EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 34
P902/17

Lady Paton
Lord Menzies
Lord Malcolm

OPINION OF LADY PATON

in the petition

of

C

Petitioner

against

N

Respondent

for an order under the Child Abduction and Custody Act 1985

Petitioner: Cartwright; Lindsays
Respondent: Malcolm; MHD Law LLP

2 May 2018

Child abduction and the Hague Convention

[1] I agree with the opinion of Lord Malcolm, and have only a few observations to add.

[2] In paragraph [25] of his opinion, the Lord Ordinary addressed the question whether "the [children are] now settled in [their] new environment" (article 12(2) of the Convention on the Civil Aspects of International Child Abduction - the Hague Convention - incorporated into our law by the Child Abduction and Custody Act 1985). In so doing, he

referred to *Soucie* v *Soucie* 1995 SC 134, and paraphrased the guidance given by the Inner House as follows:

> "[The Inner House] emphasised the balance that a court required to strike between the interests of a child not being uprooted from its community of habitual residence and cases where a clear need to remain where it had become settled could be established [emphases added]".

[3] This appears to be an inadvertently erroneous paraphrase, for two reasons.

[4] First, at the stage of an article 12(2) issue, the court is not being asked whether a child should be "uprooted from its community of habitual residence" (in this case, Italy). The question is whether a child wrongfully removed from its country of habitual residence (Italy) has become settled in its new environment (in this case, Scotland) to such an extent that

> " … [the settlement] overrides the otherwise clear duty of the court to order the return of the child (*Soucie* page 139)".

The Inner House emphasised that such a question is always one of degree, involving *inter alia* the age of the child and, if relevant (bearing in mind that age), factors such as those listed by Bracewell J in *N (Minors) (Abduction)* [1991] 1 FLR 413 at page 418. Counsel for the petitioner submitted to this court that the Lord Ordinary's opinion, read properly and as a whole, demonstrated that there had been no misdirection in paragraph [25]. However it seems to me that the erroneous paraphrasing of *Soucie* may explain why the Lord Ordinary appeared to place little weight on factors pointing to a cogent case of settlement by the two children in Scotland, and why considerable weight was given to the children's primary culture and social connection, the identity of the country in which they had lived most of their lives, their current lack of contact with relatives in that country, and their lack of any previous connection with Scotland. I therefore consider that the paraphrase adopted by the

Lord Ordinary amounted to a misdirection in law which affected the assessment of the circumstances of the case.

[5] Secondly, the paraphrase contains a reference to "a clear need to remain" in the country where the child has become settled. These words are not to be found in article 12(2). The words imply an element of necessity, which may result in a higher test to be satisfied by a parent such as the respondent. Again therefore there has, in my opinion, been a misdirection in law which has affected the assessment of the circumstances of the case.

[6] Two further matters are worth noting: the question of deception or subterfuge on the part of the respondent; and the extent to which young children might be able to understand the purpose of a return order under the Hague Convention.

[7] Concealment of the children's true whereabouts may, in many cases, amount to significant deception militating against the establishment of settlement in a new environment in terms of article 12(2). However in the present case, any concealment came to an end in December 2016 (well within the 12 month period) when the respondent's sister gave the petitioner the children's address in Scotland. Despite receiving that information, the petitioner did not commence proceedings in the Court of Session until 20 September 2017, a date after the expiry of the 12 month period. I therefore agree with Lord Malcolm that any deception or subterfuge in the present case was not a significant matter.

[8] As for an understanding of the purpose of a return order under the Hague Convention, a young child is highly unlikely to be able to grasp the concepts underlying such an order. I do not consider that such an understanding is relevant or necessary for the establishing of settlement in the new environment.

[9] In the result, I agree that this reclaiming motion should be allowed, as set out by Lord Malcolm below.

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[10] I have read the opinion of Lord Malcom, and am in complete agreement with his reasoning and conclusions. There is nothing further that I can usefully add.

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Lady Paton
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OPINION OF LORD MALCOLM

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[11] On 30 January 2018 the Lord Ordinary upheld a petition brought under the Child Abduction and Custody Act 1985 and ordered the respondent (the mother) to return her two sons (E and Y), now aged 9 and 6 years respectively, to Italy. The 1985 Act incorporated the Convention on the Civil Aspects of International Child Abduction signed at the Hague in October 1980 (the Convention) into our law. Article 12 provides for mandatory return if

proceedings are raised within 1 year from a wrongful removal or retention. The same applies in respect of later proceedings, "unless it is demonstrated that the child is now settled in its new environment" (see the second paragraph, hereinafter referred to as article 12(2)). The present case is also governed by Council Regulation (EC) No 2201/2003. The mother now reclaims (appeals) against the return order.

[12] The petitioner (the father) is Italian and resident in that country. The mother is a Polish national who, prior to her departure in 2016, was resident in Italy. The parties co-habited from around 2006. E and Y were born in Italy and are Italian nationals. They were habitually resident in Italy at the time of their removal from that country in 2016.

The background circumstances

[13] For a number of years the parties lived together peacefully and happily. In about 2015 the relationship deteriorated. There are competing accounts for this. The father claims that the mother had an affair with another man. The mother speaks of domestic abuse and violence. In any event the parties separated in June 2015, albeit continuing to live in the same property for a further 6 months. Physical separation took place in January 2016 when the mother left the family home with the children to live with friends. In her affidavit the mother claims that in March 2016 the father arrived in an inebriated condition wanting to spend time with the children. On being refused because of his condition, he punched her in the face. There are ongoing criminal proceedings relating to this alleged incident, which occurred in front of the children and the mother's friends.

[14] Without informing the father, in May 2016 the mother left Italy with the children. She went to live with her father in Poland. She informed the father where she was. He replied to the effect that she could stay in Poland for the summer with the children. His

understanding was that the children would return to Italy in time for the autumn school term, which commenced on 9 September. (There is frequent reference in the papers to the school term beginning in mid-September, but there is evidence that the exact date was 9 September.) In the course of the summer there was electronic communication between the father and the children. At some stage this stopped; again there are competing accounts as to how and why this happened.

[15] The mother's mother and half-sister live in Scotland. On 4 July 2016 she travelled there with the children, initially to live with her mother. After 3 months she obtained a council house where she now lives with the children. It is a three bedroom property with kitchen, living room, bathroom, and a small garden. Each boy has his own bedroom. In August 2016 they enrolled at a local primary school. The mother and children continue to live in that property. It is the position of the mother that she and her children are now settled in Scotland.

[16] After the children did not return to Italy, the father was contacted by representatives from their school asking about them, and later by social workers. He consulted an attorney who suggested that he lodge a complaint before the competent authority reporting the case as one of international child abduction. In December 2016, through his sister, the father was informed as to the whereabouts of the mother and his children. In her affidavit the mother states that in March 2017 the father's uncle contacted her and asked if the father could come and see the children. She assented, but he did not exercise contact. On this matter the father's position is that the mother replied to his uncle by saying that she would ask the children, who would then decide. However his uncle heard nothing further.

The petition and related procedure

[17] On 20 September 2017 the father commenced the current proceedings. At a first hearing on the 29 September, amongst other things, the Lord Ordinary appointed an advocate to enquire into and report to the court in respect of:

1. The children's degree of maturity and ability to express views (each child to be assessed separately).

2. If appropriate, the children's views on the extent to which they consider themselves settled in Scotland, and on being returned to Italy for the purpose of the courts in Italy making a decision about their future place of residence.

[18] The reporter spoke to the children at their school, and also to their head teacher. She stated that the boys had begun school at the beginning of the previous school year. They had quickly established themselves. Their English is good and they communicate well with their friends and others. The reporter indicated that one would assume that English was the older boy's first language. He wanted to remain where he was. He wanted to stay with his mother and younger brother. He named the friends he had made at school. He attends football and taekwondo lessons. He is a talented football player. His younger brother was also clear that he wanted to stay with his mother, and he expected that this would be in Scotland.

