of the Spanish court order and the submission on behalf of FPS based on comity. However he

considered that the effect of the Extra Division in *W* v *A* did not support a return based solely on the existence of the judgment of a foreign court, in that case Poland. The court had stated that the existence of such an order was an important part of the background circumstances, but not at the expense of other material considerations.

Submissions for the reclaimer

[12] Senior counsel first addressed the policy of the 1980 Hague Convention which was to stop parents such as SM from pre-empting a full blown examination of welfare by the court of habitual residence. The distinguishing feature of this case was that the merits of welfare had been determined by the Spanish court in January 2023. That court had awarded sole custody to the father and there was no outstanding litigation. Accordingly, the Lord Ordinary had erred in failing to recognise the effect of the 1996 Convention when considering whether the children should be returned to the care of their father in Spain. As a matter of general law, the rules of comity amounted to more than simply a statement of respect for a foreign court. In *Cook* v *Blakely* 1997 SC 45 the First Division had clarified that a court being requested to enforce a decision as to the parent with whom a child should live should not be drawn into acting as an appellate court against the decision of the other jurisdiction. There were two general exceptions to that, namely where a case to vary arrangements for children was already pending in another jurisdiction or where there was an immediate need to protect a child from harm. Counsel submitted that the respondent mother in this case was essentially in contempt of a Spanish order and that the Lord Ordinary had effectively endorsed that contempt.

[13] On the issue of whether the proceedings in Spain had been properly served, the reclaimer's position was that they had been but that the mother had not engaged with the

proceedings. The court had ordered re-service and ultimately edictal service had taken place. Counsel who represented FPS at first instance had taken the view he could not properly apply for direct recognition and enforcement under the 1996 Convention. It could not be confirmed on the available information that one of the essential requirements, namely that an opportunity had been given to children old enough and mature enough to express a view to do so, had been fulfilled.

[14] In relation to the Lord Ordinary's reliance on the decision of this court in *W* v *A*, senior counsel pointed out that there it had been the provisions of *Brussels II bis* that were under consideration. In terms of Article 11 of that Regulation, if a court in one Member State refuses to return a child to another Member State there is an automatic reconsideration by the court of habitual residence. So in that case, when the child was not returned to Poland there was an automatic reconsideration in that jurisdiction, something that had been a key factor in the court's decision. The difference in the present case, was that here the Spanish court had reached a final decision on welfare. Although the decision had been taken in the mother's absence, a public procurator had been involved to represent the interests of the children. As the father in this case now had sole custody of the children in accordance with the Spanish decree he had nothing to request of that court. The effect of the Lord Ordinary's decision, therefore, was that the mother would simply retain the children in Scotland with no exploration of their welfare in the court of their habitual residence. It was important to note that there were deep divisions on the facts in this case, something that the 1980 Hague Convention was not habile to determine. A vacuum had been left by the Lord Ordinary's decision because those contested issues would not be explored.

[15] Counsel's central argument related to the 1996 Hague Convention, ratified on 1 January 2011 and 1 November 2012 in Spain and the UK respectively. In terms of Article 7

of that Convention, the court in Spain, as the state of habitual residence of the children, will retain jurisdiction over them until 23 December 2024, 12 months after their retention here in Scotland. The position currently was that Scotland has no jurisdiction to make orders for Charles and James other than protective orders to prevent them from any harm. The measures taken by the Spanish court remain in place until modified, replaced or terminated in terms of Article 14 of the 1996 Convention. Reference was made to Article 23 and in particular Article 23(2) (b). It was conceded that there was a potential problem in this case because it could not categorically be stated that the children had an opportunity to express their views in the Spanish proceedings. Counsel told us that she had identified through contacts in the International Association of Family Lawyers that it was not customary in Spain to take the views of children under the age of 12. On that basis she accepted that there was the potential for recognition to be refused. While she accepted that no petition for recognition and enforcement under the 1996 Convention was before the court, she submitted that the Lord Ordinary should nonetheless not have ignored the 1996 Hague Convention. The key point, in terms of Article 27, was that there should be no review of the merits of the measure taken by the court of habitual residence. The Lord Ordinary had created a mess because he had condoned a situation where the mother was in contempt of the Spanish order, an order that the father could not review as it was in his favour. The failure to have regard to the 1996 Hague Convention even in the context of a1980 Hague Convention case was an error. While there was no authority from England and Wales that might be of direct assistance, in *T&J (Children) (Abduction: Recognition of foreign judgment*) [2006] EWHC 412 the then President of the Family Division (Sir Mark Potter) had supported the recognition of a Spanish court order within a 1980 Hague Convention case even where there were no proceedings under the *Brussels II bis* Regulation.

