Neutral Citation Number: [2021] EWCA Civ 1236

Case No: B4/2021/0653

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM**

**Mr Justice Cohen**

**FD20P00589**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 10/08/2021

**Before :**

**SIR ANDREW MCFARLANE (PRESIDENT OF THE FAMILY DIVISION)**

**LORD JUSTICE MOYLAN**
and

**LORD JUSTICE ARNOLD**

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**Re C (A Child) (Child Abduction: Parent's refusal to return with child)**

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**Teertha Gupta QC and Mr Michael Hosford-Tanner** (instructed by **A & N Care Solicitors**) for the **Appellant**

**Christopher Hames QC and Mr Paul Hepher** (instructed by **Williams & Co**) for the **Respondent**

Hearing dates : 20th July 2021

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# Approved Judgment

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**Sir Andrew McFarlane P:**

1. This appeal arises from Hague Convention child abduction proceedings relating to a 6 year old French boy, C, whose parents are both French and who had, prior to March 2020, lived in France throughout his life. C was brought by his mother and maternal grandfather to England on 15 March 2020. The visit is said to have been for a short holiday, but any return to France was, at that time, prevented by the imposition of Covid protection arrangements in both countries shortly after C arrived here. In the event, after the initial lockdown restrictions were lifted, C, his mother and grandfather stayed on in England. Their whereabouts were unknown to C's father for many months. Eventually the father traced them and Hague Convention proceedings were commenced in England in November 2020.

2. The proceedings were fully contested and were ultimately determined by Mr Justice Cohen in a judgment given on 30 March 2021, following a one day hearing the previous day. The father's application for an order for C's return to France was granted on the basis either that C would travel back and live with his mother (as the judge found was probable) or, if she refused to travel, that he would be collected by his father and paternal aunt and, back in France, C would live at the aunt's home. The mother now appeals against Cohen J's determination, permission to appeal having been granted by Moylan LJ on 10 May.

## Factual Background

3. The parents, who are both in their thirties, married in June 2010 and spent their married life in Paris, where C was born. They separated in October 2014, when C was some three or four months old. The father went to Israel in circumstances which Cohen J accepted amounted to the abandonment of mother and child. In early 2015 the mother petitioned for divorce and applied for a protection order from the Paris Family Court. The application was dismissed. But, as Cohen J held, the dismissal may be nothing to do with the merits of the application, as the father was at that time based in Israel.

4. By the end of 2015 the French court had settled visiting arrangements for the father at two separate weekend days each month for most of the day, provided that the paternal grandfather was also present. The father had by that time returned to Paris.

5. In January 2019, the Family Court in Paris confirmed the child's residence at his mother's home, but provided that the father should have visiting and accommodation rights on alternate weekends from Saturday 10 am to Sunday 6 pm at the paternal grandfather's house. That order remains in force.

6. Cohen J summarised the overall history in these terms:

> "It is clear that the conflict between the parents since 2015 has been extreme. The mother has made many allegations against the father of harassment, and use of abusive language; and it is clear that both parents have been unrestrained in what they have said against the other in front of C. The father accepts that at times he has acted behaviourally in an erratic way, and has had verbal outbursts because of - and these are the words which

> appear in a French judgment - 'his mental disorder (bipolarity) which can affect his discernment'."

7. Such was the level of parental conflict that the case was referred by the social services to the French Children's Judge. There was concern, in particular, at C's ability to function at school.

8. By August 2019 it was clear that matters had not improved and the French court stated:

> "In this case it emerges from numerous documents filed in the proceedings and the parties' submissions that the relationship is highly conflictual, with the father being particularly aggressive and insulting in certain exchanges, but the mother was also able to refuse to entrust the child to him without reason. This situation can only have a deleterious effect on the child, who needs both parents without being caught up in quarrels that inevitably place him in a conflict of loyalty."

9. The French court advised that a medico-psychological assessment of the family was required. Although that direction was made in January 2019, no such assessment was commissioned by either parent. In any event, at a later hearing in April 2019, the Children's Judge introduced what is described as 'an open education measure' which seems to be a form of education supervision order.

