



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 34

P241/23

OPINION OF LADY CARMICHAEL

in Petition of

BW

Petitioner

for

orders under the Child Abduction and Custody Act

Petitioner: D Reekie, (sol adv); BTO Solicitors LLP

Respondent: Bradbury; Brodies LLP

1 June 2023

Introduction

[1] BW resides in and is a citizen of the Netherlands. He is the father of two children, whom I will call Anna and Finn. Anna is 15 years of age and Finn is 12. Their mother is CM, who lives in Scotland and is a citizen of the United Kingdom. BW and CM were formerly married and divorced in 2015.

[2] In 2015 the parties agreed that CM would return to Scotland and that the children would stay in the Netherlands in the care of their father. Dutch social services in the Youth Protection Region of Amsterdam (“youth protection”) became involved with the family in 2020.

[3] CM brought the children to Scotland on 5 May 2022 with BW's consent. It is his position that he consented only to their coming to Scotland for a holiday and that CM has wrongfully retained them in Scotland. BW does not specify precisely a date at which he alleges wrongful retention occurred, but says that he expected them to return to the Netherlands to attend school "after the end of July 2022". BW seeks the return of Anna and Finn to the Netherlands.

[4] Social workers in the Netherlands, in particular SJ of the youth protection service, were involved with the family at the time the children came to Scotland. The children had been subject to compulsory measures in relation to their care between June 2020 and December 2021 because of concerns about BW's ability to care for them, particularly in the context of his problematic use of alcohol. They were rehabilitated to BW's care, but in early 2022 social workers became concerned that matters were deteriorating. Previous kinship carers, an aunt and uncle, were unwilling to have the children again. They were placed with paternal grandparents who became unable to cope. The history is more fully set out below by reference to the family plan prepared by the youth protection service. In late April 2022 SJ contacted CM and asked her whether the children could come to Scotland.

[5] The retention of a child is to be regarded as unlawful where it is in breach of rights of custody attributed to a person under the law of the state in which the child was habitually resident immediately before the retention. On the face of the pleadings there appeared to be a dispute about whether BW had been exercising custody rights at the time of the children's move to Scotland (sic), on the basis of the compulsory measures to which the children were said to have been subject in the Netherlands from 2020. At the second hearing that line was not pursued. It was common ground that the children were not subject to any compulsory

measures at any point in 2022. Although they were in the care of their paternal grandparents for a period, that was on a voluntary basis. It was common ground between the parties' Dutch legal advisers that both parents had "parental authority" in relation to the children.

[6] What was in dispute was whether the children were habitually resident in the Netherlands at the time of the allegedly wrongful retention. CM asserts that the children have been habitually resident in Scotland since 5 May 2022 and were in any event habitually resident in Scotland by, at latest, the end of July 2022.

[7] CM also contends that BW consented to their retention and invokes article 13(a) of the Hague Convention of 1980. She says that there is a grave risk that Anna and Finn's return to the Netherlands would expose them to physical or psychological harm or otherwise place them in an intolerable situation: article 13(b).

[8] Anna and Finn do not object to returning to the Netherlands. They would like to return there to live with their father. Their views have been ascertained by a reporter appointed by the Court.

Evidence and information available to the court

The Family Plan

[9] The following information is taken from the family plan dated 13 May 2022 prepared by the Dutch youth protection service. The service initiated an investigation in relation to allegations made in February 2020 that BW had been driving when drunk, was under the influence of alcohol daily, and could react aggressively when drunk. The children were frequently absent from school.

[10] The family plan contains a number of historical references to angry and aggressive behaviour on BW's part. At page 40, for example, there is reference to an incident (undated, but from context probably from an account given in May 2020) in which BW made Anna get him a doner kebab. He was angry because there was no sambal (a type of sauce) with it, then he started stuffing "the sandwich" into Anna's mouth. The same passage records Anna's concern that if she left, her father would kill himself. The family plan records concerns that BW told the children that they must tell CM that they hated her; that he would kill CM if they told her about their home life; and that he would kill himself if they left him (page 14). That part of the plan also records that the children were "sensitive to compliments and positive attention from their father".

[11] On 26 June 2020 youth protection obtained orders authorising the out-of-home placement of both children, supervision, and preventive youth protection. The District Court of North Holland (Family and Youth Court Section of the Haarlem Branch) granted orders, initially for six months, but extended on 15 December 2020 and extended and varied on 3 June 2021. The orders expired on 26 December 2021.

[12] The children were placed in the care of their paternal aunt. By June 2021 the children were spending four days and three nights each week with BW. The decision of the court from June 2021 narrates that although matters had improved, there were still matters of concern. BW was at that time no longer drinking, and was receiving various types of help and support. He had completed a therapeutic programme with the Brijder, an agency which provides assistance in relation to the problematic consumption of alcohol. The court considered that there was a risk of relapse and a continuing risk to the children's development. It extended the orders for supervision, but did not consider that it remained

necessary for the children to live away from their father. The court took into account advice from Timon Foster Care, and the availability to BW of support from his family, and assumed that BW would continue to accept support from two particular agencies, Odion and Intensive Out-Patient Family Support (“IAG”).