[19] The reporter concluded that the boys are intelligent children who exhibit the maturity appropriate to their age. The concept of settlement was not one which either boy could understand. They are comfortable in and achieving appropriately at their school where they have established friendships. E has integrated into the activities available to a boy of his age near his home. Their head teacher is of the view that removal from their current circumstances would be unsettling. Neither boy is able to understand the processes

involved in a return to Italy for the purpose of the courts there making a decision about their future place of residence.

The psychologist's report

[20] The parties lodged affidavits and other documents. On 3 November the Lord Ordinary remitted to Dr Katherine Edward, chartered and clinical psychologist, to enquire into and report to the court in relation to certain specified issues. The report was to be provided by 30 November. The psychologist interviewed the boys twice at their school. She also had a discussion with their head teacher. Her report can be summarised as follows.

[21] Both boys spoke positively about their experience of school. They were clearly engaged in their schoolwork and also had strong sporting interests. Both talked about having a number of friends and enjoying spending time with them at school. The older boy had friends nearby with whom he could go out and play. This was less apparent for the younger child. They presented as very happy and content with their current living situation. They were positive about their relationship with their mother.

[22] The psychologist explored their understanding of their father. Y stated that their father knows where they are, but is in Italy because he punched their mother in the eye. Both boys had seen this happen. They talked about the event in a way that strongly suggested it to be true. They were clear that they did not want to see their father. They could recall talking to him on the telephone in the past, but could not remember the last time this happened. They were both clear that they would not want to speak to him again. They were adamant that they wanted to stay where they were. They would be happy if they were to stay living in Scotland and going to their school. At the end of the first conversation both boys appeared to be excited by what was ahead for them that day at school.

[23] The psychologist had a more detailed discussion with the boys the following day. They remained clear that they wanted to live in Scotland. They struggled to provide a specific view as to why they feel so strongly about this, or a sense of what it would be like for them to leave now. However to the psychologist their desire to remain is genuine. E was particularly clear that he did not want to go back to Italy. The psychologist explored, especially with the older boy, the concept of returning to Italy so that a court there could decide what would happen. Both boys were of the view that they would prefer this decision to be made in Scotland. This appeared to be related to their sense that Scotland is now their home. They were very clear that they wish to live with their mother and, particularly, not with their father. They appeared to find stating this view easier than an exploration of the emotions surrounding these views. Both were clear that they did not want to talk to their father. They liked Poland and Scotland much better than Italy. They do not want to visit Italy. Both boys felt it likely that they left Italy because of how their father acted towards their mother. They are aware that their parents do not want to talk to each other. They again spoke positively about their experiences within the school.

[24] The psychologist spoke to the boys' head teacher. She described the older boy as a very mature child who had made great progress with his written and spoken English. The school has a high proportion of children for whom English is not their first language, and who have Polish parentage, so they have received a good level of support, not feeling that their language needs were unusual. The younger boy's language integration was in some ways easier as primary 1 and 2 work is more visual and aimed towards language formation. Both boys had settled into the school very quickly upon their arrival. E presents as a competitive and determined boy who is keen to do well. The school has no concerns for the boys with regard to academic, social or emotional progress. They are always well presented

at school and their attendance is excellent. Their mother is very involved in their education and always responds to communications from the school. The boys live in an area with a strong Polish community. Her impression is that the boys are very well cared for and nurtured within the home. They rarely mention Italy and only very rarely have spoken Italian. From the school's point of view she feels it important that, whatever happens, the boys are able to feel settled in a school and community environment. The head teacher was clear that the boys are settled and stable in school. She commented on the high quality of their sibling relationship and the manner in which she feels this reflects positively upon their care situation at home.

[25] The psychologist then responded to the specific questions posed by the court. The first concerned the level of maturity of the children. The older boy seemed to be a mature child for his age. He thought carefully before responding to questions and understood the gravity of the issues discussed. He was emotionally protective of his younger brother, which adds to an air of maturity. He could clearly state his view. It would not be expected that at his age he could fully explore certain possibilities and hypotheticals; however he is a young man able to present his own view and, to an age appropriate extent, consider the emotional impact upon himself of various outcomes.

[26] So far as the younger boy is concerned, his maturity assessment was on a par with his age. He engaged well but struggled to expand upon his views and emotional states beyond relatively basic descriptions. He is reliant on his older brother for some elements of translation (perhaps particularly with strangers) and gains obvious emotional support from him. He can present a clear view of what he wishes to have happen in his life, and has a good sense of outcomes which he feels would impact upon him negatively. He has not

reached a level of maturity to understand and explore more complex hypothetical outcomes. He was able to express views independently of his brother.

[27] The second question was whether the children object to being returned to Italy, and if so, why they object. The psychologist reported that it was clear that the boys objected to the possibility of a return to Italy. They were clear about this view, which the psychologist suggested was genuinely held by both of them. They were not able to give a complex verbal account of the reasons for this beyond stating that it would make them sad. The boys did not present a positive view of their life in Italy, and showed none of the obvious positivity or emotional animation when discussing Italy as was evident when speaking about their time in Poland or Scotland. They both witnessed negative interaction between their father and their mother and show no desire to re-engage with their father. This can be compared with their positivity about their life in Scotland. The psychologist's view is that this, alongside a lack of positive emotional connection to individuals in Italy and retained negative memories, underlay their objection to a possible return to that country.

[28] The third question was whether the children appreciate that the purpose of a return to Italy would be to enable the Italian court to make decisions about their future. Given their age and level of maturity the boys were not able to make the distinction between returning to Italy to enable a court to decide their future, as against returning to Italy to live there and resume their previous connection with their father. The older child reluctantly stated that he could tolerate a return which allowed a court to decide on these matters, however this was an outcome that would cause him anxiety and raise negative emotions. E was very clear that he wanted decisions to be made for him in Scotland. The younger boy was not able to comprehend the aforesaid distinction. Given their age and the complexity of the differentiation of returning to stay and returning so that the court could decide, the

psychologist expects that the latter scenario would be experienced as negatively by the boys as the former. They were expressing a clear view that they would not wish either outcome.

[29] The fourth question was the extent to which the children consider that they are settled in their current place of residence, having regard to the physical elements of relating to community and environment and emotional elements denoting security and stability, and having regard to the fact that there is a primary attachment to their mother, and her location. The psychologist's impression of both boys is that they are very well settled within their current school and home environment. This was also the clear view of their head teacher, who is well acquainted with them. They have fully integrated into their school and enjoy the academic and social aspects. They are emotionally stable and without overt anxiety, which is a positive given their prior experiences. The cultural mix of their school and community has allowed them to feel well integrated. They have progressed notably well with their English. The manner in which the boys discussed their home life and the descriptions they provided were very suggestive of their strong attachment to their mother, and it is likely that their proximity to her has been a factor which has facilitated their positive experience of their time in Poland and the move to Scotland. The manner in which they present as siblings and their lack of anxiety about the future suggests a stable and supportive home environment. The boys experience Scotland as their home and would not wish to leave it. Given the positivity with which they present their current living situation and the apparent security which it provides for them, it is the psychologist's expectation that removing them from that environment would cause anxiety and distress. Removal from their school, into which they have integrated so well and built meaningful connections, would also be likely to impact negatively on their emotional and academic development.

[30] The final question concerned the children's views on their relationship and connection with their father. It was reported that both boys presented a negative view of their father. They were unable to provide an account of positive experiences they had shared with him, and spoke of witnessing aggressive interaction between their parents. The older boy spoke of not gaining his father's attention when it was sought. The psychologist did not gain a sense that the boys were giving views of their father provided to them by others. For the most part their sense of their father was vague, negative and distant. They presented a slightly more ambivalent sense of their prior relationship with their paternal grandparents. The boys presented as not wishing further interaction or connection with their father, either direct or via telephone, although they were saddened by his lack of communication at their birthdays.