10. The judgment of the French Children's Judge indicates a high level of concern at the highly conflicted environment within which C was growing up. He was apparently displaying violent behaviour and signs of a conflict of loyalty as between his two parents. The Judge found that they were unable to overcome the mutual resentment they felt for each other for the benefit of their child or work together to support him.

11. Some two days following the hearing before the Children's Judge, but before the court's judgment was actually handed down, the mother brought C to London with her father. The mother claims in her statement to the court that her intention was simply to undertake a short visit, but that the imposition of lockdown prevented them returning to France. In any event, once the initial lockdown restrictions were eased, the mother did not return with C to France. Instead she enrolled him in a school in North London where she has remained living for what is now well over a year.

12. Hague Convention proceedings were commenced on 12 November 2020. An initial final hearing was adjourned from early February, because of the mother's legal funding difficulties. Later, an adjournment was sought by the mother to await the outcome of a pending appeal in the Paris Appeal Court. The adjournment was refused and the case proceeded before Cohen J on 29 March.

## Matters no longer in issue

13. During the course of the proceedings the mother raised every possible line of defence, including an assertion that C was not the father's child. The position that has now been reached, at the start of the appeal hearing, is that all of these issues have been resolved either by acceptance or the decision of Cohen J and are no longer in dispute save for

the challenge that is now made to the judge's decision with respect to Article 13(b) of the Convention.

14. It is therefore the position that C's habitual residence is France. At the time of his removal from France the father had rights of custody. Whether the removal was wrongful under the terms of the Convention, as held by Cohen J, or later became a wrongful retention is not relevant. It is clear that either on 15 March 2020 or within a short period thereafter the circumstances were sufficient to satisfy Article 3 and thereby activate jurisdiction under the Hague Convention.

15. Cohen J rejected the mother's claim that the father had either acquiesced in or consented to C moving from France to England. He also rejected her claim that the 'child's objections' were sufficient to establish an exception to the requirement for a summary return. There is no appeal against either of these two decisions. It is, however, of note that following his rejection of the 'child's objections' defence Cohen J observed:

> "…Even if I had found his views amounted to an objection, I would unhesitatingly use my discretion to return C to France in circumstances where the family has no connection with England beyond the presence of the mother and C, and where the French courts are so engaged in his welfare."

## The mother's case under Article 13(b)

16. Article 13(b) of the Hague Convention states

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
>
> a) …
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

17. The mother's case is that during the active life of the marriage, prior to the father's departure to Israel in 2014, she was the victim of domestic abuse perpetrated by the father. She relies upon the father's abandonment of the mother and child as further evidence of his abusive nature. In addition the judge accepted that the mother and child had been evicted from their family home by the actions of the father, who controlled the property company that owned the home. More recently, she cited two occasions where the father had acted violently. More generally, as the concern expressed by the Paris Family Court demonstrates, she complains about the aggressive attitude of the father towards her. Finally, she relies upon the fact that he has been diagnosed with Bipolar Disorder as a factor demonstrating his propensity for unpredictable extreme behaviour.

18. The child, C, has been a witness to much of the behaviour that is complained of. He is, plainly, as the French court has held, caught between these highly conflicted and warring parents.

19. If the mother were required to return to France she would have no accommodation of her own in which to live. She would, in all probability, have to return to living with her own father as had been the case immediately prior to her departure to England.

20. The mother's primary case before the judge was, therefore, that the circumstances were such as to satisfy the threshold in Article 13(b) even if she were to return to France with the child. Cohen J, however, rejected that submission and there is no appeal from that aspect of his decision.

21. Separately, and in any event, the mother has made it plain since the start of the Hague Convention proceedings that she would not herself go back to France, even if the court determined that her child should do so and that he had to go back without her. It is this aspect of the case which is at the centre of this appeal.

