EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 24
P1161/23

Lord Malcolm
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LADY WISE

in the Petition

by

TS

Petitioner/Reclaimer

against

S

Respondent

Petitioner: Clark, Trainer; BCKM Solicitors
Respondent: McAlpine, Donnachie; BTO LLP

2 August 2024

Introduction

[1] On 25 June 2024 we heard and refused a reclaiming motion (appeal) by the petitioner against a decision refusing to order the return to Chechnya, Russia, of a child retained in Scotland by her father. This opinion sets out the reasons for that decision.

[2] The case involves a child referred to as Cristina by the Lord Ordinary in her opinion - [2024] CSOH 40. Cristina is now 8 years and 5 months old. Her mother, the petitioner, is a

national of Kazakhstan and her father, the respondent, is a British national. Cristina is also a British national but has a visa which would entitle her to live in Russia.

[3] There was no dispute at first instance that Cristina was habitually resident in Russia on 28 August 2023 when she was retained wrongfully in Scotland by her father. The mother had been exercising rights of custody under the law of Russia and so, absent any defence under Article 13 of the 1980 Hague Convention Cristina would require to be returned to Russia. The father advanced two cases before the Lord Ordinary; first, that Cristina's return to Russia would expose her to physical and psychological harm or otherwise place her in an intolerable situation and secondly, that the child objected to such a return.

[4] On 4 April 2024 the Lord Ordinary rejected the "grave risk" defence but accepted that the child had objected to a return, that she was old and mature enough to do so and decided that, in the exercise of discretion, the petition seeking an order for her return to Russia should be refused. On appeal, only the objection defence and the Lord Ordinary's decision in relation to it, remained live.

Circumstances of the case

[5] The background circumstances are set out in the Lord Ordinary's opinion. In essence, the parties lived together in family with Cristina in Sakhalin Island, Russia, until October 2020. Sakhalin Island lies just north of Japan near to the east coast of the Russian mainland. The couple were divorced on 8 October 2020 by a court in Sakhalin Province. A court order was made determining that Cristina should reside with her mother at that time. The father was to have care of Cristina for certain periods each week, every second weekend and for three weeks holiday each year either within Russia or beyond.

[6] The petitioner remarried in 2021 to a man referred to by the Lord Ordinary as ZSA. On 18 September that year she left Sakhalin Island and went to Kazakhstan where she stayed briefly until moving to Grozny, Chechnya. In late summer 2022 she returned to Kazakhstan but was living in Grozny again from mid-January 2023. Cristina had not attended school in Russia until she was enrolled in a school in Grozny in January 2023. She had attended an international school in Kazakhstan for a few months prior to that. Grozny is situated some 6,000 miles west of Sakhalin Island.

[7] The father remained in Sakhalin Island until August 2023 when he brought Cristina to Scotland for a holiday period with the mother's consent. On 4 September 2023 he informed the petitioner that Cristina would not be returning to Russia. Cristina has lived with her father in Scotland since August 2023. The respondent has not returned to work in Russia to date.

[8] By the time of the hearing before the Lord Ordinary the petitioner was pregnant with ZSA's child. Shortly before the hearing of the reclaiming motion, the petitioner had returned to Kazakhstan where she gave birth to a daughter. We were told that her intention was to return to Chechnya in the near future.

The applicable law

[9] It was conceded that the retention of Cristina in Scotland was wrongful in terms of Article 3 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, incorporated into law throughout the UK by the Child Abduction Custody Act 1985. Article 12 provides that where the child has been present in the new jurisdiction for less than one year a return to the state of habitual residence forthwith will be ordered. Possible exceptions to that rule are provided in Article 13 which provides:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -
>
> a) …
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age 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."

Authorities on objection cases

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

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

And at paragraph 48, having considered the policy behind the other limited defences to a return, Baroness Hale concluded:

> "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 and where appropriate remedying international child abduction. Further elaboration with additional tests and checklists is not required."

