HOUSE OF LORDS SESSION 2006–07
[2006] UKHL 51

on appeal from [2006] EWCA Civ 830

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

In re D (a child)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
James Turner QC
Richard Harrison
(Instructed by Garson & Co)

Respondents:
Henry Setright QC
Marcus Scott-Manderson
(Instructed by Russell-Cooke)

Intervener
Charles Howard QC and Teertha Gupta
(Instructed by Dawson Cornwell)

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree that, for the reasons she gives, this appeal should be allowed.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the privilege of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree with it, and for the reasons she gives I would allow the appeal. I wish to add only a few comments of my own to what she has said. I do so in view of the importance of the matters that were raised with us in the course of the debate.

3. The question at the heart of this case is, and has always been, whether the father had rights of custody within the meaning of article 5 of the Hague Convention which were breached by the mother when she removed the child to England from Romania in December 2002. In that respect it is no different from all the other cases where the Convention has been invoked to protect children from the harmful effects of their wrongful removal and to ensure their prompt return to the state of their habitual residence.

4. But if the child were to be returned now, almost four years after his arrival in this country, his return would be anything but prompt. The delays that the procedures adopted in this case have given rise to have exceeded by far anything that the framers of the Convention appear to have contemplated. They are so extreme that it is impossible to believe that the child's best interests would be served by his return forthwith to Romania, as article 12 would require if his removal from Romania were to be held to have been wrongful. As the preamble to the Convention indicates, its purpose is to protect children from the harmful effects of their wrongful removal. The assumption on which the remedy of prompt return proceeds is that the state to which the child will be returned is the state of his habitual residence. Through no fault of his own, the child whose return is being sought in this case has now been settled for so long in this country that this assumption is scarcely tenable.

5. Delay does not, in itself, excuse compliance with the Convention. Courts must do the best they can to give effect to it, so long as its provisions have not become completely unworkable. The lesson of this case is that every effort must be made to avoid such delays. If there is a dispute as to whether the removal was wrongful it should be dealt with summarily. A balance must, of course, be struck between acting on too little information and the search for too much. A court cannot make a finding that the child's removal was wrongful unless it is provided with a basis for doing so. But if it is to deal with the case summarily the court must not seek perfection. It has to do the best it can on the information that has been made available, as Butler-Sloss LJ indicated in *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, 658A.

6. Article 15 of the Convention contemplates that the court may need to be provided with a determination from the authorities of the state of the child's habitual residence that the removal was wrongful. So a judge is not to be criticised if he decides to use this procedure because he cannot responsibly resolve the issue on the information provided by the applicant. Nevertheless if he decides on this course delay will be inevitable. Great care must therefore be taken, in the child's best interests, to keep this to the absolute minimum. The misfortunes that have beset this case show that, once the court has received the response, it should strive to treat the information which it receives as determinative.

7. Of course it is for the court to which the application is made, not the authorities of the requesting state, to decide whether the removal was

wrongful within the meaning of article 3. The court must apply its own view of the Convention as best it can in the light of what it knows. No doubt there will be situations where the court feels that there may still be room for argument as to what the article 15 determination amounts to. But, as my noble and learned friend Lord Brown of Eaton-under-Heywood makes clear it must resist calls for further evidence. The further delay that this would cause is incompatible with the objects of the Convention. Detailed scrutiny of the child's welfare must be left for later. That is a matter for the state of his habitual residence. Speed is of the essence if the child is to be returned promptly to that state. The court must take this into account when considering whether enough information as to whether the removal was wrongful is available, and whether the information that it has is reliable.

8. In this case the response that was received from Romania was sufficient to show that the child's removal was not wrongful within the meaning of article 3. On 9 June 2005 the final Court of Appeal of Bucharest, upholding the court of first appeal, stated in the clearest terms that, under the law as it then stood in Romania, termination of marriage through divorce brings joint custody to an end, that cases where the agreement of the parties is required about a measure which the parent with custody proposes are limited, and that none of the rights that the father had been granted on divorce gave him a right of veto or to decide the child's place of residence. It is wholly understandable that the father should feel aggrieved by what has happened in this case. The effect on his ability to exercise his rights of access is plain to see. But the phrase "rights of custody" has been given a particular definition by the Convention. It is only if there has been a breach of rights of custody as so defined that the removal can be described as wrongful for its purposes. The information provided by the Romanian court shows that, as the law stood at the time of the child's removal, the father had no such rights.

9. The absence of a right of veto is, then, decisive in this case. Had there been a right of veto the result might perhaps have been different, despite the delay. It has come to be appreciated in most, but not all, contracting states that for the Convention's purposes a right to grant or withhold consent to the child's removal from the state where he resides is a right of custody. Article 5 states that for the purposes of the Convention "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence. To understand what this means reference must be made to article 3, where the words "rights of custody" are used to define the circumstances in which the removal or retention of a child

is to be considered wrongful – "wrongful" because the Convention proceeds on the assumption that welfare issues are best dealt with in the state where the child is habitually resident.

10. The key to what the phrase means lies in these facts. The Convention is an agreement between states. It seeks to address the problems that arise where a child is moved across international borders. It does not concern itself with disputes about the exercise of custody or access rights within the country of the child's habitual residence. The right to determine the child's place of residence has to be seen in that context. The word "place" in the phrase "the child's place of residence" must be taken, for Convention purposes, to include the country of the child's residence. A right to object to the child's removal to another country is as much a right of custody, for those purposes, as a right to determine where the child is to live within the country of its residence.

11. The phrase "rights of access" is also defined for the purposes of the Convention by article 5. But it is important not to treat this definition as limiting the rights that are included within the expression "rights of custody". There is no doubt that a right to determine the place of the child's residence will be helpful to the parent who wishes to exercise the right to take the child for a limited period of time to a place other than the child's habitual residence. Time and distance matter to parents who lead busy lives, and the place of the child's habitual residence may have a very real bearing on how often, or for how long, it is practicable for a right of access to be exercised. But the fact that a right to determine the place of the child's residence may be helpful to the parent who seeks access is not a reason for treating the right to determine where the child resides as something other than a right of custody for Convention purposes. They are not mutually exclusive rights. The Convention provides different remedies where rights of custody and rights of access have been breached. The nature and purpose of those remedies helps to show why, when it comes to removal or retention across international borders, the right to determine the place of the child's residence is treated as a right of custody.

12. This was not Professor A E Anton's view. Writing shortly after the Convention was entered into, he said that the definition of "rights of custody" in article 5 suggests that the breach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of rights of custody in the sense of article 3: "The Hague Convention on International Child Abduction" (1981) 30 ICLQ 537, 546. He referred to the fact that a suggestion that the

definition of "abduction" should be widened to cover this case was not pursued. The suggestion was made by a member of the Canadian delegation during the final diplomatic conference on the Convention in October 1980: see footnote 16 to the judgment in *Furnes v Reeves* 362 F.3d 702 (11th Circ 2004), quoting from Linda Silberman, "Patching up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA" (2003) 38 Tex Int LJ 41, 46, n 34. It was in these terms:

> "Custody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent. If the mother nevertheless leaves the jurisdiction without such consent, that constitutes wrongful removal."

The fact that this suggestion was not pursued was taken by Professor Anton to indicate that, as the definition stood, taking the child out of the jurisdiction in those circumstances would not have been wrongful for the Convention's purposes.

