FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 50
P410/19

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Reclaiming Motion by

YS

Petitioner and Reclaimer

against

BS

Respondent

In respect of the petition for an order under the Child Abduction and Custody Act 1985

Petitioner and Reclaimer: MH Clark; Brodies LLP
Respondent: McAlpine; Morton Fraser LLP

1 October 2019

[1] In this petition under the Child Abduction and Custody Act 1985, the Lord Ordinary refused to make an order requiring the return of two young children to Rome. So far as relevant to this reclaiming motion, the circumstances of the case; the evidence led; the parties' submissions; and the reasons for the Lord Ordinary's decision, are set out in his note dated 25 June 2019, which is appended to this opinion (as it was not published). The Lord Ordinary found in favour of the petitioner (the father) on two of the three issues in the case, namely the children's habitual residence and whether return would create a grave risk of

harm to them. However he upheld the respondent mother's article 13 defence based upon his consent to the removal of the children to Scotland. It is that decision which is now challenged.

[2] The Lord Ordinary held that it was proved that the father had given written consent by way of a document dated 18 September 2018. There was a dispute as to its authenticity, but, preferring the evidence of the mother's handwriting expert, he concluded that the signature was that of the father. There was no similar challenge to a WhatsApp message dated 8 October 2018 in which the father made reference to "my separation note", and again indicated that, the marriage having broken down, the children should be with their mother, with the legal formalities being conducted in the courts of Scotland, if that was the mother's wish. He suggested that the children should remain in Italy until Christmas of that year with legal proceedings concerning the dissolution of the marriage to follow.

[3] On 18 January 2019 the parties were still together. They had a disagreement, which involved the police being called and the mother and children leaving the house. The following day they travelled to Scotland, where they continue to reside. The petitioner was not informed of the removal until after the event. The Lord Ordinary held that it was done in implement of the aforesaid consent.

[4] In summary the challenge is brought on the following grounds. The Lord Ordinary erred in concluding that the note of 18 September indicated real, positive and unequivocal consent to the children's removal, and that the same was extant on 19 January 2019. It only allowed the mother "to travel" to Scotland with the children, not to remove them. The fact that the father wanted the marriage to end did not support the Lord Ordinary's conclusion. The parties' relationship was volatile, with many ups and downs. This deprived any expressions of consent in September and October of 2018 of the necessary clarity and lack of

equivocation. The Lord Ordinary did not appreciate the significance of the petitioner's ill-health to the question of consent. He failed to have regard to WhatsApp exchanges, including in December 2018, which envisaged a continuation of family life in 2019. Reference was also made to a WhatsApp message of 14 January 2019. Any earlier consent had been revoked by the time of the removal of the children. The Lord Ordinary did not recognise and give due weight to the abrupt and covert removal of the children. This was inconsistent with any consent, and of any belief in the consent of their father as at 19 January 2019. Reference was made to the father's WhatsApp message of 19 January 2019.

[5] As to the father's ill-health, he was preoccupied with the thought of dying and suffered stress and anxiety. (It was not suggested that he lacked the capacity to consent.) It was stressed that the essential characteristic of the parties' life together was its volatility. However, by November/December 2018 the marriage had settled down to a degree. The Lord Ordinary erred in considering that the mother required only to prove the September consent. Had she truly believed that the father consented to their removal she would not have removed the children without warning. Counsel for the reclaimer made reference to various cases, including *Re P-J (Abduction: Habitual Residence: Consent)* [2009] 2 FLR 1051 and *Zenel* v *Haddow* 1993 SLT 975, the latter being said to be wrongly decided.

