Neutral Citation Number: [2021] EWCA Civ 1354

Case No: B4/2021/0924

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS JUSTICE ARBUTHNOT
FD20P00698

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/09/2021

Before :

SIR ANDREW McFARLANE
President of the Family Division

LORD JUSTICE MOYLAN
and
LORD JUSTICE NEWEY

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C (A Child) (Abduction: Article 13(b))

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Mr C Hames QC and Mr J Holmes (instructed by **Eskinazi & Co Solicitors**) for the **Appellant Father**
Mr H Setright QC and Mr J Evans (instructed by **Henry Hyams Solicitors**) for the **Respondent Mother**

Hearing date : 29th July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am 10th September 2021.

Lord Justice Moylan:

1. The father appeals from the order made on 4 May 2021 by Arbuthnot J ("the Judge") on his application under the 1980 Hague Child Abduction Convention ("the 1980 Convention") for the summary return of the parties' child (C), aged 8, to Poland. The Judge dismissed the father's application having determined that there was a grave risk that C's return to Poland would expose her to physical or psychological harm. The Judge also determined that C objected to returning to Poland but, as set out below, did not make any separate discretionary decision based on these objections.

2. In summary, the father contends that: (i) the Judge failed to apply the correct legal principles when determining the mother's case under Article 13(b) of the 1980 Convention; (ii) the Judge wrongly made or purported to make findings of fact; (iii) the Judge wrongly determined that the Polish authorities would not be able to protect C following a return to Poland; and (iv) the Judge's decision in respect of C's objections was flawed.

3. The father is represented by Mr Hames QC (who did not appear below) and Mr Holmes. The mother is represented by Mr Setright QC (who did not appear below) and Mr Evans.

4. For the reasons set out below, I have concluded that the Judge's decision has to be set aside and the matter remitted for a rehearing. This is regrettable having regard, in particular, to the duration of these proceedings already. However, although (I make clear) this does not provide any reason to delay determining the father's application under the 1980 Convention, it may provide an opportunity for the Polish courts, which are seised with parental responsibility proceedings, to make a welfare decision, or an interim welfare decision, dealing with whether C should remain living with her mother in England or whether they should return to Poland.

5. As the matter will be remitted, there is no need to consider the application made on behalf of the mother to rely on fresh evidence.

Background

6. I propose to set out only a very brief summary of the facts, given that the matter is to be reheard.

7. The parents and C are all Polish nationals. It appears that the parents, and certainly C, have each always lived in Poland. In any event, they were living together in Poland prior to C's, admitted, wrongful removal on 17 September 2020. The mother and the father married in 2009. Previously, the father had been in a relationship with the maternal grandmother.

8. The mother petitioned for divorce in Poland in October 2019. Those proceedings are continuing and are also dealing with parental responsibility issues. In her statement for the 1980 Convention proceedings, the mother said that she and the father separated for a period between October and December 2019 and again from March 2020. Following the latter separation, she said that they agreed that the father

"could have contact with (C) every other weekend". At some point the parents resumed living together.

9. The mother and C travelled to England on 17 September 2020. This was undertaken secretly and the father was unaware that they had left Poland until about two weeks later. The move was clearly pre-planned and the mother appears to have immediately started living with someone in England.

Proceedings

10. The father commenced proceedings under the 1980 Convention on 29 October 2020. At the first hearing, on 9 November 2020, directions were given for the parties to file and serve evidence and for Cafcass to provide a report dealing with C's "views, wishes and feelings in respect of returning to Poland", her level of maturity and whether she should be separately represented.

11. This order did not deal with the issue of protective measures as required by the *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings* issued by Sir James Munby P on 13 March 2018. As will be seen, this contributed to the determination of the proceedings being delayed. There are a number of paragraphs in the *Practice Guidance* which make clear that this issue must be addressed as early as possible in the proceedings to avoid unnecessary delay. They include paragraphs 2.5(b), 2.5(d), 2.9(b), 2.9(d), 2.11(d) and 2.11(e). I would wish to emphasise the importance of this being undertaken.

12. The order of 9 November 2020 did deal with contact. It provided that contact between the father and C should take place remotely, twice per week, with each party agreeing that they would not denigrate or criticise the other or discuss the case with C.