13. Professor Anton was very well placed to comment on this issue, and his comments were noted by the Supreme Court of Canada in *DS v VW* [1996] 2 SCR 108 in support of its opinion that to hold otherwise would confuse the concepts of custody rights with access rights; see also *Thomson v Thomson* [1994] 3 SCR 551. But the view which Professor Anton expressed was his own view, as he was careful to point out in a footnote at the beginning of his article. It was not shared by the Court of Appeal in *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654. Referring to the phrase "the right to determine the place of the child's residence, Lord Donaldson of Lymington MR said at pp 663H-664B:

> "If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the Convention. I add for completeness that a 'right to determine the child's place of residence' (using the phrase in the Convention) may be specific – the right to decide that it shall live at a particular address or it may be general, eg 'within the Commonwealth of Australia'."

14. In *In re P (A Child) (Abduction: Custody Rights)* [2005] Fam 293 the Court of Appeal had to decide whether the child's removal by the mother from the state of New York to England was wrongful. The father claimed that he had not consented to the removal and that he had rights of custody, in the Convention sense, under New York law. This was because he had been granted visitation rights, and because the court ordered that neither party was to remove the child from the state of New York except for temporary vacations without the prior written consent of the other party or prior court order. This was a ne exeat right similar to that which section 13 of the Children Act 1989 has laid down: see also section 2(3) of the Children (Scotland) Act 1995. The approach which was taken to this issue in *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654 is now commonly held amongst contracting states, as Hale J observed in *In re W (Minors) (Abduction: Father's Rights)* [1999] Fam 1, 9. Ward LJ said in *In re P* [2005] Fam 293 that the court was abundantly satisfied that *C v C* and the subsequent decisions in England to the same effect were right: para 55. In *J, Petitioner* [2005] CSIH 36, 2005 GWD 15-251 the Inner House of the Court of Session in its turn held that "rights of custody" for Convention purposes included the right to grant or withhold consent to the child's removal from the United Kingdom under section 2(3) of the 1995 Act. The issue can now be regarded as settled, so far as the United Kingdom is concerned.

15. Unfortunately, as is usually the case in international Conventions on private law, the Hague Convention has not provided any formal mechanisms to ensure that the international legal norms that it has created are applied uniformly and consistently in the numerous contracting states: see Linda Silberman, "Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence" (2005) 38 U C Davis Law Review 1049, 1057. This means that its effectiveness is left in the hands of the respective central authorities and national courts that implement and interpret the Convention. Professor Silberman is highly critical of the way the courts in the United States have approached this issue: see p 1069:

> "As I have indicated, it is important to separate Convention concepts from domestic analogues found in particular judicial systems. The term 'rights of custody' is an important concept within the meaning of the Convention and rests on an autonomous definition that triggers the return remedy. Contracting States have agreed to those situations in which they will order return – ie a breach of 'rights of custody' – and domestic definitions of

> custody rights are not necessarily the equivalent of the concept created by article 5(a).
>
> Recent decisions by courts in the United States have been the most blatant offenders of this important principle by imposing parochial domestic notions of custody on the Convention concept, effectively undermining the goals and objectives of the Convention."

16. Professor Silberman has singled out for particular criticism *Croll v Croll* 229 F 3d 133 (2d Cir 2000), cert denied, 534 US 949 (2001). The Court of Appeals for the Second Circuit departed in that case from the position that had been adopted almost unanimously by earlier decisions of intermediate courts, that a parent who could restrict whether the child moved away did have rights of custody within the meaning of the Convention. In footnote 94 at p 1071 she says that the mischief potentially caused by *Croll* should not be underestimated. In the same footnote she observes that "fortunately" the Court of Appeal in *In re P* [2005] Fam 293 decided not to follow the views of the majority in *Croll*, which had concluded that Webster's Third New International Dictionary and Black's Law Dictionaries were an appropriate source for the definition of custody rights and that nothing in the Hague Convention suggested that the drafters intended anything other by the use of this expression than the ordinary understanding of custody as revealed by these dictionaries. Judge Sotomayor's dissent in *Croll* attracts this comment, at p 1070:

> "A perceptive dissent by Judge Sotomayor in *Croll* was critical of her colleagues for applying American concepts instead of international and Convention norms. She emphasized the object and purpose of the Convention and explained that the official history and commentary on the Convention 'reflect a notably more expansive conception of custody rights' that US/English dictionaries. As she pointed out, a restriction on removal affects the specific choice as to whether a child will live in England or Cuba, Hong Kong or the United States, and it is precisely this kind of choice that the Convention is designed to protect."

17. Certiorari was denied in *Croll* when it was considered by the Supreme Court, and other federal courts have followed the decision of the majority: *Gonzalez v Gutierrez* 311 F 3d 942 (9th Circ 2002); *Fawcett v McRoberts* 326 F 3d 491 (4th Circ 2003), cert denied 540 US 1068. In *Gonzalez* at p 949 the court said that a ne exeat clause served

only to allow a parent with access rights to impose a limitation on the custodial parent's right to expatriate his child and that this, in its view, hardly amounted to a right of custody "in the plainest sense of the term." The Ninth Circuit followed this reasoning in *Fawcett* at p 500, holding that the ne exeat provision in section 2(3) of the Children (Scotland) Act 1995 did not confer "rights of custody" on the petitioning parent where the other parent had the exclusive right to determine the child's place of residence within Scotland.

18. The US decisions are not all one way. In *Furnes v Reeves* 362 F 3d 702 (11th Circ 2004) the Court of Appeals for the Eleventh Circuit said that it was not persuaded by the analysis in *Croll*. In a unanimous decision it said that the Convention's purpose is to prevent the international abduction of children and that it is thwarted, not satisfied, by the *Croll* majority's construction of the ne exeat right. And the Constitutional Court of South Africa referred with approval to Sotomayor J's dissenting opinion in *Croll's* case in *Sonderup v Tondelli* 2001 (1) SA 1171, noting in para 22 that the majority opinion was contrary to the weight of authority. Unfortunately when the Court of Appeals for the Fourth Circuit returned to the issue in *Bader v Kramer* 445 F 3d 346 (4th Circ 2006) it referred to its decision in *Fawcett*, which followed *Croll*, without disapproval. But it was able to distinguish those cases on the ground that rights of access and rights of custody were not mutually exclusive in German law, and that the visitation rights of one parent could be modified without disturbing the underlying joint custody of both parents. It held that, in the absence of any order removing the father's ability to determine the child's residence, he continued to retain joint custody over the child.

19. It is unfortunate that there remains such a profound difference of view between some, although not all, of the courts in North America and the view so widely adopted elsewhere in the common law world that a ne exeat clause confers rights of custody within the autonomous meaning which article 5 of the Convention indicates. One can only hope that the contributions that have been made to this debate by Professor Silberman in support of the dissent in *Croll's* case, taken together with the increasing weight of international authority, will encourage further thinking in those jurisdictions which still reject this view. It is, after all, in the best interests of the children who are caught up in these unhappy disputes that all states parties to the Convention should adopt the same approach. It can now be taken for granted that courts throughout the United Kingdom will give effect to ne exeat clauses that prohibit the removal of a child from another contracting

state. Is it too much to hope that this approach will come to be universally recognised?

BARONESS HALE OF RICHMOND

My Lords,

20. The facts of this case are on any view extraordinary. They concern a little boy, A, who was born in Romania on 17 July 1998 and is now aged eight. His parents were married in Romania in January 1998 and divorced there in November 2000. In December 2002, the mother brought him to England without the knowledge or consent of his father. Proceedings under the Child Abduction and Custody Act 1985 and the Hague Convention on the Civil Aspects of International Child Abduction 1980 (Cmnd 8281) ('the Convention') were launched in February 2003.