The mother's submissions to the Lord Ordinary

[31] In respect of article 12, the mother accepted that it was incumbent upon her to establish that the children were settled in Scotland. Reference was made to various authorities. The mother relied upon evidence from herself and independent parties, including affidavits from the boys' head teacher and from neighbours; the boys' school reports; the mother's tenancy agreement; her contract of employment; other documents indicating an engagement with external health services by the children and membership of the taekwondo alliance; and the report from the psychologist.

[32] On the basis that it had been established that the children were settled in Scotland, it was submitted that, in exercise of the court's overall discretion, an order for return should be refused because of the children's welfare. Reference was made to the impact upon them of removal in terms of their anxiety and distress, the disruption, and their schooling. A history

of domestic abuse was spoken to by the mother and other witnesses, and supported by a medical report and an official police report submitted to the prosecutor in Italy. At the time of their removal the mother and children were not living in settled accommodation, and this would remain an issue if they were returned. The mother has employment in Scotland but not in Italy. The court was reminded that the primary objective of the Convention, namely the swift return of the children following an abduction, can no longer be achieved. The views of the children should be taken into account. To force their return against their clearly articulated and strongly held views would have an adverse impact upon their wellbeing. The Scottish home environment is now the settled one. Any change to the status quo would involve risk and uncertainty for the boys. Their best interests point to refusal of a return order.

[33] In the context of article 13 and whether the children object to being returned, the evidence as to the children's objection to a return is clear. However counsel for the mother accepted that it was difficult to support a contention that the children are of sufficient age and maturity that an article 13 objection to return can be upheld. The mother's defence rested upon the terms of article 12.

The father's submissions to the Lord Ordinary

[34] Counsel for the father also referred to case law. It was stressed that after the children were taken to Scotland their father was not informed as to their whereabouts until December 2016. This had an impact upon whether they were or were not settled in Scotland. Their relationship is with their mother, and this is independent of any new environment. The issue of settlement should be addressed from the start of the new school term in Italy, being the date of wrongful retention, as opposed to wrongful removal in May

or their subsequent arrival in Scotland. Settlement in a new environment requires to be so well established that it overrides the otherwise clear duty of the court to order the return of the child. The effect of article 10 of the EC Regulation means that the Italian courts retain jurisdiction in substantive matters relating to the children's welfare; the Scottish courts having no jurisdiction in such matters.

[35] As to the evidence regarding settlement, it amounts to very little beyond the children doing well in school. In relation to the emotional and psychological aspects of settlement, the evidence was superficial and poor. There is no reference to their father and their relationship with him, and there is nothing particularly suggestive of a connection or settlement in Scotland. The boys do not have the maturity to understand the Hague Convention, and this limits any weight to be attached to their views, which are, in essence, that they want to stay with their mother, not that they want to be in Scotland. The psychologist reports that E prefers Scotland because he has "toys and friends", however he would enjoy both of these in Italy.

[36] The psychologist wrongly approached her task from a welfare perspective. She does not explore why the boys say only negative things about their father. She does not report on their relationship with their father and family in Italy before their removal. It is notable that the children were saddened by their father's failure to mark their birthdays. The boys clearly have a limited understanding of their circumstances. It is likely that the removal from Italy had an emotional toll upon them. Their sudden removal from Italy and their Italian family is likely to raise issues in their later life unless full consideration is given to their future by a court with appropriate jurisdiction.

[37] The psychologist had no regard to the boys' long-term future. Their inability to express why they do not want to return to Italy lessens the weight to be attached to their

views. The psychologist did not explore whether the children had been influenced by their mother's obvious determination to start a new life without discussion or consultation with the children's father. A family "airbrushed" out of a child's life is likely to cause serious anxiety and negative emotions, certainly in later life. The psychologist accepts that the boys have a strong attachment to their mother and "their proximity to her has likely been a factor that has facilitated their positive experience of … the move to Scotland". When considering settlement the court is required to consider more than a child's relationship with his mother. One should look to the long-term consequences for the boys of their futures not being properly adjudicated upon. For settlement to be established there must be a consideration of the long-term future for the child. The outcomes for children whose family history is hidden from them are generally not positive. The children should be returned in order that an appropriate court can consider all of these issues. The failure to include their father and paternal family in their lives suggests not emotional or psychological settlement, but rather insecurity and uncertainty. The psychologist's approach was superficial and one-sided, thus the court should be careful of affording too much weight to her views in respect of the children's relationship with their father.

[38] The subterfuge in bringing the boys to Scotland contradicts their settlement in Scotland. Having been spirited away from one parent, they are likely to be fearful of losing another parent and thus eager to please her. The apparent evidence of settlement should be treated with caution, as it has been founded on deceit, not only of the father, but also of the boys themselves. Their right to know and have a relationship with their father has been ignored by their mother. The evidence of settlement is superficial and focuses mainly on the boy's schooling and hobbies, as one would expect with young children. There is almost no evidence about the children being settled in a new family environment; in fact the evidence

is to the reverse. There is conflict within the wider family in Scotland and no relationship with the family in Italy. There is almost no reference to the boys' emotional stability and security beyond that they seem well/present well and have a strong attachment to their mother. The boys are simply getting on with the life their mother has made for them, and which she could make anywhere for them. The boys' negativity about their father, when contrasted with the fact that they were saddened by his lack of communication at birthdays, is suggestive of children who are confused and not emotionally settled. The children are aware of the parental conflict, and will be suggestable.

[39] Were the court to come to the view that the children were settled, it was asked to exercise its discretion to grant the order for return. Reference was made to the proximity of the raising of proceedings to the 12 month period; the aims of the Convention when set against the respondent's actions; the disharmony within the mother's own family; the view that the boys simply wish to be with their mother as opposed to being in Scotland; the mother should not be permitted to benefit from her actions; and article 10 of the Regulation of 2003.

Submissions in response for the mother

[40] In a short response the mother submitted that there could not be a wrongful retention in that the initial removal from Italy was not agreed. The cases on concealment could be distinguished from the facts of this case. To the extent that there was any concealment, the father was in the dark for a limited period. Thereafter the children lived in Scotland for nine months prior to the raising of these proceedings, and for over a year in total. Any concealment has no bearing on the question of settlement. The mother denied that the Italian courts retained jurisdiction in terms of article 10.

[41] As to earlier cases dealing with a child's relationship with the mother, they concern very young children, whereas here the boys are both of school age and act independently of their mother in many respects. Many of the factors relied upon by the father have no bearing on the issue of settlement. The psychologist's report had been misunderstood in certain respects. It requires to be considered as a whole. It is clear that the boys now consider Scotland to be their home. If the father had wished contact he could have requested that at any time, but had not done so. If the children remain in Scotland, they will gain a habitual residence in this jurisdiction.

Further response for the father

[42] The father submitted that, wherever the mother goes, the boys will follow. She thought nothing of uprooting them from Italy, and she may uproot them again. The departure from Italy was foisted on the children, as was the move to Scotland. The children are too young and immature to object to a return. The allegation of domestic abuse is a criminal matter still pending in Italy. It is yet to conclude because the mother is no longer living in Italy. It remains an unproven allegation. The mother's lack of accommodation in Italy is the result of her own choices. The father will assist in securing accommodation for her. The mother should not be able to rely on factors created by her to subvert the aims of the Convention. It was reiterated that the children's wish to stay is based upon a wish to remain with their mother, rather than a desire to stay in Scotland.