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

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

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

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

[12] There are many examples of cases involving the child's objection defence; most are first instance decisions that are fact dependent and of minimal assistance in an appeal of this

sort. Two cases are worthy of note in the present case. First, a Court of Appeal decision, *In Re M (Children)* [2016] Fam 1. There, an appeal was allowed against a decision to return three children aged 13, 11 and 6 to Ireland. In relation to very young children, Black LJ stated (at paragraph 67):

> "67 Furthermore, it is now recognised that children as young as six can be of sufficient maturity to have their objections taken into account … The perspective of a six-year-old as to what is in his or her interests, short, medium and long term, will necessarily be very limited and the *In re T* approach would surely be a formidable obstacle to his or her objections being taken into account. The fact that a six-year-old may not be as able as an older child to understand and take account of all the material considerations is catered for at the discretion stage by the fact that (see *In re M* [2008] AC 1288, para 46) '[the] older the child, the greater the weight that her objections are likely to carry'".

Secondly, it is sometimes suggested that a child's objection should be given less weight if there is no evidence that the child appreciated that a return would be so that the courts of the state of habitual residence could determine the issues of residence/custody. In the case of *PH Petitioner*, [2014] CSOH 79, Lord Doherty rejected that contention and considered (at paragraphs 13-14) that what mattered were the clear and unambiguous views of the child in that case, which coincided with other considerations relevant to her welfare.

[13] On the circumstances in which an appellate court can interfere with a decision involving the exercise of discretion, the approach remains that summarised by Lord Fraser of Tullybelton in *G* v *G* 1985 1 WLR 647 as follows:

> "… it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as 'blatant error' … and words such as 'clearly wrong,' 'plainly wrong,' or simply 'wrong' used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible. The principle was stated in this House by my noble and learned friend Lord Scarman in *B* v *W (Wardship: Appeal)* [1979] 1 W.L.R. 1041,

where, after mentioning the course open to the Court of Appeal if it was minded to reverse or vary a custody order he said, at p.1055:

> 'But at the end of the day the court may not intervene unless it is satisfied either that the judge exercised his discretion upon a wrong principle or that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly.'"

The Lord Ordinary's decision

[14] The Lord Ordinary had available to her a recent report from an experienced child psychologist and expert witness, Dr Katherine Edward (number 18 of process). That report concluded that Cristina had the maturity to be expected of a child her age although her verbal and performance skills exceeded her chronological age by about two years. She was bilingual and performed well academically. Dr Edward found that Cristina's views were reasoned and age appropriate. The Lord Ordinary concluded (at paragraph 74) that Cristina was of an age and maturity such that it was appropriate to take account of those views. Her young age was not inconsistent with that conclusion but was said to be a factor to be taken into account. The Lord Ordinary exercised a discretion in terms of the usual approach to Article 13 before deciding whether or not to make an order for return.

[15] Although Cristina had not been asked whether she understood that if she were returned to Russia it would be with a view to a court there addressing the question of the parent with whom she should live, the Lord Ordinary did not regard that as a factor reducing the weight that should be given to her view (*PH Petitioner* [2014] CSOH 79). She weighed up the independent evidence which supported that Cristina was settled well in Scotland and balanced that against the policy or object of the Convention to deter parents from pre-empting results of a dispute between them and restoring a child to her home country so that any dispute could be determined there.

[16] Under reference to *W* v *A* the Lord Ordinary considered the moral blameworthiness of a parent to be of little assistance in the exercise of discretion. She accepted that the petitioner was not responsible for the delay in bringing the proceedings and that there were no serious welfare concerns in the event that the child was returned to Russia. On the other hand, Dr Edward had concluded that neither of Cristina's parents had influenced her view and that the child was motivated by her positive relationship with her father, something she felt she had from a very young age. Ultimately the Lord Ordinary determined that discretion should be exercised in favour of refusing to order a return and that neither the policies underline the Convention nor the petitioner's previous role as primary carer were sufficient to outweigh that.

Submissions for the reclaimer

[17] Counsel for the reclaimer accepted that the test to interfere with the exercise of a judge's discretion was an exacting one. However she contended that the Lord Ordinary was "plainly wrong" in her decision to refuse the return of Cristina to Russia. The Lord Ordinary had attached considerable weight to the child's objection as narrated by Dr Edward. Cristina had still been 7 years old at the time of that report albeit that she had attained the age of 8 on the date of the final hearing before the Lord Ordinary. It was noteworthy that the child had not identified any negative features of her life in Russia. While she had spoken positively about her life in Scotland, she had referred also to good memories of her life with her mother in Russia. Counsel queried whether Dr Edward had been correct to state (at paragraph 2.6 of her report) that Cristina had not seen her mother "for some months" by the time of interview. The petitioner had visited Scotland at the end of 2023, leaving on 1 December, and the child's views had been elicited on 31 January 2024.

