Neutral Citation Number: [2018] EWCA Civ 2834

Case No: B4/2018/2435

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
HIS HONOUR JUDGE CLIFFORD BELLAMY
Sitting as a Deputy High Court Judge
FD18PO0534

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2018

Before:

LORD JUSTICE LEWISON
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE MOYLAN

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C (Children) (Abduction: Article 13 (b))

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Mr M Jarman (instructed by **Brethertons LLP Solicitors**) for the **Appellant**
Ms S Cooper (instructed by **Access Law LLP Solicitors**) for the **Respondent**

Hearing date: Tuesday 11th December 2018

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Approved Judgment

Lord Justice Moylan:

Introduction

1. The father appeals from the dismissal of his application under the Hague Child Abduction Convention 1980 ("the 1980 Convention") for the return of two children aged 6 and 4 to South Africa. The application was determined by His Honour Judge Bellamy on 21st September 2018. He decided that the mother "had established her Article 13(b) defence".

2. It was accepted by the mother that the children had been wrongfully retained in England. In response to the father's application she initially relied on the elder child's objections to returning to South Africa and on Article 13(b). At the hearing she did not pursue the former.

3. The father contends, in summary, (i) that the evidence did not support the judge's conclusions, on which he based his determination that Article 13(b) was established; and (ii) that the judge failed adequately to analyse the circumstances for the children following a return to South Africa having regard, in particular, to the specific protective measures proposed by the father.

4. At the conclusion of the hearing, the parties were informed that the appeal would be allowed and the father's application remitted for an urgent rehearing. These are my reasons for that decision.

Background

5. It is only necessary to set out a very brief summary of the background.

6. The mother was born in England but moved to live in South Africa when she was aged 9. The father was born in South Africa. The parties met and married there in 2011. They have two children who have always lived with the parents at the family home in South Africa. Both parents worked for the same company.

7. On 4th May 2018 the family travelled to England. There was an issue between the parties as to the purposes of the trip. The father said that it was for the purposes of a holiday. The mother said that it was to consider whether they could move to live here permanently. She also said that, from her perspective, "the move to England would have been a last opportunity for us to try and save our marriage". On 7th May the parents had an argument. The police were called. The father left and returned to South Africa alone.

Proceedings

8. On 6th August 2018 the father commenced proceedings seeking the summary return of the children to South Africa pursuant to the 1980 Convention. He offered a number of

undertakings including to vacate the family home. He also proposed that he would lodge the undertakings with the court in South Africa.

9. As referred to above, the mother initially relied on the elder child's alleged objections to returning to South Africa and on Article 13(b). She filed one substantive statement.

10. The mother stated that she had been the victim of significant domestic violence and abuse, beginning in 2012. She relied on a number of specific incidents which she said had taken place between then and May 2018. She also alleged that it was "not uncommon" for the father to drink excessively and that, "quite often, he was extremely drunk". The mother explained that she was particularly vulnerable. She did not believe that the father "would be able to control himself" and she would be "at further risk of physical or sexual assault should I return to South Africa". She also said that, in respect of her mental health, a return "would have a very detrimental effect on me". She also believed that the children had been affected by what they had witnessed in South Africa and were afraid to return there.

11. In respect of the father's proposed undertakings, the mother questioned their efficacy in particular on the basis that the father would either "disregard" them or be unable to "deliver" them. She referred to her concerns about the father's drinking and "the risk that he would not comply with any assurances or court orders" whether made here or in South Africa. In the event that a return was ordered, she sought additional measures including that all the undertakings "be supported by a South African order before our return rather than after".

12. In his second statement, the father disputed the mother's allegations. He adduced evidence from his employer to address, in particular, the mother's allegation about his drinking. He also adduced evidence as to his earnings in support of his offer to pay child and spousal maintenance. He additionally offered a non-molestation undertaking.

13. The mother relied on a report from her GP in England dated 23rd August 2018. She had first seen the GP on 12th June 2018 and had seen him a further five times up to 23rd August. The judge quoted from the report at length and it was clearly a significant factor in his decision. I, therefore, repeat most of the quotation.

