Subjective reasoning

Lauren Hall looks at recent case law regarding the correct approach to be applied upon an article 13b defence of risk of harm

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One of the possible defences to a Hague Convention application for child abduction is grave risk of harm to the child. This means that returning the child to where they had been living prior to their removal would place them at risk of grave psychological or physical harm or otherwise place the child in an intolerable situation. This defence derives from article 13(b) of the Hague Convention. The past nine months has seen the Supreme Court turn its attention to this same issue on two occasions. This article will assess the current interpretation of article 13(b) in light of those two cases.

Re E [2011]

In *Re E*, the Supreme Court considered article 13(b) in light of the European Court of Human Rights decision in *Neulinger v Switzerland* [2011]. One of the reasons why permission to appeal was granted in *Re E* was because the Supreme Court or the House of Lords had not previously considered article 13(b).

The Hague Convention's purpose is two-fold:

- to prevent parents from taking the law into their own hands; and
- to return children as soon as possible to their home country to enable the courts of that country to determine issues concerning the welfare of the child.

The Convention had been criticised in domestic violence cases for not giving proper consideration and weight to the domestic violence. It was argued that the courts were too willing to accept undertakings and protective measures on behalf of the left behind parent. At first instance, in *Re E*, Pauffley J decided that the protective measures were sufficient and there was:

> ... no substance in the suggestion that because of the mother's subjective reaction to an enforced return there would be a grave risk of... harm for the children.

This was subsequently supported by the Court of Appeal and it was accepted that the protective measures offered would protect the child. It appeared from this decision that there would be a continued restrictive application of article 13(b) to fulfil the obligations of the Convention. However, on appeal the Supreme Court asserted that the 'words of article 13 are quite plain and need no further explanation or gloss' and clarified the following:

- The 'burden of proof' lies with the person who opposes the child's return.
- The risk to the child must be 'grave and the risk must be more than 'real'. 'Grave' characterises the risk rather than the harm.
- 'Physical or psychological harm' are undefined. In *Re D* [2006], it had been said that 'intolerable' was a strong word, but, when applied to a child, must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'. It was accepted that exposure to the harmful effects of seeing and hearing the physical or psychological abuse of their parent

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would be intolerable. In *Re E* it was accepted that if there was a risk, the source of that risk was irrelevant. Therefore, the perception of the risk could be 'subjective'.

- Article 13(b) is concerned with looking at the future.

Essentially, it is the court's objective in allegations of domestic violence to consider whether there is a risk and how this risk can be combated by protective measures. Obviously the required tenacity of protective measures varies from case to case depending upon the particular facts and the jurisdictions involved.

In *Re E* it was decided that the children should be returned. It was believed that the Hague Convention was designed to strike a fair balance between the children's best interests to be reunited with their parents as quickly as possible and for children to be raised in an environment where they are not at risk of harm. Thus the position after *Re E* was that a child would be returned if protective measures were sufficient to meet the risk of psychological or physical harm.

Re S [2012]

Re S concerned a British mother with Australian citizenship and an Australian father. The parents, who lived in Sydney and were not married, began to cohabit in 2008. Between 1994 and 1998 the father had been a heroin addict and the mother's pregnancy in February 2009 early into their relationship coincided with serious financial difficulties for the father. These difficulties led the father to serious alcohol and drug relapses between 2009 and 2011. The mother alleged that she had been a victim of domestic violence and she also had historic long-term mental health problems, including anxiety and depression. At the time of the relationship breakdown the mother was being treated with medication and extensive psychotherapy for a chronic anxiety condition.

The catalyst for the relationship breakdown was on 19 January 2011, when the mother alleged that she found the father injecting himself with drugs. The mother sought the intervention of the police and this culminated in the police obtaining on the mother's behalf an 'apprehended violence order'. The mother then removed the child from Australia to England on 2 February 2011. The father issued his application for the return of the child shortly thereafter. The mother raised an article 13(b) defence. The basis was that she pleaded a return would be likely to cause her clinical depression which could damage her secure attachment to the child.

