OUTER HOUSE, COURT OF SESSION

[2024] CSOH 45

P92/24

OPINION OF LORD STUART

in the Petition

of

FPS

Petitioner

for

Orders under the Child Abduction and Custody Act 1985

Petitioner: McAlpine; Family Law Matters
Respondent: Trainer, Drummond Miller LLP

23 April 2024

Introduction

[1] This is an application, by the petitioner, under the Child Abduction and Custody Act 1985 for the return to Spain of two boys. I will call the boys Charles and James to make them real while respecting their anonymity. Charles was born in April 2011. James was born in March 2016. The petitioner is Charles and James' father. The first respondent their mother. The petitioner and first respondent were previously in a relationship and resided together in Spain. The petitioner is a Spanish national. The first respondent is a British national. Charles and James are Spanish nationals. Charles was born in Scotland but has lived in

Spain since 2013. James was born, and has lived his whole life, in Spain. The second and third respondents have not entered process, so I need not say anything further about them.

[2] The petitioner and first respondent resided together until January 2022 when the first respondent left the parties' family home and moved into rented accommodation, after which the parties operated a shared care regime in respect of the children. In May 2022, due to financial reasons, the first respondent moved to Scotland where she resided with her parents. Thereafter the first respondent continued to have contact with the children, which I address in more detail below. On 14 December 2023 the children travelled to Scotland with the petitioner's mother. From 14 to 18 December 2023 the children stayed with the first respondent and her parents at her parent's house. The children were returned to the care of the petitioner's mother on 18 December 2023, who was due to return to Spain with the children on 19 December 2023.

[3] Whilst at the airport pending return to Spain, Charles put his and James' passports in a bin and refused to board the flight to Spain. Charles told the petitioner's mother that he did not want to return to Spain. The police attended and took care of the children. The first respondent was telephoned and attended the airport. The children were released into, and have remained in, the first respondent's care, residing at, it appears principally, the first respondent's parent's house.

[4] The petition was served on 26 January 2024.

Applicable law

[5] The Child Abduction and Custody Act 1985 gives legal force in the UK to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"). Both the UK and Spain are signatories to the Convention. Accordingly, the relevant terms of the

Convention govern whether the orders sought by the petitioner should be granted. Insofar as relevant to the submissions made to me, the terms of the Convention are as follows:

> **"Article 3**
> The removal or the retention of a child is to be considered wrongful where—
>
> > (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
> >
> > (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. …
>
> **Article 12**
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. …
>
> **Article 13**
> Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> > (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
> >
> > (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

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

[6] It is conceded on behalf of the first respondent that (i) on 19 December 2023 Charles and James were habitually resident in Spain, (ii) the petitioner has custody rights in respect of Charles and James under the law of Spain and (iii) on 19 December 2023, the petitioner was exercising those rights. Standing these concessions, it follows that under reference to Article 3, Charles and James are being wrongfully retained in Scotland and, subject to the provisions of Article 13, in accordance with the terms of Article 12, this court should order the return of Charles and James to Spain forthwith.

[7] However, as discussed further below, the first respondent argues under reference to Article 13 that the court should not order Charles and James's return to Spain because both object to being returned to Spain and both have attained an age and degree of maturity at which it is appropriate to take account of their respective views.

[8] The leading authority in "child objection cases" remains *In re M* [2007] UKHL 55; [2008] 1 AC 1288. The leading speech, with which the other judges agreed, was delivered by Baroness Hale of Richmond. By way of introduction to the Convention, Baroness Hale at paragraphs 11 and 12 said:

> "11. The Hague Convention on the Civil Aspects of International Child Abduction 1980 is an admirably clear and simple instrument. Its twin objects are set out in Article 1:
>
> '(a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and (b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.'
>
> …
>
> 12. But it should not be thought that the Convention is principally concerned with the rights of adults. Quite the reverse.

…

Hence the Convention is designed to protect the interests of children by securing their prompt return to the country from which they have wrongly been taken, but recognises some limited and precise circumstances when it will not be in their interests to do so."

[9] From paragraph 42 Baroness Hale addresses the exercise of discretion under the Convention generally and then in relation to child objection cases:

"42. In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the Contracting States and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the Contracting States.

43. My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. 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. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word 'overriding' if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.

44. That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose 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.
…

46. In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate

> to take account of her views. These days, and especially in the light of Article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account doesn't mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances. …
>
> 48. 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."