> "[The mother] has been suffering with profoundly low mood and significant anxiety in relation to her current circumstances that she has found herself in with her husband.
> [The mother] alleges that her husband has issues with alcohol. She goes on to accuse him of being physically violent to her on numerous occasions.
> [Reference is then made to the mother's experiences in the past.]
> As a direct response to the extreme stress she is now suffering with, she has developed Telogen Effluvium, a well-recognised illness that occurs after a major stress to the body, something more commonly seen after major surgery or pregnancy.

> She has been started on Fluoxetine to improve her mood and this was increased to 40mg once a day. Unfortunately it doesn't seem to have helped her much, probably because her mood is likely situational.
> She has been referred on to IAPT which is a psychological counselling service that provides low intensity cognitive behavioural therapy. I have referred her children to our health visitor service … to assess the risk to the children due to the very concerning allegations above.
> I have significant concerns about [the mother] being returned to South Africa, given the accusations of physical and sexual abuse. She tells me that her husband has access to her house, as well as to firearms and she feels her life would be directly under threat should she return. She also worries the policing and legal system would not protect her.
> I have no concerns that [the mother's] mental state is unstable and her presentation is one of a woman struggling with enormously challenging circumstances in the best way she possibly can. There is no evidence to suggest psychosis or personality disorder from the 3 consultations we have had. I have absolutely no concerns from my interaction with [the mother] and her children that she has any impairment whatsoever in her ability to look after them and be a good mother."

14. Pursuant to the court's direction a Cafcass Officer saw the elder child and filed a written report dated 14th September 2018. It is a detailed report which included that the child missed her father a lot and also missed her paternal grandparents and her dog. The child gave a description of the parents sharing family responsibilities. She also said that she wanted to remain in England.

15. The Cafcass Officer also made some observations about the mother's allegations. It was noted that, if the allegations about domestic violence and alcohol misuse were true, they would "represent a potential risk to the children were they to be returned to such an environment". This was because it "is emotionally harmful for children to witness violence and abuse in the home". It was also observed that if the mother's "mental health is poor, this is likely to have an impact on the quality of care she can provide" the children.

16. After making the above observations, the Cafcass Officer said that, from seeing the elder child, it appeared that she "had been protected from whatever difficulties there may have been in the parent's relationship. Despite the abuse reported by (the mother) (the child) has only positive things to say about her father, she is not fearful of him and she is missing him".

17. It was, rightly, accepted by the mother, in the light of the report, that the elder child did not object to returning to South Africa.

18. The hearing took place before HHJ Bellamy on 20th September 2018. He did not hear oral evidence. Both parties were represented by counsel.

Judgment

19. The two strands to the mother's case under Article 13(b) appear to have been the risk of domestic violence and the risk that she would suffer psychologically if she had to return to South Africa. It was her case that these risks, separately and collectively, gave rise to a grave risk that the children would be exposed to physical or psychological harm or would otherwise be placed in an intolerable situation.

20. The judge summarised the evidence from the parties and the Cafcass Officer. In the course of this he set out an extract from a written record made by the police in England in May 2018.

> "[The mother] was very distressed whilst talking about [an incident] in South Africa and she was both physically shaking and emotionally very distressed in making this report."

The judge then commented that this "description mirrors the mother's presentation in court throughout this hearing."

21. The judge next set out the parties' respective submissions. The mother's case was summarised as follows:

> "33. For the mother, Mr Jubb submits that there is clear evidence that the mother is psychologically fragile. Her condition has been exacerbated by the father's violent and sexually aggressive behaviour towards her. This has led to her seeking medical help from her GP who in turn has made a referral to Splitz Support Service. There is, he submits a real risk of a significant adverse effect upon the mother, psychologically, if the court were to order the summary return of the children to South Africa. It would be intolerable for these children to witness their mother having a significant psychological relapse."

22. The judge then addressed the protective measures proposed by the father:

> "34. In his proposed protective measures the father says that he will 'arrange for the lodging of the Return Order and any undertaking with the Courts in South Africa upon the Respondent's return'. If the court is minded to order return, Mr Jubb submits that these documents should be lodged with the court in South Africa *before* the mother returns and not *after* she has returned. Given that there are currently no proceedings taking place in the South African

> court it is not clear to me what the effect would be of lodging the order and undertakings in the South African court and in particular whether that would enable the mother to take urgent steps to enforce the father's undertakings if he were to default."

I will return to this last comment below.