[6] For the mother it was submitted that the document of 18 September indicated real, positive and unequivocal consent to the removal of the children to Scotland. This was subsequently confirmed in the October WhatsApp message. The weight to be attached to the volatility of the marriage was a matter for the Lord Ordinary – see paragraph 41 of his note. Consent was given on numerous occasions, including by texts on 31 December 2018 and 14 January 2019. The state of the father's health was but one amongst a number of factors to be considered, though it did not figure significantly before the Lord Ordinary. The

main argument for the father had concerned the volatile relationship and the disintegration of family life. It was clear that there was no real expectation of continued family life in 2019. The Lord Ordinary had regard to all the communications and all relevant factors, and then reached a decision which was open to him. The removal, albeit clandestine, was in implement of repeated expressions of consent in the context of the end of the parties' married life. The message of 19 January was sent less than an hour before the mother's flight departed and was not received by her until she reached the UK.

[7] The Lord Ordinary having correctly identified the applicable law, it was submitted that there is no sound basis for this court to interfere with his decision on a question of fact. The decision in *Zenel* v *Haddow* (cited earlier) has no bearing on the proper outcome of the reclaiming motion. Counsel made reference to various cases, including *KT* v *JT* 2004 SC 323.

[8] There is no dispute between the parties as to the proper approach in law to the defence based upon consent. The Lord Ordinary outlined the relevant principles at paragraph 12 of his note. Any consent must be clear and unequivocal. It can be given for removal at a future time but must still be in operation at that date. The issue must be viewed in the context of the realities of the family life. It is not to be approached in the same manner as a commercial contract. Any consent can be withdrawn, and the burden of proof of consent rests on the party relying upon it. The above is derived from the Court of Appeal decision in *P-J* (cited earlier).

[9] The court does not consider it necessary to dwell upon the merits or otherwise of the majority decision in *Zenel*. Cases of this kind depend upon their own particular facts and circumstances. The key question is whether it has been proved that at the time the children were removed this was done with the consent of the remaining parent. The court reminds itself of the relatively limited basis upon which it can overturn a finding of fact or on an

evaluation based upon facts, a topic recently discussed at length in *Anderson* v *Imrie* 2018 SC 328 and *AW* v *Greater Glasgow Health Board* [2017] CSIH 58. If the outcome was open to the Lord Ordinary, and his decision is not tainted by any error of law, such as a wrong approach in law, or a failure to have regard to relevant evidence, an appeal court should not interfere, even if it thinks it might well have reached a different result. A "generous ambit" is given to the judge hearing the proof "within which a reasonable disagreement is possible", *G* v *G* [1985] 1 WLR 647, per Lord Fraser of Tullybelton at page 652.

[10] At root the father's submissions are an invitation to this court to retry the case and issue a different decision on the question of consent. We have not identified any error of law on the part of the Lord Ordinary. He has not made a key finding of fact which has no basis in the evidence. He has not demonstrably misunderstood or failed to have regard to relevant evidence. It follows that this court can only interfere if satisfied that the decision can be categorised as one which was not available to him, or as it is sometimes put, was "plainly wrong". For the following reasons, we are not so persuaded.

[11] At the proof there was a dispute as to the authenticity of the September document; however the ground of appeal relating to that issue was withdrawn at the outset of the hearing. On the proper interpretation of that document and of the WhatsApp message of 8 October, we have no reason to disagree with the approach taken by the Lord Ordinary. As to the appeal based upon the father's ill-health, it is true that the evidence indicated certain health issues, but there was nothing before the Lord Ordinary which disabled him from making a finding of consent, if otherwise appropriate. In the court's view the real issues in the appeal concern the volatility of the parties' married life and the covert nature of the children's removal.

[12] The September document indicated that on the breakdown of the marriage the father was of the view that the children should be with their mother in Scotland. In the October WhatsApp message he considered that the marriage was over and he stood by his "separation note". The mother should keep the children "as they need you even more than me." The mother had to decide where she wanted to live, in Italy or in Scotland, and then the appropriate proceedings could begin. It was suggested that everyone should stay in the house in Italy until Christmas to allow plans to be made. In short, the children should stay with their mother wherever she wished to live. The fact that thereafter the parties' relationship remained volatile, with some periods of affection, and even possibilities of continued married life, did not fundamentally alter the situation. It is clear that the events of 18 January 2019 made up the mother's mind that it was time to leave her husband and return to Scotland with the children. The fact that she did not warn him about this does not mean that she took this course without his consent. Likewise, if it be the case that after removal and once he found out what had happened he decided that he was unhappy about it, and wanted her to stay with the children, that does not exclude the article 13 defence. Reference can be made to *Re K (Abduction: Consent)* [1997] 2 FLR 212, pages 216/9 per Hale J, as she then was. As the Lord Ordinary noted, the context of the September and October documents was marital disharmony and the marriage coming to an end, with the September statement being "consistent with the general tenor of the evidence in the case" (paragraph 41).