[13] The family plan relates that problems emerged shortly after the orders expired. Youth protection had planned to write a safeguarding plan in January 2022. The first meeting took place on Thursday 6 January. Youth protection became concerned that BW was showing signs of relapsing. He “withdrew from care”. He frequently expressed anger towards youth protection in the following weeks. He called them several times in one day. He did not remember conversations in which he had previously taken part, and he sounded confused and sluggish. He would call to apologise and then shortly afterwards call to express dissatisfaction. He withdrew his consent for youth protection to contact third parties. He cancelled appointments. The service considered that it had lost the contact that it required to secure the safety of the children. It received expressions of concern from the children’s schools and their neighbours.

[14] According to the family plan, on 17 March 2022 the police arrested BW for being “heavily intoxicated” in charge of a vehicle. He told the police that the children were at home, but when the police attended to check on the wellbeing of the children, there was no response. The police telephoned BW on 22 March to ask if they could speak to the children. BW sounded drunk on the call. The police notified youth protection on 24 March. When youth protection contacted BW he said that the incident on 17 March had been an isolated mistake on his part. Youth protection decided that the children should be removed from the care of their father. He agreed to the children’s going to stay with their paternal

grandparents for an indefinite period. The grandparents found that they were unable to cope with the placement, and on 25 April indicated that the placement must come to an end. The options at that stage for the children were placement in foster homes, possibly separately, or with their mother in Scotland. The children's aunt and uncle were not willing to have the children to live with them again.

[15] Dutch youth protection investigated with CM whether the children could live with her. There had been an earlier assessment of her suitability, in 2020, when the possibility of the children staying with her had been mooted at that time. There was already a pre-arranged holiday for them with her in Scotland to commence on 15 July 2022. On the account given in the family plan, BW was clear that he would prefer that the children stay with their mother than that they go into foster care. On Friday 29 April BW was relieved that the children were going to their mother and seemed to realise that this was for longer than "just a holiday". On 2 May he was reluctant, and trying to negotiate with youth protection. The Family Plan narrates:

"In the end, the father and mother worked together and explained the situation to the children. Why this is happening and what this will look like. The father and children still spent time together on Monday 2 May, and Wednesday 4 May, and the father waved goodbye to the mother and the children on Thursday."

[16] The family plan records a decision by youth protection taken on 13 May 2022 to close the case, as the children have moved to Scotland, "where they live with their mother."

Correspondence involving Dutch public authorities

[17] In a WhatsApp message to CM on Tuesday 26 April, SJ referred to a plan that the children should live with her. She said that she would not tell BW of the plan until Thursday, which would have been 28 April. She expressed a preference that CM and BW

should tell the children together. She said that depending on BW's reaction on the Thursday, she could assess whether that (which I take to be reference to telling the children together) was feasible. On 28 April SJ referred to an intention to speak to BW that afternoon. On 29 April, again in a WhatsApp message to CM, she referred to having an appointment with BW that day. SJ referred, again on 29 April to having spoken to Anna, who was upset and angry on being told that youth protection had decided that she could not go back to her father.

[18] The sequence of messages records that Finn started school on 25 May 2022, and says that he has already made friends. On 14 June there is a reference to Finn being happy at school and winning competitions "for sports day". By that date Anna was in her second week of high school. CM referred to her as having good days and bad days, and as missing her boyfriend.

[19] The WhatsApp messages between CM and SJ continue until 22 August 2022. They reflect the provision of assistance by SJ in relation to negotiating passport control at Schiphol and with deregistering the children from Dutch education. The WhatsApp messages relating to deregistering them run from 20 May 2022 to 31 May 2022.

[20] By email of 28 April 2022 SJ wrote to an official at the Dutch Care and Protection Board ("RVDK"):

"Last Monday you spoke to my colleague [named] on the phone about the W family. There are new developments and we would like to update you on these. The mother is travelling to the Netherlands on Sunday and will fly back with the children on Thursday. The father has to provide his consent for this. I have reason to believe that he will agree to this and will sign the required papers, but if that is not the case, this may mean a possible urgent authorisation."

[21] An email of 29 April 2022 from a different official of the RVDK narrated the RVDK did not have a role in providing consent to the change in the children's living arrangements,

as assistance was provided to the family on a voluntary basis. If BW opposed the change in the children's living arrangements CM could initiate proceedings, and if he consented, that could be recorded in a parenting plan.

[22] On 2 May 2022 SJ wrote a detailed email to MR setting out the background to the plan for CM to travel with the children on 5 May 2022. The email included the following:

"The children find themselves in an unwise conflict of loyalty, in which the father (unconsciously) plays a major role. Finn, in particular, feels very responsible and is very protective of his father. For example, he is concerned whether his father is taking his medication and whether he has been to the clinic as agreed. Father sees this himself as curious. Anna in particular has to deal with father's verbal abuse. She protects her father to keep the violence to a minimum. Anna is very quiet and withdrawn. When the children have stable adults around them, who stimulate the children in a positive way in their development and with whom they can be children, the children flourish and make themselves heard more. This became apparent during the first out-of-home placement.

The children have been supervised from July 2020 and this lasted until December 25, 2021. Concerns have increased dramatically after the supervision order and the positive development that the family has gone through during the supervision order is very good. quickly deteriorated [sic]. [Father] has had plenty of opportunities to show that he has changed or to show that he has learned from the past, but he can't seem to keep it up. Even when assistance is offered to support father, he is not open to this. All this and the past, Youth Protection has decided that it is better for the children if they go to their mother now instead of during the summer holidays and that they stay there."

