Neutral Citation Number: [2019] EWCA Civ 352

Case No: B4/2019/0153

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE COBB
FD18P00719

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2019

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE MOYLAN
and
LORD JUSTICE BAKER

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S (A Child)
(Hague Convention 1980: Return to Third State)

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Mr E Devereux QC and Miss N Scarano (instructed by **Charles Strachan Solicitors**) for the **Appellant**
Miss P Bhari (instructed by **Birmingham Legal Ltd**) for the **Respondent**
Mr Setright QC and Ms Chaudhury instructed by **Dawson Cornwell** for the **Intervener, The International Centre for Family Law, Policy and Practice**

Hearing date: 19th February 2019

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Approved Judgment

LORD JUSTICE MOYLAN:

Introduction:

1. On 15th January 2019 Cobb J determined the father's application under the Hague Child Abduction Convention 1980 ("the 1980 Convention") and ordered that the child, A, be "summarily returned" to Hungary. An Annex to the order contained 14 undertakings given by the father but for which Cobb J would have decided that the mother had established the grave risk exception under Article 13(b) of the 1980 Convention.

2. What makes this case unusual is that Hungary was not the state of the child's habitual residence prior to his wrongful removal. He, with his parents, was habitually resident in Germany.

3. The grounds of appeal did not seek to challenge the court's power under the 1980 Convention to make an order requiring a child to be taken to a third state but contended that the judge had failed to give any "adequate consideration to the implications and/or appropriateness of" such an order and was wrong to have made this order in this case. It was also argued that the "robustness" of the specific protective measures relied on by the judge, namely the father's undertakings, had not been properly analysed by the judge and that they did not ameliorate the grave risk as established by the mother.

4. I gave permission to appeal on 28th January 2019 because I was satisfied that the appeal had a real prospect of success both in respect of the challenge to the judge's decision to order that the child be "returned" to Hungary and of the challenge to the "robustness" of the protective measures.

5. The use of the word return is clearly inapt when referring to an order requiring a child to be taken to, what for convenience can be called, a third state (i.e. a state other than the requested state and the state in which the child was habitually resident prior to the wrongful removal or retention). However, I propose to use it for this purpose for ease of reference.

6. Public funding for leading counsel for the mother was granted at the end of the week before the appeal was listed. In response to a request from Mr Devereux QC on 15th February 2019 I gave permission for a short additional skeleton to be filed by 10.00 am on Monday 18th February 2019, the day before the hearing of the appeal. Unexpectedly, this skeleton provided the first notice to the father that the mother would be seeking to argue (a) that there is no jurisdiction under the 1980 Convention to order that a child be returned to a third state; and (b) that the undertakings provided by the father were not within the scope of Article 11 of the Hague Child Protection Convention 1996 ("the 1996 Convention") and, further, that the 1996 Convention did not in any event apply in this case because of Article 61 of BIIa (Council Regulation (EC) No 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility).

7. At the commencement of the appeal Ms Bhari understandably submitted that she was not in a position to deal with these new points, if the mother was given permission to raise them.

8. This was, to put it mildly, not a satisfactory position when the new points went to issues of jurisdiction. In those circumstances, we informed the parties that we would initially hear submissions confined to the existing grounds of appeal. At the conclusion of those submissions we were able to inform the parties that the appeal would be allowed and the application under the 1980 Convention dismissed, with reasons to follow. We did not, therefore, need to hear submissions on or address the new points.

9. Additionally by way of introduction, also on 15th February 2019, The International Centre for Family Law, Policy and Practice had applied for and, with the agreement of the parties, was given permission to intervene by way of written submissions. These submissions were in support of the court having power under the 1980 Convention to make a return order to a third state. As referred to above, it has not been necessary to determine this issue of principle in this case.

10. I set out below my reasons for agreeing in the outcome to this appeal as referred to above.

Background

11. Cobb J's decision is reported: [2019] EWHC 56 (Fam). I propose, therefore, to set out only a brief summary of the background.