[13] It is well established that consent can be given to removal in the future. There was no material change of circumstances by January 2019, remaining characterised by marital volatility and disharmony. Prior to the removal there was no evidence of revocation of consent. While the circumstances bear similarities with those in *KT* v *JT* 2004 SC 323 (see

paragraphs 26/29), in *Re L (Abduction: Future Consent)* [2008] 1 FLR 914 it was stated that questions of consent under article 13 will always be fact-specific and involve questions of degree, and furthermore that "commonsense is everything in this sphere" (Bodey J at paragraphs 29/30). That was a case where the decision was that the mother did not act on the basis of the relocation consent relied upon by her, but upon a later more restricted holiday permission. There is no similar factual context here; and no reason to conclude that the mother acted as she did because she knew or believed that the father had changed his views on who should retain the children if she returned to Scotland. The immediate background was a major disagreement, with police called and the mother taking the children away from the house. The more general context was repeated recognition by the father that if the marriage ended the children should be with their mother wherever she chose to settle. Given his circumstances, which involve spending much of the year working in a protected compound in Iraq, this was an understandable, indeed entirely sensible decision.

[14] For the above reasons the reclaiming motion is refused.

Appendix

Note by Lord Brailsford (see paragraph 1 above)

[1] The petitioner is described in the petition as having "British Iraqi citizenship". At the time of the raising of the petition he had been resident in Italy for approximately nine years and was said to be habitually resident in that country. On 5 January 2013 the petitioner married BS, a British national born in Scotland. The marriage took place in Scotland. There are two children of the marriage, AS born in September 2013 and DS born in October 2015.

Both children are British nationals and hold British passports. The two children are the subject matter of the petition.

[2] The bare outline of the facts giving rise to the current petition are as follows. The petitioner is the owner of a residential property in Rome, Italy purchased prior to the parties marriage. Since approximately mid-2011 the petitioner has been engaged by BP as an independent engineering contractor in the oil industry in Iraq. His pattern of engagement has been throughout the period since mid-2011 to work for a period of one month in Iraq followed by a period of one month during which time he is normally resident in Italy. His place of work in Baghdad is not a suitable place of residence for children and neither the respondent nor the children have gone with him to Iraq. The respondent and the children have, in terms of time, been normally resident in the petitioner's house in Rome. The petitioner and the children have however spent a minority of their time in Scotland residing in a property owned by the respondent. The children have attended nursery or pre-school in both Italy and Scotland. I will return at a later stage and in more detail to the issue of connection of the children with both Italy and Scotland.

[3] The marriage was, in language used by counsel for both parties, "volatile". The tenor of the evidence was to the effect that during the course of at least 2018 the marriage was deteriorating. On 19 January 2019 the respondent removed the children from Italy and returned to Scotland. The respondent avers that she had the petitioner's consent to return to Scotland with the children, a matter which is disputed. Whether or not there was consent the actual circumstances of the removal of the children from Italy were covert and not within the knowledge of the petitioner. The respondent and the two children returned to her residence in Scotland. They have been resident there since January 2019. The children have attended nursery or school since that time.

[4] Against the foregoing background the petitioner avers that the children were habitually resident in Italy immediately prior to their removal from that country on 19 January 2019, that he did not consent to the removal of the children from that country, that he had parental rights and responsibilities in relation to the children, that the removal had been wrongful and that accordingly an order for return of the children to Italy should be made.