22. The learned judge approached the issue as follows:

> "33. The big issue in this case is Article 13(b), namely it is said by the mother there is a grave risk that a return to France would expose C to harm, or place him in an intolerable situation because the mother says simply that she will not go with him if that is what the court orders and, says (the Cafcass Officer), it would be traumatic for C to be without his mother who has been his main carer for all of his life.
>
> 34. I must assess the mother's evidence, and seek to determine the reality of what she will do. Will she return to France or not? The test is not what it is reasonable for her to do. Secondly, what protective measures can be put in place to ameliorate the situation? I have to look at that, not so as to determine whether objectively the mother's expressed refusal to return to France is reasonable, but to determine what impact those measures will have on her reasoning, and whether they are really likely to lead to her returning."

23. The judge then reviewed the evidence, noting that counsel for the mother had not pressed the court in any way to consider allegations that had taken place prior to January 2019. The judge therefore concentrated on the two occasions when the father was said to have assaulted the mother in July 2019 and January 2020 and upon the forced eviction which had taken place in October 2019. With regard to the eviction the judge concluded that 'It does sound an astonishingly un-child-focussed act by the father, and he appears later to have expressed his regret'. But, the judge went on to hold with regard to the mother's accommodation with the maternal grandfather following the eviction:

> "There has been no suggestion by the mother that the accommodation with C in her father's home is in any way either unsatisfactory or unavailable for her and C's future habitation."

24. The judge concluded his consideration on this point as follows:

> "There is no medical evidence that the thought of a return to France or an actual return would unhinge the mother's equilibrium to the extent that she could not go or would not be able properly to function if she did go and all I have is in the most general sense her simply saying, 'I will not go'. I have to say that I do not accept that this loving and devoted mother would separate herself from the child that she loves, and I do not accept or take at face value that she simply will not and could not go.
>
> Nor do I believe that there is any reason why she should think that way. I am quite satisfied that the protective measures offered by the father, when combined with additional measures that will stop enforcement of any charge on the property in which she lives with her father and the provision of proper financial support until the matter can get before the French court, would in combination give the mother and C a quite sufficient degree of security. I am further satisfied that the French court has at its power the full ability to add to any undertaking or make any further order for protective measures if need be.
>
> The mother has not sought any further or additional undertaking from the father. She has not asked for me to require that her old accommodation is made available for her. Her approach is simply that she will not go regardless of what the undertakings might be."

25. Although it is right that the judgment does not expressly state a conclusion on Article 13(b) at this point, all that the judge has said in the lead up to it makes it plain what that conclusion was. Having determined that Article 13(b) could only be established on the basis that the mother would not return, and having set himself the task of determining 'the reality of what she will do – will she return to France or not?'. The judge then determined that she would return to France if C were ordered to go there and, on the basis of that decision, it must follow that the Article 13(b) defence was not made out.

26. Immediately following the judge moved on [at paragraph 47] to say this:

> "I conclude that in any event, for the reasons that I have given, I would exercise my discretion to order return. I remind myself that C is a child who is reported as having had a good and affectionate relationship with his father, and I read that in the report of (Cafcass Officer), who has seen all the papers. If the mother does not return, then I authorise the father and his sister to collect C, but I do very much hope that it does not come to that, as the mother would be doing a great harm to C if she forced that situation."

27. The judge accordingly made an order for C's return.

## Proceedings in French Court of Appeal

28. On 16 May 2021, following a case management hearing in the Court of Appeal of Paris, Judge Sophie Mathe issued a detailed 'interlocutory order' in the cross-appeals that each parent has made within the French matrimonial proceedings. The judge is critical of the mother for failing to seek orders from the French court before unilaterally moving to England. The father had applied to terminate the mother's parental authority. Judge Mathe concluded that:

> "… as things stand, the withdrawal of the mother's exercise of parental authority would be premature, even though there is no disputing that the mother has failed to fulfil her obligations. She must quickly change her behaviour because persisting with it could qualify as a serious reason. Furthermore, the father's behaviour, particularly with regard to payment of the contribution to the child's maintenance and education and his management of conflict with the mother, has been neither exemplary nor appropriate; he has not hesitated to stop the payment for several months and has increased his insults and verbal attacks."