12. The parties are both Hungarian nationals. At the date of the judgment the father was aged 53 and the mother 40. They met in Hungary in about 2009/2010 and started living together. They married in 2017. They have one child, A, now aged 4.

13. In September 2016 the father moved to live and work in Germany. The mother and A joined him there in January 2017. The father had lived and worked there many years previously but it appears that this was the first time the mother had lived outside Hungary. The parties both have children by previous relationships and other family members who live in Hungary. The mother has a sister who lives in England.

14. In March 2018 the family travelled to Hungary for a holiday. After a few days the father returned to Germany. Shortly after that the mother and A travelled to England since when they have been living with the mother's sister.

15. The father travelled to England in early April 2018. As set out in Cobb J's judgment, the mother told the father that she wanted to end their relationship and "apparently in response to this news … the father made an attempt on his own life" on 15th April 2018. He was admitted to hospital. The mother visited him in hospital with A. During that visit, as described in the judgment:

> "the father seriously assaulted the mother on the ward; he attempted to strangle her. The mother had been holding A at the time of the assault and dropped him to the floor. Both the mother and A were medically checked and were found not to have sustained any serious or long-lasting injuries, but both were plainly shaken and understandably distressed by the events. The mother deposes to the fact that "A was very upset by the incident in the hospital". While in hospital after this incident, the father again made attempts on his own life …".

16. On 17th April 2018 the father pleaded guilty to assaulting the mother and was given a suspended sentence of six months. A restraining order was also made prohibiting the father from contacting the mother.

17. The father left Germany and moved to Hungary at some point between the end of April and August 2018. He then initiated the process under the 1980 Convention by contacting the Hungarian Central Authority.

The Proceedings

18. The father's application under the 1980 Convention was issued on 24th October 2018. The application, and the statement from his solicitor filed with the application, sought an order for A's return to Germany.

19. The letter sent by the Hungarian Central Authority to the English Central Authority, ICACU, with the request under the 1980 Convention noted that, "Although (the father) turned to our office in Hungary, according to the application made by the father the family lived in Germany, therefore the child's habitual residence is in Germany". This letter stated that the father was seeking the child's return to Germany as the State of the child's habitual residence.

20. The first substantive order made in the proceedings, dated 6th November 2018, required the father, among other matters, (i) to give a full account of the circumstances in which he came to England and subsequently assaulted the mother; (ii) to state the jurisdiction to which he sought the child's return; (iii) if he sought the child's return to Germany, to set out his proposals as to the child's maintenance, accommodation and education there; and (iii) to serve a statement which included the "protective undertakings he offers in the event that the child is summarily returned".

21. In his statement dated 15th November 2018 the father said that he would prefer A to be returned to Hungary but would leave it to the court to decide whether the order should provide for a return to Germany rather than Hungary. As to the assault, the father explained that the mother had responded to his trying to talk about "a return to Germany or Hungary … in a highly negative manner and because of her behaviour I acted headlong which I deeply regret". The father also said that he was "prepared to give all of the usual and any undertakings" as required by the mother or the court to protect the mother and A on their return.

22. The mother opposed the application on a number of grounds including Article 13(b). She alleged that her relationship with the father had been characterised by domestic abuse and relied on what she had told her doctor in Germany in February 2018 and on the incident in the hospital. She also alleged that the father had mental health problems which impacted on the way he behaved. She objected to a return order either to Hungary or Germany.

23. In his statement in response, the father disputed the mother's account of their relationship. He said that the mother had "taunted" him when she came to see him in the hospital. This led him to act "completely out of character" for which he expressed "deep remorse for what happened". He highlighted the family's connections with Hungary but

said that he could provide a home for A in either Hungary or Germany. He again said that he asked the court to decide to which country A should be returned and that he would "give all of the usual and any undertakings".