[23] On 23 August the RVDK wrote to CM in the following terms:

"From the Youth Protection Department, Ms SJ, we understand that the children, Anna and Finn, have moved to Scotland a few weeks ago and have come to live with you. And father has not objected to this.

Youth Protection has been in contact with social work in Scotland and understands the children are doing well. For that reason, they closed the file."

[24] BW's agents made inquiries of a Ms Grasmaijer of youth protection who replied on 12 April 2023, advising that they would not provide information to third parties and that they recently spoke with BW who indicated that he no longer needed a family plan.

[25] CM's agents also made inquiries of Ms Grasmajer. She replied on 28 April 2023:

"I have consulted with the lawyers again. We cannot give more information than that the placement with mother was with the consent of both parents. That is why it is not legally established. It has been voluntary."

CM's affidavits

[26] Before she travelled to the Netherlands CM approached social services in her home town. They assigned MR, who had carried out a parenting assessment of CM on the earlier occasion when there was a possibility of the children's moving from the Netherlands to Scotland. With MR's help CM registered the children with schools and signed them up with sporting clubs. CM gives an account of having explained to the children that they would be in Scotland in the long term. She says that shortly after the children arrived in Scotland BW "bombed" the children with messages to try to undermine her relationship with them and confuse them as to their living arrangements. I refer more fully below to some of BW's communications with Finn.

[27] SJ told CM that because of their ages, the children would be separated if put into foster care, and could have been accommodated anywhere in the country.

[28] CM's contact about the proposal that the children come to Scotland was mainly with SJ, rather than with BW directly. She was present at one meeting with him. Her account is this:

"All conversations regarding the move were done with BW through child protection, this was to avoid any misunderstandings and any conflict over the matter. SJ told me that BW was involved in the discussions and she kept him up to date. BW was aware that the children were coming here and would be going to school here after the summer holidays. BW knew that he would be able to see Anna and Finn in the Scottish school holidays. I was only present for one meeting between SJ and BW. It took place at BW's home and I was there to collect the children's passport and other documents of theirs needed for bringing them to Scotland. SJ clearly stated to him in my presence that the children were not able to live with him anymore and that the

option of foster care is not a viable option for the children. BW agreed that the children would be better living with me than in foster care. BW was made aware that they would be coming here, following online lessons for their schooling and after the summer holidays would be in full time education here in Scotland. Due to timetable changes occurring in June, they had a period of phasing in prior to the summer holidays beginning. I was not present for any of the other meetings between SJ and BW as they took place before my arrival in the Netherlands, when I was still in Scotland. The discussions around the children moving here were completed by child protection. I was told that BW agreed.”

[29] CM’s affidavit makes reference to an audio clip that Anna recorded of BW on 5 March 2022 before she left the Netherlands, and which she sent to CM. It and an informal, but unchallenged, translation of it are productions. I listened to the clip and formed the view that BW’s manner in it was one of uncontrolled anger. The language in which he addressed Anna was very abusive indeed. To be addressed in such language, and in such a manner would, objectively, be likely to frighten and distress the person addressed, whether an adult or a child. It is difficult to form a judgment as to whether BW was intoxicated at the time of the interaction, as I do not know how he usually speaks. His speech does, however, sound slurred in the recording.

MR’s affidavit

[30] MR is a social worker employed by the local authority in whose area the children are residing with their mother. She first became involved with the family in 2020 following a request from the RVDK under Article 55 of The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children. The request was for an assessment of whether it would be viable for the children to move to Scotland at that time. The request included a reference to Anna’s wish at that time to live with her mother, and to

Finn's fear that if he left the Netherlands BW would harm himself. At that time Anna told MR that she wanted to move to Scotland, and Finn told her that he did not want to leave the Netherlands. MR's assessment at that time was that CM would provide a safe and nurturing environment for the children. The Dutch authorities advised, however, that the Dutch court had decided that the children should remain with their paternal relatives until at least 2021, and the Scottish local authority closed its file.

[31] CM contacted MR on 27 April and told her that the children had been removed from BW's care and were with their paternal grandparents, and that SJ had asked CM to have the children to live with her in Scotland permanently. MR contacted SJ, who provided her with a history consistent with that outlined above. It included an account that if the children were to remain in the Netherlands they would require to be in foster care, and that it was not known whether it would be possible to accommodate the children together.

[32] After the children moved to Scotland, the local authority social work department provided support and has made home visits. MR has had individual sessions with the children in their schools. She has made available a translation app for those sessions, but has generally not needed to use it because the children respond to her in English.

The children's rooms at home are age and stage appropriate and they have everything they require. CM has a strong support network.

[33] CM informed MR of communications from BW encouraging the children to write letters asking to be returned to the Netherlands, and to look for their passports. MR spoke to BW about those matters on 14 October 2022. He denied asking the children to write letters, although said he could not help it if they did so. He told her that he felt that the children were settling in Scotland, that Finn was frequently out with friends, and that he,

BW, had found peace with that situation. The children had direct contact with BW in Scotland in October 2022. On 22 December 2022 CM informed MR of an account by Anna that in a hotel during contact, BW asked her to cut up her Young Scot card. When she refused he told her to get out of the hotel and be a “[mother’s surname]” like her mother. CM also gave an account of a call between BW and Anna in which BW said he would be better off dead, and that he planned to cancel his phone contract. This had led to Anna watching a movie with him.