21. A dispute arose as to the effect of the orders made about A when his parents divorced. Each was permitted to adduce expert evidence. The judge found himself unable to resolve the difference of opinion between the experts and directed that a determination be obtained from a Romanian court pursuant to article 15 of the Convention. The Romanian proceedings were not resolved until 9 June 2005, when the final Court of Appeal in Romania ruled that the removal of A to this country had not been wrongful under Romanian law. Nevertheless, when the case came back before the English court on 1 August 2005 it was ordered that further evidence on Romanian law be obtained from an expert jointly instructed by the parents. That expert reported in October 2005 and reached different conclusions from the Romanian court. Thereafter the parties were permitted to put further questions to him.

22. The case eventually came on for hearing in February 2006 and judgment was handed down on 28 March ordering A's immediate return to Romania upon certain undertakings by the father. The mother then issued proceedings in Romania seeking permission to remain here with A. Those proceedings have still not been heard. The mother also appealed against the English order. At this point the child applied to be made party to these proceedings, but this was refused by the Court of Appeal. Nevertheless, the court directed a report from a CAFCASS officer. This made it clear that A was adamantly opposed to returning to

Romania. The next day, on 24 May 2006, the Court of Appeal dismissed the mother's appeal, [2006] EWCA Civ 830. She now appeals to this House. A, through his litigation friend from the Children's Legal Centre, has been given leave to intervene in this appeal.

The issues

23. The simple question before us is whether A should now be returned to Romania, some three years and 10 months after he left. But this depends upon the answers to some more complex questions arising under the Hague Convention. The first, and most important, is whether removing A from Romania to England was 'wrongful' within the meaning of article 3 of the Convention. Only then does the duty under article 12 to return him to his home country arise. Central to the answer to that question is whether the father has 'rights of custody' or only 'rights of access' within the meaning of article 5. In answering that question, the effect of the Romanian judgment under article 15 must be considered. If the conclusion is that the removal was wrongful, two further questions arise. Is the court entitled to refuse to return the child under article 13 – either because there is a grave risk that his return would place him in an intolerable situation or because he objects to his return and is of an age and maturity where it would be appropriate to take account of his views? Finally we are asked to consider the ways in which the point of view of a child in A's situation should be placed before the court in Hague Convention proceedings.

Wrongful removal

24. The world would be a simpler place if the Convention had provided that all removal or retention of a child outside the country where he or she is habitually resident without the consent of the other parent or the authority of a court is wrongful. But it does not. The Convention recognises that not all parents have the right to demand the automatic return of children who have been taken away without their consent. It does so by providing that the removal or retention of a child is only wrongful under article 3 if 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". These rights may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state." In addition, those rights must actually have been being

exercised at the time (or would have been had it not been for the wrongful removal). Article 5(a) provides that "'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence".

25. The Convention also obliges, in article 21, the Central Authorities to assist a 'left behind' parent in realising his or her 'rights of access', not by securing summary return to the home country, but through promoting their peaceful enjoyment, removing obstacles to their exercise, and initiating or assisting the initiation of proceedings to protect them. Article 5(b) provides that "'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence". Thus it was envisaged that the right to have the child to stay away from his home might still amount to 'rights of access' rather than 'rights of custody'. It is quite clear from the Explanatory Report of Professor Elisa Pérez-Vera (April 1981) that the original parties to the Convention drew a deliberate distinction between rights of custody and rights of access and did not intend that mere rights of access should entitle a parent to demand the summary return of the child. As Professor Pérez-Vera pointed out, such an approach would ultimately lead to "the substitution of the holders of one type of right by those who held the other" (para 65).

26. Nevertheless it is common ground between all the parties to this case that they are not mutually exclusive concepts. A person may have both rights of access and rights of custody. The question is, do the rights possessed under the law of the home country by the parent who does not have the day to day care of the child amount to rights of custody or do they not? States' laws differ widely in how they look upon parental rights. They may regard the whole bundle of rights and responsibilities which the law attributes to parents as a cake which can be sliced up between the parents: one parent having the custody slice, with the package of rights which that entails, and the other having the access slice, with the different package of rights which that entails. This is by no means an unusual way of looking at the matter. Alternatively, the state may regard the whole bundle of parental rights and responsibilities as inhering, and continuing to inhere, in both parents save to the extent that they are removed or qualified by the necessary effect of a court order or an enforceable agreement between them. The expert evidence in this case demonstrates that there was serious academic debate in Romania about whether the law adopted the first or the second approach. In the event, the Romanian court adopted the former whereas the single joint expert adopted the latter.

27. As Professor Pérez-Vera points out, following a long established tradition of the Hague Conference, the Convention does not define the legal concepts used by it. However, article 5 does make clear the sense in which the concepts of custody and access rights are used, "since an incorrect interpretation of their meaning would risk compromising the Convention's objects" (para 83). Custody relates to the care of the child's person rather than his property. It is a narrower concept than that of 'protection of minors' used elsewhere. It may, however, be jointly held. Access includes the right to 'residential access' even across national boundaries.

28. In the absence of a supranational body to define and refine these autonomous terms, member states must strive for consistent practice – not in the content of their domestic laws but in the effect that they give to the particular features of one another's laws. As Lord Browne Wilkinson said in *In re H (Minors) (Abduction: Acquiescence)* [1998] AC 72, 87 (albeit in the context of the meaning to be given to 'acquiesced' in article 13(a) of the Convention):

> "An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states."

In that case, therefore, English concepts and English law rules about the meaning of acquiescence could have no direct relevance to the interpretation of the Convention. We must be equally prepared to resist projecting the view taken in English law of the rights of parents onto the Convention concepts as they apply to the laws of other member states which may take a different view.

29. There is no problem when return is requested by the parent with the right to the day to day care of the child – or in English terms the parent with whom it has been determined that the child is to live. The problem is with the characterisation of the other parent's rights. If these amount to joint custody, there is equally no problem. The main debate has been over the effect of what are sometimes referred to as 'travel restrictions' – either a court order prohibiting the removal of the child from the home country or a 'right of veto' giving one parent, who may or may not also have rights of access, the right to insist that the other

parent does not remove the child from the home country without his or her consent or a court order.

30. The internal position in English and Scottish law is clear. Parents who share parental responsibility (that is all married parents and increasing numbers of unmarried parents) each have all the rights and responsibilities of parents. They retain those rights subject only to the practical limitations of any court order and can exercise them independently of one another unless this is inconsistent with a court order. While a residence order is in force, no person may remove the child from the United Kingdom without the written consent of each person with parental authority or the leave of a court (Children Act 1989, s 13(1)(b). In England, the person with the benefit of the residence order may remove the child for less than one month: s 13(2)). Even if there is no residence order, it is a criminal offence for a parent to remove a child from the United Kingdom without the consent of each person with parental responsibility or the leave of a court (Child Abduction Act 1984, ss 1 and 6; in England with the one month exception for people with the benefit of a residence order).

31. But the mere fact that English and Scottish parents enjoy such rights of veto does not of itself mean that they enjoy 'rights of custody' within the meaning of the Convention. Hitherto, however, both in England and Scotland, the courts have regarded travel restrictions as giving rise to rights of custody. As long ago as *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, the Court of Appeal held that a court order prohibiting either parent from removing a child from Australia without the other's consent gave the other parent rights of custody under the Convention. Lord Donaldson MR observed, at p 664, that the right to determine the child's place of residence "may be specific - the right to decide that it shall live at a particular address or it may be general, eg 'within the Commonwealth of Australia'". In *In re W; In re B (Child Abduction: Unmarried Father)* [1998] 2 FLR 146, I applied the same approach to rights of veto arising by operation of law. Both cases were relied upon by the Inner House of the Court of Session in *J, Petitioner* [2005] CSIH 36, 2005 GWD 15-251, where it was held that the right of veto enjoyed, by virtue of section 2(3) and (6) of the Children (Scotland) Act 1995, by a parent with the right to contact amounted to 'rights of custody' under the Convention.