29. In relation to the father's further interim application for a change in C's residence from the mother to the father, the judge concluded:

> "In this case, the child is six years old. He has always lived with his mother because his parents separated just after he was born. The father initially had supervised visiting rights in a neutral place and was then allowed to have the child to stay every other weekend. The previous decisions took this bipolarity into account.
>
> The behaviour of the mother, who chose to leave without informing the father, has deprived the child of his father, with no legitimate reason to justify this. Furthermore, through her behaviour, the mother has decided not to respect the decision, particularly the investigation that has been ordered and that she is not contesting in her statement of appeal. This measure should assist the parties and the courts to find a solution in the interests of the child and the parents must get back in contact with the appointed expert to allow this measure to proceed. Finally, it should be noted that the mother has not answered the summons of the children's judge.
>
> However, at this stage, it has not been proven that it would be in [C]'s interests to change his usual place of residence to his father's home, even though this option must be considered if the mother continues her lack of respect for the father's place and court decisions."

30. The judge directed that the mother must continue to afford the father contact to C in accordance with the current French order. The final appeal hearing was fixed for 25 November 2021.

## The mother's appeal

31. The mother relies on five Grounds of Appeal which are, in summary, as follows:

    1) The judge was wrong in fact and/or there was insufficient evidence to decide that the mother would return with the child to France;

2) The judge approached the matter on his objective assessment of what it would be reasonable for the mother (and hence the child) to be expected to tolerate, and this was wrong in law;

3) The judge's approach to the mother's defence was wrong in law and fundamentally flawed in that

    a) He blurred the decision making process by merging the gateway decision under Article 13(b) with the exercise of his discretion; and

    b) Failed to make any mention of the 'good practice guide' in relation to Article 13(b);

4) Having itself raised the question of whether a psychologist's report was necessary, the court then wrongly dismissed the application by the mother;

5) The judge was wrong to order that if the mother indeed refused to return to France, this six year old child must be returned in the care of his father and aunt, without any further consideration of enforcement measures and taking steps to secure the return which had not been explored or tested in court.

32. In advancing her appeal Mr Teertha Gupta QC, who did not appear below, leading Mr Hosford-Tanner, who did, primarily focussed his submissions on the judge's conclusion that, if an order were made requiring C to return to France, the mother would go with him. The mother's case is that she originally had no intention of staying in England and that it was only when 'lockdown' ended that she changed her mind and decided not to return to France. During submissions, in reply to questions from my lord, Lord Justice Arnold, Mr Gupta accepted that the mother's stated reasoning was focussed upon C and was not based on herself [2nd statement paragraph 42]:

> "In June 2020, when the lockdown ended, I had to decide whether to return to France or remain in the UK. With all that had recently happened including the paternal grandfather's two eviction attempts and the sustained historic campaign of abuse against us I could not bear the thought of returning [C] into that environment. I saw that [C] was happier here and so I decided to remain. I chose to protect my son's life."

Nevertheless, Mr Gupta's instructions are that, now, the mother is adamant that she will not return to France even if C is required to do so.

33. Mr Gupta submits that before the judge could make a finding that, contrary to her stated intention, the mother would return to France, he should have heard oral evidence from her in order to assess the veracity of her claim. Mr Gupta accepted that neither party had applied for, nor suggested that there be, oral evidence, nevertheless he submitted that the judge should have required the mother to give oral evidence so as to enable the court to drill down to the detail of her position and her reasoning. Oral evidence could, Mr Gupta considered, have been given shortly, without the mother traversing the detailed history of her relationship with the father. Mr Gupta accepted that there was no authority on the need for oral evidence in Hague cases in relation to an issue such as this. Typically, oral evidence is rarely permitted in Hague proceedings and is normally confined to issues relating to habitual residence or acquiescence or consent.

34. Mr Gupta is also critical of the judge for, on his submission, failing to give any clear analysis of the reasons for his conclusion concerning the likelihood of the mother's return to France.