On her return to Russia the petitioner had retained contact with Cristina through video on three to four occasions per week. In contrast the respondent had not facilitated video contact since the Lord Ordinary's decision other than on one occasion.

[18] It was submitted under reference to the *dictum* of Baroness Hale in the case of *In Re M* that the court must assess the nature and strength of the child's objection when exercising a discretion whether or not to make an order for return. The Lord Ordinary in this case had failed to do so. Had she addressed those issues, the Lord Ordinary would have observed that the nature of the objection in this case was narrow in focus and in scope. While Cristina had said that she wanted to live in Scotland with her father, she had expressed a desire to maintain meaningful contact with her mother. In the circumstances of the case that was a forlorn and unrealistic desire. It was acknowledged that following the decision of the Russian court the mother had taken the child a long distance away from her home in Sakhalin Island where her father then remained. However, the Russian court had made a determination as to the best interests of the child in 2020 following a thorough examination of evidence including a psychological analysis. At that time the court had found that Cristina's primary attachment was to her mother.

[19] Dr Edward's report did not permit a conclusion about where Cristina's primary attachment lay in 2024. It had not been within Dr Edward's remit to look at attachment, simply at the issue of the child's objection to being returned to Russia. There was no credible or reliable material to suggest that attachment had changed, simply that the child stated she was fond of her father. The child had been in the care of her father since August 2023, an appreciable period of time which no doubt underpinned what the child had said. It was acknowledged that the mother's moves to Kazakhstan and then to Chechnya had thwarted the contact ordered by the Russian court. The backdrop to this case had been

actings on both sides that interrupted the child's relationship with each of her parents at different times.

[20] Counsel submitted that the child's view amounted to no more than wanting to maintain a positive relationship with both parents. While she may have stated an objection to being returned to Russia, that had to be placed in context. Given that Cristina was clear that she wished to see her mother even if she did remain in Scotland, the petitioner's evidence should have informed the Lord Ordinary about the difficulties of travel given visa and economic restrictions. Those difficulties were exacerbated by the birth of the child with whom she had been pregnant at the date of the hearing. For those reasons the nature of the child's objection, which was to a return but coupled with a desire to continue to see her mother, could not be fulfilled and the Lord Ordinary had failed to assess that.

[21] While the child's objection had been clear and consistent that did not mean it had strength. The objection had been a modest one. In any event, when the Lord Ordinary came to exercise her discretion the broader welfare considerations should have led to a conclusion that Cristina should be returned to her mother's care. The correct approach would have been to give Cristina's objection relatively little weight and to look at the matter more broadly. There was some undisputed material supporting an absence of serious welfare concerns should Cristina be returned to the mother's care. In contrast, welfare concerns would arise on a refusal to return the child because she was being kept away from her mother who had been her primary carer until August 2023. Ms Clark accepted that individual facts required to be assessed in exercising a discretion and that it was not a tick box exercise. Nonetheless, it was a striking feature of this case that this was a very young child. There were themes emerging from the jurisprudence that included greater weight being given to older children. That was entirely absent in this case. Further, in other cases

the nature of the objections had often been emphatic when return was ultimately not ordered. Counsel had been unable to identify any case in which a singleton child of Cristina's age had successfully objected to a return under the 1980 Convention. A number of cases were cited to illustrate that point. Although it was accepted that Dr Edwards had found that Cristina's views were free of influence, a younger child might be more easily influenced than an older one.

[22] In accordance with this jurisdiction's domestic obligations, which now effectively include Article 12 of the United Nations Convention of the Rights of the Child, Cristina had been given the opportunity to state her views and had done so. Intellectual maturity did not equate with emotional maturity. Cristina's domestic experience of life until 2023 was a Russian life. She would identify as a Russian child. This case could be contrasted with that of *PH, petitioner* where the child had resided in Scotland until the age of 12. He had then lived in Norway, a country to which he objected to being returned "most strongly and unambiguously". In *W* v *A* a 10 year old child had expressed a clear reason for not liking Poland because the situation there was "mega crowded". This case was not analogous with those examples.