[5] The respondent did not dispute that the petitioner enjoyed parental rights and responsibilities in respect of the said children. She did not accept that the children were habitually resident in Italy immediately prior to 19 January 2019. Her position was that the habitual residence of the children was in Scotland. She further maintained that the petitioner had consented to the removal of the children from Scotland. Lastly, the respondent averred there was a grave risk of either physical or psychological harm to the children should they be returned to Italy. In all the foregoing circumstances the respondent's position was that a non return order should be made.

[6] ...

The law

[7] Both parties identified as issues of law to be determined the following matters: (a) custody rights and habitual residence; (b) the issue of consent and; (c) the "Grave Risk" defence under Article 13(b) of the Hague Convention.

[8] A number of ancillary legal issues arose. Parties were agreed that in relation to establishing that the Hague Convention applied in the circumstances of this case an evidential onus rested upon the petitioner. In the event that that evidential burden was discharged and it was established that there was a wrongful removal of the children from

Italy it was agreed that the evidential onus shifted to the respondent to establish the applicability of any exceptions to the mandatory return of the child.

[9] Both parties had produced reports from skilled witnesses, in both cases experts in the field of interpretation of handwriting. In relation to these reports counsel for both parties were agreed that I was not entitled to prefer one report over the other unless I could determine there was some objective reason for so doing.

[10] In relation to the substantial arguments, that is custody rights and habitual residence, consent and the Grave Risk defence it was apparent from my consideration of the written submissions prepared by counsel for each party that there was no material difference with their interpretation of the law. Both parties agreed that in terms of Article 3 of the Hague Convention, incorporated into UK law by virtue of section 1(2) of the Child Abduction and Custody Act 1985, that in the event of the removal of the children from Italy being established as wrongful I was obliged to return the children to that country unless the facts satisfied me that one of the definitions set forth in the Convention was engaged, in which case the exercise of a discretion entitled me to make a non-return order in terms of Article 12 or 13 of the Convention.

[11] ...

[12] In regard to consent counsel for the respondent initially drew my attention to two Scottish cases where the matter had been considered.[1] Beyond those cases both counsel agreed that the most authoritative guidance in relation to the issue of consent was to be found in a decision of the Court of Appeal of England and Wales in the case In *Re P-J (Children)(Abduction: Consent)*[2]. The relevant principles identified in that passage were that

[1] Zenel v Haddow 1993 SC 975 and KT v JT 2004 SC 323

[2] [2010] 1 WLR 1237 at paragraph 48

any consent given must be clear and unequivocal; it can be given for removal at a future but unspecified date but must still be in operation at that date; it must be viewed in the context of the realities of the family life, or more aptly the disintegration of the family life. It is not to be viewed in the context or governed by the law of contract; consent can be withdrawn at any time before actual removal; the burden of proving consent rests on the person seeking to assert it. Again the emphasis in all these tests is on factual matters. The question of consent is essentially a factual matter.

[13] ...

...

Evidence

...

2) Consent

(a) Petitioner

[22] The petitioner's position was that the respondent removed the children from Italy in a clandestine and covert manner. She booked flights for herself and the children to return to Scotland in the late evening 18 January 2019 with departure being the following day. The petitioner was not informed of this. There was no structure or planning behind the move. For example the children, were not enrolled in school in Scotland before their departure from Italy.

[23] The petitioner's position was that there was no consent for the respondent and the children to return to Scotland. The document which the respondent contended constituted consent did not, as a matter of construction, constitute a clear and unequivocal expression of consent to removal from Italy. Moreover, on the basis of the forensic science report of

Kathryn Thorndycraft[3] there were doubts as to the authenticity of the purported signature to that document". My understanding of the petitioner's position in relation to this was that this was an allegation of forgery of a document. There appeared to be a further line of argument that even if that document was genuine and, as a matter of construction, amounted to a consent to travel the passage of time since its creation (in September 2018) and the date of the clandestine departure meant that at the time of departure it could no longer be regarded as unequivocal and clear consent to removal from a country of habitual residence.