[34] MR spoke to BW on 27 January 2023 during which BW referred to CM in pejorative terms, and said that she belonged in jail. He said that if he had care of the children, he would permit CM to have contact with them only if she had “an ankle bracelet”.

[35] MR’s view is that both children are loyal to their father. Finn has told her that things were “bad” when he was aged 10. Her assessment is that the children have been guarded in their communications with her as a result of BW’s influence. Although both children would prefer to live in the Netherlands, they have a positive relationship with CM. Finn has built positive relationships with his peers, although Anna has struggled more, as her focus has been on important friendships in the Netherlands. The children’s teachers are happy with their attendance and academic progress at their schools. MR’s concerns about the children relate to the emotional impact on them of BW’s communications with them in which he makes negative comments about CM, and in which he indicates that he might harm himself.

Text messages from BW

[36] CM has produced various text communications between BW and Finn. I refer to the less recent of them more fully in the context of the information deriving from the children

themselves. The most recent are said to date from the four weeks preceding the second hearing. They contain references to the importance of not lying in the context of court proceedings.

BW's affidavits

[37] BW's position in relation to the initial involvement of social services was that this had happened because his sister in law lied about his having been drinking and driving, although he accepts that he was an alcoholic in early 2020. In relation to events in early 2022, he says that his mother's boyfriend made a false allegation that he had been drinking on 18 January 2022. In relation to events in March 2022 he says that on 16 March he was experiencing a lot of pain from a tooth, that he meant only to have one or two shots with a friend, but that he ended up drinking the whole bottle. He says he was arrested the following day because he had too much alcohol in his system from the night before.

[38] He claims that in April 2022 SJ provided false information about him to a clinic that he was due to attend on an out-patient basis. The nature of that false information is not clear from his affidavit. He says that he made a deal with SJ for the children to come back to him when he had "done the clinic". He says that she recorded further, again unspecified, false information about him with "the safety chamber". He claims that she is not working anymore because she provided that false information. There is nothing to vouch that assertion. It appears that BW has drawn an inference to that effect. He says that the police opened a fraud case against SJ at his instigation, and that the next day she was "suddenly" on maternity leave. He made a complaint against her and was told initially that she would

return to work in May 2023. He was then told that she was “gone and has nothing to do with the case.” He did not believe that.

[39] BW’s account is that Dutch social workers made a plan behind his back. They told him that it would be “nice” for the children to stay with their mother so that their paternal grandfather did not require to drive them around. The children would do lessons online. There was no discussion of their going into foster care. He does not mention any meeting at which CM was present. He is adamant that the children were going for a holiday, and that he told them that they would return in six to seven weeks. He says:

“There is nothing by a judge, no court, nothing at all. It was just grown up people speaking about something happening. The [family plan] was an extra thing, it was not binding. [Name of social worker] asked if I would like to do it so can look back but don’t have to do, I say I do it but I did not put my [signature] on anything.”

[40] It is difficult to discern from that passage what BW says the significance of the family plan was, or what it was he acknowledges having done.

[41] Neither of BW’s affidavits contradicts MR’s account of her interactions with him, or deals with the allegation about his conduct towards Anna in the hotel. He provides explanations for a number of incidents mentioned in CM’s affidavit and in the family plan.

DK’s affidavit

[42] DK is BW’s neighbour. He says that his son was friendly with Anna and Finn. His son misses Finn. DK speaks in positive terms of BW’s affection for his children, and theirs for him. He says that the children would be welcome in DK’s house and that DK and his family would support BW if the children returned to the Netherlands.

Correspondence produced by BW

[43] BW has produced a number of letters from a general practitioner, Dr Strootman, confirming that BW attended the Brijder from March 2022; that he is also attending Odion; that he takes disulfiram (Antabuse) twice a week, and has attended aggression management training; that he is looking for work; and that Dr Strootman has drafted a letter of referral for Anna and Finn for intensive pedagogical home care which can be provided by Odion. There is also a letter vouching that a urine test on 23 March 2023 was negative for alcohol.

[44] There is a letter from the Brijder dated 6 March 2023 stating that BW attended between 25 March 2022 and 24 May 2022. During that period his urine tests for alcohol were negative. Tests for cannabis and benzodiazepines were positive, and BW had explained to the service that the cannabis derived from an oil he used for arthritis and that benzodiazepines were prescribed medication. An email from the same service expresses the view that BW engaged with treatment “to quit using substances and be a good father”, and that BW should continue to take disulfiram and engage with Odion in order to maintain sobriety.

[45] BW produced assistance plans relating to Finn from two different agencies. They predate the children’s departure from the Netherlands. The one by an agency called Altra appears to date from April 2022 and suggests the children could remain with their father if there were foster arrangements for weekends, if BW remained under “intensive control of addiction care” and received intensive parenting assistance. It records a view that BW is not always honest about his alcohol consumption. It concludes with the view that it was not safe enough to place the children back at home.