35. Lack of detailed analysis and reasoning is a criticism that Mr Gupta seeks to apply more generally to the whole judgment. The judge records the relevant factual elements in the history, but, submits Mr Gupta, the judgment does not contain any, or any sufficient, analysis. Although it is accepted that Hague Convention cases require focus and judgments may be pithy and short, the mother's case is that there was nevertheless a need for much more detail than that which was included in the judgment in this case. Mr Gupta cites, as an example, the absence of any analysis of the fallback plan favoured by the judge whereby C would go to France to live with his paternal aunt.

36. In relation to ground 3, Mr Gupta submitted that the judge had conflated two stages in the process of determining the application which, as a matter of law, are distinct from each other and must be approached in sequence, namely the question of whether Art 13(b) is established and the separate question of the exercise of judicial discretion in the event that it is established.

37. The *Guide to Good Practice* under the Hague Convention, published in 2020 by the Hague Conference on Private International Law deals expressly [at paragraph 72] with the 'unequivocal refusal to return' of the abducting parent:

> "In some situations, the taking parent unequivocally asserts that they will not go back to the State of the habitual residence, and that the child's separation from the taking parent, if returned, is inevitable. In such cases, even though the taking parent's return with the child would in most cases protect the child from the grave risk, any efforts to introduce measures of protection or arrangements to facilitate the return of the parent may prove to be ineffectual since the court cannot, in general, force the parent to go back. It needs to be emphasised that, as a rule, the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child."

Mr Gupta is critical of the judge for not referring to this important guidance.

38. Mr Gupta goes further, he submits that, rather than conflating the two stages, the judge in fact simply failed to determine whether Art 13(b) was, or was not, made out, with the result that the decision was in reality totally based on the exercise of judicial discretion and nothing more. At no stage does the judge formally state that he has found that Art 13(b) is not established. Mr Gupta drew attention to the judge's statement at paragraph 47 [see paragraph 26 above] that 'I conclude in any event, for the reasons that I have given, I would exercise my discretion to order return'. Mr Gupta correctly observed that the question of judicial discretion would only arise if Art 13(b) had been established; if it were not established the court would have no discretion and a summary return order would have to be made. Mr Gupta therefore submitted that, by implication, the judge must have found that Art 13(b) was made out. If that is so then, on the basis of well established authority, the court should not nevertheless exercise the discretion that would then arise in favour of a return to a situation which would expose the child to a grave risk of harm.

39. Mr Gupta's overall submission is that the confused situation that he had drawn attention to arose entirely out of the unjustifiably short and confused structure of the judgment, and the judge's failure to conduct any proper analysis of the key issues.

40. Turning to ground 4, Mr Gupta accepted that he did not challenge the judge's refusal to grant the last minute adjournment that was sought to allow the mother to obtain a psychological report. The submission now made is simply that the court would have been assisted by having such a report and that judge was in error in proceeding to determine the case without one.

41. Where (at paragraph 10) the judge stated that 'there is nothing that indicates that this lady has any psychological condition', he was, submits Mr Gupta, in error as the father himself had at two points in his statement questioned the mother's psychological functioning. On the basis of these two passing references, the mother's case is that the judge should have, of his own volition, determined that a psychological assessment was required.

42. At the start of the appeal hearing the court heard an application on behalf of the mother to adduce fresh evidence in the form of a short medical report. No formal application had been made to admit fresh evidence and Mr Gupta submitted that that the report was not material to which the principles in *Ladd v Marshall* [1954] 1 WLR 1489 applied. It was, he submitted, simply a document that may well assist the court. The court refused the application to admit the new material. Civil Procedure Rules, r 52.21(2) provides that, on appeal, the court will not receive evidence that was not before the lower court 'unless it orders otherwise'. It is well established that the principles in *Ladd v Marshall* describing the special grounds upon which leave to adduce fresh evidence may be granted continue to apply. The court does afford some flexibility in matters relating to the welfare of children as described in *Re E (Children) (Reopening Findings of Fact)* [2019] EWCA Civ 1447 by Peter Jackson LJ at [25]:

> "A decision whether to admit further evidence on appeal will therefore be directed by the *Ladd v Marshall* analysis, but with a view to all relevant matters ultimately being considered. In cases involving children, the importance of welfare decisions being based on sound factual findings will inevitably be a relevant matter. Approaching matters in this way involves proper flexibility, not laxity."