32. Mr James Turner QC, on behalf of the mother, has questioned whether a mere right of veto should amount to 'rights of custody'. The reasoning is simple. If rights of custody 'shall include' the right to

determine the child's place of residence, it is not enough that they include the right to determine for the time being the country where the child lives - it must mean the right to determine where the child actually lives. The Convention envisages a compendium of more than one right. Furthermore, the purpose of the right to determine the country where the child lives is simply to facilitate the exercise of the right of access – and that does not attract the right to demand summary return to the home country. Indeed, a person possessing a right of veto may have no access rights at all; whereas a person having access rights may have no veto right. It would be surprising if a parent who enjoyed a close and continuing relationship with his child might have no rights of custody whereas a parent who has not seen his child for years might do so.

33. Mr Turner is able to cite other jurisdictions in the common law world which have taken this view. In 2000, in *Croll v Croll* 229 F 3d 133, a majority of the United States Court of Appeals for the Second Circuit held that a ne exeat clause in a Hong Kong custody agreement giving custody, care and control to the mother did not give rights of custody to the father. That decision was followed in 2002 by the Court of Appeals for the Ninth Circuit in *Gonzalez v Gutierrez* 311 F 3d 942; and in 2003 by the Court of Appeals for the Fourth Circuit in *Fawcett v McRoberts* 326 F 3d 491 (referred to without comment but distinguished in 2006 in *Bader v Kramer* 445 F 3d 346). The majority in *Croll* relied on the deliberate distinction drawn in the Convention between rights of custody and rights of access, the lack of international consensus on the issue, and the published views of Professor A E Anton, chair of the Hague Conference Commission which had drafted the Convention at (1981) 30 ICLQ 537, 546.

34. The majority in *Croll* were able to point to two decisions in the Supreme Court of Canada to demonstrate a lack of international consensus. In *Thomson v Thomson* [1994] 3 SCR 551, the court had held that removal in breach of a ne exeat clause in an interim custody order was in breach of rights of custody held by the court, in order to preserve its jurisdiction to make a final determination, but expressed the view that such a clause in a final order would not give the other parent rights of custody. In *DS v VW* [1996] 2 SCR 108, *Thomson* was relied upon a fortiori where any prohibition upon removal had been implicit in the custody order made in the United States.

35. However, in 2004 the United States Court of Appeals for the Eleventh Circuit in *Furnes v Reeves* 362 F 3d 702 rejected the reasoning of the majority in *Croll v Croll* in preference for the dissenting views of

Sotomayor CJ. They pointed out that to order return of the child did not convert the other parent's rights of access into rights of custody, because there was no obligation to return the child to that other parent. The object was to maintain the status quo and the jurisdiction of the home country over any disputes. The observations in both Canadian cases were obiter. Apart from them, known opinion elsewhere in the common law world was united. Thus the full court of the Family Court of Australia, in *JR v MR*, 22 May 1991, had followed the English decision in *C v C* [1998] 1 WLR 654, as did Lindenmayer J at first instance in *Director General, Department of Families, Youth and Community Care v Hobbs* [1999] FamCA 2059. The Constitutional Court of South Africa had reached the same result in *Sonderup v Tondelli* (2001) (1) SA 1171 (CC). The Israeli High Court, in *Foxman v Foxman* in 1992 had also held that rights of custody should include cases where parental consent is required to remove the child from the country of residence. To these might have been added New Zealand, which has gone further still and held that rights of access can in themselves amount to 'rights of custody': *G v B* [1995] NZFLR 49; *D v C* [1999] NZFLR 97; see also *Hunter v Murrow (Abduction: Rights of Custody)* [2005] EWCA Civ 976; [2005] 2 FLR 1119 (para 42 below).

36. I acknowledge the force of Mr Turner's argument, especially when viewed against the original paradigm case of abduction by a non-custodial parent from the custodial primary carer. It is also the case that some parents who possess a right of veto have in fact very limited contact - if any - with their children, so that to force a child to return to the home country simply for the sake of obtaining permission to leave which will almost certainly be granted seems heavy handed. But the circumstances of families are infinitely various. It is an object of the Convention to enable such decisions to be taken in the courts of the home country where those circumstances can (in most cases) better be investigated and evaluated. It is not for the courts of the requested state to start making value judgments about the merits of the case, save to the very limited extent that the Convention permits this. As far as the Convention is concerned, a person either has rights of custody or he does not - the quality of his relationship with the child is not in point. It would, at the very least, be an odd result if a Convention designed to secure the summary return of children wrongfully removed from their home countries were not to result in the return of children whose removal had clearly been in breach of the laws, court orders or enforceable agreements in the home country.

37. Therefore, in common with the understanding of the English and Scottish courts hitherto, and with what appears to be the majority of the

common law world, I would hold that a right of veto does amount to "rights of custody" within the meaning of article 5(a). I see no good reason to distinguish the court's right of veto, which was recognised as "rights of custody" by this House in *In re H (A Minor)(Abduction: Rights of Custody)* [2000] 2 AC 291, from a parental right of veto, whether the latter arises by court order, agreement or operation of law.

38. I would not, however, go so far as to say that a parent's potential right of veto could amount to "rights of custody". In other words, if all that the other parent has is the right to go to court and ask for an order about some aspect of the child's upbringing, including relocation abroad, this should not amount to "rights of custody". To hold otherwise would be to remove the distinction between "rights of custody" and "rights of access" altogether. It would be also inconsistent with the decision of this House in *In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562. There an unmarried father had no parental rights or responsibility unless and until a court gave him some; but he did, of course, have the right to go to court to seek such an order. This was held not to amount to "rights of custody" within the meaning of article 5(a). Nor could a subsequent order grant him such rights if by then the child's habitual residence had been changed.

Article 15

39. Article 3 makes it quite clear that, however wrongful the removal might be in the eyes of the English or Scottish laws of parental responsibility, what matters is whether it is "in breach of rights of custody attributed to a person . . . under the law of the state in which the child was habitually resident immediately before . . ." Plainly, therefore, the first question is "what rights does that person have under the law of the home country?" The second question is, "are those rights 'rights of custody' within the meaning of the Convention?" What is the court in a requested state to do if uncertain of the answers? Article 15 contemplates that it may seek a determination from the authorities of the requesting state:

> "The judicial or administrative authorities of a contracting state may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the state of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of article 3 of

> the Convention, where such decision or determination may be obtained in that state. The central authorities of the contracting states shall so far as practicable assist applicants to obtain such a decision or determination."

The last sentence indicates that this is something other than the assertion or certificate of the central authority (cf the certificate as to the law of the requesting state which, under article 8, sometimes accompanies a request from one central authority to another). It is a determination by the authorities having the power within the requesting state to make authoritative decisions relating to rights over children (see Professor Pérez-Vera, *op cit*, para 86). The reference to "administrative authorities" caters for those states in which some decisions about children are entrusted to bodies which are more administrative than judicial in character (see *ibid*, para 44).