23. The judge then set out the law including referring to *Re D (Abduction: Rights of Custody)* [2007] 1 AC 619; *Re E (Children)(Abduction: Custody Appeal)* [2012] 1 AC 444 and *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 AC 257.

24. The judge's substantive determination is contained in the following paragraphs, which I set out in full:

> "47. Given the seriousness of the allegations made by the mother it is in my judgment undoubtedly the case that, if true, the court would find that those matters give rise to a grave risk that these children would be exposed to physical or psychological harm or otherwise placed in an intolerable situation if they were returned to South Africa without any steps being taken to put in place protective measures to safeguard their welfare.
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> 48. As Baroness Hale observed in *Re E …*, every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these are physical or psychological abuse or neglect of the child herself and exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. If the mother's allegations against the father are true, the impact they have on her own physical or psychological well-being and, as a consequence, upon the well-being of the children goes well beyond the rough and tumble, discomfort and distress one might expect them to be able to take in their stride.
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> 49. In this case there is clear evidence of the significant impact the abuse has had on the mother. It is apparent in the letter from her GP. It is apparent from the documents and logs disclosed by the police. It is apparent from the CAFCASS report. It was evident in her demeanour in court throughout this hearing. An order requiring the summary return of these children to South Africa would, I have no doubt, aggravate the distress and fear already being experienced by this mother. That is a risk. If her complaints about the father's behaviour are true then it is a grave risk. That is a risk which places these children in an intolerable position.

> 50. Is it possible to ameliorate that risk by putting in place protective measures? In *Re D (Abduction: Rights of Custody*) Baroness Hale made the point that if such measures are proposed it has to be shown that they will be effective to secure the protection of these children. 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.
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> 51. In this case the mother suffers from intense anxieties. Because it is not possible at this stage to undertake a finding of fact hearing, it cannot be said that there is an objectively proven foundation for those anxieties. However, that this mother's anxieties are real, intense and (if she were to return to South Africa with the children) potentially psychologically disabling, is in my judgment clear. If she returns to South Africa with the children and what is presently identified as a risk becomes a reality, it will not just be the mother who suffers as a result. It will also be the children."

25. In the light of those conclusions, the judge dismissed the application.

Submissions

26. The parties' respective cases were argued succinctly but comprehensively and persuasively on this appeal. I am grateful to both counsel but particularly to Ms Cooper (and to her solicitors) who was acting pro bono and had taken the case on not long before the hearing. Despite coming only recently to this case, Ms Cooper's submissions were, as I have said, both comprehensive and persuasive. She was also able to rely on a full skeleton which had been prepared by Mr Jubb.

27. Mr Jarman submits that the judge failed to follow the guidance in *Re E* and "look to the future", at [35]. He failed to analyse what the circumstances would be for the children if they returned to South Africa and, as can be seen from paragraph 47 of the judgment, "jumped" to the conclusion that the mother's allegations created a grave risk within Article 13(b). He submits that the judge did not undertake a balanced assessment of the evidence which would have included that the parents would be separated and that the children would be returning to their home environment. It would also have included elements of the Cafcass Officer's report.

28. Mr Jarman accepts that the mother "plainly demonstrated some anxiety" about returning to South Africa and that the judge was entitled to conclude that there was "a risk". However, he submits that the evidence did not establish that the children would be exposed to a *grave* risk if returned. He points to the GP having "no concerns" about the mother's ability to be a "good mother". He also submits, in particular, that the

evidence did not support the judge's conclusion that the mother's "anxieties" were "potentially psychologically disabling" if she were to return to South Africa.

29. As to the specific measures proposed by the father, Mr Jarman submits that the judge failed to analyse how or why they might "ameliorate that risk". The judge asked this question in paragraph 50 but, Mr Jarman submits, he did not then answer it. Further, Mr Jarman told us that the issue of the legal enforceability of the measures proposed by the husband had not been raised either before or at the hearing. Nor could he recall the judge's concerns, as set out at the end paragraph 34 (as quoted above), being raised. In reply Mr Jarman did, however, say that he had told the judge that the father proposed an order being made in South Africa prior to the return of the children in the same terms as the undertakings he had offered prior. This might suggest that there had been, at least, some reference to the question of enforceability during the hearing.