The Lord Ordinary's decision

[43] The Lord Ordinary heard the submissions of counsel for the parties on 4 and 12 December 2017. On the latter date he issued an ex tempore judgment indicating that he

intended to grant the prayer of the petition. This court was informed that the view taken was that the children were not settled in their new environment. His Lordship continued the petition so that he could be addressed on the arrangements to be made for the accommodation and ongoing support of the mother and children on their return to Italy. After hearings on 16 and 30 January the court was satisfied on these matters. The Lord Ordinary granted the prayer of the petition and ordered the mother to return the children to the jurisdiction of the Italian courts by 2 April 2018.

[44] Shortly before the appeal hearing his lordship provided a note setting out his reasoning. He considered that the failure to return the children to Italy at the start of the autumn school term in 2016 was "a fresh, a new, wrongful removal". Nonetheless it remained necessary to consider the question of settlement. The date of the commencement of the school autumn term in Italy had not been precisely established, the best evidence being that it was about mid-September. (In fact there was evidence that the relevant date was 9 September, and before this court it was not suggested that the proviso to article 12 based upon settlement in the new environment did not arise.) The Lord Ordinary addressed the question of settlement in terms of article 12. He noted that where the proceedings are raised after the expiry of 1 year since wrongful removal (or wrongful retention) a discretion arises to refuse the return of the children if "it is demonstrated that the child is now settled in its new environment."

[45] The Lord Ordinary dealt with the question of settlement and related matters at paragraphs 25 to 36 of his note:

> "[25] Settlement is a question of fact. The issue has been considered by the Inner House: *Perrin* v *Perrin* 1994 SC 45, where stress was placed on determining the physical element involved in relating to a community and the emotional element denoting security and stability; and in *Soucie* v *Soucie* 1995 SC 134, which emphasised the balance that a court required to strike between the interests of a child

not being uprooted from its community of habitual residence and cases where a clear need to remain where it had become settled could be established. In the House of Lords in *Re M (Children)* (*Abduction: Rights of Custody*) [2008] 1 AC 1288 the discretionary nature of the decision to be made by a court was to the fore, to the extent that it was stated that in appropriate circumstances an order for retention [sic] can be made even if a court is satisfied that a child is settled in its new country of residence.

[26] More recently in *HIB* petitioner 2014 Fam LR 41 Lady Wise gave consideration to the views of children in relation to the issue of settlement.

[27] In relation to the factual issues which have been employed in considering and determining issues of settlement a lengthy list was developed in the submissions of counsel. Examples given were children being settled in a physical sense in a community, in school, in home, with other people, having friends, participating in groups and community activities, the degree of emotional security a child may develop with a geographical place and the element of security and stability. It is probably fair to assert that it would be impossible, and in any event of no practical value to attempt to devise a list of all factors which might be relevant. As I said at the outset of this chapter, settlement is a question of fact. In an individual case the court must simply assess all the relevant factors upon which it has evidence or information and then attempt to strike a balance between the competing interests of the objectives of the Hague Convention to discourage wrongful removal of children and the interests of children to have security and stability in the place where they are being brought up.

[28] In the present case the two children are relatively young, 9 and 6 years of age and are consequently of primary school age. They were born in Italy, resided in that country until May or June 2016, and spoke at the time of the wrongful removal Italian as their primary language. They were raised, when living in Italy, in the company of Italian relatives and at least in the case of the older child had attended school or pre school in that country. They held Italian passports. By virtue of their mother's nationality they had both connections with, and relatives in Poland. On the basis of the evidence before me they had no connection with the United Kingdom, specifically Scotland, before being brought to this country in July or August 2016. On arrival in Scotland they had, objectively judged, no real discernible connection with this country. They either did not speak or had limited competence in English. Insofar as I can determine the reason for the children's arrival in Scotland appears to have been the desire of the respondent to avoid requiring to return to Italy. The respondent's only connection with Scotland seems to have been that her mother and a sister resided here. It is to be noted that at some stage, for reasons which the court is not aware, the respondent ceased to have contact with her mother and sister. The situation at the date of the hearing was that the respondent and therefore the children had no relatives with whom they were in regular contact resident in Scotland.

[29] On the basis of information before the court the children are, in a material sense secure in Scotland. The respondent has obtained the tenancy of a local authority house where the family live. Both children attend school. An affidavit, which deals with both children, was available from the head teacher of the relevant school. On the basis of this document it is clear that both children have settled in the school environment and are involved in the school community. The older child's English has progressed well. He participates in sporting activities. A school report was available which is confirmatory of these matters. The head teacher had less detail to impart about the younger child, but again a school report was available. This was in favourable terms. Both children have made friends at school.

[30] Both children have been seen by a consultant child psychologist on two occasions. The psychologist also spoke with the children's teacher. Both children state they like living in Scotland. Both children were settled in both their home and school environment. Both children stated that they did not wish to leave Scotland. The psychologist did not doubt the voracity [sic] of these views.

[31] In addition to the foregoing the respondent produced affidavits from two neighbours. In relation to care these documents were positive. The view was expressed by both deponents that the children were happy and participated in social events within the community in which they lived.

[32] All the foregoing matters were founded upon by counsel to the respondent in support of her submission that settlement in Scotland was established and that the court should exercise its discretion to refuse a return order.

[33] In response to the respondent's submissions on the issue of settlement and return counsel for the petitioner drew to my attention the views expressed in the report of the child welfare reporter. In the final paragraph the reporter expressed the view that 'Neither boy is able to understand the processes involved in a return to Italy for the purpose of the courts here making a decision about their future place of residence.' I would also note that the reporter remarked that in response to a question designed to obtain the older child's views he replied 'that he wanted to stay with his mother and [younger brother].'

[34] In relation to the psychologist's report counsel for the petitioner noted that whilst both children were able to say they wished to stay in Scotland, neither was able to verbalise a reason for this. It was submitted that whilst the psychologist profers an explanation for this, the explanation does not have regard to relevant considerations such as the circumstances of the removal from Italy, the effect of exclusion from Italy on the children and the respondent's hostile attitude to the petitioner. It was also observed that the psychologist reports that the positivity expressed by the children in relation to living in Scotland appears to be focussed on features such as 'toys and friends', which ignores or at least gives insufficient weight to the existence of these features in Italy. It was also drawn to my attention that the psychologist did not expressly diverge from the reporter's view, already quoted, that

the children were unable by reason of age to adequately express a view on the issue of return.

[35] On the basis of all the information available relative to settlement, I have formed the view that whilst these children have, using the word conventionally, settled well in Scotland this is primarily due to their attachment to their mother. I consider that there is nothing unusual or distinctive as to their degree of attachment to Scotland. I express this view primarily because the children were unable to explain why they said they wanted to remain in Scotland. Further, the elder child did state that it was to be with his mother and brother. This supports the view that primary attachment is maternal, which I do not find surprising. Balanced against that is the consideration that residence in Scotland entails the children being removed from the country of their origin and, on the basis of the evidence their primary culture and social connection. They are now being deprived of contact with their Italian family members, and for that matter Polish family members. They are removed from the culture in which they were brought up and with which they have a real and substantial connection. It appears to me to be a necessary inference from the child welfare reporter's concluding remarks on the children, lack of proper appreciation of the purpose of the Italian courts making a decision about their future place of residence, that they have no complete understanding of the factors which require to be considered when that decision is made. The views they have expressed that they wish to remain in Scotland are based upon an incomplete understanding of the complex factors affecting their long-term welfare. They have settled well in Scotland, no doubt because, like most children, they are resilient and adaptable, and, primarily, are secure in their home environment with their mother. There is no reason why this need be disturbed by a return to Italy. Arrangements have been made for them to have accommodation with their mother and apart from their father. The Italian court, in the country where they have lived most of their lives, is best placed to make welfare decisions which will have a lasting effect on their welfare and development.

[36] Having regard to these features I considered that I should exercise my discretion in ordering a return to Italy."