[10] Lady Hale re-visited Article 13 in *In re E* [2011] UKSC 27. In giving the judgement of the Court along with Lord Wilson, the Court made a number of observations of general relevance as follows: (i) the context in which these cases arise has changed in many ways from the context in which the Hague Convention was originally drafted … [t]here is every indication that the paradigm case which the original begetters of the Convention had in mind was a dissatisfied parent who did not have the primary care of the child snatching the child away from her primary carer (paragraph 6), (ii) there is no easy solution to such problems … [t]he first object of the Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children … [i]f an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there (paragraph 8), (iii) that … the Hague Convention … [has] been devised with the best interests of children generally, and of the individual

children involved in such proceedings, as a primary consideration (paragraph 18), (iv) in every Hague Convention case where the question is raised, the national court does not order return automatically and mechanically but examines the particular circumstances of this particular child in order to ascertain whether a return would be in accordance with the Convention; but that is not the same as a full blown examination of the child's future (paragraph 26) and (v) the words of Article 13 are quite plain and need no further elaboration or "gloss" (paragraph 31).

[11] In terms of Inner House authority, in *W* v *A* 2021 SLT 62, Lord Malcolm give the opinion of the court in connection with an Article 13 child objection defence. At para [9] Lord Malcolm wrote:

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

[12] At para [11] Lord Malcolm explained further

> "This is a child objections case and one would expect the judge to engage with the stated reasons for the child's concerns, with due weight afforded to them, all as part of the 'child-centric' approach suggested by Lady Hale."

[13] And then at para [16]:

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

Evidence

Child welfare report

[14] Given that the sole basis of resistance to return is the objection of the children, I was conscious at the outset that it was appropriate to appoint an experienced child welfare reporter. Mrs Innes, KC is a very experienced Court reporter. Mrs Innes' report is typically comprehensive, thorough, objective and measured in answering the questions posed by the court. It is independent. I am grateful to her for the obvious care and attention expended in preparing it. I consider that I am entitled to place considerable weight on it and do. The reporter was provided with copy pleadings, all affidavits, the 1st, 2nd and 3rd inventories of productions for the petitioner and 1st inventory of productions for the first respondent. The reporter met both children. She had no direct communication with either parent. Again, given the prominence of the children's objection in this case and that the sole visibility to the views of the children is through the reporter, I have set out the reporter's record of the views of the children in some detail.

[15] The reporter spoke to the head teacher at James' current school. The head teacher confirmed that James was getting on fine at school. He has settled well. He is engaged, well mannered. He was very bright and mature for his age in comparison to his peers. He has not shown any distress or unhappiness. The school has no concerns about his care at home from his presentation at school. James had mentioned in class that he did not want to go back to Spain because of "all the drama".

[16] Following her discussion with James, the reporter reports that he was happy to speak to her. He likes his teacher. He has friends in his class, some of whom he knows from visiting in the holidays. He reported having "a lot of memories of them". He enjoys football and plays Monday, Friday and Sunday. He lives with his mum and stepfather, Murray. He

described Murray as "very good" and "amazing". He and his brother share a room. The house has a garden. They are hoping to get another house. His mum drops him at his grandparents in the morning. He describes his mum as "amazing". She would "do anything" to see him or have him stay in Scotland. He gets on well with his brother. Spain was "not very good". His dad was drinking and driving. Most of the time he was not with them. Their dad was "not really in the house", leaving them at the house alone. His dad would take them (Charles and him) to their paternal grandmother's house. He "used to hate it". James described the petitioner as "not really cool" and "very annoying". He would tell Charles and him off for no reason, for example if they lost a football match. After his parents had split up and his mother had moved back to Scotland she and his grandparents would come to visit them. He and Charles visited mum for the whole of August. They would FaceTime mum quite a lot. He was "very sad" that his mother was in Scotland whilst he was in Spain. He used to cry at school. His brother also used to cry. He did not feel that there was anyone in Spain he could talk to. He would cry in secret (eg in the toilet of the school). At Christmas (2023) he and his brother planned to run away. When they were at the airport they kept running away to the toilet but it did not work. When they were about to board the plane his brother ran away and threw their passports in the bin. There was "all the drama". He said he made the plan and his brother agreed. He thought he had told his aunt of the plan and possibly his mum (albeit I note from the first respondent's sister's affidavit that this might have been in the car after the children were collected from the airport). He has spoken to his dad once since being in Scotland. It was "a little bit good". He does not want to talk to his dad right now. He had moved school in Spain after the summer. He and Charles had not wanted to leave their old schools or their friends. He "hated" the new school. The school had a football pitch but they were not allowed to play

football on it. He had only made a couple of friends at the new school. He contrasted this to his new school where he has about ten friends in his class and many more in the other classes. In Spain he was not trusted to walk down the road to see his friends. However, he is able to do this in Scotland. He did not like living in Spain "because of all the drama". He likes being in Scotland. He "loves" living with his mum and has more freedom. James reported that his grandparents don't like his stepdad (Murray) "for some reason", that there had been "a drama" and that as a result they were living with Murray at the moment. However, it wasn't as though his mum had fallen out with her parents.