30. Ms Cooper submits that the judge's decision was one which he was entitled to make on the evidence and information before him. The judge had been right to conclude that there was "clear evidence of the significant impact the abuse has had on the mother". He was also entitled to conclude, on the basis of the mother's allegations as to the father's behaviour, that, if true, the risk was a grave risk of abuse which would bring the case within the scope of Article 13(b). The judge had followed the guidance in *Re E* as set out in [36].

31. Ms Cooper also submits that the judge was entitled to find that returning to South Africa would "aggravate the distress and fear already experienced by (the) mother" such that, if the mother's allegations about the father were true, there was a grave risk that the children would be placed in an intolerable situation. She likewise submits that the judge was entitled to find that a return would "potentially (be) psychologically disabling" for the mother. The evidence included the GP's "significant concerns" for the mother if she were to return to South Africa, the mother's demeanour during the hearing and her psychological fragility.

32. In respect of the protective measures, Ms Cooper submits that the judge took them into account. He considered whether it had been "shown that they will be effective to secure the protection of" the children and, although not expressly stated, must have concluded that they would not, probably for the reasons set out in paragraph 34 of the judgment.

33. Ms Cooper also made more general submissions about the efficacy of undertakings in conjunction with orders made under the 1980 Convention. She submits that the courts should be cautious about placing undue weight on undertakings given to the English court which, by their very nature, may not be directly enforceable in another state.

Legal Framework

34. The legal principles applicable in this case are not in dispute between the parties. I, therefore, propose to make only a few general observations.

35. Proceedings under the 1980 Convention need to be determined expeditiously. The fact that applications are to be determined expeditiously permeates the 1980 Convention and the Guides published by the Hague Conference. This was why in *Re D* Baroness Hale expressed the "whole object of the Hague Convention (as being) to secure the swift return of children wrongfully removed from their home country", at [48].

36. The "general scheme" was recently addressed by Lord Hughes in *Re C and Another (Children)(International Centre for Family Law, Policy and Practice Intervening)* [2018] 1 FLR 861. He referred to the "very limited exceptions" to a return being ordered, to the obligation on States to "act fast" and that "the return is summary", at [3].

37. It has also long been recognised that the need for expedition and the summary nature of the process militate against the court hearing oral evidence. Accordingly, in *Re K (Abduction: Case Management)* [2011] 1 FLR 1268, Thorpe LJ said, at [13], that "oral evidence in Hague cases is very seldom ordered" because "Hague applications are for peremptory orders to be decided on written evidence amplified by oral submissions".

38. Likewise the summary nature of the process means that the court will typically not be in a position to make findings about any disputed allegations in particular allegations made to support an Article 13(b) defence. In the judgment of the court in *Re E*, given by Baroness Hale and Lord Wilson JJSC, it was said, at [32]:

> "… in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination."

At [35] the point was made that "art 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country". The judgment then returned to the approach the court should take to factual disputes.

> "36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such

> protective measures, the court may have no option but to do the best it can to resolve the disputed issues."

39. In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations. In *Re W (Abduction: Intolerable Situation)* [2018] 2 FLR 748, I referred to what Black LJ (as she then was) had said in *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720 when rejecting an argument that the court was "bound" to follow the approach set out in *Re E*. On this occasion, I propose to set out what she said in full:

> "52. The judge's rejection of the Article 13b argument was also criticised by the appellant. She was said wrongly to have rejected it without adequate explanation and to have failed to follow the test set out in §36 of Re E in her treatment of the mother's allegations. In summary, the argument was that she should have adopted the "sensible and pragmatic solution" referred to in §36 of Re E and asked herself whether, if the allegations were true, there would be a grave risk within Article 13b and then, whether appropriate protective measures could be put in place to obviate this risk. That would have required evidence as to what protective steps would be possible in Lithuania, the submission went.
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> 53. I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Article 13b exception (see Re E supra §32) and for the court to evaluate the evidence within the confines of the summary process. Hogg J found the mother's evidence about what had happened to be inconsistent with her actions in that she had continued her relationship with the father and allowed him to have the care of E, see for example what she said in §37 about the mother not having done anything to corroborate her evidence. She also put the allegations in context, bearing in mind what Mr Power had said about something good having happened in E's parenting, which she took as a demonstration that E would not be at risk if returned to Lithuania (§36). The Article 13b argument had therefore not got off the ground in the judge's view. The judgment about the level of risk was a judgment which fell to be made by Hogg J and we should not overturn her judgment on it unless it was not open to her (see the important observations of the Supreme Court on this subject at §35 of Re S , supra). Nothing has been said in

> argument to demonstrate that the view Hogg J took was not open to her; in the light of it, it was unnecessary for her to look further at the question of protective measures. She would have taken the same view even if the child had been going back to the father's care, but the Article 13b case was weakened further by the fact that the mother had ultimately agreed to return with E.