[46] There is correspondence confirming that as at 22 March 2023 BW was receiving assistance from Odion; that he was disqualified from driving for a period of one year, but that he can request an investigation into his fitness to drive one year after ceasing to use alcohol.

[47] BW also produced correspondence with a view to demonstrating that the children had not been deregistered from an optician (Anna) and doctor (Finn) in the Netherlands. The first correspondence from the optician is dated 1 November 2022, providing an appointment on 2 January 2023, which is followed by a further letter saying that that appointment has been cancelled and cannot take place, and providing a date in February. A letter from an ENT specialist at the Zaan medical centre dated 11 January 2022 narrates that an appointment for Finn has been moved “at your request or our discretion” from a date in December 2022 to a date in January 2023. There is nothing to indicate whether BW made the original appointments or whether they were routine appointments generated by the optician and medical centre respectively.

Information deriving from the children

[48] The children told the reporter appointed by the court that they would prefer to live in the Netherlands with their father. They both miss their friends in the Netherlands.

[49] The children’s teachers told the reporter that both children told their peers at school that they would be going back to the Netherlands. Anna told the reporter that CM had told her and Finn that they were coming for a holiday. Anna had been expecting to go back to the Netherlands. She did not remember whether she had been given a specific date for their return.

[50] I have no doubt that the reporter reported accurately what the children and teachers told him. Their belief that they were returning to the Netherlands and Anna's assertion that that is what CM told her are potentially of some relevance. The reasons why a family have come to be in a particular location can be of relevance in assessing whether a child has acquired a habitual residence. There is an issue as to whether BW consented to a holiday or to a long term move to Scotland. Neither party referred to *In re LC (Children) (Reunited International Child Abduction Centre intervening)* [2014] AC 1038, but I approach the matter of habitual residence on the basis that the state of mind of an older child in relation to the nature and quality of residence may be a relevant matter.

[51] In assessing what weight to give to those matters, I take into account the content of WhatsApp messages sent by BW to Finn. There is a reference in a WhatsApp message from CM to SJ to messages sent by at latest 11 August 2022. In those messages he told Finn that he had been stolen, and exhorted him to telephone the police. One of the messages reads, "You better not be nice to the police over mum". In another he sent an image of a letter dated 9 September which reads:

"To whom it may concern
 With this letter, I would like to object. This is my case number details [case numbers]
 Case name: Anna W and Finn W
 [case number]
 You can reach me on this number [telephone number]
 I would be grateful if you would do this as quick as possible,
 With kind regards
 B, Anna and Finn W."

Finn rewrote the letter in his own handwriting as BW requested, and sent an image of it to BW. There followed a number of messages in which BW blamed CM for the situation.

He told Finn that he would come for Finn, that they would return by sea to the Netherlands, that BW would "go to the judge" and that SJ could not do anything about it. BW told Finn

that he and Anna should take a walk once weekly during which they and BW could talk about what they were “going to do”. He told Finn that CM was “listening with everything and she [was] not to be trusted”, and that CM and SJ had done “all this sneakily”. BW has lodged two handwritten letters, one dated 10 September 2022, and the other undated, which relate that Anna and Finn wish to live in the Netherlands. They relate that there was an agreement that they would go to Scotland only for a holiday.

[52] CM states in her affidavit that BW constantly tells Anna also that she is going back to the Netherlands. She says that BW told the children to turn off the location features on their telephones. BW claims that he has told the children they if they want to stay in Scotland that is “okay”. That is not consistent with the content of his messages to Finn. BW claims that CM has sent him messages in Finn’s name, but he has not produced any messages of that sort. I am satisfied that it is more likely than not that Anna and Finn’s views have been substantially influenced by BW. The handwritten notes apparently from Finn follow a determined effort on the part of BW to procure from Finn messages that support BW’s position.

[53] The views expressed by SJ in correspondence with MR about the children’s relationship with their father, and their loyalty to him, are untested in evidence. MR’s own views, again untested, but provided on oath in her affidavit, are to similar effect. I regard them as relevant to assessing the significance of what the children say about their understanding of the basis on which they came to be in Scotland, particularly against the background of messages which are clearly calculated to manipulate Finn. I have taken into account also the historical accounts in the family plan regarding the way in which BW has expressed himself to the children about CM, and the threats that he has made to harm her

and to harm himself, and the more recent accounts in CM's and MR's affidavits about his interactions with both children. There is a clear and consistent picture of an individual prepared to communicate in very inappropriate ways with his children with a view to influencing their opinions and behaviour towards both CM and towards himself.

[54] I have concluded that it is very unlikely that CM told the children that they were coming to Scotland only for a holiday.

Information about Dutch law

[55] Both parties produced some advice from Dutch lawyers. BW produced an opinion from Ms Ingrid Maaste, advocaat and mediator. She is his legal adviser in the Netherlands, and is not an independent expert. CM produced an opinion by Ms Pauline Montanus, who is not her legal adviser. I do not set out their respective views here in any detail, but refer to them where their views are potentially relevant in relation to one of the issues in the case.