The submissions for the mother in support of the appeal against the order to return the children

[46] The mother has now reclaimed (appealed). She contends that the wrongful removal took place when the children were removed from Italy in May 2016. In any event, if the situation is analysed as one of wrongful retention in Scotland from the date when the children should have been returned to Italy for the start of school, the evidence demonstrates a date of 9 September 2016, or at latest mid-September, both of which occurred

more than a year before the raising of these proceedings. It follows that on any view the issue of settlement under article 12 requires to be considered.

[47] The court has to consider as a matter of fact whether it has been demonstrated that "the child is now settled in its new environment." Having formed the view that the children were settled well in Scotland in conventional terms, the Lord Ordinary did not require to assess the "quality" of that settlement in any other context. He erred in asking whether there is anything unusual or distinctive as to their degree of attachment to Scotland, and also in the view that a child must be in a position to explain why he wants to remain in Scotland. He was wrong to embark upon a balance between the interest of the child in not being uprooted from its community of habitual residence and a need to remain where the child had become settled. (It is important to appreciate that the arguments of the parties were prepared on the shared understanding that the judge held that the children were not settled in Scotland, and that this remained their position in oral submissions.)

[48] The Lord Ordinary considered a number of matters which are not relevant to the determination of the question of settlement; for example, there is no need for a prior connection with the country of settlement. The Lord Ordinary's review and assessment of the evidence was superficial. There was no acknowledgment of the length of time the children had been living in the one place and attending school. There was no sense of an appreciation of the true extent of their involvement in the school and local community as seen in the affidavits and reports, including school reports. It was not explained why all this evidence does not point to a conclusion of settlement. The evidence includes independent accounts from the head teacher and neighbours. There was no proper basis for the conclusion that the settlement in the conventional sense is primarily due to the boys' attachment to their mother. Most of the evidence relates to the children's schooling and

activities independent of their mother. The psychologist stated that the proximity of their mother had been a factor which had facilitated their positive experience in Scotland. There was no proper consideration of the psychologist's considerable support for settlement in terms of both its emotional and psychological elements.

[49] The Lord Ordinary highlighted the comments of the child welfare reporter, namely "that neither boy is able to understand the processes involved in a return to Italy for the purpose of the courts there making a decision about their future place of residence." The Lord Ordinary erroneously allowed this to inform his approach to the issue of settlement, and also the exercise of any discretion. The question of a child's understanding of the purpose of a return order is part of an assessment of their age and maturity, and can arise when considering an objection to return in the context of article 13. It plays no part in the assessment required for determining whether a child is settled or not.

[50] The Lord Ordinary appeared to indicate that he is not of the view that settlement in terms of article 12 had been established, accordingly the next stage of exercising his discretion was not required. If it had been, the issue of discretion to order return or not would have been at large (*In re M* (*Abduction: Rights of Custody*) [2008] 1 AC 1288 at paragraph 43), and would involve taking account of Convention policy, the circumstances that gave rise to the discretion, and wider considerations of the children's rights and welfare. For whatever reason the Lord Ordinary focused on (i) the children's lack of understanding of the processes involved in a return to Italy for the courts there to make decisions and (ii) on their removal from their culture in Italy. The only welfare based matter commented upon was the fact that the children "are now being deprived" of contact with relatives in Italy and Poland; however there was no evidence that this would be a continuing situation regarding the Italians, and none at all to suggest that there was no

contact with Polish relatives. In so far as the Lord Ordinary addressed an exercise of discretion, no proper balancing exercise had been undertaken.

[51] The conclusion that the children are not settled in Scotland should not stand, and the appeal court should consider the matter of new in light of all the evidence and submissions. On a proper and full consideration of the evidence the conclusion should be that the children have settled in their new environment. In that event the court's discretion should be exercised to refuse to order the return of the children to Italy. The report from the psychologist makes it abundantly clear that the children would be adversely affected by any such return. They have been living in Scotland since 4 July 2016. They have attended school since 17 August 2016. This is the only formal education system the younger child has experienced. There is a history of exposure to domestic abuse. The mother has no employment and no accommodation in Italy. The Lord Ordinary sought to address the latter, but without a satisfactory conclusion. Furthermore, the primary objective of the Convention is the swift return of the children to their country of habitual residence. On any view that objective cannot fulfilled. Though still young, the children have strongly held views which are genuine and considered to be their own. In the exercise of an overall discretion it is important to take those views into account. The interests of the children require that an order for their return should be refused.

The submissions for the father in response to the mother's appeal

[52] For the father it was submitted that the emotional element of settlement would encompass a sense of belonging to the place rather than just living there in a comparatively settled manner. A child's own emotional connection with the place must be more than feeling secure in the care of an absconding parent. Otherwise emotional settlement upon

that basis could be transferred to wherever the absconding parent took the child. The question of settlement has to be considered in the "spirit of the Convention" (*Soucie* v *Soucie* 1995 SC 134 at 139). Something more than settlement in the conventional sense of the word is required. *Cannon* v *Cannon* [2005] 1 WLR 32 sets out the correct approach when there has been concealment of the child's whereabouts. Judges "should not apply a rigid rule of disregard but they should look critically at any alleged settlement that is built on concealment and deceit, especially if the defendant is a fugitive from criminal justice." An example of a consideration relevant to the necessary qualitative assessment would be the ability of the child concerned to explain, independently of the abducting parent, why he wants to stay.

[53] The Lord Ordinary did not err in his consideration of settlement in terms of article 12 of the Convention. He had regard to the relevant authorities and noted the two elements required to establish settlement. Having regard to *Soucie*, the Lord Ordinary was correct to require settlement so cogent that it outweighed the primary purpose of the Convention to return the child. In terms of the Convention the child's interests are to remain in his country of habitual residence unless there is a clear need for him to remain where he has become settled. The children's national heritage is relevant to an assessment of their emotional integration with Scotland. Until May 2016 they had lived all of their lives in Italy speaking Italian as their first language. Their removal from their country of origin bears on the factual exercise which the judge required to carry out since it relates to the emotional constituent of settlement. The Lord Ordinary considered that the children's emotional attachment to Scotland was primarily due to the attachment to their mother. The children had "no complete understanding" of the emotional aspect of settlement which necessarily encompasses a consideration of their long-term welfare.

[54] The appeal court is not entitled to reconsider the facts. The Lord Ordinary considered all the factual material advanced before him; the weight to be attached to that material being a matter for him. He had appropriate regard to the psychologist's report. The weight to be applied to it is again a matter for him. The "positive experience" of the children in Scotland is not indicative of settlement in the Convention sense. The children's attachment to their mother may have facilitated their positive experience here, however that is not the same as saying that the emotional element of settlement has been established. It is axiomatic that if a child does not fully understand the circumstances of his residence in a new country, it will be difficult to show that he has emotionally integrated into his new country. "An older child will be consciously or unconsciously enmeshed in the sole carer's web of deceit and subterfuge" - *Cannon* paragraph 57. Where there has been concealment, for the emotional element of settlement there would require to be a clear understanding of the relevant facts as to why he was living where he was, and also as to the purpose of a return order and what it would entail on the part of the child concerned. A lack of understanding as to why he was living where he was, why he wanted to stay there, and of the purpose of a return order (all evidenced by an inability to explain those factors) necessarily impacts on the understanding of the concept of settlement, given that those factors are directly relevant to the emotional constituent of settlement.

[55] It is not entirely clear why the Lord Ordinary made comments in relation to an exercise of his discretion. This may have been in relation to the wrongful removal from Italy, as opposed to the later "second wrongful removal" (paragraph 22 of the Lord Ordinary's note). If the Lord Ordinary required to exercise a discretion, he had regard to all relevant factors relating to the children's welfare. In particular he took account of the concealment of their whereabouts; the absence of contact with and a relationship with their

father and Italian family; the lack of any contact with family in Scotland; that there was no connection with Scotland prior to moving there; that things such as "toys and friends" would be available to the boys in Italy; that the children simply want to stay with their mother who is their primary carer; that leaving Scotland with their mother would not disturb the boys resilience, adaptability and security with their mother; and the provisions of article 10 of the Regulation of 2003.