24. The final hearing took place on 14th December 2018. As explained below, when the judge gave judgment on 20th December 2018 he adjourned the case to enable the father to provide "a written and signed schedule of the undertakings which he is prepared to offer … including evidence in support, to secure the return of A to Hungary". The matters to be addressed by way of undertakings were set out in the judgment.

25. The father filed a statement dated 10th January 2019 stating that he would give undertakings dealing with all the matters identified by the judge. The evidence he provided was relatively limited but included a letter from his Hungarian lawyer which stated that he had "started the procedure under Hungarian procedural law" in respect, it would appear, of the child. There were a number of other documents which had not been translated from Hungarian but which have been translated for this appeal.

26. At the adjourned hearing on 15th January 2019 Cobb J added a postscript to his judgment and made an order that A should be returned to Hungary. The order listed the undertakings provided by the father and contained a number of recitals including that the undertakings had been given and accepted by the court pursuant to Article 11 of the 1996 Convention; that they were "binding and enforceable obligations in this jurisdiction" and were intended to "constitute binding and enforceable obligations in Hungary"; and that they were "measures" within the 1996 Convention as well as under Regulation (EU) No 606/2013.

27. The undertakings given by the father included: (a) not, in summary, to molest the mother or A; (b) not to remove A from the mother's care and control and that, pending a decision of the Hungarian court, A would remain in the mother's care; (c) to submit to supervised contact with A until welfare issues could be considered by the Hungarian court; (d) to provide and pay for an identified property for the mother and A's sole occupation until 1st March 2019 and an equivalent property thereafter pending the decision of the Hungarian court; (e) to pay the mother maintenance for herself and A at a stipulated rate until the Hungarian court could be seised of the issue of financial support; (f) not to come within a specified distance of the property occupied by the mother and A; (g) to submit to the jurisdiction of the Hungarian court and to "co-operate to bring this matter before the Hungarian court for the purposes of determining" care, contact and welfare issues.

The Judgment

28. The judge observed that "the general preparation of the (father's) case was not the finest example of its type". He pointed to the fact that the father's "generalised comments" about the undertakings he was prepared to offer "fell rather short of the onus on him" under Article 11(4) of BIIa; that the father's evidence contained "internally contradictory information"; and that the father was not clear whether he wanted an order for return to Hungary or Germany. During the hearing the judge sought clarification from Ms Bhari and was told, on instructions, that the father sought a return to Hungary and that he would offer any undertakings the court "reasonably required in order to secure the return of A".

29. The judge referred to a number of authorities including *In re D (A Child) (Abduction: Custody Rights)* [2001] 1 AC 619; *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144; and *O v O (Abduction: Return to Third Country)* [2014] 1 FLR 1405. On the issue of undertakings the judge referred to *Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349; *Re M (Child Abduction: Undertakings)* [1995] 1 FLR 1021; and, in his postscript, to *Re C (Article 13(b))* [2018] EWCA Civ 2834. He additionally referred to *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515 and *Re W (Abduction: Domestic Violence)* [2005] 1 FLR 727.

30. The judge summarised the parties' respective cases and then set out his conclusions. In respect of the mother's case under Article 13(b) he said:

> "46. It is difficult to form a confident view about domestic violence during the parties' relationship and marriage. There is, however, incontrovertible evidence of a serious act of violence perpetrated on the mother after the wrongful removal or retention which lends some weight to the mother's case that this was an abusive relationship. Although at her visit to her GP in February (prior to the removal) the mother's complaints of a history of violence were all self-reported (there was no independent contemporary verification of her account), the history certainly coincides with the father's undoubtedly abusive conduct on 15 April. I am therefore unpersuaded by the father's case that in visiting her GP to make complaint, the mother was merely laying false ground for her departure, and his protestation that his conduct was 'out of character' is less convincing than the mother's account that this was part of a pattern. Whether the domestic abuse was as bad as she says it was is a matter on which I cannot reach any firm adjudication, but I proceed on the basis that she has established to my satisfaction that the father has displayed violence to her both historically and recently."