Habitual residence

[56] Habitual residence is a question of fact involving an evaluation of all the relevant circumstances. The test adopted by the Court of Justice of the European Union is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends on numerous factors, including the reasons for the family's stay in the country in question. It is the stability of the residence that is important, not whether it is of a permanent character. There is no requirement that the child should have been resident in the country in question for a particular period of time. There is no rule that one parent cannot unilaterally change the habitual residence of a child. Parental

intentions are a potentially relevant factor, but not the only relevant factor. *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2014] AC 1; *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1017; *Re R (Children)* [2016] AC 76.

[57] The onus is on BW to establish wrongful retention, and hence to demonstrate that the children were habitually resident in the Netherlands at the time of the allegedly wrongful retention. In the present case CM is asserting that there had been a change of habitual residence, by, at latest, the date of the allegedly wrongful retention. The onus is on her to establish that that change has taken place.

Submissions

[58] BW's contention was that he had not consented to anything more than a holiday for the children in Scotland. It was relevant that the children had a similar understanding of the reason for their travel to Scotland. They had conveyed that understanding to others, including the reporter appointed to ascertain their views. The children had not been deregistered from all services in the Netherlands, and remained registered with opticians and a doctor in the Netherlands as at November 2022.

[59] CM submitted that I should find that the children had acquired a habitual residence in Scotland by the end of July 2022, which is the point at which BW alleged they were retained wrongfully. I should take into account in particular:

- (a) that the move to Scotland was planned with the assistance of the social work departments in both countries;

- (b) that the children were de-registered from school in the Netherlands, and they began school in Scotland in June 2020, after a short period of online learning;
- (c) that by the end of July 2022, they had attended school, made friends and become part of the local community;
- (d) that they had a settled family life with their mother by that time and had, for example, decorated their rooms in their mother's home not long after their arrival in May 2022 as recorded in a WhatsApp message from CM to SJ on 25 May 2022; and
- (e) that the authorities in the Netherlands closed their case on the basis that the children were no longer habitually resident in The Netherlands.

Habitual residence - decision

[60] I am satisfied for the following reasons that the children were habitually resident in Scotland by the end of July 2022.

[61] This is not a situation in which CM established a new place of residence for herself in 2022. She had already been living in Scotland since 2015. She is Scottish. She attends university in Scotland and lives close to members of her family. Her settled situation is one which of its nature lends itself to swifter integration into the local community for the children than would likely be the case if she had no previous connection with Scotland, and with the area where she lives. The integration of a child in a given place is likely to be related at least to some extent to the degree of integration of his or her primary carer in that place.

[62] The reasons for the children's stay in Scotland is of significance.

[63] The children's move to Scotland was planned with and facilitated by social workers both in the Netherlands and in Scotland. The reason why Anna and Finn came to stay in Scotland was because the Dutch authorities actively sought the cooperation of CM in having the children come to live with her long term.

[64] By the end of July 2022 they had spent nearly three months in Scotland. There is no dispute that they initially had some classes online in Dutch, but they also began attending school in Scotland before the summer holidays in 2022. They began to integrate into the life of their local community at an early stage during their stay in Scotland. They had a stable home in Scotland from the point of their arrival in Scotland. At the time when they arrived in Scotland, there were already plans for their education in Scotland, and they started to attend Scottish schools before the summer holiday period. Before the start of July 2022 their lives in Scotland had characteristics of stability and the sort of routine that would be usual for children of their ages integrated in the social environment of the place they were living. They were swiftly deregistered from education in the Netherlands with SJ's assistance.

[65] For the reasons already given, I am unable to attach significant weight to the account from the children that they understood they were coming to Scotland only for a holiday.

[66] I attach relatively little weight to the circumstance that the children may have remained registered with some services in the Netherlands. Unlike education services, they are not services that are used continuously. CM is unlikely to have had any pressing reason to deregister the children from those services, and is unlikely to have known of any planned appointments with them.

[67] The intentions of the parents are only one relevant factor. There is no doubt that CM did understand and intend that the children were moving to live with her on a stable and settled basis in Scotland.

[68] On BW's account, the move to Scotland at the point at which it occurred was not simply a holiday period in the ordinary sense of a holiday. It was a period, albeit he says a limited one, which was required to cover his own re-engagement with services - on his own account a clinic - which he required to "do" before the children could come back to him. It occurred in part during the children's normal school year. It is not necessarily inconsistent with their acquiring a habitual residence in Scotland.

[69] I have, for the reasons set out below, concluded that he did know that the children were coming to live with CM and to have their settled home with her in the longer term, and that he consented to that, and not simply a holiday. I have reached my conclusion regarding habitual residence without taking that into account. Taking it into account would tend to reinforce rather than undermine my conclusion about the acquisition of habitual residence in Scotland.

[70] My conclusion regarding habitual residence is sufficient for disposal of the petition. I record my views in relation to the respondent's case under article 13(a) and (b) below.

Article 13(a)

Law

[71] Any consent given must be clear and unequivocal. It must be viewed in the context of the realities of the family life. It is not to be viewed in the context of or as governed by the law of contract. The burden of proving consent rests on the person seeking to assert it. The

question of consent is essentially a factual matter: *YS v BS* 2020 SCLR 459 [2019] Fam LR 134, at paragraph 8, approving the approach of the Lord Ordinary. That reflects the approach in *In re P-J (Children) (Abduction: Consent)* [2010] 1 WLR 1237. Although those authorities relate to consent for removal, they apply equally to retention.