[17] The reporter met Charles at his school. When the reporter arrived Charles was with the school nurse. He had self-referred and was in the course of completing a child concern form. Charles was "pretty scared of going back" because of what his father had been doing. The reporter wrote "I was concerned about [Charles]. He was ashen faced and appeared very stressed and anxious. At times he became upset and cried a little although he was clearly trying not to cry." Charles reported that his dad was always drunk, drove the car whilst drunk and left them [the children] in the house on their own. He was able to give a couple of specific examples to the reporter. One example concerned the petitioner driving after drinking. The petitioner was unable to drive properly – Charles demonstrated the car going to and fro over the road. Charles felt "really scared". Charles knew no one at the new school in Spain and had only made a couple of friends. The new school did not give him "good vibes" and he missed his friends. He confirmed that they were not allowed to play football at the new school. He was "really worried" about his brother when things were going badly in Spain. He described the petitioner as being "pretty violent" by which he meant that he got angry easily. His father screamed, shouted and swore. Sometimes he threw things and he had hit James a couple of times. When at the airport in December he

and his brother were going to the toilet to waste time hoping they would miss the flight. They said they did not want to go back to Spain. The police came. They spoke to their dad on the telephone. He said something to James about going to jail and he, Charles, had to reassure James. James was crying. They said they wanted to go back to see their mum. After things had settled down in Scotland he felt "really happy"; "it felt like a dream come true". He did not really want to speak to his dad at the moment, "he makes me angry and sad. Mostly angry". His dad did not spend much time with them in Spain and now he is saying that his mum has abducted them. They are currently living with his mum and stepdad (Murray). Murray is "really nice". His mum is "trying to do the best for us". He started school in Scotland in January and he really likes it. He has "loads of friends". He "feels safer" there. He enjoys playing football and golf and there are opportunities to do these things in Scotland. He misses his friends, his dog and football from Spain. In relation to his meeting with the school nurse, Charles reported to the reporter that he had asked to see the school nurse because he was struggling with anxiety. He was really scared of his dad. He really did not want to go back to Spain. He was feeling angry, sad and scared. He had been self-harming by hitting and punching himself and the nurse had suggested ways of stopping this. He also tried to distract himself from his thoughts by playing football or games or reading. He hoped that when his father sees what he had to say and the effect it was having on him he will "re-think". At the moment "it seems like he does not care". He knows "we are begging to stay". His mum's view is "100% whatever" he and his brother want to do. If they wanted to go back to Spain she would be "fine with it although she'd be sad." The reporter asked Charles if there was anything else he felt it important that the judge knew. Charles said "I really, really, really, really, really, really don't want to go back". Charles wanted the reporter to write in the report in capitals "I REALLY DON'T WANT TO

GO BACK TO SPAIN". The reporter reiterated her concerns for Charles. He appeared so stressed and anxious. The reporter described him as "carrying the weight of the world on his shoulders". His hope was that his father would "re-think" and listen to his views when he saw the impact all of this was having on him.

[18] Turning specifically to answer the questions set out in her remit, the reporter confirmed that both children are of an age and degree of maturity that they are capable of expressing their views.

[19] With the caveat regarding the specific Convention context in which the term "object" is used, the reporter confirmed that both children object to being returned to Spain. The reporter thereafter reported that the reasons for this are linked to their father's behaviour, their fear of him and their fear that they will never be allowed to return to Scotland again. Further, their reasons go beyond simply an objection to being returned to their father's care. They both expressed unhappiness with (in James' case hatred of) their school in Spain to which they had been moved in September 2023. They objected to having been separated from their previous school friends. They disliked the fact that there was no ability to play football there, which they both enjoy. They had both struggled to make new friends. James also felt that outwith school hours he had more freedom in Scotland than in Spain. The fact that the weather would be better in Spain and there would be beaches and swimming pools available made no difference to his desire to remain in Scotland. There seemed to be little or no aspect of their lives in Spain that would persuade them to return.

[20] In relation to the question of parental influence, the reporter records that she did form the impression that the children knew quite a lot about the current litigation; however, focusing on their expressed view that they do not wish to return to Spain, that did, to the reporter, seem to be their own view. They were able to give reasons for that view, albeit the

reporter acknowledged that some of the reasons in relation to their father's behaviour were likely to be subject to challenge/denial. Specifically, the reporter observed that it might be difficult to see how a view as dramatically expressed as running away at the airport and throwing their passports in a bin at a time when they were in the care of their paternal grandmother as not one which was their own. I agree with that observation.

[21] Finally, the reporter addressed the question of whether the children appreciated that the purpose of a return to Spain would be to enable a Spanish Court make decisions about where their future should lie. The reporter explains that prior to her visit, she did not think that either child appreciated that return would be to allow a Spanish court to make decisions about their future. The reporter discusses, in relation to each child, each child's understanding of the process. The reporter concludes that following her explanation and discussions with the children, for both children the most immediate issue would be who they would be living with and where they would be going to school if they were back in Spain whilst proceedings were ongoing.