13. The parties provided their respective statements in November and December 2020 and Cafcass provided its report on 18 December 2020.

14. At the next hearing, on 21 December 2020, directions were given for both parties to provide statements dealing with the issue of protective measures. At this hearing the mother made clear that she was relying on Article 13(b) and C's objections. The matter was set down for a final hearing on the first available date after 28 January 2021.

15. The mother provided her statement on 22 January 2021. This set out a number of measures that she sought, including a "protective order" prohibiting the father from coming within 100 metres of where she and C were residing.

16. The father did not provide his statement until 10 March 2021. It is not clear why it was so late. In this, he said that he would agree "not to go where (the mother and C) may be living or to (C's) school" and made a number of other proposals as to, for example, a temporary period of indirect contact. He pointed out that there is no Polish equivalent to an undertaking and that the specific protective order the mother sought (as referred to above) could only be imposed by a prosecutor and not by the civil court.

17. The next hearing, which should have been the final hearing, took place on 11 March 2021. At this hearing the court, "very unusually" (as Mr Setright submitted and I would agree), gave permission for the parties to obtain expert evidence "in relation to the procedure by which protective measures can be obtained in Poland … and the effectiveness of any such orders". Neither party had sought this order, which was raised by the Judge at that hearing. The hearing could also not proceed because the interpreter for the mother had only been booked for one hour.

18. Expert evidence was duly obtained. This set out that, if made by the English court, some of the proposed protective orders sought by the mother would be recognised and enforceable in Poland, but not all of them would be, and that "not all of them in the event of a hypothetical breach by (the father) will result in a particular reaction from the Polish courts or other authorities". In particular, an order made by the English court prohibiting the father from contacting or approaching the mother would not be enforceable in Poland. This was because, as the father had said, such orders "may only be imposed by a prosecutor or a criminal court on the basis of a criminal procedure"; they were not a civil matter. The report also noted that:

> "in the event of any negative behaviour on the part of the (father), the (mother) has the option of reporting such a matter to the police or to the prosecutor. It should therefore be expected that these authorities would react to the above-mentioned violations immediately due to the ongoing police investigation with regard to the abuse of the defendant and (C). Such protective measures, in the event of a threat to the life and health of a minor and the defendant herself, are to be applied immediately, are immediately enforceable and the procedure for their application is free of charge. It should also be noted that the prohibition on the applicant's direct contact with the daughter would also prevent the applicant from picking the minor from school, etc."

19. Additionally, the report stated that an order could be made by the civil court, dealing with parental responsibility, prohibiting or restricting the father's contact with C; "non-compliance with (such an order) will entail an appropriate legal response". Violation of an order prohibiting contact would "constitute a criminal offence (which would be) subject to imprisonment of between 3 months and 5 years". Such an order could only prohibit contact between the father and C and not between the father and the mother but, it was pointed out that, not only would breach of such an order constitute a criminal offence, such behaviour "would not be without a negative impact" and "would influence the court's final judgment" in the pending parental responsibility proceedings.

20. The final hearing took place on 19 and 23 April 2021.

21. There have also been a number of hearings in the Polish proceedings which have not yet been concluded.

The Judgment

22. The Judge summarised the mother's case as follows:

> "The mother's case is that her relationship with the father has been punctuated by physical and verbal abuse and serious sexual assault including when she was sharing a bed with (C) … Some physical assaults by the father were also witnessed by (C)."

The mother also alleged that the father had been verbally and physically abusive towards C. She relied on four incidents which the Judge considered "striking". These dated from December 2012; a second, undated incident; April 2020; and September 2020.

23. The Judge set out that:

> "As a result of the abuse, the mother said she fled Poland on 17th September 2020 and took (C) and their pet dog with her. The father points out that it was a planned departure because when the mother left Poland she immediately went to live with a new partner and his child in England and she had organised a pet passport for the family pet. It is not clear when the mother's new relationship started."

The father also commented that the mother had made "no reference to any abuse" in the divorce proceedings in Poland.