Decision

[72] There was a dispute between the parties as to a matter of fact, and I do not rehearse their submissions as to the particular parts of the evidence in relation to which each of them respectively suggested that I should attach weight.

[73] I accept CM's fairly detailed recollection of the single meeting at which both she and SJ were present with BW, a meeting of which BW gives no account at all. It is consistent with the contents of the family plan. It is also consistent with the correspondence from the Dutch authorities. The correspondence does contain reference to the prospect that BW might "sign papers". The absence of any signed paper is not, however, conclusive as to whether he did in fact consent to the children's moving to Scotland. It is plain from the correspondence that the youth protection service were alive to the fact that some form of legal order would be required in the event that BW did not agree to the children's move to Scotland. It is unlikely that they would simply then have proceeded to facilitate the children's move in the way that they did had he agreed only to a holiday.

[74] I do not accept BW's assertions that he has been the victim of deception at the hands of the Dutch social services. In evaluating the contents of his affidavits I have taken into account that they disclose a very marked tendency to blame persons other than himself for anything that is not welcome to him. Some of the blame that he attributes to others is

obviously unmerited. He has described CM as a liar and as having engaged in fraud (handwritten letter 7/4 of process). It is difficult to see any reasonable basis on which he could regard her, even on his own analysis, as anything other than a fellow victim of deception by SJ as to the extent of his consent. His response to the audio clip recorded by Anna is one which blames her temper and her “hormones”, although he says he is not proud of the incident, and that he has since undertaken a course in relation to his aggression. That pattern of attributing blame causes me to be sceptical about the allegations he makes against SJ. There are other factors that cause me to be sceptical about his account. His denial to MR that he encouraged the children to write letters supporting his position is demonstrably false. His account of having told the children they would be away for six or seven weeks is at odds of a date of allegedly wrongful retention at the end of July 2022. I cannot adjudicate on each of the allegations in respect of which BW provides an explanation, but I note that he accepts responsibility in respect of none of them.

[75] I record that Ms Reekie suggested that I should have regard to parts of Ms Maaste’s report in which she stated that BW had given permission only for a holiday. I have left that out of account. There is nothing to indicate that she had any personal knowledge of that, rather than an account provided to her by BW, who is her client.

Article 13(b)

Law

[76] The risk to the child must be grave. Although “grave” characterises the risk rather than the harm, there is in ordinary language a link between the two. The words “physical or psychological harm” are not qualified, but they gain colour from the alternative “or

otherwise place the child in an intolerable situation". Intolerable means a situation which the particular child in the particular circumstances should not be expected to tolerate. It is not reasonable to expect a child to tolerate physical or psychological abuse or neglect of herself. Article 13(b) looks to the future, namely the situation as it would be if the child were to be returned forthwith to her home country. This is not necessarily the same as being returned to the person who has requested her return (although it may be on the facts of particular cases). The situation the child will face on return depends on the protective measures which can be put in place to secure that she will not be called upon to face an intolerable situation when she gets home: *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 paragraphs 33-35.

[77] Clear and compelling evidence of a grave risk of substantial harm is required. That risk must be much more than the risk inherent in any unwelcome return to the country of habitual residence. In the absence of compelling evidence to establish that the courts of the requesting country do not have the power to protect the child, the courts of the requested country should assume that they will be able to do so: *L v H* 2021 SCLR 467, paragraph 15; *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654.

Submissions

[78] Ms Bradbury referred to the history of involvement with social services. She submitted that despite apparent engagement with an anger management programme, BW's communications continued to indicate that he was unable to regulate his behaviour and emotions. There was an established history of problematic alcohol use but little to suggest sustained recovery. There was no vouching of his assertion that the positive tests

for cannabis and benzodiazepines had the explanations that he asserted they did. There was no family network to provide support if the children were returned to the Netherlands.

It was likely the children would face further disruption and involvement with social services if they were returned. They would likely face separation in foster care, which would be intolerable, even absent any specific evidence about how that would affect them: *Urness v Minto* 1994 SC 249.

[79] In the course of her submissions Ms Reekie submitted that BW would undertake to engage with youth protection if the children were returned to the Netherlands. She said he would support the children to have contact with CM; he loved the children “more than he did not love CM”. Ms Reekie did not submit that there was any mechanism to enforce any undertakings BW offered. The children’s demeanour to the reporter had not suggested that they feared any abuse at the hands of their father.

[80] There was no basis for suggesting that the children would necessarily be placed outside the care of their father on return to the Netherlands. BW’s position was that he was free of alcohol use and understood he could never drink again. He had learned from past events. Ms Reekie submitted that I could place significant weight on the various documents vouching BW’s engagement with services.

Decision

[81] The children were the subject of compulsory measures relating to their care by virtue of court orders between June 2020 and December 2021. In June 2021 the court made the following assessment:

“... there is still a question of serious threat to development. In the past, the children were exposed in their home to aggression, psychological abuse, and serious neglect.

The children have been damaged by this and their confidence in the father needs to grow again. [...] The father's situation has also improved significantly: he is no longer drinking and is receiving various types of help. [...] Due to the risk of the father having a relapse, the threat to their development for the children has not yet been sufficiently removed."