Submissions

For the petitioner

[22] Mr McAlpine lodged a written submission, which he adopted. There was no material difference in the relevant law relied upon by Mr McAlpine to that set out above.

[23] In relation to the question of whether the children objected to return, Mr McAlpine accepted that, standing the terms of the reporter's report, this question ought to be answered in the affirmative. Whilst the petitioner did not accept the views expressed by the children were genuinely their own, having been the subject of influence by the first respondent, these were matters to be considered at the 'discretion' stage. Again, standing the terms of the

reporter's report, Mr McAlpine accepted that both the children had attained an age and degree of maturity at which it is appropriate to take account of their views.

[24] In relation to the exercise of discretion, Mr McAlpine made reference to a number of productions and affidavits in making the following submissions relevant to the exercise of discretion: (i) the first objective of the Convention is the speedy return of the children to the country of their habitual residence and where, as here, little time had elapsed since the wrongful retention, that objective ought to be afforded substantial weight, (ii) whilst the approach to the evidence as set out in *D v. D* 2002 SC 33 applied, that did not, in this case, preclude the court making findings on the basis of the affidavits and productions lodged, (iii) from the terms of the reporter's report it was clear that the children had been exposed to inappropriate information, from which it might be inferred that the children's views had been influenced, (iv) the evidence before the court in connection with the children's objections is not at a level that should give rise to the court exercising its discretion to refuse return, (v) beyond this, there were significant welfare concerns in connection with the children's continuing "chaotic" residence in Scotland, especially when compared to the settled and stable life they enjoyed in Spain and (vi) the existence of the Spanish order of January 2023 was particularly relevant and, irrespective of the dispute of whether the respondent had been served with the Spanish proceedings, this court should respect the Spanish order and return the children.

For the first respondent

[25] Ms Trainer, for the first respondent, lodged a written submission, which she also adopted. Ms Trainer relied upon the law consistent with that set out above. Ms Trainer conceded that the children were habitually resident in Spain and that the petitioner was

exercising rights of custody, both at the material time. Accordingly, Ms Trainer accepted that the required elements of Article 3 were satisfied and, unless one of the defences set out in Article 13 applied, the Court was bound to return the children. The defence advanced in this case was the children's objection to being returned. If the Court was satisfied that the "gateway" requirements of (i) objection and (ii) the child having attained an age and degree of maturity at which it is appropriate to take account of their views, the Court should exercise its discretion and refuse to order return.

[26] Under reference to the reporter's report, Ms Trainer submitted that the court could be satisfied that (a) both children objected to being returned to Spain and (b) both had attained an age and degree of maturity at which it is appropriate to take account of their views.

[27] Turning to the question of discretion, Ms Trainer submitted that, when the following factors were appropriately weighed in the balance, the Court should refuse to order return, namely: (1) the strength of the children's objection, as particularly evidenced by (a) Charles' presentation, (b) the children's sustained and consistent expression of objection and (c) the actions of the children at the airport (in particular, the court should dismiss any suggestion that these were not genuine expressions of objection by children), (2) the narrated incidents of behaviour of the petitioner, particularly his drinking, leaving the children unaccompanied in the house, his anger exhibited towards the children and the frequent leaving the children with their grandparents and (3) that the children were settled and obviously happy in their new environment, including at school, at home and with friends.

[28] In relation to the Spanish court action and the orders obtained by the petitioner, Ms Trainer submitted that the order appeared to have been obtained without the knowledge of the first respondent and due to misrepresentations by the petitioner. The first

respondent's affidavit confirms her lack of knowledge, which is supported by her mother's affidavit. The translation of the Spanish court order lodged at 7/3 of process, page 3, records that the whereabouts of the first respondent were unknown to the Spanish Court, despite the petitioner knowing where the first respondent was living throughout the relevant period. The document lodged by the petitioner at 6/57 of process provided no confirmation of service. No formal confirmation of service of the Spanish court proceedings had been lodged by the petitioner.

[29] Ms Trainer also emphasised that the children's behaviour at the airport was not instigated by the first respondent. Notwithstanding Lord Malcolm's statement to effect that the focus is not on the moral blameworthiness of the abducting parent, nor on notions of deterrence, this was not a case where any such moral blameworthiness could legitimately be made out and any policy of "deterrence" did not properly apply.

Decision and reasons

[30] As noted above, standing the concessions on behalf of the first respondent (i) that on 19 December 2023 Charles and James were habitually resident in Spain, (ii) that the petitioner has custody rights in respect of Charles and James under the law of Spain and (iii) that on 19 December 2023, the petitioner was exercising those rights, it follows, under reference to Article 3, that Charles and James are being wrongfully retained in Scotland and, accordingly, in accordance with the terms of Article 12, subject to the provisions of Article 13, this court should order the return of Charles and James to Spain forthwith.