[23] In relation to the father's position, he had contended that he had medical difficulties that prevented his return to work and to Russia. However an email sent by his employer indicated that certainly in January 2024 a recovery within six months and a resumption of the services provided there was not ruled out. He had failed to show that there was a clear impediment to him returning to Russia with or without the child.

[24] The Lord Ordinary had not listed and analysed any factors other than Cristina's young age. While she had acknowledged that the mother had been the child's primary carer, she did not explain what weight she had attached to that and why she had done so.

There had been no assessment at all of the mother's relationship with the child. The Lord Ordinary's conclusion in paragraph 83 of her opinion illustrated the complete absence of consideration of the significance of the mother child relationship. It was accepted that a Lord Ordinary in a case of this sort was not engaged in making findings in fact, but was, it was submitted, required to undertake at least a broad analysis of relevant aspects of welfare. The focus of the decision was on the considerable weight attached to the child's objection but an explanation of how that was balanced against other factors was absent. The effect of the Lord Ordinary's decision was to cede jurisdiction in relation to the substantive welfare decisions about Cristina to the Scottish courts. This would place the reclaimer at a material disadvantage given that she has care of a recently born infant and would be litigating from afar. Given the length of these proceedings, habitual residence had "come and gone".

[25] If the Lord Ordinary had erred this court could look at the matter of new. In that event, it would have to be acknowledged that the child has now been present in this jurisdiction for almost a year rather than the six to seven months of residence when the Lord Ordinary heard the case. That said, if looking at matters at the current time, the birth of the child's half sibling was significant. The retention of Cristina in Scotland was depriving the newly born baby of kinship with her. That factor was not in existence when the Lord Ordinary had determined the case. While Cristina had now completed a full academic year in Scotland she had told Dr Edward that she was missing friends in Russia. The decision of the Russian court from 2020 was still relevant. The respondent had taken no steps to vary or enforce it despite the disruption of operation in contact that the petitioner's changes of residence had caused. There was material lodged to support the suitability of the education available to the child were she returned to Russia.

Submissions for the respondent

[26] Counsel for the respondent pointed out that it had been a matter of concession at first instance that Cristina had objected to being returned to Russia and that she had attained an age and stage of maturity which made it appropriate to take account of her views. Accordingly the Lord Ordinary had been engaged in the exercise of a discretion. This court could only interfere with that if that discretion had been exercised upon a wrong principle or was otherwise "plainly wrong". The arguments that had been presented by the reclaimer essentially went to the weight to be attached to various factors but it amounted to nothing more than a disagreement with the Lord Ordinary's conclusions.

[27] Reading the Lord Ordinary's opinion as a whole, it was evident that she had set out in some detail the background circumstances and the material upon which the exercise of the discretion was made. It was perfectly appropriate to attach significant weight to the reported conclusions of Dr Edward, whose views had support in the affidavit evidence from others including Cristina's current school teacher and a friend of the respondent whose evidence is referred to at paragraph 32 of the Lord Ordinary's opinion.

[28] There was no proper basis for suggesting that the objection of the child was not sufficiently strongly articulated. Dr Edward had described Cristina's objection as "clear and well-reasoned" (at paragraph 2.10). Section 3 of her report dealt thoroughly with the issue of whether there had been parental influence and found that there had not. Some of the extraneous factors mentioned by Dr Edward, such as Cristina's presentation and her being embedded and integrated into her school community in Scotland, fed into the strength of her objection. Regardless of the lack of specific reference to strength, it was reasonable to conclude that Cristina's objection to being returned to Russia was a strong one. The child had been drawing on her own lived experience which included having been taken

6,000 miles away from her father with whom she had a close relationship. It was abundantly clear from what she said to Dr Edward that she did not wish to be parted from him again in that way.