Mr Gupta's concession that the material that he sought to submit was not fresh evidence and fell outside the parameters of *Ladd v Marshall* was therefore determinative of the application. In any event, having read the material on a preliminary basis, we concluded that it was of limited relevance to the substance of the appeal.

43. With respect to ground 5, Mr Gupta submitted that the judge simply failed to investigate the viability of the plan for C to go back to France with the father and paternal aunt, and then live with her pending any further determination by the French court. He also argued that the judge should have required the father and the aunt to give oral evidence in order to assess the plan, rather than simply relying on what was said on paper. In so submitting, Mr Gupta again accepted that there had been no request made for there to be oral evidence on this aspect.

44. In oral submissions, Mr Gupta and Mr Hosford-Tanner did not press an argument made strongly in their skeleton argument to the effect that the Paris Court of Appeal had now

made a merits decision which supported the mother, with the consequence that it was no longer appropriate for the English court to contemplate making a return order under the Hague Convention. A reading of the decision of Judge Mathe demonstrates that such a submission would be unsustainable.

45. The appeal was opposed by Mr Christopher Hames QC, who did not appear below, and Mr Paul Hepher, who did. The court did not press Mr Hames to respond orally, but in a short submission Mr Hames stressed that there was no decided authority on the issue of oral evidence in these circumstances, which fell outside the limited areas where some oral evidence may be called in Hague proceedings. Neither party even raised the question of oral evidence, and the judge was, in Mr Hames' submission, entitled to proceed as he did.

## Discussion and conclusion

46. The only arguable point in this appeal relates to the judge's conclusion that it was probable that the mother would return to France if an order were made requiring C to go there (grounds 1 and 2). Despite Mr Gupta's forceful advocacy, the other grounds are plainly not established. I will therefore discuss these first.

47. In relation to ground 3 and the assertion that the judge blurred the decision making process by conflating Art 13(b) considerations with the exercise of judicial discretion, there is some justification in Mr Gupta's criticism that the description of judge's analysis is both short and lacking in clarity.

48. In *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, the Supreme Court described the structured approach to be adopted by a court when evaluating issues relating to Art 13(b):

> "[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."

In *Re A (Children) (Abduction: Article 13(b))* [2021] EWCA Civ 939, Lord Justice Moylan has recently undertaken a commendably clear and thorough analysis of the approach of the court in cases where Art 13(b) is raised. Whilst I agree with and endorse all that my lord says in his judgment in *Re A*, counsel did not consider it necessary to take the court in detail to *Re A* during oral submissions and it is not necessary to do so in this judgment. That is so because the error that the appellant asserts in the present case does not go to the analysis of factual allegations of domestic abuse, set against the protective regime that might be available in France, which is the primary focus of *Re A* and most Art 13(b) cases. There is no appeal against the judge's decision on that aspect

of the Art 13(b) determination. The issue which is at the centre of the appeal relates to his conclusion on the question of whether the mother would return to France.

49. Although a potential for confusion arises from the fact that the judge did not formally announce his decision on Art 13(b) before moving on to state that he would, in any event, exercise his discretion to order a return, a consideration of the judgment as a whole is only capable of one interpretation. At paragraph 33 the judge identified the 'big issue' in the case as Art 13(b) in the context of a mother who was refusing to return. At paragraph 34 he set out his primary task as 'I must assess the mother's evidence, and seek to determine the reality of what she will do. Will she return to France or not?'. What then follows is his analysis of the evidence concerning the mother's life in France before she departed. He noted the absence of medical evidence. He then, at paragraph 44, stated his conclusion on the central question that he had identified at paragraph 34 which is that he did not accept that she would separate from her child and he did not accept that she would not return to France. This conclusion is reinforced in the next paragraph by the judge expressing satisfaction that the regime of protection that would be in place would give mother and child 'a quite sufficient degree of security'. By that point, although the judge did not say so in terms, it is clear that he had rejected the mother's case under Art 13(b); no other interpretation is sustainable.