40. As was made clear in *Re S*, at [22], the approach "commended in *Re E* should form part of the court's general process of reasoning in its appraisal of a defence under the article". This appraisal is, itself, general in that it has to take into account all relevant matters which can include measures available in the home state which might ameliorate or obviate the matters relied on in support of the defence. As referred to in *Re D*, at [52], the English courts have sought to address the alleged risk 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" (my emphasis).

41. I would also note that the measures being considered are, potentially, anything which might impact on the matters relied upon in support of the Article 13(b) defence and, for example, can include general features of the home state such as access to courts and other state services. The expression "protective measures" is a broad concept and is not confined to specific measures such as the father proposed in this case. It can include, as I have said, any "measure" which might address the risk being advanced by the respondent, including "relying on the courts of the requesting state". Accordingly, the general right to seek the assistance of the court or other state authorities might in some cases be sufficient to persuade a court that there was not a grave risk within Article 13(b).

42. In the light of the submissions made in the present case, I would make two further brief observations. They are brief because this is not the occasion for a detailed analysis of the issues.

43. First, in respect of Ms Cooper's submissions about the efficacy of undertakings given to the English court, it is clear that, in deciding what weight can be placed on them, the court has to take into account the extent to which they are likely to be effective. This applies both in terms of compliance and in terms of consequences, including remedies, in the absence of compliance. The issue is their effectiveness which is not confined to their enforceability: see, for example, *H v K and Others (Abduction: Undertakings)* [2018] 1 FLR 700, at [61]. In saying this, because I acknowledge the concerns that have been expressed about the court's perhaps giving insufficient weight to the point made by Ms Cooper and the need for caution when relying on undertakings, I make clear that I am *not* saying that enforceability is not an issue, only that it forms one element of the court's assessment.

44. Secondly, as referred to above, we were told by Mr Jarman that the issue of the enforceability in South Africa of the specific measures proposed in this case, and about

which the judge raised doubts (in paragraph 34), was not raised either before or at the hearing below. From the statements it appeared that the issue was only whether the undertakings should be lodged with the court in South Africa or whether an order should be made there. From the submissions, as set out in the judgment (paragraph 34), it appears that the issue was when the undertakings should be lodged. In any event, if enforceability was to be an issue, it should have been raised well before the hearing.

45. The President of the Family Division issued Practice Guidance on *Case Management and Mediation of International Child Abduction Proceedings* on 13th March 2018. The issue of protective measures is dealt with in a number of paragraphs which make clear that the issue of specific protective measures, both proposed and sought, must be addressed at the earliest opportunity. It also makes clear that, when required, steps must be taken "in the most expeditious way available, to ensure that information is obtained, whether from the Central Authority of the Requesting State or otherwise, as to the protective measures that are available, or could be put in place, to meet the alleged identified risks"; paragraph 2.11(e). At paragraph 3.12 reference is made to International Judicial Liaison as being one means of ascertaining whether the courts of the home state "can accept and enforce orders made or undertakings offered by the parties" in that state or can make a "mirror order".

Determination

46. The mother's case before the judge was based on the risk of domestic violence and the risk that she would suffer psychologically if she had to return to South Africa. As set out in paragraph 19 above, she asserted that these risks, separately and collectively, gave rise to a grave risk that the children would be exposed to physical or psychological harm or would otherwise be placed in an intolerable situation. Although I acknowledge that the mother's case must be assessed as a whole, I propose to consider how the judge dealt with the two elements as relied on by her.

47. When I first read the judgment, it was not clear to me whether the judge's determination was based only on the risk that the mother would suffer psychologically. This was because, in paragraphs 49 and 51, the judge referred to a return aggravating "the distress and fear already being experienced by the mother" and to it being "potentially psychologically disabling". However, as was pointed out during the hearing the judge also, in paragraph 47, determined that the mother's allegations, if true, would give rise to a grave risk that the children would be exposed to physical or psychological harm or be placed in an intolerable situation.