40. In this case, being unable to decide between the competing experts, the judge requested the father to obtain an article 15 decision. The mother challenged the jurisdiction of the Romanian court of first instance which concluded that it did not have jurisdiction. The father appealed. The Court of (First) Appeal held that the first instance court had been wrong to refuse jurisdiction but that the father's rights did not amount to rights of custody for the purposes of article 3 of the Convention. The father launched a further appeal. In a fully reasoned judgment, the final Court of Appeal in Bucharest upheld the first Appeal Court's decision. It held that the equality of rights enjoyed by parents before their divorce is subject to exceptions. On divorce, the court is obliged to award custody to one or the other. The parent with custody shall exercise parental rights and fulfil parental duties. The parent without custody keeps his right to have personal contact with the child and to watch over his upbringing, education and professional training. The effect of divorce is to divide the bundle of rights between the parents. The agreement of the non-custodial parent is only required to certain specified measures – adoption and the loss or re-acquisition of Romanian citizenship. Otherwise, the divorced non-custodial parent does not have a right of veto of measures taken by the custodial parent relating to the child's person. His right to "watch over" is not a right to direct. Law 272/2004, which came into effect on 1 January 2005, requiring both parents to give their consent to the removal of a child from Romania, was not retrospective in its effect. Not surprisingly, therefore, the Bucharest Court of Appeal concluded that the removal of the child in December 2002 had not been wrongful. (It is perhaps worth noting that, according to a note provided by the Romanian Ministry of Justice, the Romanian central authority had originally taken the same

view of the father's rights as eventually did the Bucharest court and declined to transmit the father's request. It only did so after the father had launched proceedings here.)

41. How then should the courts of the requested state respond to such a determination? Most certainly not as they did in this case. Having received a determination, binding between the parties, in the final court of the requesting state, the English High Court proceeded in effect to allow the father to challenge that ruling by adducing fresh expert evidence. The fact that the expert was jointly instructed does not cure the vice. This was a question on which there were known to be two views. The vice is that he was asked at all; and furthermore that he was asked to answer questions about the rights which the father enjoyed under Romanian law. The fact that a first instance court in Romania had reached a different conclusion in another case shortly before this decision (the *Rada case*) is not a sufficient reason for an English court to query the decision of the final Court of Appeal in Romania in the instant case. The ultimate result was that the English trial judge took a different view from the view taken in Romania. She ordered the return of the child to a country whose courts had authoritatively ruled that the mother was within her rights to remove the child to live in this country.

42. How could this have happened? On 28 July 2005, the Court of Appeal handed down its decision in *Hunter v Murrow (Abduction: Rights of Custody)* [2005] 2 FLR 1119. The English court had made an article 15 request to the New Zealand court concerning a child whose unmarried parents had separated before he was born and had never lived together, although father and child had had considerable contact by informal agreement with the mother. It appears that the father had neither parental responsibility nor rights of veto. Nevertheless, the New Zealand court held that the access which the father had enjoyed by virtue of the agreement with the mother amounted to 'rights of custody' for the purpose of the Convention. As the researches of counsel demonstrated, this takes the concept of 'rights of custody' further than it has been taken in other common law jurisdictions.

43. The Court of Appeal declined to accept that ruling. But their reasoning is important. They did not challenge the ruling as to the content of the father's rights in New Zealand law. They merely challenged the characterisation of those rights as rights of custody for Convention purposes. This was on the basis, long established in the English application of the Convention, that rights of custody are to be distinguished from mere rights of access: see, most recently, *In re V-B*

(Abduction: Custody Rights) [1999] 2 FLR 192 and *In re P (Abduction: Custody Rights)* [2004] EWCA Civ 971; [2005] Fam 293. *Hunter v Murrow* afforded no warrant at all for allowing the father to challenge the Romanian court's decision as to the content of his rights under Romanian law. Save in exceptional circumstances, for example where the ruling has been obtained by fraud or in breach of the rules of natural justice, it must be conclusive as to the parties' rights under the law of the requesting state.

44. Indeed, article 15 might be thought to go further. The foreign court is asked to rule on whether the removal is wrongful in Convention terms. The Court of Appeal relied upon the decision of this House in *In re J* (para 38 above), the authority cited by Lowe, Everall and Nicholls, *International Movement of Children* (2004), para 15.9, in support of their proposition that "a declaration made under article 15 can be no more than persuasive, and cannot bind the parties or the authorities of the requested state, who will accept as much or as little of the judgment as they choose." But *In re J* was not an article 15 case. It is one thing to fail to give effect to a foreign custody order which is not binding upon the courts of this country. It is another thing to fail to give effect to a ruling, which the courts of this country have themselves requested, as to the content and effect of foreign law. Given, however, that the Convention terms have an autonomous meaning, it is possible to contemplate the possibility that the foreign court's characterisation of the effect of its domestic law in Convention terms is mistaken. We are here concerned, not with domestic law, but with the effect given domestically to autonomous terms in an international treaty which are meant to be applied consistently by all member states. We, just as much as they, are bound by Lord Steyn's injunction, in the context of the Refugee Convention, in *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 517:

> "In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning."

The foreign court is much better placed than the English to understand the true meaning and effect of its own laws in Convention terms. Only if its characterisation of the parent's rights is clearly out of line with the international understanding of the Convention's terms, as may well have

been the case in *Hunter v Murrow*, should the court in the requested state decline to follow it.

45. While ultimately, therefore, the decision is one for the courts of the requested state, those courts must attach considerable weight to the authoritative decision of the requesting state on both issues. I do not share the view of the Court of Appeal that article 15 would be more useful were it directed solely to ascertaining rights under the domestic law of the requesting state. It could with advantage draw a clearer distinction between the two issues. The reasons for rejecting a determination of the first issue will be different from the reasons for rejecting a determination on the second. But we still have something to learn from the requesting state's characterisation of the position.

46. Perhaps one day, the problem will disappear. All member states will accord equal parental responsibility to all parents, with universal rights of veto, and all will regard these as rights of custody. There is a general trend towards shared parental authority - and even shared parenting - after separation and divorce, but it is not universal. It is not so very long ago that the law of this country was very different. Particularly when a country first accedes to the Convention, it may be useful in cases of doubt to obtain an authoritative ruling on the content and effect of their law. It is in their interests, and those of the applicant, that this be obtained as quickly as possible. It is sad that it took so long in this case, but the Romanian authorities must be mystified indeed that the English courts have ordered the return to Romania of a child whose removal the Romanian final court of appeal has authoritatively and irrevocably determined was not wrongful.

47. For these reasons, essentially the same as those of my noble and learned friends, Lord Hope of Craighead, Lord Carswell and Lord Brown of Eaton-under-Heywood, I would allow this appeal and dismiss the proceedings, on the ground that the father did not have "rights of custody" for the purpose of the Hague Convention when A was removed to this country in December 2002, that accordingly the removal was not wrongful, and that no obligation to return the child arises under article 12 of the Convention. That is all that need be said to dispose of this appeal. But many other matters have been canvassed before us and some require comment.

Resisting return

48. The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed. That object is negated in a case such as this where the application is not determined by the requested State until the child has been here for more than three years.

49. Article 12 of the Convention caters for delay in making the application for return. If an application is launched more than 12 months after the wrongful removal or retention, the child is nevertheless to be returned "unless it is demonstrated that the child is now settled in its [sic] new environment". The choice of the date of application rather than the date of decision is deliberate: the left behind parent should not suffer for the failings of the competent authorities (see Professor Pérez-Vera, *op cit*, para 108). It is not possible, therefore, to argue that cases such as this fall outside the Convention altogether.

50. Nevertheless, article 13 provides that there are circumstances in which the authorities of the requested state are not bound to order the return of the child. These are (a) where whoever had rights of custody was not actually exercising them at the time or had consented to or later acquiesced in the child's 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." Article 13 also provides that the judicial or administrative authority may refuse to return 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 [sic] views".