[16] Mrs Scott spent some time explaining the background to the order of the Spanish court. In December 2021 SM had assaulted FPS in the family home, including with a baseball bat to his injury. A non-custodial order, akin to a community payback order, had been imposed with a non-harassment order. While the mother denied the offence in her affidavit, there was ample documentation to confirm the disposal of the criminal proceedings. While the Lord Ordinary had stated (at para [39]) that it had little bearing on his decision it was important because it had prompted the parties' separation and the mother leaving. SM had not been involved in the day to day care of the children between that point and their retention in Scotland in December 2023. Turning to the order in the Spanish proceedings, (6/53 of process), FPS's position was that, while he had taken the children over to his own mother's caravan in Scotland and from there they had gone to spend time with their maternal grandparents during 2022, he had not known exactly where the respondent was living. The initial application in the Spanish court had asked for the mother to be given non-residential contact every second weekend. However she had departed for Scotland and the Spanish court made no order partly as a result of the domestic abuse said to have been suffered by FPS. It had been open to the mother to appeal the Spanish order and she had not done so. It was not entirely clear whether the order had been notified to both parties as required by its terms. In any event no steps had been taken to modify or vary it since it was granted. While it was accepted that the children had flown to Scotland in March, August and December 2023, senior counsel's position was that this was primarily for contact between them and the maternal grandparents. The mother had also visited Spain in March/April 2023.

[17] Senior counsel submitted that, if it was insufficient to rely on recognition under the 1996 Hague Convention such that the gateway on the Article 13 defence of objection by the

children to return had been opened, then the exercise of judgment of the Lord Ordinary required to be examined. While this did involve the exercise of a discretion at large it was a limited exercise where the court should have regard to other welfare considerations and take a view of them on a summary basis (*In Re M* [2016] Fam 1). It was not an assessment of competing evidence and could be distinguished from the situation where facts of a jurisdictional nature require to be set up such as that involved in the case of *D* v *D* [2002] SC 33. Substantive evidence about the welfare of the child was the preserve of the court with primary jurisdiction, in this case Spain.

[18] It was contended that although the children's objections were heartfelt, they were not well founded. They had been with the respondent for only 4 weeks after a 2 year gap where they had seen her only about three times per year. The respondent had a poor track record of serving the welfare of her children. She had no established household and no home of her own, nor did she have established employment. She has apparently taken the children to reside with a partner of relatively recent standing who was disapproved of by her parents. There was little in the affidavits to reassure the court about the arrangements for the children were they to remain in Scotland. Conversely, there was no suggestion that there was anything unsuitable or inadequate in terms of provision for the children in Spain. They enjoyed a privileged lifestyle and loving family and friends there. The Lord Ordinary had been faced with competing accounts of the parties which he could not resolve. He had to some degree burdened the children with being the arbiters of truth, for example in relation to their assertion of the father's drinking and driving which was denied by him and for which there was no other evidence. The Lord Ordinary had failed to use all of the material available to him including in particular the mother's criminal conviction and the welfare information from the Spanish court. The absence of a finding on grave risk should

have been fed into the equation. Even if matters could be regarded as finely balanced the policy of the 1980 Hague Convention should have resulted in an order for return of the children to Spain and to the custody of their father as already determined by the Spanish court.

Submissions for the respondent

[19] Counsel for the respondent first addressed the position of the Spanish court order. While the mother's position remained that the proceedings had not been served on her, the principal basis on which this court should not accept the reclaimer's submission on recognition was that there was no material demonstrating that the views of the children had been sought before the Spanish order was made. In *M* v C, 2021 SC 324 this court emphasised the great weight that should be given to the right of a child to be heard in proceedings concerning them. If children were of a sufficient age and maturity to form an express view their voices must be heard unless there are "weighty adverse welfare considerations of sufficient gravity to supersede the default position" requiring their views to be elicited (paragraph 12). In that case, a sheriff's failure to consider whether a five year old child should be given an opportunity to express a view was sufficient to allow an appeal. Accordingly, a court in Scotland would expect the children's views to be taken. In the present case, if it could not be shown that a Spanish court had done so, there was a fundamental reason why this court would not have recognised the Spanish order had such an application been made at first instance.