[56] In the event that the court considers the case anew, it was submitted that the Lord Ordinary's finding of no settlement should be repeated. If the court finds that there is settlement, nonetheless it should return the children. The children's attendance at school had been based on subterfuge. The father only discovered their whereabouts in December 2016. Their first language is Italian. The parties are in dispute as to the alleged domestic abuse incident. The father has offered to provide a property for the mother and children and pay three months' rent. The lack of contact with their father will have impacted adversely on the children's welfare. A swift return to Italy has been frustrated by the mother's concealment of her move to Scotland. The views of the children require to be read in the context of their limited understanding of their current situation and the purpose of the Convention.

The case law

[57] The leading authority on the proper approach to settlement under article 12 is *In re M and another (Children)* (*Abduction: Rights of Custody*) [2008] 1 AC 1288, and in particular the speech of Baroness Hale of Richmond. There were two issues in the case. The first was: once a child is settled in a new environment, is there still a discretion to return the child under the Convention, or must that be done, if it is to be done, under some other

jurisdiction? The second issue was: if there is such a discretion, on what principles should it be exercised? One view, supported by Lord Rodger, was that a finding of settlement removed the case from the Convention altogether. This might explain some of the earlier cases which test "settlement" by reference to, amongst other things, the objectives of the Convention, perhaps influenced by the comments of the author of the Explanatory Report to the Convention (paragraph 107) to the effect that if a child has become settled in the new environment, its return should take place only after an examination of the custody rights exercised over it, something which is outside the scope of the Convention. A contrary view was taken by the Court of Appeal in *Cannon* v *Cannon* [2005] 1 WLR 32, namely that settlement merely elides the mandatory duty to return.

[58] Lady Hale recorded that the case before the House appeared to be the first when a "settled" child had been ordered to return. She reached the view that even a child who was settled in terms of article 12 could be returned within the Convention procedures and without an examination in the traditional manner of the child's best interests. This

> "would avoid the separate and perhaps unfunded need for proceedings in the unusual event that summary return would be appropriate in a settlement case. It recognises the flexibility in the concept of settlement which may arise in a wide variety of circumstances and to very different degrees". (paragraph 31)

However a view had gained currency that in Convention cases the court should favour a return order in all but "exceptional" cases. This approach was rejected. The Convention itself identified exceptions to the general rule of return, including settlement under the proviso to article 12. "It is neither necessary nor desirable to import an additional gloss into the Convention".

[59] Lady Hale stated that where the Convention allowed an exercise of discretion, it was a discretion "at large". Her Ladyship continued at paragraphs 43/4:

> "The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. … The underlying purpose (of the Convention) is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be."

Lady Hale noted that the courts were increasingly taking account of the views of the child, even when they were not determinative. In paragraphs 47/8 her Ladyship stated:

> "In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer 'hot pursuit' cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors, which may well, as here, include the child's objections as well as her integration in her new community. All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child. The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction. Further elaboration with additional tests and checklists is not required."

[60] In overturning the Court of Appeal's decision to return the Zimbabwean children, Lady Hale accepted the proposition that in the past the "child-centric" exceptions of settlement (article 12) and objection (article 13) had been analysed more from the parents' perspective than from the children's. The children had to suffer all the upset of being brought to the UK secretly. They had settled down and become integrated in their local church and schools. They were now well settled, and, if the father's application succeeded, would again be the victims of a second international relocation contrary to their wishes.

According to her Ladyship, against all the factors pointing to no return, the policy of the Convention carried little weight. "The delay has been such that its primary objective cannot be fulfilled". In conclusion her Ladyship noted that cases under the second paragraph of article 12 are few and far between. "They are the most 'child-centric' of all child abduction cases and very likely to be combined with the child's objections."

[61] In a short concurring speech Lord Hope stressed that the policy of the Convention is that the interests of the child will always be of paramount importance. Lord Rodger (paragraph 7) preferred the view that once the child had settled in the new environment, Convention considerations flew off "because the purpose of the Convention to promote speedy return can no longer be achieved." As article 18 envisages, the court should then have resort to its powers outside the Convention. He concluded by saying that, happily, for the reasons given by Lady Hale, "it may not make very much difference in practice whether the discretion is exercised under or outside the Convention." Lords Bingham and Brown concurred with the speech of Lady Hale.

[62] Perhaps the most important element in the decision is the emphasis on a child-centred approach. This is consistent with the overall policy of the Convention, namely to promote the welfare of children (see the preamble). After a wrongful removal or retention, a swift return to the country of origin will minimise disruption in the life of the child; but where that is no longer possible because of the passage of time, and the child is settled in the new environment, in many, perhaps most cases, to insist on return is likely to cause harm to the child with little or no countervailing benefit – hence the proviso to article 12(2). The child-centred approach also suggests that the question of settlement should be considered from the perspective of the child, and using his or her sense of time

(see Schuz "In search of a settled interpretation of article 12(2) of the Hague Child Abduction Convention" (2008) 20 CFLQ 64 at 75).

[63] In submissions to this court both counsel made reference to *Perrin* v *Perrin* 1994 SC 45, a decision of the Inner House. The child involved was under 1 year old when removed, and was still under 2 years at the time of the court's decision. The affidavits showed little more than that she was healthy. In its judgment the court referred to a passage from the judgment of Bracewell J in *Re N* (*Minors*) (*Abduction*) [1991] 1 FLR 413 at 418.

> "What factors does the new environment encompass? The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the mother, which has always existed in a close, loving attachment, that can only be relevant in so far as it impinges on the new surroundings."

Bracewell J stressed that every case turns on its own facts. The Lord Ordinary in *Perrin* had agreed with all of this, but observed that it was difficult to apply to a child under 2 years of age. Having said that the word "settlement" should be given its ordinary natural meaning, Bracewell J spoke of a physical element of relating to a community and an environment, and an emotional element denoting security and stability. Lord Murray, delivering the opinion of the court in *Perrin*, stated (page 51) that where the 12 months is exceeded by only a short period, the quality of evidence required to establish settlement would require to be good. It might be thought that this comment ignores the fact that a year had passed, and the clear inference from the terms of article 12 that a child can become settled in that period. It also passes over the inability after 12 months to order a prompt return. No doubt for good reason the authors of the Convention chose to link the possibility of settlement with the passing of at least a year between the wrongful act and the raising of proceedings under the Convention. It is not clear to me that any gloss upon the terms of the Convention is required. Either the evidence demonstrates settlement, or it does not. Similar sentiments

have been expressed elsewhere; see for example the decisions of the Full Court of the Family Court of Australia in *Director General, Department of Community Services* v *M and C and the Child Representative* [1998] FLC 92-829 at paragraphs 52 and 91, and *Townsend* v *Director General, Department of Families, Youth and Community* [1999] 24 Fam LR 495 at paragraphs 33/35. Whatever else, it is clear that there cannot be a higher standard than that required for a change of a child's habitual residence; on the contrary one might expect settlement in the new environment to carry a lesser burden of proof.