51. It is obvious, as Professor Pérez-Vera points out, that these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated (*op cit*, para 34). The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of article 13(b), which focuses on the situation of the child, could lead to this result. Nevertheless, there must be circumstances in which a summary return

would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of article 13 does not mean that it should never be applied at all.

52. In this case, it is argued that the delay has been such that the return of this child to Romania would place him in an intolerable situation. "Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there. In many cases this will be sufficient. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so. In Hague Convention cases within the European Union, article 11.4 of the Brussels II Revised Regulation (Council Regulation (EC) No 2201/2003) expressly provides that a court cannot refuse to return a child on the basis of Article 13(b) "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return". Thus it has to be shown that those arrangements will be effective to secure the protection of the child. With the best will in the world, this will not always be the case. No-one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm.

53. In this context, a delay of this magnitude in securing the return of the child must be one of the factors in deciding whether his summary return, without any investigation of the facts, will place him in a situation which he should not be expected to have to tolerate. He is not responsible for the passage of time. But the passage of time has contributed to a situation in which he is adamantly opposed to returning to Romania. As reported by the very experienced CAFCASS officer, these views are "authentically his own". They are confirmed by the very experienced solicitor who now acts for him. It is not simply that he is settled here within the meaning of article 12. He has spent nearly half his life here and has no life that he can recall in Romania. While the father has offered certain undertakings about his life there, it is quite clear that the father intends to oppose his return to the country which he

now regards as his home and that if returned to Romania he will face months if not years of further litigation between his parents.

54. His situation is not comparable with that of a child whose primary carer wishes to relocate to another country. In those cases it is axiomatic, not only that the parent wishes to relocate but also that she has made sensible and practical plans to do so. If relocation is permitted, the child should not be exposed to further litigation between his parents. These features are completely absent in a case such as this, although happily it is not a case where the mother has said that she will not return if the child is ordered to do so.

55. As the question does not arise for decision in this appeal, it is unnecessary for us to express a view upon whether the courts below placed sufficient weight upon this consideration in their evaluation of the article 13(b) issue. They were certainly well aware of it. But two further observations must be made in the light of the arguments which have been addressed to us. It is common in article 13 cases to divide the issues into two. First, is one of the so-called "defences" there provided made out on the facts? Secondly, if it is, should the court exercise its discretion not to order the summary return of the child? It is possible to envisage circumstances in which a child should be returned despite the consent or acquiescence of the other party or the child's own objections. But, as my noble and learned friend, Lord Brown of Eaton-under-Heywood, pointed out in the course of argument, it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate.

56. Secondly, the policy of the Convention is, of course, a reason for giving a restrictive application to the article 13 "defences". But it has nothing to do with whether or not any of those defences is made out on the facts of the individual case. Nor does the court's view of the morality of the abductor's actions. By definition, one does not get to article 13 unless the abductor has acted in wrongful breach of the other party's rights of custody. Further moral condemnation is both unnecessary and superfluous. The court has heard none of the evidence which would enable it to make a moral evaluation of the abductor's actions. They will always have been legally wrong. Sometimes they will have been morally wicked as well. Sometimes, particularly when the abductor is fleeing from violence, abuse or oppression in the home

country, they will not. The court is simply not in a position to judge and in my view should refrain from doing so.

The child himself

57. There is evidence, both from the CAFCASS officer who interviewed him after the Court of Appeal refused him leave to intervene, and from the solicitor who represents him, that A is adamantly opposed to returning to Romania. Yet until the case reached this House, no defence based on the child's objections was raised. This is not surprising. A was only four and a half when these proceedings were begun. At that age few courts would accept that he has "attained an age and degree of maturity at which it is appropriate to take account of its views". But he is now more than eight years old and he was more than seven and a half when these proceedings were heard by the trial judge. As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.

58. Brussels II Revised Regulation (EC) No 2201/2003 recognises this by reversing the burden in relation to hearing the child. Article 11.2 provides:

> "When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child.. It applies, not only when a 'defence' under article 13 has been raised, but also in any case in which the court is being asked to apply Article 12 and direct the summary return of the child – in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is, as already stated, not to be confused with giving effect to his views.

59. It follows that children should be heard far more frequently in Hague Convention cases than has been the practice hitherto. The only question is how this should be done. It is plainly not good enough to say that the abducting parent, with whom the child is living, can present the child's views to the court. If those views coincide with the views of the abducting parent, the court will either assume that they are not authentically the child's own or give them very little independent weight. There has to be some means of conveying them to the court independently of the abducting parent.

60. There are three possible ways of doing this. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional, to a face to face interview with the judge. In some European countries, notably Germany, it is taken for granted that the judge will see the child. In this country, this used to be the practice under the old wardship system, but fell into disuse with the advent of professional court welfare officers who are more used to communicating with children than are many judges. The most common method is therefore an interview with a CAFCASS officer, who is not only skilled and experienced in talking with children but also, if practising in the High Court, aware of the limited compass within which the child's views are relevant in Hague Convention cases. In most cases, this should be enough. In others, and especially where the child has asked to see the judge, it may also be necessary for the judge to hear the child. Only in a few cases will full scale legal representation be necessary. But whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.

61. Hitherto, our courts have only allowed separate representation in exceptional circumstances. And recently in *In re H (A Child)* [2006] EWCA Civ 1247, the view was expressed in the Court of Appeal, that if the test for party status were to be revised in any direction, it should in future be more rather than less stringently applied. But Brussels II Revised Regulation requires us to look at the question of hearing children's views afresh. Rather than the issue coming up at a late stage in the proceedings, as has tended to take place up to now, European cases require the court to address at the outset whether and how the child is to be given the opportunity of being heard. If the options are canvassed then and there and appropriate directions given, this should not be an instrument of delay. CAFCASS officers and, in the few cases where this is appropriate, children's representatives are just as capable of moving quickly if they have to do so as anyone else. The vice has been when children's views have been raised very late in the day and seen as a 'last ditch stand' on the part of the abducting parent. This is not the place they should take in the proceedings. There is no reason why the approach which should be adopted in European cases should not also be adopted in others. The more uniform the practice, the better.

62. That is not, of course, this case. When the proceedings began, it might well have been considered inappropriate to hear A's views. When the proceedings should have been completed, in August 2005, this may still have been the case. But once the proceedings were prolonged beyond then, A had reached an age where it could no longer be taken for granted that it was inappropriate for him to be given the opportunity of being heard. Consideration should then have been given to whether and how this might be done. It could scarcely by then have been said that seeking his views, or allowing his legal participation, would add to the already inordinate delay. It goes without saying that, if having heard from the child, an issue arises under the Convention which has not been raised by either of the parties, the court will be bound to consider it irrespective of the pleadings.

Human Rights

63. Two human rights issues have been canvassed before us. First are the article 8 rights of all the parties to this case to respect for their family life. Second is the article 6 right of the mother to a fair trial of the issue between her and the father. On the one hand, the plaintiff in a Hague Convention case has the benefit of automatic legal aid, without merits or means test, enhanced by the services of the specialist practitioners to whom these cases are referred by the central authority. On the other

hand, the defendant is only entitled to legal aid on the usual means and merits tests, and may well not find his or her way to a specialist solicitor in the early days when crucial decisions have to be taken and affidavits filed. This, it is argued, it not the 'equality of arms' which is inherent in the concept of a fair trial.