48. Dealing first with the risk of domestic violence. As Baroness Hale said in *Re E*, at [34], "the harmful effects of seeing and hearing the physical or psychological abuse of" a parent are well-recognised". However, the situation which the court is assessing is not the past but the future. In my view, as submitted by Mr Jarman, the judge in the present case does not analyse the nature and degree of any risk based on the situation as it would be for the children. He simply states that the allegations "would … give rise to a grave risk" and would "impact" on her physical and psychological well-being.

49. I accept, of course, that this court must look at the judgment as a whole and must not undertake too narrow an analysis. However, in my view, it becomes clear from paragraph 50 that the judge did not sufficiently address the situation as it would be. The judge asks whether the proposed protective measures would "ameliorate that risk" but does not provide an answer, other than inferentially. This inference would derive from the judge's determination that the Article 13(b) defence was made out and his concerns as to the effect of the order and undertakings being lodged in the court in South Africa.

50. Whilst in some cases such an inference would be sufficient, I do not consider that it is in this case. This is for two main reasons. First, the judge appears to relate the risk to the mother's allegations of abuse she has suffered rather than to the situation as it would be if she and the children returned to South Africa. Nowhere in paragraphs 49, 50 and 51 does it seem to me that the judge deals with the risk of future abuse. The failure by the judge to address the nature of the risk of domestic violence occurring in the future and to answer why this would not be sufficiently ameliorated by the measures proposed by the father are, in my view, fundamental gaps in the reasoning which cannot be filled by this court. Secondly, to answer these questions, the judge would have needed to consider the evidence as a whole, including the Cafcass Officer's report. He would have needed to analyse why there would be a risk of sufficient gravity to come within the scope within Article 13(b), in particular when the parties would not be living together. This court is certainly not in a position to say that such a consideration would have led to the judge concluding that Article 13(b) was established.

51. Turning to the risk to the mother psychologically. In my view the evidence does not support the judge's conclusion that a return would be "potentially psychologically disabling". The medical evidence expressed "significant concerns" about the mother "being returned" to South Africa. It does not support the judge's conclusion because it nowhere refers to the potential psychological consequences of the mother returning. It also, as referred to above, expressed "no concerns … that (the mother) has any impairment whatsoever in her ability to look after" the children. The other matters, including the mother's demeanour during the hearing, neither individually nor collectively support this conclusion. This applies equally to the judge's conclusion that a return would "aggravate the distress and fear" to the extent of being a grave risk.

52. Accordingly, to adopt what was said by Lord Wilson in *Re S*, at [27], the evidence did not support the conclusion that the mother's anxieties were "of such intensity as to be likely, in the event of a return, to destabilise her parenting … to the point at which the (children's) situation would become intolerable" or cause them psychological harm.

53. In conclusion, therefore, the judge's determination that the mother had established her defence under Article 13(b) cannot be maintained and the order must be set aside.

54. During the course of the hearing both counsel sought, informally, to put new evidence before the court. The mother wanted to rely on a further report from the GP. The

father wanted to rely on a letter from his South African lawyers. We did not admit that evidence but it supported the conclusion that this court is not in a position properly to determine the application which must, therefore, be reheard.

Lord Justice David Richards:

55. I agree that the appeal must be allowed for the reasons given by Moylan LJ.

Lord Justice Lewison:

56. I agree with the judgment of Moylan LJ which mirrors my reasons for joining in the decision to allow the appeal.

57. As a relative tyro in this field, I have concerns about the way that the Supreme Court has expressed the current approach to evidence in cases under the Hague Convention. The obligation placed on the court by article 11 of the Convention is to "act expeditiously;" and if a decision is not reached within six weeks to explain the reasons for the delay. In cases within the EU article 11.3 of Council Regulation (EC) 2201/2003 (Brussels II bis) requires the judgment itself to be given within six weeks, unless there are exceptional circumstances. The shortness of that time scale is such that under normal circumstances an application, even a contested application, will be dealt with summarily. Oral evidence is not completely barred; but it will be rare. A party who seeks a direction for oral evidence must demonstrate that it is necessary to assist the court to resolve the proceedings justly: President's Practice Guidance on Case Management and Mediation of International Child Abduction Cases (13 March 2008) para 3.8.