[31] The first respondent argues that, in accordance with Article 13, Charles and James object to being returned and, accordingly, I should refuse to order return.

[32] Subject to the petitioner's assertion of influence of the children to which I will return, on the basis of the evidence before me I accept that (i) both Charles and James object to being returned to Spain and (ii) both are of an age and maturity at which it is appropriate to take account of their respective views.

[33] The question therefore becomes whether, on the basis of the evidence before me, I consider it appropriate, in the circumstances of each child, to refuse to order Charles and James' return to Spain. In answering that question, in accordance with the authorities cited above, I take into consideration the nature and strength of the child's objections, the extent to which they are authentically their own or the product of the influence of the respondent, the extent to which the objections coincide or are at odds with other considerations that are relevant to the children's welfare and wellbeing, as well as the general Convention considerations. For completeness, neither party suggested that the children should be separated from each other.

[34] I was referred, by way of affidavit and productions, to a considerable amount of material. Whilst I have not narrated the evidence contained in these affidavits and productions *ad longum*, in reaching my decision, I have had regard to all of this material, including the Spanish Ministry of Justice Request for Return lodged at 6/2 of process. Having considered the material before me, remaining mindful of the directions of more senior courts about how I must approach that material, and the submissions of counsel, I refuse to make an order to return either Charles or James to Spain.

[35] Both counsel attacked the credibility and reliability of the other party, submitting that I should be cautious about accepting what certain parts of the other party's affidavits narrated. For the petitioner, Mr McAlpine submitted that on all material points the affidavits of the petitioner were corroborated, or at least supported, by other affidavits and

productions. For the first respondent, Ms Trainer submitted that the petitioner had presented his case in a way that he deemed would suit his position rather than providing the court with a full and accurate account to allow the court to make a decision in the best interests of the children.

[36] I have considered all of the affidavits carefully. Some matters covered in them are more material than others to the decision before this court, for example those relevant to the reasons for the children's objection to return and to the position of the children in Scotland and Spain from a broader welfare perspective. In relation to such material matters, as was authoritatively stated in *D v. D* 2002 SC 33, where there are contradictions between affidavits, and no other evidence to support a conclusion one way or another, no conclusion should be drawn; and I proceed on this basis. There are a number of material matters where there are contradictors between the parties and I address these first.

[37] The first of the material matters over which there is dispute is whether the petitioner has driven after drinking alcohol as reported by the children. The petitioner denies the allegation. The affidavits of William Halliday, Kristoffer Taft and the petitioner's father do not address the issue. The affidavit of the petitioner's mother states that, to her knowledge, the petitioner has never driven under the influence of alcohol. The petitioner also relies upon 6/56 of process, together with the affidavit from the Spanish lawyer Mariano Gomez, which Mr McAlpine submits show that the petitioner has 14 out of a maximum of 15 points on his licence. Mr McAlpine also submits that no independent evidence has been lodged in support of the allegation. The first respondent states that the petitioner was arrested for drink-driving on three occasions and received two bans, one of which was for refusing to give a breath specimen. The first respondent's sister refers to her own awareness of the petitioner being caught drink driving on two occasions.

[38] In relation to 6/56 of process, together with the affidavit from the Spanish lawyer Mariano Gomez, whilst these might establish the current status of the petitioner's licence, they might not reflect the historical position. The inference I draw from Mr Gomez's affidavit and 6/56 of process is that the Spanish driving licence system operates on the basis of deduction of points for offences, thus the positive statement that the petitioner has the maximum number of points (albeit Mariano Gomez is not correct about this, the petitioner having 14 of a maximum of 15) and, like the UK system, points deductions (additions in the UK) will be time limited, thus a person can recover their position over time. If that is correct, and that is the inference I draw from the material before me, then any previous arrest and its consequences might not be apparent from a licence, so again might not shed light on the contradictions between the parties' respective positions. Further, it strikes me that the comments from the first respondent and her sister, even if correct, are not time specified and are likely to be historical. In terms of previous arrest, Mariano Gomez's affidavit is qualified by reference to information he has but the extent of that information is not explained. To that extent none of the above facts appear to bear directly on the actual experiences reported by the children. If matters ended there, I might consider that I was in the territory of *D* v *D*. However, I also have the position of the children as clearly expressed to the reporter. No reason has been put before me to disregard what the children said to the reporter about their father's drinking, for which specific instances are referred to; for example because, it might be suggested, the children have either been fundamentally mistaken or for some reason have lied to the reporter. As I have already said, the reporter is very experienced, she had the parties' pleadings and most of the affidavits, she was well aware of the issue of the petitioner driving whilst under the influence of alcohol. Had the reporter had any concerns regarding the veracity of what the children had told her of such

matters, I would have expected the reporter to raise these as being relevant to the children's objections. In these circumstances, I accept that the children have direct experience of their father driving the car whilst under the influence of alcohol, including when they have been in the car.