50. In the circumstances, the judge's subsequent reference to the exercise of discretion was in error. Once the mother's final line of defence had fallen with the finding on Art 13(b), the court did not have any discretion in the matter and was obliged to order a return under Art 12:

> "12. Where a child has been wrongfully removed or retained in terms of Article 3 and … a period of less than a year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

The judge's error in this regard was not, however, material in that the purported exercise of discretion in favour of a return was on all-fours with the requirement for summary return under Art 12.

51. In the context of ground 3, it is right that the judge did not refer to the *Good Practice Guide* in relation to Art 13(b). The *Guide* is an important resource and the task of a judge in these difficult and complicated cases may well be supported by reference to it. In the present case the relevant paragraph is [72] (see paragraph 37 above) and it is cast in carefully balanced terms which include the following note of caution:

> "It needs to be emphasised that, as a rule, the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child."

The approach adopted by Cohen J in the present case demonstrates that he was very much alive to the prospect of the mother attempting to achieve precisely this situation. In the circumstances, it is not possible to understand how express judicial reference to the *Guide* would have led the judge to adopt a different course or that he otherwise fell into error by not doing so.

52. Ground 4 is cast on the basis that the judge is said to have raised during the hearing the question of whether a psychological report on the mother was necessary. There is no transcript of the hearing and no direct quotation from the judge has otherwise been put forward. The mother's counsel's skeleton argument stated that 'in the course of the hearing, the learned judge commented that he would have anticipated a psychological report if mother was opposing on article 13(b) to assess mother's mental health and likely effect of any order for return to France/whether mother could cope with a return'.

53. Ground 4 seeks to challenge the judge's refusal of the mother's application, made after the close of the hearing and immediately before judgment, for an adjournment in order to obtain a report from an expert psychologist. During submissions, Mr Gupta argued that it 'would have assisted the court' to have the input of a psychologist. He did not, however, make a four-square challenge to the judge's refusal of an adjournment; that he did not do so was, in my view, a reflection of the impossibility of arguing the point.

54. Children and Families Act 2014, s 13, which provides for the control of expert evidence in children proceedings, applies to proceedings relating to child abduction [CFA 2014, s 13(9); Family Procedure Rules 2010, r 12.1(1)(e) and r 25.2(1)]. By CFA 2014, s 13(6), a court may only give permission for the instruction of an expert if it is of the opinion that the expert evidence is 'necessary to assist the court to resolve the proceedings justly'. It was of note that Mr Gupta did not submit that the instruction of a psychologist was 'necessary', but, again, it is understandable that he did not do so as the ground for such a submission simply did not exist. The only references that Mr Gupta could turn to that even touched on the mother's psychological functioning came in two passing observations made by the father in his statements. There is no such assertion made by the mother in her statement – despite her case being advanced on multiple alternative fronts. The mother has not taken up or complied with the direction of the French court for a psychological assessment. The question of a psychological report in the English proceedings was not raised by the mother's experienced legal team until after the day after the oral hearing had concluded, the implication being that, at least until that moment, even her own advisers had not considered that such a report was necessary.

55. Where a parent raises a case under Art 13(b) the primary responsibility and burden for establishing that case is upon the parent. For a judge to remark that, in the circumstances of the present case, he would have anticipated a psychological report to be presented, is an observation that goes to point out a weakness in the parent's case. For a judge to speak thus is materially different from a judge stating that he considers that such a report is necessary to assist the court to resolve the proceedings justly.

56. In the circumstances, there is no basis for challenge to the judge's decision to refuse the mother's request for an adjournment and to refuse her request for permission to instruct an expert psychologist.