[64] The Inner House returned to the subject in *Soucie* v *Soucie* 1995 SC 134. The Lord Ordinary had considered that the age of the child was relevant (still under 3 years of age) in that the important relationship in terms of emotional and physical environment was the connection with the mother. He considered that, given the spirit of the Convention, it would only be in exceptional circumstances that a parent would receive a benefit from a wrongful removal by the court refusing a return order. (It can be noted that this is an example of the thinking subsequently rejected by the House of Lords in *Re M.*) Broadly the Inner House accepted the Lord Ordinary's views and adopted his approach. The opinion of the court was delivered by Lord Sutherland:

> "… in considering the proviso to article 12 what must be clearly shown is that the settlement in a new environment is so well established that it overrides the otherwise clear duty of the court to order the return of the child. In our opinion the respondent has failed to demonstrate that such a settlement has been established. The facts founded on by the respondent are such as might be expected to be found in any case of a young child living with its mother. Because of the age of the child it is unlikely that the child can properly be said to be established in a community involving such matters as school, people, friends, activities and opportunities, to use the words of Bracewell J. As far as the emotional constituent denoting security and stability is concerned the overwhelming security and stability which is provided for the child will be provided by the presence of her mother. It is clear from the facts of this case that if an order is made for the return of the child the mother will go with the child and accordingly that emotional security and stability can be maintained. For these reasons we are satisfied that the conclusion to which the Lord Ordinary came on the

> facts was one which he was entitled to reach and therefore this reclaiming motion must be refused." (page 139)

[65] The need for exceptionality and factors overriding a duty to return the child has been rejected by the House of Lords. It is now clear that after the 12 months has passed, a two stage approach is required, not an assessment of settlement in the context of whether a return order should or should not be made. The first stage under the proviso to article 12(2) is to ask – is the child settled in the new environment? This is to be approached using the natural and ordinary meaning of the word "settlement". It should not be conflated with notions such as the importance of the aims of the Convention. It is a pure question of fact. If the answer to the question is no, barring some other determinative factor, the child will be returned. If the answer is yes, the court then enjoys a discretion "at large". In this regard the interests of the child should be at the forefront, as opposed to, for example, a desire to deprive the removing parent of what might be described as a reward for a wrongful act. The discretion is to be carried out in recognition that the primary objective of the Convention, namely to order prompt return, can no longer be achieved, given the long delay in the raising of proceedings. Counsel for the father made much of the emphasis in *Perrin* and *Soucie* on the importance of the parent/child bond, which it was said contradicted any finding of settlement, in that it would continue wherever the child was located. Whatever merit such an approach might have, it is much less apparent in the present case where the children are of school age and enjoying friends and activities independent of their caring parent.

[66] For the father, reliance was placed on the Court of Appeal's decision in *Cannon* v *Cannon* [2009] 1 WLR 32. It was a remarkable case on its facts. The mother abducted the child from the USA to England, and succeeded in concealing their whereabouts for over 4 years.

Thereafter the father raised proceedings under the Convention, and the mother claimed, amongst other things, that the proviso to article 12(2) applied. At first instance Singer J adopted a child-centred approach and refused to expose the child to the disruption inherent in "a second dys-location, potentially inflicting cumulative trauma" [2005] 1 FLR 127 at paragraph 105. The child had been settled in the same city for 5 years and had attended only one school. The concealment had no impact on her and her mother's daily lives. In the judge's view, the child was settled in terms of the Convention. If he had a discretion, he would refuse to order her return to the USA.

[67] In perhaps the high-water mark of the adult-centred approach, the Court of Appeal reversed this decision, explaining (see paragraphs 57/59) that the child must take its emotional and psychological state in a large measure from its sole carer, and that the court must stand with the deprived father and not reward the turpitude of the abductor who had concealed her whereabouts for such a long time. It is difficult to reconcile this decision with the subsequent guidance in *Re M*, and it is interesting to note that when the case was remitted for the application of the appeal judgment, Kirkwood J held that the child was "settled in every sense of the word" [2005] 1 FLR 938 at paragraph 23. In exercising his discretion and refusing a return order, he accepted the submission that "the sins of the mother should not be visited on the child". He was not willing "to sacrifice this child" in pursuit of deterrence and a rigorous enforcement of the Hague Convention, which, in any event, did not require him to do so (paragraph 38). Eventually the father was granted an order allowing contact in England.

The Lord Ordinary's reasoning

[68] It is now necessary to analyse the Lord Ordinary's decision. Both notes of argument presented to this court proceeded on the basis that he ordered the children's return because he was not satisfied that they were settled in Scotland. We were told that this was the crux of his ex tempore oral decision. Shortly before the appeal hearing the court and parties received a note from the Lord Ordinary setting out his reasoning. The passage dealing with article 12 and settlement has been quoted earlier. It concludes with the Lord Ordinary saying that he considered that he should exercise his discretion and order a return of the children to the jurisdiction of the Italian courts. That discretion arises only if settlement has been established. The disconnect between the submissions of the parties and the terms of the Lord Ordinary's note has not eased this court's task.

[69] The uncertainty may be explained, at least in part, by the Lord Ordinary's ambivalence on the question of whether the proceedings were or were not commenced more than a year after what he described as "a fresh, a new, wrongful removal" in September 2016 when the children were not returned to Italy for the start of the school term. This was on the view that the father's agreement that the children could stay in Poland until then, though not "acquiescence" in terms of the Convention, nonetheless removed any element of wrongfulness in respect of the earlier removal of the children from Italy. For my part, I would begin the clock when the children were wrongfully removed from Italy. There was never any consent to the children being taken from the jurisdiction of the Italian courts. At most the father recognised a fait accompli and insisted that it should be of a temporary nature. However, given that on the Lord Ordinary's approach the 1 year period started on 9 September 2016 (frequently referred to as mid-September), and the proceedings were raised on 20 September 2017, the point is not of critical importance. The Lord Ordinary says

that he could not be satisfied as to whether the petition was presented within, albeit just within, the 1 year period or alternatively, and again narrowly, just outwith that period. Nonetheless he (correctly) considered that the issue of settlement required to be addressed. However there was no express and definitive finding on the issue of whether the proviso to article 12(2) applies, and this may explain some of the uncertainties as to the exact basis for his Lordship's decision to return the children. (For completeness it should be recorded that the father lodged a cross appeal to the effect that the Lord Ordinary wrongly categorised the failure to return the children to Italy for the start of the school term as wrongful "removal", when it should have been wrongful "retention" - a point at best somewhat academic, but which, in the event, does not arise given the view expressed above.)

[70] The Lord Ordinary mentions some of the case law, including *Perrin, Soucie* and *In re M.* He notes that settlement is a question of fact and states:

> "In an individual case the court must simply assess all the relevant factors upon which it has evidence or information and then attempt to strike a balance between the competing interests of the objectives of the Hague Convention to discourage wrongful removal of children and the interests of children to have security and stability in the place where they are being brought up."

I have some difficulty with this passage. If, as appears to be the case, it is a description of the court's task when deciding whether the children are settled, I would respectfully disagree with any suggestion that the "competing interests" mentioned play a part in the exercise. If the Lord Ordinary is merging the two stages of (1) settlement and (2) if settled, an exercise of discretion, he has fallen into an error similar to that addressed by the guidance given in *Re M.*

[71] The Lord Ordinary then recounts the children's Italian heritage and their lack of connection with Scotland. He states that the children are, in a material sense, secure in Scotland. They attend school and their mother has a local authority house. They "have

settled in the school environment and are involved in the school community." The older child's English has progressed well. (On the evidence the same can be said of Y.) E participates in sports. The Lord Ordinary records that school reports are favourable and both boys have made friends. His Lordship mentions the psychologist's report and the positive affidavits from neighbours who speak to the children being happy and participating in social events in the community. He notes that counsel for the father stressed the child welfare reporter's comment that "neither boy is able to understand the processes involved in a return to Italy for the purpose of the courts there making a decision as to their future place of residence." In response to a question, the older boy said that he wanted to stay with his mother and younger brother. The father's counsel had observed that neither child was able to articulate a reason for their desire to stay in Scotland. The explanation for this given by the psychologist did not have regard to relevant considerations, such as the circumstances of the removal from Italy, the effect of exclusion from Italy on the children, and the mother's hostile attitude to the father. As to the boys mention of "toys and friends" in Scotland, it was submitted that they would be available in Italy.