[39] The second matter over which there is dispute between the parties relates to whether the first respondent assaulted the petitioner with a baseball bat and the consequences thereof. The first respondent states that whilst the court might have made a ruling about the alleged assault she did not assault the petitioner with a baseball bat. Mr McAlpine submitted, under reference to 6/52 and 6/54 of process and the affidavit of Mariano Gomez, that the first respondent's position was unsustainable and that this reflected adversely on her credibility and reliability. Mr McAlpine also submitted that the evidence demonstrated that the first respondent is a violent person and that given her behaviour the first respondent has had limited contact with the children since December 2021. I accept Mr McAlpine's submission that the first respondent's position in relation to the assault in December 2021 is contradicted by the productions and affidavit referred to and that this does reflect adversely on the first respondent's credibility and reliability. I do not accept that it demonstrates that the first respondent is a violent person. It does demonstrate that the first respondent committed a violent act on that day. However, the circumstances appear unclear and there is a suggestion that the parties' relationship was difficult at this time. I note that the first respondent's sister states in her affidavit that she thought the argument started as a result of the petitioner "sleeping with their neighbour". I also note that 6/52 of process records that the first respondent had no previous convictions and there is no independent evidence before me to suggest any similar, subsequent behaviour. In relation to the asserted causative link between the first respondent's behaviour and limited

contact with the children, I address this element of the submission next. Thus, while I accept that the recorded events of December 2021 did take place, I also consider that they have little bearing on the issues before me.

[40] The third matter over which there is a dispute is the extent to which the first respondent had contact with the children following her moving out of the family home in January 2022 and thereafter following her return to Scotland. Ms Trainer submitted that at the outset of the proceedings, the petitioner sought to underplay the nature of the first respondent's relationship with the children and that position only changed when the first respondent lodged productions demonstrating that the petitioner's position was not correct. Ms Trainer made reference to 7/6 to 7/45 of process, being photographs of the first respondent with the children on various occasions and flight information for the first respondent's flights between Spain and Scotland. I accept that the petition and petitioner's first affidavit in relation to the first respondent's interaction with the children are inconsistent with productions lodged and the affidavits of the first respondent's mother and sister and that this reflects adversely on the petitioner's credibility and reliability. I also note that the third aspect of the petitioner's submission in connection with the first respondent's conviction, namely the asserted causative link between the first respondent's behaviour and limited contact with the children, is significantly undermined by his inaccurate presentation of the extent of contact.

[41] A similar concern also arises in relation to the petitioner's credibility and reliability from the apparent absence of knowledge on the part of the first respondent of the Spanish court proceedings. I will address the relevance of the Spanish Court orders to the question of return below. The position of the first respondent, supported by her mother, is that she did not receive intimation of the Spanish proceedings. Further, the translation of the

Spanish Court order lodged at 7/3 of process, page 3, records that the whereabouts of the first respondent were unknown to the Spanish Court. That, according to Joaquin Delgado, another Spanish lawyer, means the court was advised by the petitioner that the first respondent's address was unknown. That would appear to be the case when the evidence suggests the petitioner clearly knew where the first respondent was living throughout the relevant period. This also appears to me to be consistent with, as Ms Trainer put it, the petitioner presenting his case in a way that he deems would suit his position rather than providing the court with a full and accurate account to allow the court to make a decision in the best interests of the children and again reflects adversely on his credibility and reliability.

[42] In relation to the petitioner's submission regarding parental influence of the children's views, as the reporter acknowledges, assessing the extent to which children's views are independent of parental influence is not straightforward as there will always be some degree of influence – positive or negative, express or implied. Mr McAlpine submits that, on the basis of the reporter's report, it is clear that the children have been exposed to inappropriate information or discussion, citing a number of examples. I do not accept that submission. In the first instance, the reporter is extremely experienced, was, and is, well aware of the importance of influence in Hague Convention cases, she had copies of the petition (as adjusted) and the petitioner's second affidavit, both of which put parental influence in issue and she was expressly asked to report on whether, and if so, to what extent, the children's views are independent of parental influence. The reporter was well aware of the examples cited by Mr McAlpine. Indeed the examples cited by Mr McAlpine appear to emanate from the reporter's report. Against that background, I have no doubt that the reporter will have approached the issue of influence with great care and that her

experience will have equipped her to do so astutely. Having done so, the reporter concluded that "focusing on their expressed view that they do not wish to return to Spain, that does seem to me to be their own view." In addition, the matters raised and relied upon by the petitioner to imply influence do not correlate to the reasons the children give for their objection to return. Thus, even if, as the petitioner puts it "the children have been exposed to information", I do not consider that that exposure has influenced the children's stated reasons for objecting to return.