He also proceeded "on the basis that the father has formally indicated his deep remorse at his conduct" at the hospital and that the father had complied with the restraining order.

31. The judge described himself as being in the same "territory" as Singer J had been in *Re O*, namely by "making clear that without undertakings, or with only the undertakings that are offered, *Article 13(b)* will apply" so that "further or other undertakings are a prerequisite for" A's return. He identified the "essential question":

> "48. The essential question is whether protective measures are, or could be, robust and efficacious enough to protect A from the grave risk of physical or psychological harm in the event of a return. Although the father has been frustratingly vague in making proposals, I see no reason in principle why I should not consider favourably the father's general offer of a range of undertakings as to non-molestation, threats to the mother or violence to her going forward, and his assurances about providing accommodation for her and A."

32. The judge's conclusion in respect of Article 13(b) was as follows:

> "49. Subject to my being satisfied that the father offers suitably detailed and concrete undertakings to reflect relevant protective measures, I propose to order A's return as requested by the father. I will be so satisfied if the father voluntarily gives the following undertakings (or undertakings of a similar nature) *in writing and signed by him*, which would be in force pending determination of the issues by a court in Hungary …
>
> (the judge then set out 12 matters which were to be covered by undertakings)
>
> 50. I propose to adjourn the application for a return order to 15 January 2019 at 10am to await formal *written and signed* confirmation (or otherwise) that the father is willing to make the undertakings set out at [49] above or undertakings which reflect these intentions. Any written undertakings are to be served on the mother and filed with the court by noon on 11 January 2019, together with evidence in support."

33. The judge expressed his conclusion about a return to a third state succinctly:

> "51. Finally, this case has been, as I have indicated above, rendered the more unusual by the fact that the applicant seeks the return of A to a 'third state'. I dispose of this aspect now. Ms Scarano submits that it would be "exceptional" for a court to order a 'return' to a third state. I am loath to use the word 'exceptional' because to do so would be to overstate the position; further, 'exceptional' is one of those words which once used tends to acquire quasi-statutory authority in a wholly unintended way. For my part, I would be prepared to accept that it will be an *unusual* case where the court will order a return to a third state, but it is in principle unobjectionable, and each case will be fact-sensitive. As it is, the mother would, it seems to me be more greatly disadvantaged in the return order being made to Germany – a country where, she says, she never wanted to live. At least in Hungary she has family and some support."

34. In the judge's postscript from 15th January 2019, he considered the decision of *Re C* and said:

> "56. On 11 January 2019, and in accordance with my direction, the father filed a signed and sworn statement of evidence containing a suite of undertakings which he was prepared to offer to mitigate the acknowledged risk. I am satisfied that these broadly correspond with my expectations (set out in [49] above). The father came to court on 15 January 2019, and has been able (through counsel) to augment, refine and clarify the undertakings offered, and add further explanation for the circumstances in which he can deliver upon them. He also formally and verbally gave those undertakings in court, confirming to me that he understands the serious consequences in this country were he not to comply".

The judge then referred to the mother not being present at the hearing and to Ms Scarano's submissions that the undertakings were not sufficient because the father could not be relied upon and because they did not provide the mother with sufficient reassurance "about what lay ahead for her back in Hungary". He concluded as follows:

> 58. It is unnecessary for me to rehearse the full list of undertakings (fourteen in number) here in this judgment, but I am satisfied that they materially ameliorate the future risk of harm to the mother and/or A, and they are sufficiently "effective" (per Moylan LJ in *Re C*) to neutralise the mother's contention that A would be exposed to the grave risk of physical or emotional harm in the event of a return. I am satisfied that the undertakings are sufficiently "detailed and concrete" ([49] above), as I expected them to be; while Ms Scarano plainly had a point in criticising the presentation of the father's case initially (I too criticised this – see [3] and [21] above), I do not accept Ms Scarano's current complaints about the presentation of the father's case on undertakings since the 20 December 2018 hearing. Moreover, I remind myself, as I reminded Ms Scarano, that the arrangements set out in the undertakings are designed to provide short-term protection to the mother and to A only pending the engagement of the Hungarian Court. In my judgment, they do so.
>
> 59. In this case the undertakings offered by the father are reinforced by my knowledge (all of this is evidenced in writing) that: i) The father has notified the relevant social services department in Hungary of the likely return of A, and has indicated his willingness to co-operate with their assessment;
>
> ii) The father's lawyer has apparently initiated child welfare court process in the Courts of Hungary, and has confirmed that "if the Honourable English Court imposes further conditions on the return of the child of course we act in accordance with these conditions";
>
> iii) The father remains bound in this jurisdiction by the terms of the Restraining Order, by which the father is "prohibited from making any contact directly or indirectly with [the mother] save via her solicitors, social services, or Family Court proceedings/order for the purpose of child contact"; whatever the territorial limitations of this provision going forward, it is material to note (in terms of 'effectiveness' of the undertakings) that there is no evidence that over the last nine months the father has breached that order.
>
> 60. I am satisfied that the undertakings proposed are voluntarily and freely given, and I accept them. The Applicant father should consider himself bound by them until the matter is put before the Hungarian Court; his Hungarian lawyer confirms that the father

> knows the likely impact on the father's substantive case in Hungary were he not to honour them.
>
> 61. With those undertakings in place, I am satisfied that it is appropriate now to make the order for return of A to Hungary as foreshadowed by the judgment which I delivered a little less than 4 weeks ago."

Submissions

35. I am grateful to the parties for their respective submissions which can be summarised as follows.

36. The mother submits that the judgment contains no analysis explaining why it was appropriate to make an order, which the judge accepted was an "unusual" order, requiring A to be returned to a third state. At the hearing Mr Devereux submitted that the judge has made what was, in effect, an order for the child's relocation which is not only not an order under the 1980 Convention but is an order contrary to Article 16 which expressly provides that the requested state "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention". It was, Mr Devereux submits, a welfare determination but one made without any welfare exercise having been undertaken.

37. Mr Devereux acknowledged that the court's order was seeking to remedy the mother's unilateral act but submitted that, in doing so by ordering A's return to a third state, the court was acting by supporting another unilateral act, namely the father's decision to move to Hungary. Rights of custody include the right to decide where a child lives and the father's unilateral decision should not, he submits, be endorsed in this way by the court. A decision determining that a child should move to live somewhere other than the state of his habitual residence is, Mr Devereux submits, a decision engaging "the merits of rights of custody".

38. In addition, it is submitted that the judge failed to consider the implications of a return to a third state in terms of the robustness of the proposed protective measures. Under the provisions of BIIa, Article 10, Germany retained jurisdiction until certain conditions were satisfied including that "the child has acquired a habitual residence in another Member State". Hungary did not have jurisdiction to make decisions concerning parental responsibility. There was no evidence addressing the issue of jurisdiction, the letter from the father's Hungarian lawyer being of limited assistance, and no evidence as to how and whether the undertakings given by the father would be enforceable in Hungary. Article 11(4) of BIIa requires that "adequate arrangements have been made" and there was no evidence which supported any such conclusion. The mother, accordingly, challenges the judge's conclusions as set out in the judgment at [58].

39. The mother also questioned whether the father could be relied on to comply with his undertakings given the history and submitted that she had been unable to respond to the specific undertakings proposed by the father because he had failed to provide these until his statement of 10th January 2019.

40. Ms Bhari submits that the judge came to a decision which he was entitled to make and which he has sufficiently explained. In her submission the judge's approach was "careful and measured".