58. Under article 13 the courts of the requested state have a discretion not to return a child in certain circumstances. The condition precedent to the exercise of that discretion is that the person opposing return "establishes" that one of two criteria is met. This places the burden of proof on the objector: *Re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72. The reason why the Convention places the burden of proof on the objector is designed to ensure that the underlying purpose of the Convention is carried out, viz., the child is to be summarily returned to his or her country of habitual residence unless the abductor can prove that the other parent has in effect consented to the removal of the child; or one of the other exceptions under the Convention applies. It must also be borne in mind that a decision to return an abducted child is not determinative of her future. Apart from the purpose of deterring child abduction, one of the other principal purposes of the Convention is to ensure that it is the country of habitual residence that determines any dispute about custody. So the decision is itself only an interim measure.

59. In *E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 Lady Hale and Lord Wilson discussed the burden of proof and how it was to be discharged.

They referred to certain decisions of the European Court of Human Rights and said at [26]:

> "… the national court does not order return automatically and mechanically but examines the particular circumstances of this particular child in order to ascertain whether a return would be in accordance with the Convention; but that is not the same as a full blown examination of the child's future…"

60. However, they went on to say at [32]:

> "There is nothing to indicate that the standard of proof is other than *the ordinary balance of probabilities*. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination." (Emphasis added)

61. They went on to discuss how that test might be satisfied. At [36] they said:

> "There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, *if they are true*, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues." (Emphasis added)

62. There are a number of fields in which the court is required to reach a decision on a jurisdictional or quasi-jurisdictional question summarily. To give three examples far from the facts of the present case: an application to serve a claim form outside England and Wales; a decision whether jurisdiction has been established under the Judgments Regulation, and a determination of the Centre of Main Interests for the purpose of recognition of cross-border insolvency proceedings must all be determined summarily.

63. In the first of these cases, the Supreme Court held in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 at [7]:

> "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

64. In the second of these cases, the Privy Council held in *Bols Distilleries BV v Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 WLR 12 at [28] that:

> "The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction."

65. In the third of these cases, the courts have applied the same test*: In re Stanford International Bank Ltd* [2010] EWCA Civ 137, [2011] Ch 33 at [30].

66. In cases under the Civil Procedure Rules there are many situations in which a court must make a decision summarily, based on evidence which has not been tested by cross-examination in the usual way. Where a claimant applies for an interlocutory injunction, the normal threshold is whether there is a serious issue to be tried. But where the grant or refusal of an interlocutory injunction is likely to be dispositive of the case, different considerations apply. As Lord Diplock explained in *NWL Ltd v Woods* [1979] 1 WLR 1294, 1307:

> "Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."

67. Like other jurisdictional issues in civil proceedings, the question whether a child should or should not be returned to her country of habitual residence will be decided once and for all at the stage of the summary hearing.

68. The *assumption* that the allegations about past conduct are true ("if they are true") which, according to *Re E*, underpins the exercise, seems to me to be quite different from the evaluative exercise that the court undertakes in other areas of the law. In addition, I find it hard to reconcile that approach to the evidence with the statement in *Re E* that the legal burden of proof is the ordinary civil standard. It might have been said that, as an international convention, the standard of proof under the Hague Convention differed from the ordinary domestic standard; or it might have been said that the relevant test was the same as that in other summary procedures, but that was not what the court said.

69. In Hague Convention cases within the EU the problem is compounded by article 11.4 of Brussels II bis, which places on the left-behind parent the burden of establishing that adequate arrangements have been made to protect the child after her return. If, as seems to be the case, *Re E* requires the accusations to be assumed to be true, but the efficacy of the protective measures to be investigated the overall effect is to reverse the burden of proof required by article 13 (b). I am heartened that, from the examples that Moylan LJ has cited, experienced family judges do not apply *Re E* in its full rigour; but recognise that some evaluative exercise is necessary. But that was not the solution proposed by Mr Turner in *Re E*.

70. The solution proposed by Mr Turner in *Re E* may be pragmatic but, with great respect, unless I have misunderstood it, it seems to me to be unprincipled. The approach to the evidence in Hague Convention cases may be open to reconsideration by the Supreme Court one day; but the current approach binds us.

71. Finally, I would like to add my gratitude to the mother's legal team who stepped in at short notice and pro bono.