[43] In terms of the nature of the children's respective objections, the reporter explored these in detail with each child and I have set these out above at some length. I will not repeat these in detail. The focus of both children's objection lie in their father's treatment of them, their father's leaving them unaccompanied in the house, their own experience of their father's drinking and driving, their being left with their paternal grandparents for significant periods and their unhappiness at school. The reporter records that Charles "was certainly expressing fear of a return to his father's care." Conversely, in Scotland, the children articulated a better relationship with their mother and enjoying and having more friends at school.

[44] In terms of the strength of the children's respective objection, again, this was comprehensively explored by the reporter and, again, I will not reiterate in detail what I set out above. The reporter's report is striking in respect of her concern for Charles' wellbeing from his presentation during her discussions with him. Charles reported self-harming as a consequence of thoughts about possible return. When asked by the reporter if Charles felt it important that the judge knew anything in particular, Charles said "I really, really, really, really, really, really don't want to go back" and wanted the reporter to write in the report in capitals "I REALLY DON'T WANT TO GO BACK TO SPAIN". From the above I infer

significant strength of objection on Charles' part and also a significant degree of concern for his welfare should he be returned. The reporter's report suggests that James was less forceful in the strength of his objection, albeit I note that James told the reporter that he "hated" his new school in Spain.

[45] In terms of the petitioner's submission in relation to the nature and strength of the children's objection to return, I was left with the conclusion that the petitioner sought to belittle the nature and strength of the objection, failing to properly address the substantive elements. The petitioner, in his own submission, made reference to the children's own 'lived experience'. That, of course, is the only one they have and, whilst I would accept that there ought to be a degree of objectivity on the part of the court reaching a judgment about the factors relevant to the exercise of its discretion in relation to orders for return, in considering the nature and strength of a child's objection, just as with a proper assessment of grave risk under Article 13(b), the subjective, lived experience of the child is also relevant. It is on the basis of the child's lived experience that the child chooses to object or not. Drawing the above together, I accept that the children have identified reasonable and rational reasons for their respective objections to return and that in James' case his objection is strong and in Charles' case his objection is very strong.

[46] Turning to the broader considerations regarding the children's education, home environment and general welfare and wellbeing, both in Spain and in Scotland, subject to what I have said elsewhere, and in particular in relation to the matters raised by the children as underpinning their objections to return, which I accept, I accept much of what is said by and on behalf of the petitioner about the general suitability or adequacy of the children's accommodation and school, their involvement in extra-curricular activities and, to a lesser extent, the stability of their lives in Spain. The first respondent accepted that there were

good times in Spain. The children do not paint a picture of a wholly unsuitable life in Spain. The children's respective objections are made under reference to a number of specific reasons as discussed above. In the absence of these objections it is not suggested that there is something unsuitable or inadequate such that the children could not or should not be in Spain. Beyond the petitioner's own affidavits, the affidavits lodged on his behalf are of little material assistance. They confirm what the first respondent accepts as good times and the practical arrangements in Spain but do not materially address the relevant issue before me, not least the children's objections.

[47] In relation to the children's school in Spain, Mr McAlpine made reference to 6/17 of process, a letter from the Costa Blanca International College dated 14 February 2024. The letter appears to have been prepared by the principal of the college in contemplation of lodging in these proceedings and is, in part, reliant on misleading information provided by the petitioner. For example in the first bullet point it records that the children are going to Scotland to visit their grandparents and fails to mention their mother and that the children did not return as a result of a decision taken unilaterally by the mother, which is inconsistent with the evidence before me that I accept. It might be said that in informing the college as he has, this is another example of the petitioner presenting his case in a way he might deem best suits his needs. The second bullet point, which suggests that the children have adapted and have made friends within their respective classes is at odds with what the children told the reporter, who reports that the children do not like the school, have made few friends there but had kept their feelings about this to themselves. Thereafter the letter states that the petitioner has engaged well with the school. It is not, so far as I understand the submissions, suggested that the petitioner does not engage with the children's school.

[48] In relation to the children's school in Scotland, the first respondent had also lodged email productions from the children's current schools, 7/4 and 7/5 of process, one for each child. These similarly report that the children have settled well, made friends and that the first respondent is engaging well with the school. The emails also record that the children have reported to their teachers the reasons for their objections to returning the Spain.

[49] On the basis of the evidence before me it would appear that the children's schools in both Spain and Scotland are able to provide the children with a suitable learning environment and that the parties are engaging appropriately with the schools. The difference between the schools appears to the children's experience of the schools. They both dislike the college in Spain and appear to have been significantly unhappy, making few friends, whereas in Scotland they appear to be happy and have made more friends, all as set out by the reporter.

[50] Beyond school, Mr McAlpine made reference to a number of productions, including photographs, showing that the children were involved in football and golf clubs in Spain and enjoying other activities. I accept these at face value and, as noted above, it is not disputed by the first respondent that there will be good times in Spain. However, they portray only a few moments in time and do not speak meaningfully to the reasons the children object to being returned to Spain. Accordingly, I find they have limited relevance.