41. The judge ordered the child's return to Hungary because of the child's and the parents' connections with that State and because the mother had made clear that she did not like living in, and did not want to return to, Germany. It had been accepted that the court had power to make such an order. In her written submissions Ms Bhari argued that the judge "did not make the decision based on the unilateral decision of the father or a mere welfare analysis as suggested by the mother, but based on all the circumstances of the case, including the mother's position that whilst she did not agree with a return at all, Hungary was preferable to Germany".

42. Ms Bhari also submits that the judge was right to decide that the undertakings given by the father are sufficient and ameliorate any risk of harm following the child's return to Hungary and pending the outcome of proceedings in Hungary in respect of the child. The judge carefully considered whether the undertakings provided by the father would "address or ameliorate the risk of future harm" and was entitled to conclude that they provided protection to the mother and A pending the engagement of the Hungarian court.

43. Ms Bhari also submits that, based on the letter from the father's Hungarian lawyer, it is clear that Hungary will have jurisdiction once the child returns to Hungary. Further, the mother had ample opportunity to address the nature and efficacy of the undertakings but had chosen not to do so.

44. In response to a question from the court, Ms Bhari did not suggest that, if the appeal was allowed and the judge's order set aside, any other order should be made under the 1980 Convention. She did, however, submit that the application under the 1980 Convention should be remitted so that the father could make an application seeking a summary return under the court's inherent jurisdiction.

45. I should also record elements of the submissions made on behalf of the ICFLPP.

46. The submissions support the existence of the power under the 1980 Convention to order that a child be returned to a third state. It was pointed out that *O v O* was referred to by the Supreme Court in *In re C and another (Children) (International Centre for Family Law, Policy and Practice intervening)* [2019] AC 1. In the course of his judgment, at [35], Lord Hughes JSC referred to the Pérez-Vera Explanatory Report, para 110, as making clear that the decision not to phrase Article 12 as permitting only a return order to the state of habitual residence was "deliberate". This would have been too inflexible and would not cater for, to quote Lord Hughes JSC, the "example given (in the Report) … of the applicant custodial parent who has, in the meantime, moved to a different state". The "propriety, in such circumstances, of an order returning the child to the new home state of the custodial parent" was not an issue in that case.

47. The submissions also include a survey of the international authorities which revealed a difference of approach among the five States considered (Australia, New Zealand, Canada, South Africa, and Israel) in part legislative and in part jurisprudential.

48. It is also submitted that, in the context of BIIa, the structure of Articles 10 and 11 "clearly aims to preserve the jurisdiction of the country of habitual residence following a wrongful removal or retention". One "considerable problem" which a return to a third state is, therefore, said to create is the issue of jurisdiction. What is the jurisdiction of that third state? This, in turn, it is submitted, gives rise to "the question of the efficacy of protective measures". The robustness of the proposed protective measures will require particular scrutiny if the court is considering returning the child to a third state.

Determination

49. I start with three general observations.

50. First, in respect of the order of 6th November 2018, the focus of the parties appears to have been on the provision requiring the father to set out the "protective undertakings" he would offer and did not extend to protective measures more generally. I mention this because, as I said in *Re C*, at [41], the expression "protective measures" has a wide meaning.

51. The *Practice Guidance on Case Management and Mediation and International Child Abduction Proceedings* dated 13th March 2018 refers in paragraphs 2.9(b), 2.11(e) and 3.6 to "protective measures (including orders that may be subject to a declaration of enforceability or registration under Art 11 of the 1996 Convention or, where appropriate, undertakings) the applicant is prepared … to offer". In addition, paragraph 2.11(e) also states that, where the respondent raises a defence under Article 13(b), the applicant must address the issue of "the protective measures that are available, or could be put in place, to meet the alleged identified risks". This latter provision makes clear the broad potential scope of the exercise. I also do not consider that the use of the words, "prepared … to offer", in the other provisions in the *Guidance* should be taken as restricting their scope to protective measures which the applicant can provide.