64. In this case, however, the mother has been adequately represented throughout. It is by no means clear that had counsel been available when the case took a wrong turn on 1 August 2005 the outcome would have been any different. Nor is this the case in which to explore whether the outcome either way would represent a disproportionate interference in the right to respect for the family lives of either of these parents with their child.

65. Such arguments are not, however, always irrelevant in Hague Convention cases. Article 20 of the Convention reserves the right of member states to refuse to return a child if "this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms". Article 20 is not incorporated into the Child Abduction and Custody Act 1985. At that stage, there was no human rights instrument incorporated into United Kingdom domestic law. The Human Rights Act 1998 has now given the rights set out in the European Convention legal effect in this country. By virtue of section 6 of the 1998 Act, it is unlawful for the court, as a public authority, to act in a way which is incompatible with a person's Convention rights. In this way, the court is bound to give effect to the Convention rights in Hague Convention cases just as in any other. Article 20 has been given domestic effect by a different route.

Rights of access

66. In many Hague Convention cases, the 'left behind' parent is seeking, not the day to day care of the child, but to keep the same sort of relationship which he or she enjoyed with the child before the abduction. Sometimes this could never be done unless the child returns to live permanently in the home country. Not all countries are as sanguine about allowing the primary carer to relocate to another country as we have been. Sometimes, however, sensible arrangements could be made to translate the contact which was enjoyed in the home country into contact across international borders. Now that travel within Europe is so accessible and inexpensive, and so many other means of communication at long distance exist, this should be a real possibility in many cases. It

is thought that many Hague Convention cases could be settled on this basis were the machinery available to do so. Such settlements would be much more likely if the parties have not become entrenched in their hostility as a result of the Hague Convention proceedings.

67. At the moment, however, the claim for return under the Hague Convention proceeds in its summary and (usually) speedy way. Any application for a residence, care or supervision order under the Children Act 1989 (or their equivalents elsewhere in the United Kingdom) has to await the determination of the Hague proceedings: see the 1985 Act, s 9. Under article 16 of the Convention, the court cannot decide upon the merits of rights of custody until it has been determined that the child is not to be returned under the Convention. But this does not apply to contact and rights of access. I notice that in *Hunter v Murrow* (para 42 above), at para 31, Thorpe LJ canvassed the possibility of revisiting the decisions in *In re G (A Minor) (Enforcement of Access Abroad)* [1993] Fam 216 and *In re T and Others (Minors) (Hague Convention: Access)* [1993] 2 FLR 617 in the light of more recent international jurisprudence. It would not be beyond the wit of man to devise a procedure whereby the facilitation of rights of access in this country under article 21 were in contemplation at the same time as the return of the child under article 12.

Conclusion

68. The United Kingdom may be justifiably proud of its record in speedily returning abducted children to their home countries. Brussels II Revised Regulation was designed to strengthen the application of the Convention throughout Europe – but the United Kingdom needed no encouragement vigorously to apply the Convention's principles. It was already doing so. However, the Convention does not require the return of each and every child brought to this country without the consent of the other parent. There are some cases, albeit few in number, where this is not required. This was clearly one of them: the child's removal to this country was not wrongful. I would allow this appeal and dismiss the proceedings.

LORD CARSWELL

My Lords,

69. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Baroness Hale of Richmond. I too would allow the appeal, for the reasons which she has given on the article 15 issue, and the remarks which I wish to add are very limited.

70. When Johnson J found himself faced with opinions from experts on the content of Romanian law containing a conflict of view which he was unable to resolve, he invoked the article 15 procedure to obtain a "decision or other determination" from the Romanian court. As my noble and learned friend Lord Hope of Craighead observes in paragraph 6 of his opinion, great care should be taken to keep resort to this procedure to the absolute minimum, because of the delay inevitably involved, tending to impair the usefulness of what is envisaged as a speedy and relatively summary procedure under the Hague Convention. Once resort is had to the procedure – which I have no doubt was quite justified in the present case -- the issue arises how the courts of the requested state should treat the determination.

71. The terms of article 15, that the requested state may seek from the authorities of the state of the habitual residence of the child "a decision or other determination that the removal was wrongful within the meaning of article 3 of the Convention", are such as to convey the implication that the determination is to be binding on the courts of the state which has sought it. But that construction could conceivably lead to difficulties if the foreign tribunal or agency made a determination on the wrongfulness of the removal which could not be supported under the terms of the Convention but had to be treated as canonical. It is for this reason that the determination made by the foreign court is not treated as final and binding on the issue whether the rights of the parent within its jurisdiction and the courts of the requested state reserve some measure of right to decide that issue. The synthesis in English law is to be found in the practice, exemplified in *Hunter v Murrow (Abduction: Rights of Custody)* [2005] EWCA Civ 976; [2005] 2 FLR 1119, of regarding the foreign court's determination of the content of a parent's rights as binding, but not necessarily accepting as definitive any conclusion whether those rights amounted to rights of custody in the autonomous Convention sense. I think that it is desirable that the courts of the requested state should be able to reach their own decision on the latter

issue, which they will wish to ensure is consistent with the proper interpretation of the Convention. I agree, however, with the view expressed by Lady Hale in paragraph 44 of her opinion, that those courts should be slow to reject a conclusion on the existence of rights of custody expressed by the court or administrative authority of the foreign state. As she there points out, the foreign court is much better placed than the court of the requested state to understand the true meaning and effect of its own laws in Convention terms. For this reason the determination of the foreign court should ordinarily be accepted, unless it clearly runs counter to the conclusion which would flow from applying to the parental rights set out by the foreign court the autonomous Convention meaning of such concepts as rights of custody.

72. The Third Civil Section of the Court of Appeal of Bucharest gave a careful and detailed decision on the content of the rights of the respondent father in the present case. It held unequivocally that the parent to whom custody was not awarded only acquired the right (under the law at the material time when the child was removed) to visit the child and to watch over his upbringing, education and professional training, none of which rights grants him the power to make any decisions concerning the person of the child, therefore he is not entitled to decide upon his dwelling place or upon changing this. It accordingly upheld the decision of the Fourth Civil Section of the Court of Appeal that the removal of the child was not illegal, because the father did not have rights of custody. Given the clear exposition of the fasciculus of rights vested in the father, the English court should in my opinion have proceeded to consider the determination of rights of custody expressed by the Romanian court, which, although not conclusive, should have carried substantial weight. It was quite wrong to permit the father to adduce further expert evidence from Dr Mihai which challenged not only the conclusion but the statement of the content of the father's rights set out in the judgment of the Romanian court. The English court should have considered the terms of the judgment itself, without any subsequently obtained expert evidence. If it had done so it could only have come to the same conclusion as the Romanian court, even without applying any presumption in its favour.

73. I accordingly consider that the respondent father did not have rights of custody within the meaning of the Hague Convention and that the child was not wrongfully removed from the Romanian jurisdiction. The conclusion reached by Hogg J and the Court of Appeal was incorrect and the appeal should be allowed on this ground.

74. Lady Hale and Lord Hope have discussed in some detail the effect of rights of access, rights to determine the child's place of residence and rights to object to the removal of a child from the jurisdiction. They have pointed up the conflict between the line of authority represented by such cases as *Croll v Croll* 229 F 3d 113 (2d Cir 2000) and the prevailing English and Scottish decisions. They both favour the conclusion that a ne exeat clause gives rights of custody. I appreciate the cogency of the reasons which they give in support of that conclusion, but I should prefer to reserve my opinion on the issue until it falls directly for decision in a case before the House.