[29] Counsel enumerated 12 factors which the Lord Ordinary had taken into account in the exercise of her discretion and on which she was entitled so to rely. These included:

- the totality of Dr Edward's report;
- the nature of the child's objection;
- the child's age and maturity;
- the lack of any influence by the respondent in relation to the child's views;
- the circumstances in Russia prior to Cristina's departure from Scotland;
- Cristina's integration into life in Scotland and her happiness here;
- the other evidence relating to Cristina's current circumstances;
- the fact that Cristina had positive memories of Russia and that the petitioner had been her primary carer;
- Cristina's mention to Dr Edward of difficult times particularly during and after the parties separation and times apart from her father;
- the impact of the petitioner's own behaviour on the child including the petitioner speaking negatively about the respondent and the child not being confident that she would be permitted to see her father in the event that she returned to Russia;
- the lack of any serious welfare concerns for Cristina in Russia;
- Cristina being reported as having done well at each of the schools she attended when in the primary care of the petitioner.

[30] It was for the Lord Ordinary to balance all of these factors and attach such weight to them as she considered appropriate. Any issues of financial difficulties or visa problems for the mother had not been raised in any concrete way at first instance. The Lord Ordinary had not been dealing with welfare issues in relation to residence and contact. These would be dealt with if the litigation about those matters continues and substantive welfare decisions require to be made.

[31] It was not sufficient to overturn the decision at first instance that the Lord Ordinary had not made a list of all of the broader welfare considerations she took into account. She had made specific reference to the petitioner having been the child's primary carer (at paragraph 84). It had to be inferred that all of the material narrated in detail had been relied upon to some extent. Contrary to the submissions made on behalf of the petitioner, the respondent was not opposed to contact between mother and child. He had instructed a child psychologist with a view to addressing Cristina's current refusal to communicate with her mother. There had been very regular contact between Cristina and the petitioner in November 2023 during the mother's visit to the UK. She had returned to Scotland in March-April 2024 and had enjoyed contact with Cristina on six occasions. The petitioner's stated concern about the future of contact had no validity. In any event, the Lord Ordinary had been aware of the geographical issues in this case that would render future issues of contact complex.

[32] The petitioner had produced a number of first instance decisions and one appellate decision, as examples of the age of children whose objections had been successful. None of these was particularly relevant given the concession that the Lord Ordinary was engaged in the exercise of discretion. All such cases are extremely fact specific. The Lord Ordinary had set out the applicable principles appropriately and had dealt with them. Unlike the situation

in *W* v *A*, where the issue of the exercise of discretion had been before the Lord Ordinary but had been ignored, no such situation arose here. In the absence of any glaring error, the petitioner simply did not get to the point where this court could decide the matter of new.

[33] It could not be said that the Lord Ordinary had failed to adopt a child centric approach. By giving very considerable weight to Cristina's views that was exactly what had been done. It was not wrong to focus on the child and her objections in weighing up the various factors. As the Lord Ordinary had also attached weight to the policy of the Convention and the background of the mother having been the primary carer, her decision could not be faulted. If that was wrong and the court required to look at the matter of new, the same decision should in any event be reached. All of the factors relevant to the Lord Ordinary's decision were still relevant. In addition to those listed, it could be taken into account that the abduction was not planned and that there has now been a passage of time approaching a calendar year which meant that a swift return to Russia was no longer possible. While that was not the fault of the petitioner, it was a relevant fact. This court could also take into account that the mother is currently in hospital in Kazakhstan following the birth of her second child and so no immediate return to Russia could take place. The relatively young age of the child was again just a fact. This court would require to look at this particular child and her particular stage of maturity.

Decision

[34] The undisputed facts of this case illustrate that Cristina had not enjoyed a completely settled existence in one location prior to her retention in Scotland in August 2023. Some terms of the 2020 order of the Russian court had, by 2021, been departed from through the petitioner's move from Sakhalin Island to Kazakhstan and then to Chechnya. While the part

of the court's order providing that Cristina would live primarily with her mother was complied with, the regular and frequent contact between father and child ordered by the Russian court could no longer take place given the 6,000 mile distance. Further, when the Russian court looked at this matter in 2020 the petitioner had not become seriously involved with her current husband. Her remarriage and various moves between Kazakhstan and Chechnya were not anticipated. Accordingly, Cristina's life had been subject to significant changes in the period 2020-2023. The assessment of the child's primary attachment to the mother was, by August 2023, some three years out of date and is now almost four years old. To put it another way, Cristina was approximately half her current age when the Russian court order was made; its significance has been superseded by a number of important events in her life since then.