24. The Judge noted that no complaint had been made to any Polish authority about the father's conduct until after the mother had left Poland. This had led to an ongoing criminal investigation in Poland into the mother's allegations in the course of which statements had been obtained from a number of witnesses.

25. In respect of C, when she saw the Cafcass officer, she "made it clear that she wanted to remain in England" and "did not wish to return to Poland", a view she expressed "firmly". The report concluded that C's maturity was generally consistent with her age and "that her views should be taken into account". Adding that:

> "However, I did not consider (C), likely due to her young age, had a full appreciation of the matters to be considered and balanced, including the loss to her of not being raised in her birth country alongside her wider family."

The Cafcass officer did not consider it "a safe option for the mother and (C) to return to the family home in Poland if the father remained in the property until further enquiries and assessment had taken place". She also said that:

> "Whilst appreciating the mother's accounts of abuse to herself and (C) are challenged and disputed by the father, I would not recommend it be a safe option for (C) to be placed in her father's sole care in Poland if her return was ordered and (the mother) chose not to return, until there had been a welfare assessment undertaken by the relevant safeguarding authorities in Poland."

26. The mother relied on recordings she had made of two occasions of remote contact between C and the father. The Judge dealt with these in some detail and they were

clearly influential in her decision. She concluded that they showed that the father was, in essence, not able to control his behaviour because of things he had said about the mother and to C during the contact and even though he had told the court that he would not denigrate the mother or discuss the case during contact.

27. The Judge set out the relevant articles from the 1980 Convention and referred to *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 ("*Re E*"); *MB v TB (Article 13: Alleged Risk of Oppressive Litigation)* [2019] 2 FLR 866, [31]-[32] and [37]; *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, [52]; *Re M and others (Children) (Abduction: Child's Objections)* [2016] Fam 1, [69]; and *Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return)* [2019] EWHC 490, [50].

28. At the beginning of the section in the judgment dealing with Article 13(b), the Judge set out:

> "The first question for the court is whether the mother has established there is abuse of such magnitude that 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" (13 b)). Does the seriousness of the allegations taken at their highest after an evaluation consistent with the summary nature of the proceedings carry the case over the 13 b) threshold so that the court is not bound to return (C) to Poland?"

29. The Judge then set out the parties' respective cases and analysed the evidence. When considering "the allegations at their highest", there are a number of references which might suggest that the Judge was making findings. For example, the Judge said: "There is a mass of evidence before me that the father was abusive towards the mother"; and "There is evidence which I accept that he slapped (C)". She then concluded:

> "[81] I find that there is a grave risk that (C)'s return would expose her to physical harm if she were to be assaulted again by her father or to psychological harm if she were to see her mother abused by him.
>
> [82] A lesser concern raised by the mother is that (C) would be placed in an intolerable situation if she and her mother did not have appropriate financial support to give them a soft landing when they return to Poland. I will consider the undertakings put forward by the father and whether they can be effective and will protect (C) her mother below."

It can be seen that the Judge simply stated, at [81], the harm which would arise *if* C were to be assaulted and *if* she were to see the mother abused by him. Further, the Judge's analysis at this stage of the judgment did not include any consideration of the future, in other words what C's circumstances would be if she returned to Poland. The sole focus was on the mother's allegations about past events.

30. Later in her judgment, the Judge referred to the fact that she had not heard oral evidence from the parents so that "none of the allegations made have been tested by cross-examination". She then said: "I do not make findings therefore about the disputed evidence". However, the Judge then said about one of the alleged incidents (December 2012) relied on by the mother: "The fact that the father felt no restraint about attacking the mother in front of others is concerning"; and about one of the other incidents (undated), that it "showed the father's lack of control".

31. The Judge next dealt with C's objections. She decided that C did object to returning to Poland and noted that this gave rise to a discretion as to whether to make a return order.

32. The next section of the judgment dealt at length with "Protective Undertakings". The Judge summarised the effect of the expert evidence noting that a "restraining order … prohibiting (the father) from approaching the mother … would not be enforceable under Polish law" and that such an order can only be made in Poland "as part of a criminal procedure". She also set out that the Polish court could make an order prohibiting contact between the father and C and that breach of such an order would be a criminal offence.