[72] The Lord Ordinary's reasoning is set out in paragraphs 35/36, which have been quoted earlier. Having reflected on the full terms of the Lord Ordinary's note, I consider that, notwithstanding what was understood to have been the basis for his ex tempore decision, this court should proceed on the basis of the concluding paragraph of the Lord Ordinary's note, namely that the return order was the result of an exercise of his discretion. Leaving aside that in an extreme case the court will always have an option not to return a child, in the context and circumstances of this petition the Lord Ordinary would only be exercising such a discretion if he had concluded that the 12 month time period had elapsed and the children were settled in their new environment in terms of article 12. In any

event, in my opinion the evidence overwhelmingly points to the children having become settled in both emotional and physical terms by the time of the raising of these proceedings. (I have already mentioned that by then the 12 month period had elapsed.) Reference can be made to the evidence summarised earlier. I agree with the Lord Ordinary when he says that the children "have settled well in Scotland". I am not sure whether he intended to qualify that by referring to settlement in the "conventional" sense, but that is how the term is used in the Convention. It has no special or technical meaning. As to counsel for the father's reliance upon the "concealment" cases, while recognising that this can be a significant factor when deciding whether settlement has or has not occurred, each case will turn upon its own facts. Here the concealment was of limited duration. It had no real impact upon the children's lives. It did not prevent timeous raising of proceedings (the failure in this regard remains unexplained). In my opinion, the fact that the father was unaware of the children's whereabouts until December 2016 is of no real significance to the key issues.

[73] If I am in error as to my understanding of the structure of the Lord Ordinary's reasoning, and he is to be understood as having rejected the mother's case upon settlement, I would take the view that he erred in law. The passages in his note which would have to be used to justify such an approach, including the removal from Italian culture and lack of understanding as to the purpose of a return to Italy, are not relevant to what is a purely factual matter, namely whether in a natural and common sense way it can be said that the children are settled in Scotland. As discussed below, there is no basis for any view that the boys' attachment to their mother contradicts either settlement or non-return. Given the evidence, I consider that settlement is the only reasonable conclusion in respect of both children. If it had been necessary I would have concluded that any other view would be plainly wrong.

[74] Returning to the Lord Ordinary's exercise of his discretion, his reasoning is set out in paragraph 35. His order can be overturned only if one or more of the well-recognised grounds for interfering with a discretionary decision can be identified. Before considering this matter further, it is worth summarising the guidance given by the House of Lords in *Re M*. It was to the following effect. If, after the passage of at least a year before proceedings are raised, settlement has occurred, the primary objective of the Convention, namely a prompt return to the country of habitual residence, can no longer be achieved. The Convention fixed on the concurrence of that period and settlement of an abducted child as eliding a mandatory return order. Many judges had viewed these factors as excluding a summary return order. Lady Hale (and the majority of their Lordships) disagreed, but still viewed summary return in a settlement case as likely to be an "unusual event" (paragraph 31). The discretion not to return was "at large", as opposed to restricted to exceptional cases (paragraph 43). Increasingly in article 12 cases judges are giving weight to the views of the children. Furthermore, the courts of the country of origin can no longer be assumed to be the better forum for the resolution of the parental dispute. The child's integration in the new community is a relevant factor. The primary focus is the interests of the child or children, as opposed to removing any benefit gained by the absconding parent. Settlement cases are the most "child-centric" of all child abduction disputes.

[75] Reverting to the reasoning of the Lord Ordinary at paragraph 35, he referred to the following factors:

1 Settlement is primarily due to the children's attachment to their mother.

2 There is nothing unusual or distinctive in their degree of attachment to Scotland - a view primarily based on the children's inability to explain why they wanted to remain in Scotland.

> 3 Residence in Scotland means that the children are removed from their Italian culture and social connection, and from their Italian family members.
>
> 4 The children do not have a proper appreciation of the purpose of the Italian courts deciding upon their future, nor a complete understanding of the relevant factors in that decision-making process.
>
> 5 The children are resilient and adaptable, and, primarily, are secure in their home environment with their mother - something which need not be disturbed by a return to Italy.
>
> 6 An Italian court, in the country where they have lived for most of their lives, is best placed to make welfare decisions which will have a lasting effect on the children's welfare and development.

[76] To my mind it is striking that the Lord Ordinary does not appear to weigh in the balance the detriment to the children of once more being uprooted and returned to Italy, purely for a court there to resolve the parental dispute. There was evidence that in Italy this is likely to be a slow process lasting some years, with presumably at least the prospect of a further return to Scotland after resettlement in Italy. No weight is given to the integration of the children in Scotland since the summer of 2016 and to their good progress at school, including their proficiency in the English language. Little or no regard is given to the child psychologist's concern as to the harm to the boys which a return to Italy would cause. No reference is made in this context to their clearly expressed desire to remain in Scotland. Much is made of their emotional attachment to their mother. The case law discussed earlier indicates that this has been a major factor in cases involving very young children whose entire world is more or less their mother. However, E is 9 years old, and Y is 6 years of age. They are both at school, and clearly have outside interests and friends. Their horizons expand well beyond their mother and the home environment.

[77] There is no sense that the Lord Ordinary has adopted the "child-centric" approach discussed by Lady Hale. There is no stated recognition of the impact of the passage of time

and settlement on the ability to achieve the Convention's main aim, nor to the downgraded status of the courts of the country of origin. On the contrary the Lord Ordinary appears to consider that it is important to return the boys to Italy because that is where they have lived for most of their lives. Considerable emphasis was placed upon their inability to fully explain why they want to stay in Scotland. For myself I do not find that surprising for still relatively young children. Likewise I am unconcerned by their apparent lack of a full appreciation of the limited purpose of any return to Italy; a factor which bears little on any of the issues in dispute.

[78] In summary I respectfully consider that the Lord Ordinary has not followed the authoritative guidance laid down in *Re M*; has taken account of irrelevant factors; and has not weighed in the balance relevant factors pointing towards non-return. In these circumstances I am of the view that it is open to this court to exercise its own discretion on the question of whether it should order the summary return of the children to Italy.

[79] At the time of writing this opinion, the children have been in Scotland for over 20 months. They are very well settled at home, at school, and in their local community. Considerable weight should be given to the psychologist's and the welfare reporter's responses to the court's request for their assistance (summarised above) which point clearly to non-return. The court has a wide discretion to do what is in the boys' interests, giving the appropriate weight to the terms of the Convention and its objectives. The primary aim of a swift return to Italy can no longer be achieved, as is implicitly recognised in the terms of article 12. I would echo the comments of Lady Hale to the effect that, against all the factors pointing to no return, the Convention policies relied on by the father and the Lord Ordinary carry little weight. I agree with her Ladyship that the return of a settled child is likely to be an unusual event. While I appreciate that the Lord Ordinary was persuaded that the

children should be returned to Italy, for myself I can identify no particular features of the present case which would justify that course of action. The Lord Ordinary approached the matter on the basis that return was necessary to allow the Italian courts to decide matters. However, under reference to the Council Regulation, it was the submission of counsel for the father that non-return will not remove the jurisdiction of the Italian courts to make decisions which are binding on and enforceable in the Scottish courts. If that is indeed the case, that would be an additional reason for letting the children remain here in Scotland in the meantime.

Decision and disposal

[80] In the whole circumstances, and for the reasons which I hope emerge with sufficient clarity from all of the above, I have no real hesitation in reaching the view that the requested return order should be refused, and that the children should remain in Scotland with their mother while their long term future is resolved. I would allow the reclaiming motion, refuse the cross appeal, quash the interlocutor of the Lord Ordinary dated 30 January 2018, refuse the prayer of the petition, and, pursuant to article 12(2), make a non-return order authorising the children to remain in Scotland.