52. This has some relevance in the present case because, if the exercise in respect of protective measures had been undertaken more broadly, there might have been earlier attention paid to the question of the nature of the Hungarian court's jurisdiction which would be relevant to the efficacy of the proposed protective measures as referred to further below. I say "might" because it only became clear during the final hearing of the application that the father was seeking a return order to Hungary.

53. The second observation relates to the ambit of the 1996 Convention. For the reasons given above, this judgment is not addressing the issue of whether the 1996 Convention applies to intra-EU proceedings because of Article 61 of BIIa nor is it addressing the scope of Article 11. Although we are not dealing with these issues and although, as will be clear, no submissions were made to Cobb J about them, I would draw attention to the fact that, even when the 1996 Convention applies, the jurisdictional scope of Article 11 is not unlimited. For example, there are some matters which are expressly excluded from the scope of the Convention such as "maintenance obligations": Article 4. The exclusion of such obligations would seem to exclude certain of the father's undertakings from the scope of Article 11 (i.e. those relating to maintenance). The recitals to the 15th January 2019 order could not bring them within the 1996 Convention simply by asserting that they were "measures" for the purposes of Article 23" of that Convention.

54. Thirdly, I also repeat what I said in *Re C*, at [43], about the "need for caution when relying on undertakings". In *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144, Lady Hale JSC (as she then was) drew attention to this issue, at [7], when she referred to concerns having been expressed about the "too ready" acceptance by the courts of common law countries of undertakings which are not enforceable in the courts of the requesting state. She also drew attention to the importance of the "efficacy of protective measures" adding, at [36], that "the appropriate protective measures and their efficacy will obviously vary from case to case and from country to country".

55. The Hague Conference on Private International Law is expected soon to be publishing a Guide to Good Practice on Article 13(b) of the 1980 Convention. This is likely to refer to the need to consider whether, when undertakings are being relied upon, they can be made enforceable in the requesting state and, if not, that they should be used with caution when being relied on as measures to protect against an Article 13(b) risk. It will also draw attention to the difference between protective measures and practical arrangements. The latter are put in place to ensure an orderly return so are directed towards facilitating and implementing the child's return by, for example, providing who will pay for flights. They might be described as arrangements which are more light touch.

56. Clearly, protective measures designed or relied on to protect a child from an Article 13(b) risk are in a different category. If the court is considering such measures in the context of determining whether the risk has been established or whether, as in the present case, such measures will sufficiently ameliorate an identified grave risk, the efficacy of the measures will need to be addressed with care. Clearly, the more weight placed by the court on the protective nature of the measures when determining the application, the greater the scrutiny required in respect of their efficacy.

57. Turning to the return order made in this case, in my view, as submitted on behalf of the mother, Cobb J's order was in effect a relocation order. It was self-evidently not a summary return order to the state of A's habitual residence at the date of the wrongful removal or retention, namely Germany. It was also not a return order to the state to which the custodial parent had moved as referred to by Lord Hughes JSC in *In re C*. It was an order which required the mother to move to a state with which she and A clearly had connections but in which they had not been living and to which there was no existing agreement or arrangement that they would move.

58. This situation is, therefore, very different to that which existed in the Supreme Court's decision of *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1017. In that case applications had been made by the father under the 1980 Convention and under the inherent jurisdiction. The Supreme Court ordered the child's return to Texas under the inherent jurisdiction. Further, the context in which that order was made was very far removed from the circumstances of this case. Following a "welfare-based custody hearing" at which both parents had been represented, a court in Texas had decided that it was in the child's best interests for the father to have "primary residence", at [5]. Following this the child lived with the father for about 1½ years. A later order had also been made by a District Court in Texas requiring the mother to return the child to the father. A range of other factors were referred to in Lady Hale JSC's judgment, at [34] to [37], but it is clear from [36] that the court's decision was significantly influenced by the existence of the Texas court's order which conflicted with an order made by the English court. It was "necessary to

restore the synthesis between the two jurisdictions" and for the court in Texas to decide where the child's best interests lay. Further there was "not the slightest reason to consider that (the child) would suffer any significant harm by returning to Texas", the mother not having defended the 1980 Convention proceedings on the basis of any risk of harm, at [37].