[20] Chapter 62 of the Rules of Court provided the necessary procedural route for seeking recognition and enforcement of an order under the 1996 Convention. If it was accepted that recognition using that procedure would have been refused because the requirements of

Article 23 of the 1996 Convention could not be met, the Lord Ordinary could hardly be said to have erred by failing to give effect to that provision. The procedural route for recognition and enforcement under the 1996 Convention had been available to FPS. An explanation had now been given of why he did not proceed using that route and to date nothing had been produced indicating that the views of the children had been sought in the Spanish proceedings. Regardless of whether the views of the children had been taken, Article 28 of the 1996 Convention provided that enforcement would take place "taking into consideration the best interests of the child". Those interests inevitably included the views of the children, something that would require to be considered in terms of Article 12 of the United Nations Convention on the Rights of the Child. Counsel accepted that Article 28 of the 1996 Convention provided a limited safeguard only and that had the recognition and enforcement provisions in Articles 23-27 been met in this case a different conclusion could have been reached.

[21] Turning to the terms of the Spanish court order itself the decision had been made on the basis that the mother's whereabouts were unknown but in light of the list of contact visits referred to by FPS in both 2022 and 2023 (nine in total) it was difficult to see how that could be an accurate statement. In any event, the order of the Spanish court giving the father the sole exercise of parental authority was made for administrative reasons, so that he could apply for passports, deal with medical matters and so on. Notwithstanding the statement in FPS's grounds of appeal to the contrary effect, senior counsel had now conceded that SM has not been deprived of her parental responsibilities and rights in Spain. That position was confirmed by FPS's Spanish lawyer (number 6/58 of process).

[22] In relation to the question of whether the welfare issues relating to these children had been determined, it was trite that no decision relating to children was final and that all

decisions such as that made by the Spanish court would be subject to later variation. The absence of legal aid provision in Spain and the challenges of litigating in a foreign language had to date militated against SM being able to seek to vary the Spanish order although steps had now been taken to speak to a lawyer there. Counsel accepted that there was a need to vary the Spanish order although as it did not fulfil the requirements for recognition in this jurisdiction it was less easy to see an ongoing role for the Spanish court. While interesting questions might arise about the extent to which one could oppose a recent enforceable decision from a 1996 Convention state in the context of a 1980 Hague Convention application, the question did not arise in this case because FPS could not satisfy the court that the Spanish decree should be recognised. In any event, the reclaimer was wrong to elevate that order into a final custody decision, it was simply an order reviewable on a material change of circumstances.

[23] The reclaimer had been wrong to contend that the Lord Ordinary had effectively acted as a court of appeal or that he had, in conflict with Article 27 of the 1996 Convention, reconsidered the merits of the Spanish decision. The central issue before the Lord Ordinary was, given the clear report stating that the children had objected, whether they were of a sufficient age and maturity that those objections required to be taken into account. Having decided that they were, he then required to consider those objections against other balancing factors. Quite properly, he had acknowledged the existence of the Spanish order as part of that exercise. There was no authority to support the reclaimer's suggestion that in the context of a 1980 Hague Convention case that the court's discretion at large would somehow be fettered by the existence of a foreign order. Even if the decision of the Spanish court was on the face of it capable of recognition under the 1996 Hague Convention, it required to be given no more than respect in the context of exercising a discretion on whether or not to

return children under the 1980 Convention. Accordingly, the Lord Ordinary had not erred in law in relying on the decision of this court in *W* v *A* and there was no real scope for interference with his decision.