(b) Respondent

[24] The respondent's position was that against the background of a deteriorating marital relationship the petitioner consented to the respondent and the children returning to reside in Scotland.

[25] Evidence in support of the respondent's position constituted a document[4] in the following terms:

> "TO WHOM IT MAY CONCERN
>
> I [YS] declare that as of today 18 September 2018 wish to declare that I am now separated from [BS] and wish to proceed to divorce her through the Scottish Legal System. I have no objection to her travelling to Scotland with our sons [AS] and [DS] from Rome, Italy. [YS]"

The document has a signature which is said to be the petitioners.

[26] Beyond that the respondent's position was that the continuing nature of the consent contained in the document dated 18 September 2018 is confirmed by a text message from the

[3] No 6/24 of process

[4] No 7/17 of process

petitioner to the respondent dated Monday 8 October 2018.[5] The text is in the following terms:

> "I have been thinking about everything and even though I am unsure as to my real health condition both physically and psychologically I do not (*sic*) that neither my body or mind can take anymore of being with you. We have tried for years to live at peace but unfortunately it has not and will not happen. You will blame me, I will blame you and that just makes everything worse…
>
> I also live for my children and my home but not at any cost, and the price that I feel I need to pay is far too much to keep us as a family. I stand by my separation note, I don't want to be your husband anymore, I don't want you as my wife. You will keep the children as they need you even more than me. You just need to decide if you want to continue to live in Italy or if you want to go back to Scotland to live, then we can start the proceedings under the appropriate legislation. My suggestion is that we all stay in the house in Italy until Xmas. At least that way we have time to plan and if you do want to move back to Scotland then [AS] can finish the semester at his current school."

The respondent's position was that the reference in the text message to "my separation note" is a reference to the document dated 18 September 2018. Beyond that the text is said to plainly show a continuing consent to a removal from Italy to Scotland if the respondent wishes. It is confirmatory of the position that there was consent given to the respondent to remove the children to Scotland.

[27] It was not disputed that the text was sent by the petitioner to the respondent. The construction of the language in the text is a matter for the court. So far as the statement in the document dated 18 September 2018 is concerned the petitioner disputes the signature was his and, as I understand it, maintained it was a forgery. To that end both parties obtained reports from handwriting experts. Both parties were agreed that I could not accept one handwriting report in preference to the other unless there was an objective reason for so doing. Whilst it was not a matter of agreement I am satisfied that both reports were

[5] No 7/56.1 of process

prepared by persons who were properly qualified to give expert testimony on the question of handwriting.

[28] In relation to the substantials of both reports the critical element is the conclusion in the report by Kathryn Thorndycraft on behalf of the petitioner that "it is probable that the question signature" is not the genuine signature of the petitioner. In that regard the conclusion of the report by Dr Evelyn Gillies was at variance, that author considering there was "a high probability" that the signature was that of YS. Following exchange of both reports an addendum report was prepared by Dr Gillies. This considered the conclusions of Ms Thorndycraft's report and made a number of criticisms. Of themselves these criticisms might form the basis of an objectively justified basis to differentiate between the two reports. The most important consideration is however the information provided by Dr Gillies, that was not disputed by counsel for the petitioner, that the document examined by Ms Thorndycraft was not an original but was a photocopy of the original document. It was the opinion of Dr Gillies that this was an impediment to the conclusions reached by Ms Thorndycraft. The reasons for the criticisms originating in the expression of an opinion on handwriting based on a photocopied document are expressed succinctly under the heading "Overall Comments" on page 6 of 8 of Dr Gillies' addendum report.

...