75. The judge in the Family Division and the Court of Appeal also rejected the mother's case advanced under article 13 of the Convention. In view of the conclusion reached by the House on rights of custody, it is not necessary for us to consider the article 13 case, but I should be slow to reverse the concurrent findings of two lower courts on such an issue. Hogg J gave a reasoned decision under the intolerable situation limb of article 13(b) and the Court of Appeal upheld it. Unless that decision was plainly wrong – and while I have considerable sympathy for the position in which the child would be placed if returned to Romania, I could not so regard the decision – the House would not be justified in reversing it. Nor should it readily upset the decision to refuse to allow the child to be represented. I would only observe that although the child in this case is much more mature than when the proceedings began, some care has to be taken in deciding on the weight to be given to the views expressed by a child of seven years, bearing in mind the misapprehensions which children can entertain and the limited extent of such a child's insight into his own best interests. Courts would, however, do well to take careful account of the factors now favouring hearing the child's views which Lady Hale has set out in paragraphs 57 to 62 of her opinion.

76. For the reasons which I have given I would allow the appeal and dismiss the originating summons whereby the father applied for the return of the child to Romania.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

77. This is an extraordinary case. It is, we are told, unique in the length of time which elapsed before the judge's order for the child's summary return to Romania (over three years after the commencement of Hague Convention proceedings); and unique too in being the only case in which a United Kingdom court has rejected a foreign court's article 15 determination that the child's removal was not in the event wrongful within the meaning of article 3. It is solely upon the article 15 aspect of the case that I wish to add a short judgment of my own, gratefully adopting the detailed exposition of the law and facts to be found in the speech of my noble and learned friend Baroness Hale of Richmond.

78. Article 15 itself I should for convenience set out again:

> "The judicial or administrative authorities of a contracting state may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the state of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of article 3 of the Convention, where such a decision or determination may be obtained in that state. The central authorities of the contracting states shall so far as practicable assist applicants to obtain such a decision or determination."

79. The courts in this country, I may note, are themselves able to make article 15 determinations with regard to children removed from, or retained outside, the UK by virtue of section 8 of the Child Abduction and Custody Act 1985:

> "The High Court or Court of Session may, on an application made for the purposes of article 15 of the Convention by any person appearing to the court to have an interest in the matter, make a declaration or declarator that the removal of any child from, or his retention

> outside, the United Kingdom was wrongful within the meaning of article 3 of the Convention."

In fact, we are told, no article 15 determination has ever been requested from a UK court although from time to time our courts do, it appears, make declarations purportedly under section 8 for all the world as if pursuant to an article 15 application. Holman J's grant of an ex parte application for such a declaration in *In re H (Child Abduction) (Unmarried father: rights of custody)* [2003] EWHC 492 (Fam) [2003] 2 FLR 153 is a case in point:

> "At first glance, article 15, when read alone, may suggest that the trigger for a decision or other determination under that article has to be a request from the judicial or administrative authorities of a contracting state. But it has been well established for several years here, by authority of the Court of Appeal, that it is not necessary for someone in the position of this father to await or seek a formal request from the judicial or administrative authorities of another contracting state; and that article 15 of the Hague Convention and the wider terms of section 8 of the 1985 Act, when taken together, contemplate and empower this court to make such a declaration even before there are any proceedings in, or any request from, a foreign contracting state.
>
> I should stress, however, that it is a strong thing for any court to make a declaration of this kind on a without notice application and in circumstances in which the court has heard no argument to the contrary of that submitted by the applicant. In my view, a court should only make a declaration of this kind on a without notice basis if it is satisfied that the circumstances are so clear as not to admit of any real argument." (p 156)

80. Assuming (without deciding) that such declarations may properly be made, in my judgment it is plain that they should carry altogether less weight than true article 15 determinations, ie determinations made in response to a foreign state's request. A true article 15 determination will almost certainly have been made following the full inter partes argument. Quite possibly, as here, it will have been appealed and become final and binding between the parties. For the very reason that the process must inevitably take an appreciable time (and thus delay what is intended to be an essentially summary process) it will

presumably only have been requested in the first place because no other means of answering the critical questions appeared satisfactory. The questions are first, what are the rights of the left behind parent under the law of his or her home country and, secondly, are those rights "rights of custody" within the meaning of article 5 of the Convention. The other possible means of answering these questions—in particular the first—are by way of a certificate or affidavit such as may accompany or supplement the initiating application for the child's return pursuant to article 8(f) or, pursuant to article 14, evidence as to the foreign country's law (including any relevant judicial or administrative decisions), ordinarily adduced by expert witnesses. It was only because the judge here felt unable to resolve the conflict between the rival expert witnesses on Romanian law that he felt the need for "an authoritative decision as to whether or not [the child's removal] was, for the purpose of the Hague Convention, in breach of the father's rights of custody under the Convention" to be "increasingly plain", and therefore asked the father to obtain an article 15 determination which in the event was only finally communicated two years later on 9 June 2005.

81. In circumstances like these it seems to me almost inconceivable that the court requesting the article 15 determination would then not simply accept it. Certainly there would need to be some compelling reason to reject it such as a flagrant breach of the rules of natural justice in the foreign judicial process or a manifest misdirection as to the autonomous meaning of the Convention term "rights of custody". There is nothing of that sort here. On the contrary, the judge—neither Johnson J (who had requested the determination) nor Hogg J (who later ordered the child's return to Romania)—on 1 August 2005, acting merely on the father's request, ordered that an expert in Romanian law be jointly instructed by both parties to cover exactly the same ground as the Romanian Appeal Courts had themselves just covered. This decision seems to me incomprehensible unless perhaps it is to be explained by reference to the Court of Appeal's judgments in *Hunter v Murrow (Abduction: Rights of Custody)* [2005] EWCA Civ 976 [2005] 2 FLR 1119 which had been handed down just three days previously on 28 July 2005.

82. Lady Hale has indicated the substance of *Hunter v Murrow* at paragraph 42 of her opinion and at paragraph 43 has explained why the Court of Appeal understandably felt able to reject the New Zealand court's article 15 determination in the particular circumstances of that case. What concerns me, however, about *Hunter v Murrow* (and what may possibly have misled the judge in our case) is what I understand to be the Court of Appeal's view as to the weight to be attached to an

article 15 declaration. That, it appears from paragraphs 53-55 of Dyson LJ's judgment, is no more than such respect as comity requires to be given to any foreign judgment, which in turn is no more than the respect afforded by an appellate court to a judgment on the law by an experienced first instance judge.

83. I profoundly disagree with this approach which seems to be based on demonstrably false reasoning. It rests above all on the judgments both of the Court of Appeal and this House in *In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 which, as Lady Hale points out, was not an article 15 case at all. *In re J* was rather, just like Holman J's case of *In re H* to which I referred at paragraph 79 above, a case where, on a father's ex parte application following the child's removal to England, and without any request for an article 15 determination, the judge declared the removal wrongful. Quite why Lord Donaldson of Lymington MR, in the only reasoned judgment in the Court of Appeal, referred to article 15 at all (least of all as a provision akin to article 14) is unclear. Certainly Lord Brandon of Oakbrook, in the only reasoned speech in this House, made no mention of it. *In re J* in my judgment provides no authority whatever for treating an article 15 determination as one deserving only of respect. I repeat, on the rare occasions on which such determinations may be expected to be sought, they should to my mind be treated almost invariably as conclusive on both limbs of the issue to which they are ultimately directed: "whether the removal or return was wrongful within the meaning of article 3 of the Convention." Certainly that was so here.

84. For these reasons, which are not, I think, materially different from those given on this central issue by Lord Hope of Craighead and by Lady Hale, with both of whose opinions on all issues I am in respectful agreement, I too would allow the appeal.