59. As Mr Devereux submits, the judge's order in the present case was, in effect, a welfare determination but one made without the judge having undertaken a welfare assessment. Any such assessment would have been addressed with a different focus, with different evidence and with a different approach to the evidence to that which has taken place because the proceedings would not have been confined to the structure provided by the 1980 Convention. The judge's determination was clearly not a welfare determination, even a summary one, as can be seen from paragraph [51] of his judgment. His approach was confined to the structure of the 1980 Convention.

60. Further, as a subsidiary point, and to adopt the words from *In re P (A Child) (Abduction: Consideration of Evidence)* [2018] 4 WLR 16, in my view the judge has insufficiently examined "in concrete terms the situation" which would exist in Hungary, in particular in respect of jurisdiction. In simple terms, I question whether his conclusion that the undertakings are "effective" is supported by his reasoning.

61. First, the judge provides no explanation for his conclusion (at [58]) that the father's undertakings are ""effective" … to neutralise" the grave risk. Is this based on a conclusion simply that the father can be relied upon to comply with them or is it based on them in some manner being effective in Hungary? The recitals to the Order would certainly indicate that the judge viewed the undertakings as being enforceable in Hungary and that this was an integral part of his determination. As referred to above, Cobb J was not addressed on this issue but, for the reasons given above, even if Article 11 of the 1996 Convention applies in the present case, I struggle to see how it would apply to the maintenance obligations covered by the undertakings (which would include the undertaking to provide a property).

62. Secondly, the judge makes clear that the undertakings are to provide "short-term protection to the mother and to A only pending the engagement of the Hungarian court". Again as referred to above, the precise extent of the Hungarian court's jurisdiction (or powers) is not clear because, in part, of the structure of BIIa. I would agree with the submission made on behalf of the mother that the letter from the father's lawyer is of limited assistance and it provides no assistance on the court's prospective financial powers.

63. Additionally, this court has had the advantage that the Hungarian documents provided to Cobb J for the hearing on 15th January 2019 have been translated. These make clear that all that has taken place in Hungary is that the father has been to the local guardianship office (of the Department of Guardianship and Justice) where he was, or appears to have been, told about the jurisdictional requirements of BIIa and that the relevant guardianship authority in Hungary would only be competent if the child is in Hungary and "is considered to be subject to the Child Protection Act". The document records that there is currently no guardianship procedure in Hungary and that the "administrator" has "no competence with regard to the child's unlawful expulsion abroad". This contrasts with

Cobb J's understanding that child welfare proceedings had "apparently (been) initiated" in Hungary.

64. In conclusion, therefore, it is clear to me that the judge's order that A be returned to Hungary cannot stand. In summary, it was a welfare determination but without any welfare assessment having been undertaken. I also consider that the judge's reasoning as to the efficacy of the protective undertakings provided in this case was insufficient to support his conclusion that they were "effective" (for the reasons set out above).

65. As Ms Bhari rightly acknowledged during the hearing, there is no other order which it would now be appropriate to make under the 1980 Convention. I can see no proper purpose being served by remitting the application as suggested by Ms Bhari. Any application under the inherent jurisdiction, if considered appropriate, could be made separately and does not need the 1980 application to continue. Accordingly, the 1980 Convention application will be dismissed.

66. The above comprise my reasons for the appeal being allowed and the application under the 1980 Convention being dismissed.

LORD JUSTICE BAKER:

67. I agree.

LORD JUSTICE LONGMORE:

68. I also agree.