2) Consent

[40] A preliminary, but fundamental matter in relation to this issue is the authenticity or otherwise of the petitioner's signature on the note dated 18 September 2018. In regard to that question I consider that I am entitled to prefer the evidence adduced on behalf of the respondent from Dr Gillies to that produced by the petitioner in the report by Kathryn Thorndycraft. My reasons for taking this view are primarily to be found in the addendum

report of Dr Gillies and in particular her comments, which are critical of Ms Thorndycraft's report on page 6 of 8 of the addendum report. This page contains a number of cogent and plausible criticisms of Ms Thorndycraft's report. Most importantly, and in my view of primary importance, is the observation that the document subjected to examination by Ms Thorndycraft was not an original – albeit that an original was and could have been available for examination. The fact that an original document was available and not examined of itself raises questions in relation to the best evidence rule. More fundamentally than that however it is, as Dr Gillies explains, well recognised – indeed it is so well recognised and features so frequently in reports that I consider the matter almost to be within judicial knowledge – that there are problems and limitations in attempting forensic handwriting examination on the basis of photocopies. For these reasons I prefer and am prepared to accept the report and addendum report of Dr Gillies in preference to that of Ms Thorndycraft. The conclusion of Dr Gillies's report is that it is highly probable that the signature on the document dated 18 September 2018 is that of the petitioner. I proceed on that basis.

[41] Having accepted the document of 18 September 2018 as genuine I consider that there is no difficulty in construction of that document. The document is, in my view, a clear and unequivocal expression of consent, and moreover consent of a continuing nature, to the respondent travelling to Scotland with the children. The context in which that consent was granted, as is apparent from the terms of the document itself, is of marital disharmony and a desire by the petitioner for the marriage to be brought to an end. It should be noted that that statement is in any event consistent with the general tenor of the evidence in this case.

[42] My conclusions in relation to the document of 18 September 2018 would be sufficient of themselves to determine the issue of consent in favour of the respondent. However, and

having regard to the fact that counsel for the petitioner presented an argument that even if there was consent it had subsequently been terminated, I consider the text dated 8 October 2018. There is no dispute that this was a text sent by the petitioner to the respondent. I observe that the text itself makes reference to "my separation note" which, at least as a matter of inference, appears to relate to the document dated 18 September 2018 and provide, if it was needed, further evidence of the authenticity of that document. Beyond that the text is again a clear expression of the petitioner's view that he wished the marriage to terminate and, moreover and importantly, that he was content that the legal formalities of marital dissolution could be determined in the courts of Scotland, if that was the wish of the respondent. The text also appears to carry the implication of an acceptance that the respondent is the primary carer of the children ("you will keep the children as they need you even more than me"). This expression would, in my view, be consistent with permitting the respondent and the children to return to Scotland. Lastly, the text carries with it the plain implication that consent is ongoing shown by the fact that the author suggests that both parties and the children remain in Italy until Christmas (that is 2018) with legal proceedings in relation to dissolution of the marriage to follow thereon.

[43] The construction I place upon this document is a further expression in addition to the document of 18 September 2018 stated in clear and unequivocal terms that the respondent is, at her choice, free to return to Scotland with the children.

[44] On the basis of the foregoing I am satisfied that the return to Scotland on 19 January 2019, albeit the removal on that date was done covertly and without bringing it to the attention of the petitioner, is implement of consent initially uttered by the petitioner on 18 September 2018 and continuing thereafter until the date of departure from Italy.

[45] I should add at the end of this chapter of my analysis a few comments in relation to reliability and credibility. An argument was advanced by counsel for the respondent to the effect that if I accepted that the document of 18 September 2018 was authentic and had been signed by the petitioner then, in face of the petitioner's denial of signing the document, this finding was adverse to the reliability and credibility of the petitioner. I accept this submission to be well founded and, as a matter of law, correct. It is not however, in my view, of material significance in this case. None of the other disputed issues, that is habitual residence and grave risk, in my view turn on issues of the reliability or credibility of the petitioner's evidence. I accordingly need say nothing further about the issue of reliability and credibility.

...

Conclusion

[48] On the basis of all the foregoing whilst I am satisfied that it has been established that the children had a habitual residence in Italy immediately prior to their departure for Scotland on 19 January 2019 I am equally satisfied that the petitioner had consented to the removal of the children from that country and their return to Scotland. Having regard to those findings the removal of the children was not wrongful within the meaning of that term in the Hague Convention. I will accordingly make a non-return order.