[24] There was nothing in the reclaimer's argument to support a conclusion that the Lord Ordinary had been "plainly wrong" in the exercise of his discretion. Reference had been made in the opening narrative of his opinion (para [2]) to there having been shared care of the children by the parties in the first few months of 2022. That narrative was not part of his reasoning in the case. The factors he took into account were clearly narrated at paragraphs [46] to [54] of his opinion. The reclaimer highlighted factors that he considered were more important, but what the Lord Ordinary required to do was take all the matters listed into consideration, which clearly he had done. Importantly in this case, the strength and nature of the children's objections had weighed heavily with the first instance judge. The older boy was 13 and had taken dramatic action at the airport. Both boys were distressed at the idea of being returned to Spain against their will. While much emphasis had been placed on their having been in their fathers care following the parties separation, it could not be overlooked that they had been parented by both parties until the older boy was almost 11 and the younger one 6 years of age. In the context of their lives as a whole there had been no very lengthy period of absence from their mother, with whom they were now settled. Their objections had been reasoned.

Analysis and decision

[25] This is the first occasion in which this court has been asked to consider the application of the 1996 Hague Convention in the context of a petition for a return of children under the 1980 Hague Convention. Until fairly recently, due to the UK's membership of the

European Union, questions of the relationship between an order relating to children in one EU member state and their possible return to that state were dealt with by the 1980 Hague Convention and Council Regulation (EC) No 2201/2003 (*Brussels II bis)*. It seems likely that the provisions of the 1996 Hague Convention will be relied on to a greater extent now that the Council Regulation is no longer applicable to proceedings commenced after 31 December 2020. While no mention was made of the 1996 Hague Convention to the Lord Ordinary in this case, it is an important international instrument, ratified by the UK and to which the court should have regard whenever relevant. The practical handbook on the operation of the 1996 Hague Convention, published by the Hague Conference on Private International Law, confirms that the 1980 Hague Convention and the 1996 Convention should complement each other. They should be able to operate in tandem and not in conflict. That said, a party such as FPS requires to make a choice about which procedural route to take when seeking the return of children to a country that is a signatory to both Conventions. Where there has been a recent substantive determination of relevant welfare issues by the other state and the requirements for recognition can be satisfied, then Articles 23 to 27 of the 1996 Convention should provide a relatively straightforward route to recognition and enforcement.

[26] In the present case, it was not suggested to us that the reclaimer was unaware when the case was argued at first instance of the availability of the recognition and enforcement provisions of the 1996 Hague Convention; Chapter 62 of the Rules of the Court of Session provides the relevant procedural mechanism. Rather, recognition and enforcement was apparently considered, but there was insufficient material to be able to state to the court, as is required in such proceedings, that the children had been given the opportunity to express their views in the Spanish court. In the context of a 1980 Hague Convention application in

which the central defence was that the children objected to a return, the issue becomes whether there was a requirement to consider whether formal recognition of the Spanish Order using the 1996 Hague Convention was possible. If it was not capable of recognition, to what extent, if any, would such an analysis have had an impact on the outcome of the case?

[27] The essential complaint is that the Lord Ordinary failed to acknowledge or address the recognition and enforcement provisions of the 1996 Convention. However, had he enquired of Counsel for FPS why recognition and enforcement of the Spanish Order had not been sought, he would have been informed that one of the reasons for refusal of recognition might well apply, as there was no information to confirm that the children had been given the opportunity during the proceedings to express a view – Article 23(2)(b). In those circumstances, the Lord Ordinary would no doubt have regarded the Spanish order in the way that we know he did, namely by giving respect to it and taking it into account as a factor to be balanced against other considerations in the case, including the strength of the children's objections. In the particular circumstances of this case, the existence of the Spanish Order was not and never could be determinative. Accordingly, the reclaimer's argument that the Lord Ordinary should have given the Spanish Order formal recognition under the 1996 Hague Convention rather than just general respect on the basis of comity is without foundation.

[28] We acknowledge that in *W* v *A* [2020] CSIH 55, the state of habitual residence (Poland) was undertaking a merits review of custody arrangements notwithstanding the order not to return the child there meantime. In the present case, neither side has sought to vary the Spanish Order since the children were retained here. We accept the submission on behalf of SM that the absence of legal aid provision in Spain and the language barrier will

present challenges, but we note that she has taken some steps to secure the services of a lawyer in that jurisdiction.