57. Ground 5, asserts that the judge was wrong to endorse a return with the father and paternal aunt (if the mother refused to travel with C) when this had not been explored or tested in court and without any further consideration of enforcement measures. This court has not, however, been taken to any reference during the hearing where those acting for the mother sought to explore or test this plan themselves before Cohen J. Both the Court of Appeal for Paris and the local Children's Judge in France are fully aware of C's overall circumstances and, if there are grounds for concern over C's

welfare if in the care of the father and paternal aunt, then the French courts are to be relied upon to respond to ensure that C is protected. In circumstances where it seems that a point of this nature was simply not run at first instance, it is difficult to contemplate holding that the judge was in error in approaching it as he did and it is consequently disproportionate to consider setting aside the return order on that basis.

58. Turning, finally, to the focus of the case, namely the judge's conclusion that the mother would, in fact, return to France if C were ordered to go there (grounds 1 and 2), it is clear from her witness statement that the mother's stated basis for changing her mind and not going back to France after the first lockdown, as she says that she planned to do, arose from her desire not to return C to the circumstances that had previously existed and because C seemed to be happier in England. Later in her statement she simply asserted that 'if C is returned to France it would be without his mother which would put him at a very grave risk of harm'. It was on this evidence that the judge determined the issue.

59. On the question of whether the judge fell into error by not requiring the mother to give oral evidence, it is clear that there is no reported authority on the point in this context. Hague Convention proceedings are summary and, save where it is necessary to do so on issues of habitual residence or consent and acquiescence, oral evidence is not adduced. In the present case, neither party either applied for, or even suggested, the mother to be called to give oral evidence. Against that background, it is very difficult to understand how the judge can be held to be in error by not himself requiring her to be called.

60. In addition, I do not accept Mr Gupta's premise that any oral evidence that the mother might have given would have been short. On the contrary, it would seem likely that, if the mother were to be asked 'why?' she would not return to France, her testimony would have opened up and led to her listing all of her complaints about the father's past behaviour. Such a development would be wholly contrary to the approach taken to Hague cases in this jurisdiction.

61. Whilst, in a case such as this where the issue is one of whether a parent is, or is not, likely to return to the home country with their child if the child is ordered to do so, it may be open to a court to receive oral evidence from that parent on the point, to do so is by no means a requirement. In the present case, the judge is not, therefore, open to criticism for making his determination in the absence of oral evidence.

62. The judge considered the more recent history from January 2019 onwards (and he was not apparently pressed to look back further). He concluded that, taking the mother's case at its highest, there was no suggestion that the accommodation available to her with the maternal grandfather was unsatisfactory, or that the protective measures offered by the father, when combined with additional measures, would not provide a quite sufficient degree of security for herself and C. These factors, coupled with the judge's appraisal that this was a loving and devoted mother, led him to conclude that he did not accept that she would simply not go to France if C were ordered to do so. On the evidence before the court such a finding was plainly open to the judge and he was entitled so to find. Ground 1 is, therefore, not made out.

63. Ground 2 asserts that the judge approached the factual issue 'on his objective assessment of what it would be reasonable for the mother to be expected to tolerate'.

That assertion runs into difficulty when set against the judge's clear and correct setting of the question (in paragraph 34) that he then went on to answer in that he expressly states:

> 'Will she return to France? The test is not what it is reasonable for her to do. … I have to look at that, not so as to determine whether objectively the mother's expressed refusal to return to France is reasonable, but to determine what impact these measures will have on her reasoning and whether they are likely to lead to her returning.'

64. When (at paragraph 44) the judge set out his answer to the central question it was, again, not in terms of what he would consider to be reasonable, but was a bespoke answer focussed on this mother: 'I do not accept that this loving and devoted mother would separate herself from the child that she loves' [emphasis added].

65. In the circumstances, there is, in my view, no basis for asserting that the judge fell into error by imposing an objective assessment of what he considered a reasonable mother would do. On the contrary, the judgment demonstrates that the judge was clearly, and correctly, engaged in determining whether this mother would not go to France if the court required her son to do so. Cohen J determined this issue against her and, on that basis, correctly held that her Art 13(b) claim was not established.

66. For the reasons that I have given, I would dismiss this appeal. The judge's order therefore stands and, if my lords agree, steps must now be made to repatriate young C to France.

**Lord Justice Moylan:**

67. I agree.

**Lord Justice Arnold:**

68. I also agree.