[51] Turning to the petitioner's submission regarding the first respondent's "chaotic" lifestyle in Scotland, the submission appears predicated on a number of factors. One factor is the first respondent's 'history of abusing drugs and alcohol' in support of which reference is made to various affidavits and 6/55 of process. In relation to the affidavits, insofar as they reference the first respondent's drinking alcohol and drug taking, they appear to me to relate to a period some time ago and relate to different circumstances where it appears the parties'

relationship was under strain. In relation to the messages lodged at 6/55 of process, I note what these state but also note that the messages are from June 2019. That is two and half years before the parties separated and nearly five years ago from today's date. In the absence of more current evidence it is difficult to see its relevance to a consideration of the life style the children have in Scotland today.

[52] I also note that there is no suggestion of concern arising from the first respondent's behaviour from the limited social work records lodged in process (7/46 of process) or the emails from the children's schools (7/4 and 7/5 of process).

[53] In terms of accommodation in Scotland, although there appeared to be some confusion about where the first respondent and children resided, Ms Trainer confirmed, under reference to 7/46 of process, that the first respondent sought assistance from the local authority with housing and that she was now on a list for allocation of accommodation for herself and the children only. Ms Trainer also confirmed that on occasion the first respondent would stay over at her partner's house together with the children.

[54] Thus, in relation to broader considerations regarding the children's education, home environment and general welfare and wellbeing, whilst, subject to what the children report to the reporter as discussed above, I accept that the evidence suggests there are positive elements to the children's general welfare in Spain but I reject the submission that the evidence suggests that the children's life style in Scotland is chaotic. On my assessment of the evidence before me, I find that the children's welfare and wellbeing are appropriately well served in Scotland.

[55] That brings me to the Spanish order of January 2023. Mr McAlpine submitted that the order was particularly relevant and, irrespective of the dispute of whether the respondent had been served with the Spanish proceedings, this court should, as a matter of

comity, respect the Spanish order and return the children. As I have said before, in *W* v *A* the Inner House considered submissions regarding the emphasis that ought to be placed on an order of the court of habitual residence in favour of the party seeking return. In response to those submissions, at paragraph [10], the Inner House stated:

> "The important point is that the Lord Ordinary required to carry out his own assessment on the evidence before him, not simply enforce the Polish judgment. It was an important part of the background circumstances, but not at the expense of other material considerations."

[56] Further, I acknowledge (i) that the Convention requires the swift return of children to the jurisdiction of their habitual residence as being recognised, in the first instance, as the proper place to make long terms decisions about their welfare, including residence, (ii) that the Convention is born out of a comity between the contracting states and a mutual respect for one another's judicial processes and (iii) that the Convention acts as a deterrence against abduction in the first place. Standing the relatively short period the children have been out of Spain, these factors, Mr McAlpine submitted, ought to be given substantial weight. I accept the relevance of these considerations and I do weigh them in the balance, acknowledging the shortness of time that the children have been out of Spain and that the petitioner appears to have acted swiftly in reliance of the Convention in seeking return. It is, however, also important to recognise, as Lady Hale made clear at paragraph 44 of *In re M*:

> "As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose 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."

[57] At paragraph 43 Lady Hale rejected the proposition that Convention objectives "should always be given more weight than the other considerations. Sometimes they should

and sometimes they should not." And at paragraph 48 her Ladyship noted that "The Convention itself contains a simple, sensible and carefully thought out balance between various considerations." In addition, in *W* v *A*, at para [9] (cited above), Lord Malcolm stated that:

> "A child centric approach is required, with her interests and general welfare at the forefront. The focus is not on the moral blameworthiness of the abducting parent, nor on notions of deterrence."

In light of these dicta, it seems to me axiomatic that if a child-centric approach with the child's interest and general welfare at the forefront suggests that the child should not be returned, the "Convention considerations", including this court's approach to the order of the Spanish court, must yield. It is also relevant, as Ms Trainer re-emphasised at the close of her submission, in this case, and I find as a matter of fact that this is correct, it was not the first respondent who initiated the retention of the children in Scotland. That was at the instigation of the children, with the first respondent reacting accordingly. Accordingly, irrespective of Lord Malcolm's emphasis, issues of moral blameworthiness and notions of deterrence did not arise. I accept that submission.

[58] Drawing all of the above together and considering the factors relevant to this particular case, including the nature and strength of the children's objections, the extent to which those objections are authentically the children's own objections or the product of the influence of the first respondent, the broader considerations regarding the children's education, home environment and their general welfare and the general Convention considerations, taking, as I am required to do so, a child-centric approach, with the children's interests and general welfare at the forefront, in light of the evidence before me, I refuse to make an order for return of the children.