33. The Judge then said:

> "[103] The question is whether the protective safeguards offered by the father will protect the child and the mother from harm. It is clear that the mother and child have a very close relationship and the child is aware of the claims and counterclaims being made by the parents. (C) has chosen her primary carer's position and as (the Cafcass office) said she is aligned with her mother. If the mother is abused by the father it will harm (C) psychologically and emotionally, particularly if the abuse happens in her presence."

It can be seen, again, that the Judge simply stated what harm would be caused *if* the mother was abused by the father.

34. The Judge then further analysed the alleged incidents relied on by the mother and the recordings of the remote contact sessions. She noted that "More recent threats made by the father are the subject of documentary evidence" and dealt with the contact recordings during which the father had made "threats to the mother" and with what the Judge described as "the threat to blackmail the mother with intimate recordings".

35. The Judge summarised the submissions made on behalf of the father:

> "[117] Mr Holmes for the father asks me to bear in mind factors on the other side of the balance. I do. Amongst a number of factors, I bear in mind the following:
>
> a) None of the abuse either verbal or physical was reported to the Police by any of the witnesses that made statements in the Polish proceedings.

> b) It is particularly surprising that none of the witnesses that saw (C) being abused, including what was said to be with a belt, ever considered that they should take this to the authorities.
>
> c) The father makes a perfectly fair point when he questions why it is that the mother agreed to contact every other weekend in Poland if he was as violent as she says he was.
>
> d) The father has never tried to visit the mother and child in England despite knowing their address. I accept that is the case although travel has been disrupted for a number of months because of the pandemic.
>
> e) The mother has been recording contact for some time, it is striking that there are only two inappropriate contacts.
>
> f) If the order is not made (C) will lose touch with her extensive family in Poland. She will also not be brought up in her birth country."

36. The Judge's ultimate conclusions were as follows:

> "[118] Having considered the various points made for and against return to Poland, in my judgment this is one of the few cases where a child should not be returned. It is clear to me that the father will not abide by conditions imposed by the court, he has been abusive in the past and although (C) could be the subject of protective measures the mother cannot be unless measures are taken by the prosecutor. Any abuse of the mother will harm the child.
>
> [119] The father is determined to get (C) to live with him. If the mother and child were to return, I cannot see how the mother would be protected from the father's behaviour. I do not say that the Polish authorities are incapable of protecting victims of domestic abuse but any recourse to the courts and police would be after the threats or abuse had taken place. Protective measures such as a refuge or a new telephone number in my judgment would not be sufficient. In the past he has been happy to assault her in front of others.
>
> [120] As things currently stand, no direct contact should be allowed because the father threatens the child and pressurises her in one way or another. He shows no insight into her feelings. On balance, there is a grave risk that (C)'s return will expose her to physical harm were she to have direct contact with her father and psychological harm via any attack by the father on the mother. From what I have seen of the father, protective measures will not be effective, he is unlikely to submit to any court ordered restraint and (C) and her mother will be at grave risk of harm if they are returned to Poland."

It can be seen, again, that the Judge did not analyse the circumstances as they would be if C were to return to Poland. She simply stated the grave risk *were* C to have direct contact or were the father to assault the mother.

37. The Judge rejected the mother's argument that "the financial position of the family would make a return intolerable to" C.

38. Finally, under the heading, "The exercise of discretion – child's objections", the Judge said:

> "[122] The child expressed the views of her mother, she is very aware of the disputes between the mother and father and has been a witness to his assaults on her primary carer as well as being a victim of abuse herself. Bearing in mind her age and the decision I have made above I am not going on to consider whether I should take her views into account. I have found Article 13(b) to be made out. In practice, I would not exercise my discretion in favour of a return."

Submissions

39. I only set out a very brief summary of the parties' respective submissions.

40. The father's primary challenge is to the Judge's approach to, and conclusions in respect of, Article 13(b). Mr Hames submitted that the Judge wrongly made findings of fact; did not "look at the future"; and did not evaluate the nature or gravity of the risk to C arising from a return to Poland. In general terms, he submitted that the Judge failed to consider the "specific risk or situation" which was said to establish the Article 13(b) defence. Among other authorities, he relied on *Z v D (Art 13: Refusal of Return Order)* [2021] 1 FLR 210.