[82] Although the children were rehabilitated to the care of their father, social services in the Netherlands perceived that matters were deteriorating swiftly in early 2022. BW does not appear to accept that matters were as troubling as the social services perceived them to be. The audio clip of Anna's interaction with BW from March 2022 is consistent with at least one incident of verbal abuse towards her at that time, involving uncontrolled anger and very unpleasant language. He tells her to "fuck off" to "the Ms [a reference to the family of CMJ]". As I have already noted, it is an incident in respect of which BW accepts responsibility only to a limited extent, and which he blames in part on Anna's temper and "hormones". It is an incident that is consistent with some of the concerns recorded by Dutch social services. Social services were sufficiently concerned to have the children accommodated with their grandparents, but that placement broke down.

[83] I require to consider what would happen on the children's return to the Netherlands. Ms Montanus suggested that it was unlikely that the children would return immediately to the care of their father, given the circumstances in which they left the Netherlands. She suggested that social services would obtain an order from the court, and that the children would be accommodated in foster care. Ms Maaste appeared to accept uncritically BW's account that he is free of problematic alcohol use and could see no reason why the children should grow up otherwise than in his care. She pointed to the availability of court orders authorising compulsory measures, either in the context of a child living at home or a child accommodated outside his usual home.

[84] There is no evidence in this case as to measures that might protect the children from harm. Ms Maaste referred to “soft landings” with which the RVDK could assist, in the context of a “Cooperation Protocol for forced execution of return orders in international child abduction cases”. Ms Montanus advised that the Netherlands would not recognise undertakings given to a court in the United Kingdom. The protocol to which Ms Maaste referred related only to cases in which the Netherlands was the returning state. Ms Reekie acknowledged that that characterisation of the protocol was correct.

[85] I consider that it is more likely than not that the children, if returned to the Netherlands, would immediately be subject to some form of inquiry and intervention by Dutch social services, on an emergency and unplanned basis. Given the circumstances in which they came to leave the Netherlands, it is inconceivable that they would, if initially in his care, remain in his care for long without the suitability of that arrangement being subject to scrutiny. At the time the children left the Netherlands, none of their paternal family was in a position to offer kinship care. There is no evidence that that situation has changed. CM’s account is that SJ told her the children would be separated if put in foster care because of their ages, and that they could be accommodated anywhere in the Netherlands. I consider that it is more likely than not that the children would face at least the prospect of temporary separation from each other if returned to the Netherlands.

[86] Taking matters on the most positive view on BW’s case, he is currently not abusing alcohol, and is able to care for the children. I turn to what the situation of the children would be if they were returned to his care on, or shortly after, their return to the Netherlands. During the time that the children have been in Scotland BW has sought directly to influence both Finn and Anna. This is apparent from his text messages to Finn.

The earlier text messages speak for themselves in that regard. The more recent ones are less specific in their content. They do contain communication between Finn and BW in relation to what information BW might provide to the court. They refer to the possibility that the truth might be twisted, albeit not by BW or Finn. CM gives an account of BW's seeking to influence Anna by referring to a risk of harm to himself. I accept CM's account because it is consistent with the content of his earlier text messages and because it is consistent with the family plan which records the impressions of the youth protection service in the Netherlands. MR gives a (secondary hearsay) account of a troubling interaction between Anna and BW in the course of direct contact after Anna's move to Scotland. I accept this account as well. The language BW used in it is consonant with the language he used in the audio clip from March 2022, in its pejorative reference to Anna's aligning herself, to or being with, her mother or her mother's family. Some of the communications have been extremely negative in their characterisation of CM. BW has told Finn that CM is not to be trusted.

[87] Taking those matters into account, I consider that it is more likely than not that BW would seek to undermine and damage the children's relationship with CM if the children were in his care. That is itself a form of emotional abuse.

[88] On the assumption that BW is currently not using alcohol, there is a real and substantial risk that BW will relapse into alcohol use and disengage from services. I base that assessment on his behaviour in the past as recorded by Dutch social services. In making that assessment I am not suggesting that BW's engagement with services, when he engages with them, is motivated by cynicism, or that he deliberately disengages when he has achieved the aim of being reunited with his children. I am satisfied that once the children were living with him again and were no longer subject to orders of the court, matters

deteriorated. The court in June 2021 rightly, as it turned out, perceived a risk of relapse. In assessing the risk of harm that the children would be exposed in the event that BW relapsed into alcohol use, I take into account the assessment that the Dutch court made of the harms to which they had been exposed in the past, namely aggression, psychological abuse, and serious neglect.

[89] I have given no weight in this case to the demeanour of the children as observed by the reporter. As I have already indicated, I have been able to attach little weight to the information they provided to the reporter because of the way that BW has communicated with them since they came to Scotland, in the context of the observations by Dutch and now Scottish social workers about the relationship of the children to their father.

[90] Taking all of these matters into account, I am satisfied that there is a grave risk that the return of Anna and Finn to the Netherlands would expose them to psychological harm and place them in an intolerable situation.

Conclusion

[91] I dismiss the petition because the children were habitually resident in Scotland at the point at which it is alleged that they were wrongfully retained. Had I not been of that view, I would have exercised my discretion to refuse to return them to the Netherlands on the basis that the conditions in article 13(a), and, separately, 13(b) of the Hague Convention are satisfied. I reserve all questions of expenses.