[29] More importantly, we do not accept that FPS is unable to return to the Spanish court to seek orders that would prompt an urgent response from the respondent and/or the children. The mother's right to exercise custody was suspended by the Spanish Court but she retains parental responsibilities and rights over the children. If FPS has concerns about the current care arrangements for the children he has a forum in which those can be litigated, as the Spanish court will retain substantive jurisdiction until December 2024. Some of the submissions made on FPS' behalf came close to an invitation to determine this case on the basis of moral blameworthiness, a concept that no longer resonates in proceedings of this type (*W* v *A*, at paragraph 9). In any event, court orders relating to the care of children can never be regarded as final in the sense of being incapable of variation. There is no material before us to suggest that the Spanish court would refuse to revisit the issue of care arrangements for these children having regard to the material change of circumstances that has now taken place. We reject the submission that the Lord Ordinary erred in relying on the decision in *W* v *A*. As with any case in which a defence under Article 13 of the 1980 Hague Convention is advanced, he required to carry out a careful and balanced assessment. He was not faced with a petition for enforcement of a foreign decree and so did not err by failing to characterise his task in those terms.

[30] It may be that situations will arise where the existence of a recent, fully recognisable and enforceable court order from a 1996 Hague Convention state will be a near determinative factor in the context of proceedings for return under the 1980 Hague Convention, but this is not such a case. We note that in the case of *T &J (Children) (Abduction: Recognition of foreign judgment)* [2006] EWHC 412, none of the grounds for non-recognition of

the foreign judgment applied; it was accepted that the parent seeking return was in a position to seek recognition and enforcement (paragraphs 45 and 48). That situation is not analogous with the circumstances of this case.

[31] In any event, it seems to us to be unlikely that the existence of the Spanish order in this case could ever have precluded an examination of the children's objections to a return where the petitioner had sought to invoke the 1980 Convention. Article 28 of the 1996 Convention provides that enforcement of the foreign order will take place ".. in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child". While that must be read together with the prohibition on reviewing the merits of the existing order (Article 27) it would seem to provide at least a limited safeguard in a situation where the children's circumstances have dramatically changed since the order was made.

[32] Significantly, in the present case, where the central issue is the children's objection to a return, the court requires also to have regard to the United Nations Convention on the Rights of the Child. This case has been litigated on the eve of the coming into force of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (2024 asp 1). That legislation incorporates the UNCRC into Scots domestic law. Article 3 of the Convention requires that the best interests of the child shall be a primary consideration in all actions concerning them. Article 12 requires that a child be provided the opportunity to be heard in any judicial and administrative proceedings affecting them. Proceedings under the 1980 Hague Convention are clearly relevant proceedings in that context. In our view, in keeping with this jurisdiction's domestic and international obligations, the Lord Ordinary required to consider the children's objections in this case.

[33] Turning to the subsidiary argument for the reclaimer that the Lord Ordinary should not have acceded to the objections of the children in this case, we have concluded that the decision reached was well within the exercise of his discretion. The Lord Ordinary took into account the circumstances in which Charles and James exhibited their initial refusal to return to Spain and the strength of their objections as articulated to the court reporter. He conducted the necessary balancing exercise between those factors, the policy of the 1980 Convention, the existence of the Spanish Order, the circumstances in which the children were living and other broad welfare considerations insofar as known to him, bearing in mind that the parties had given competing accounts.

[34] We reject the contention that the Lord Ordinary effectively acted as an appellate court or otherwise engaged in a review of the merits of a custody decision. The relevant material before the court in these proceedings related to welfare considerations arising from the recent change in the children's living arrangements, something that patently had not been before the Spanish court. In accordance with the accepted approach in cases of this type, the Lord Ordinary undertook a broad welfare check to satisfy himself that, should he refuse to order the children's return to Spain, they would not be left meantime in a chaotic situation, something that FPS had alleged. He concluded that there were on the face of it no such concerns and fed that conclusion into the balancing exercise. That is a very different exercise to a merits review. The assessment was carried out on an assumption that another court would hear any dispute on future care arrangements. Had the Lord Ordinary failed to consider wider issues of welfare at stage two of his analysis, he would have fallen into error (*Singh* v *Singh* 1997 SC 68, at 73). The weighing of each factor for and against a return was squarely within the exercise of his discretion and we can find no material fault in his analysis.

[35] In the absence of any obvious error in the Lord Ordinary's reasoning, there is no basis on which to justify interference with his decision. For the reasons given, the reclaiming motion is refused.