41. He also submitted that the Judge failed to apply the established principle that the court should accept, unless the contrary is proved, that the authorities of the requesting State are equally adept at protecting children. Mr Hames relied on *Re H (Children) Child Abduction: Grave Risk)* [2003] 2 FLR 141 and *G v D (Art 13(b): Absence of Protective Measures)* [2021] 1 FLR 36, at [39]. He submitted additionally that, because the Judge had failed to analyse the nature and degree of the alleged risk, she did not explain, with any degree of analysis, why, whatever the risk might be, the protective measures (including orders) available in this case would not be effective to protect against any such risk.

42. Mr Setright submitted that the judgment below is "detailed and comprehensive" and should be upheld. He submitted that the Judge sufficiently set out the relevant legal principles and reached a decision which was open to her. What is required, he submitted, is for the court to consider the matter holistically, taking the allegations at their highest, in the context of the proposed and available protective measures. Mr Setright submitted that this is what the Judge did and pointed to her saying that she would "take the allegations at their highest but examine them with care".

43. In respect of the submission that the Judge wrongly made findings of fact, Mr Setright relied on the Judge's clear comment that she was not making findings. He

submitted that, alternatively, the passages relied on by Mr Hames should be read as including the words "taking the allegations at their highest". He also relied on aspects of the evidence which were, as the Judge said, "the subject of documentary evidence". These comprised what were said to be a "threat to blackmail the mother" and the father's conduct during contact as disclosed by the recordings. The latter included threats towards the mother and, what the Judge referred to as, "an unpleasant implied threat to the child" that she should get ready to return to Poland.

44. As for the Judge's approach to the issue of protective measures, Mr Setright submitted that this case is not an example of the Judge not "trusting" the Polish authorities to protect the mother and C; it is rather a case in which the court concluded that they could not do so, based on the limitations imposed by Polish law and, more importantly, on the evidence of the father's actions and attitude.

45. Mr Setright accepted that the Judge did not deal with, what he neatly termed, the "objection discretion"; i.e. the discretion that arises if the court concludes that a child objects to retuning to their home State.

46. Finally, Mr Setright submitted that, if the order is set aside, the matter should be remitted for a rehearing.

Determination

47. Article 13(b) has been addressed at some length in a number of decisions including two which have handed down since the judgment below in the present case: *Re A (Children) (Abduction: Article 13(b))* [2021] 4 WLR 99 and *Re A-M (a child) (1980 Hague Convention)* [2021] EWCA Civ 998. It is not, therefore, necessary to deal with the legal issues other than for the purposes of explaining my decision in this case.

48. I start with father's challenge to the Judge's approach to, and determination of, Article 13(b). As explained below, and despite Mr Setright's submissions to the contrary, I accept Mr Hames' submission that the Judge did not "look at the future" and did not evaluate the nature or gravity of the risk to C arising from a return to Poland.

49. Article 13(b) is forward-looking. As Lady Hale and Lord Wilson said in *Re E*, at [35], it "is looking to the future" and as Lord Wilson said in *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257, at [34], the "critical question is what will happen *if*, with the mother, the child is returned" (my emphasis).

50. This is also made clear in the *Guide to Good Practice: Part VI, Article 13(1)(b)*, published in 2020 by the Hague Conference on Private International Law ("the *Guide to Good Practice*"):

> "[35] The wording of Article 13(1)(b) also indicates that the exception is "forward-looking" in that it focuses on the circumstances of the child *upon return* and on whether those circumstances would expose the child to a grave risk.

> [36] Therefore, whilst the examination of the grave risk exception will usually require an analysis of the information/evidence relied upon by the person, institution or other body which opposes the child's return (in most cases, the taking parent), it should not be confined to an analysis of the circumstances that existed prior to or at the time of the wrongful removal or retention. It instead requires a look to the future, i.e., at the circumstances as they would be if the child were to be returned forthwith. The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence.
>
> [37] However, forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That said, past behaviours and incidents are not per se determinative of the fact that effective protective measures are not available to protect the child from the grave risk"

That this is the effect of Article 13(b) was rightly accepted by Mr Setright who submitted that the court's "essential task" is to address the issue of *risk*, in the event of the child's return.