[35] As the child's ability to object to a return to Russia was accepted at first instance (and there was no attempt to withdraw that concession before us), the decision to be made by the Lord Ordinary was indisputably one for the exercise of her discretion. She required to take into account all of the available material and conduct a balancing exercise. While she did not list every relevant factor, it is clear from the detail in which Dr Edward's report and conclusion is analysed at paragraphs 74-84 of the opinion, that she attached considerable weight to the child's stated objection. As against that, the object of the Convention is specifically taken into account (paragraph 77) together with the petitioner's role as primary carer and broader welfare considerations in relation to Cristina's current life in Scotland.

[36] The focus of the argument advanced by counsel for the petitioner was based on there being a requirement to consider the nature and strength of the child's objection, something she contended that the Lord Ordinary had failed to do. However, we note that in the passage in the case of *In re M and another (Children) (Abduction: Rights of Custody)* [2008]

1 AC 1288, at paragraph 46, Baroness Hale states that "once the discretion comes into play the court **may** have to consider the nature and strength of the child's objections …" (emphasis added). Where a discretion is being exercised, it is for the first instance decision-maker to decide what features of the particular case before her are most influential. Accordingly, while there are many cases in which the emphatic nature of a child's stated objection may be highly relevant, in other cases other factors may be more important. What the Lord Ordinary required to do was to examine carefully the available report setting out the child's stated objection, the reasons for it and how those fitted with the other material relative to welfare considerations. Indisputably that is how she approached the matter in this case.

[37] For example, the Lord Ordinary considered it relevant that Cristina's views had been formed in a context where there had been a significant period during which she was deprived of regular contact with her father. This had clearly had an impact on the child who was not confident that she would see her father as much as she would like if she were returned to Russia. Cristina's views were said by Dr Edward to be grounded in reality and were described as "clear and consistent". We cannot accept that the absence of a reference to strength somehow undermines the impact of the views expressed. A clear and consistent view may be more powerful than those expressed vehemently but inconsistently. That was for the Lord Ordinary to consider in light of the circumstances of the case.

[38] Many of the authorities in cases of children's objections refer to greater weight being attached to the views of an older child. There may be good reason for that, as a matter of generality, although given the peculiarly fact specific nature of cases of this sort, we are not sure that such a general statement provides any real assistance. There are examples where the objections of relatively young children have been accepted for the purposes of Article 13

of the 1980 Convention - eg *In re M (Children)* [2016] Fam 1; *MP petitioners* [2023] CSOH 58 and *W* v *A* 2021 SLT 62. In our view, it does not detract from the impact of Cristina's objections that she was making those as a singleton child rather than within a group of siblings. Her intellectual ability is beyond her chronological age and her account to Dr Edward was well reasoned.

[39] Many of the submissions made to us, such as issues of attachment, the recent birth of the petitioner's child, the costs and practical difficulties of contact and so on, related to matters that would be more relevant to a substantive welfare determination. The exercise in which the Lord Ordinary was engaged was a decision about whether to accede to Cristina's stated objection to being returned to Russia as the state of habitual residence. In that context, we are not persuaded that her views ought to have been given "relatively little weight" as counsel maintained.

[40] In all the circumstances, in refusing the reclaiming motion we concluded that the Lord Ordinary's decision could not be characterised as "plainly wrong". Nothing in her opinion indicated that she had erred in the exercise of her discretion. The decision reached was reasonably available to her. Accordingly, there was no need for us to consider the matter of new. Had we done so, we would have had regard in particular to the passage of time. Cristina has been settled in Scotland for a full academic year now, longer than any period during which she was residing in Chechnya.

[41] Decisions of this sort are restricted to the question of whether a child should be returned to the state in which she was habitually resident at the time of the wrongful retention. Longer term decisions about Cristina's welfare, including the extent to which she should spend time with each parent, have yet to be determined. Self-evidently, it would be in her interests for those substantive welfare decisions to be taken without further delay.

The decision taken in this case to refuse an order for Cristina's return to Russia has no real bearing on that important matter. We hope that discussions about arrangements for Cristina's future care and for contact can now commence.