51. It is also axiomatic that the risk arising from the child's return must be *grave*. Again quoting from *Re E*, at [33]: "It must have reached such a level of seriousness as to be characterised as 'grave'". As set out in *Re A*, at [99], this requires an analysis "of the nature and degree of the risk(s)" in order to determine whether the required grave risk is established.

52. There is, with great respect to the Judge, no analysis in the judgment, to adopt what is said in the *Guide to Good Practice*, of C's circumstances if she were to return to Poland *nor* of why or whether those circumstances would potentially expose C to a grave risk of harm. She did not look, with any degree of specificity, to C's situation as it would be following a return to Poland.

53. As referred to above (paragraph 29), the sole focus of the judgment, in the section leading to the Judge's initial conclusion, at [81], that there was a grave risk, was on the allegations about past events as relied on by the mother.

54. The Judge might be said to refer to the future when she questions whether the father "will obey an order not to contact (C) except for court ordered contact" and, more particularly, when she set out her conclusions which were, I repeat:

> "[81] I find that there is a grave risk that (C)'s return would expose her to physical harm if she were to be assaulted again by

> her father or to psychological harm if she were to see her mother abused by him.";

and,

> "[120] … On balance, there is a grave risk that (C)'s return will expose her to physical harm were she to have direct contact with her father and psychological harm via any attack by the father on the mother."

However, as can be seen, neither of these paragraphs involves an assessment of C's circumstances if she were to return to Poland. They are simply propositions as to the effect of these acts if they were to occur.

55. During the hearing, Newey LJ described the Judge's analysis as a "truism" because no-one would question that being assaulted would cause physical harm nor that seeing your mother being assaulted would cause psychological harm. This is not, in my view, a mere question of semantics or phrasing. It means that the Judge has not properly assessed how or whether C would be exposed to either of these risks nor how or whether they would be *grave* risks. As Mr Hames submitted, the judgment does not contain any analysis of the nature or the degree of the risk of C being assaulted nor of C seeing her mother being abused by the father. As a result, the Judge did not address the risk of these events happening if C was to return to Poland.

56. This can also be seen from the "first question" the Judge asked, which was "whether the mother has established there is abuse of such magnitude that" a grave risk of harm within Article 13(b) was established. With respect to the Judge this is not the right question. It is not the "magnitude" of the alleged abuse nor, as the Judge also stated, the "seriousness of the allegations taken at their highest" which, by themselves, establish the required grave risk. This is looking at the position as it is alleged to have been prior to the wrongful removal and not at the manner in which the asserted risk, in *this* case, would arise following a return. Again, I do not consider that this is an issue of semantics or phrasing.

57. As a result, in summary, and as was highlighted during the hearing of this appeal, the Judge did not properly look to the situation as it would be if C was returned to Poland nor did she undertake a proper evaluation of the nature or gravity of the risk arising from a return in order to determine whether it was a grave risk as required by Article 13(b).

58. Further, as Mr Hames submitted, unless the court properly analyses the nature and severity of the potential risk which it is said will arise if the child is returned to the requesting State, the court will not be in a position properly to assess whether the available protective measures will sufficiently address or ameliorate *that* risk such that the grave risk required by Article 13(b) will not have been established. As set out in *Re E*, at [36], the question the court is considering is "how the child can be protected against *the* risk" (my emphasis). The whole analysis is contextual and forms part of the court's process of reasoning, as referred to by me in *Re A*, at [97], adopting this expression from *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257, at [22].

59. This means that the Judge's analysis of whether the protective measures sufficiently addressed the prospective risk or risks was also flawed because it was not directed to the circumstances as they would be if C returned to Poland.

60. I would note, in passing, that although the authorities sometimes deal with protective measures as "offered" by a parent (as the Judge did in this case), the issue is broader. As set out in the *Guide to Good Practice*, at [36], the court needs to consider "the availability of adequate and effective measures of protection in the State of habitual residence". As I have said, this is a broader analysis although it will obviously include any specific measures offered or identified by the left-behind parent. I would also endorse what MacDonald J said in *G v D*, at [39], namely:

> "**[39]** Finally, it is well established that courts should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting State are equally as adept in protecting children as they are in the requested State (see for example *Re H (Abduction: Grave Risk) [2003] EWCA Civ 355, [2003] 2 FLR 141, Re M (Abduction: Intolerable Situation) [2000] 1 FLR 930* and *Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433*). In this context I note that Lowe et al observe in *International Movement of Children: Law, Practice and Procedure* (Family Law, 2nd edn), at para 24.55 that:
>
> > 'Although, as has been said, it is generally assumed that the authorities of the requesting State can adequately protect the child, if it can be shown that they cannot, or are incapable of or, even unwilling to, offer that protection, then an Art 13(b) case may well succeed. It seems evident, however, that it is hard to establish a grave risk of harm based on speculation as opposed to proven inadequacies in the particular cases.'"

It is not necessary further to consider the Judge's approach in the present case.

61. It is also not necessary to consider the father's submissions in respect of the issue of C's objections. As referred to above, Mr Setright accepted that the Judge had not considered whether or how to exercise her discretion based on C objecting to a return to Poland.

62. During the course of his submissions, as referred to above, Mr Setright submitted that the process is holistic. In other words, whilst the court's process of reasoning will inevitably comprise more than one stage, the issue which the court ultimately has to determine, by reference to all the relevant evidence and factors, is whether the grave risk required by Article 13(b) has been established. There is no mandated approach and the *Guide to Good Practice*, at [46], sets out alternative approaches:

> "Courts commonly assess the availability and efficacy of protective measures at the same time as they examine the assertions of grave risk; alternatively, they do so only after the existence of a grave risk and an understanding of its nature has been established by the party objecting to return."

However, it is possible that the Judge in the present case was led astray by setting out her determination that "there is a grave risk" in the course of her judgment rather than at the end. Whatever course is adopted, judges clearly need to bear in mind that the decision as to whether the required grave risk *has* been established requires, as Mr Setright submitted, the court to consider the matter comprehensively and by reference to all relevant matters.

63. I would further repeat what I said in *Re A*, at [96]:

> "[96] If the judge concludes that the allegations would *potentially* establish the existence of a grave risk within the scope of article 13(b), then, as set out in *In re E*, at para 36, the court must "ask how the child can be protected against the risk". This is a broad analysis because, for example, the situation faced by the child on returning to their home state might be different because the parents will be living apart. But, the court must carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to a grave risk within the scope of article 13(b). And, to repeat what was said in *In re E*, at para 52: 'The clearer the need for protection, the more effective the measures will have to be.'" (my emphasis)

64. Mr Hames also submitted that the Judge wrongly made or purported to make findings in respect of the disputed allegations relied on by the mother. Although the Judge said that she was not making findings, on a number of occasions in the course of her judgment the Judge appeared to have been making findings. For example, she referred to "a mass of evidence … that the father was abusive"; and said that the father "assaulted (the mother) physically as described by the witnesses in the police investigation". In the paragraphs setting out her conclusions, as set out above, the Judge said: "he has been abusive in the past"; and "In the past (the father) has been happy to assault (the mother) in front of others".

65. It is difficult not to describe these examples as representing findings. However, even if the Judge was not making findings, in my view, her observations sufficiently have the appearance of findings as to support this element of the father's case. They appear clear statements of her assessment as to the effect of the evidence and sufficiently depart from the *Re E* approach as further to undermine her conclusion that Article 13(b) was established.

Conclusion

66. For the reasons set out above, I have concluded that this appeal must be allowed. It would, clearly, have been preferable if this court had been able to determine the application. However, we are not in position to undertake the broad analysis required because we have not heard full submissions on, or been taken sufficiently through, the evidence to determine what order should be made, in particular in respect of how the discretion to make a return order should be exercised in the light of the Judge's conclusion that C objects to returning. The matter will, therefore, be remitted to be reheard, as soon as can be arranged.

Lord Justice Newey:

67. I agree.

Sir Andrew McFarlane P:

68. I also agree.