The Supreme Court clearly affirmed Re E*'s authority that the source of the article 13(b) risk is irrelevant and disagreed with the Court of Appeal's 'crucial question' of whether the risk was realistically and reasonably held.*

At the directions hearing before Coleridge J on 30 June 2011 the application was listed for:

- consideration of whether the allegations raised by the mother would come within the article 13(b) exception having regard to the proposed undertakings/protective measures; and

- subject to the court's conclusions as to the above, a summary disposal with directions to enable a further hearing with oral evidence as the court considered appropriate.

This directed an apparent two-stage approach with Charles J having careful regard to the decision in *Re E*, particularly the emphasis upon protective measures. Charles J decided to adjourn the hearing because he was not in a position to consider whether the protective measures offered would be practically enforceable. Charles J was keen to have further information as to the precise protective measures that were proposed to take effect as soon as the mother arrived in Australia.

Consequently, the parties jointly instructed a psychiatrist to undertake an assessment of the mother's mental health, the impact on this mental health of a return to Australia, and what protective measures could be put in place to safeguard the effect on her mental health on a return to Australia. The expert psychiatrist reported that the mother's current psychiatric condition was 'stable', concluding that the impact on the mother of a return to Australia would be 'significant and severe'. The expert did not address protective measures and he was not pressed on this point or requested to attend the hearing to give oral evidence.

Charles J concluded that despite the protective measures offered, a return would give rise to grave risk of harm under article 13(b). This was despite his finding that the mother would have a 'home and an appropriate package of support' in Australia. He held that this was the conclusion even if the mother's allegations of abuse were untrue.

Court of Appeal

The father appealed and put forward three successful arguments:

- The Court of Appeal held that *Re E* was a 're-statement and not an evolution of current law' and that it had not set a lower standard for an article 13(b) defence.

- The judge at first instance had arrived at a 'disproportionate conclusion' that the protective measures offered were inadequate and that the return would nevertheless place the child in an intolerable situation. The Court of Appeal focussed on the expert avoiding addressing what protective measures could be put in place to satisfy the risk and stated that any anxiety as to enforceability of the protective measures should be low given the sharing of common law with Australia. The Court of Appeal did not accept that the court needed to 'weigh objective reality of asserted anxiety', in such a context of the mother's 'subjective perception' of risk of her having a severe reaction to a return order being made. The Court of Appeal

considered that the court still had the crucial question of:

> ... were these asserted risks, insecurities and anxieties realistically and reasonably held in the face of the protective package, the extent of which would commonly be defined not by the applicant but by the court?

- The Court of Appeal was also concerned that the judge misdirected himself by considering the 'emotional toll of relocation proceedings that the mother would belatedly bring on return.'

The Court of Appeal allowed the father's appeal and ordered that the child be returned to Australia. The mother then appealed to the Supreme Court.

Supreme Court

The Supreme Court unanimously allowed the mother's appeal with Lord Wilson giving the leading judgment. This began with a look at the decision in *Re D* in which it had been held that the terms of article 13(b) were 'plain' and that they did not require the need for 'elaboration'. The Supreme Court held that the very words of the defence 'restricted' its availability and the Court of Appeal's 'crucial question' and the formulation of it had created confusion about the approach to an article 13(b) defence.

In addressing the mother's psychological health, the Supreme Court noted that Charles J had before him evidence of the mother's pre-existing mental health condition with GP evidence and further medical evidence of psychotherapy in Australia. Moreover, it was agreed that there should be a psychiatric report of the mother's mental health. The evidence suggested that the mother's pre-existing mental health difficulties would be exacerbated by a return to Australia.

The Supreme Court affirmed that in cases of domestic violence the court should adopt a two-stage approach:

- To ask the question: if the allegations of domestic violence are true would the child be exposedto physical or psychological harm?
- If the answer is yes, how the child can be protected against that risk?

However, it was unnecessary to have formal separate investigation of a defence as a preliminary point.

The Supreme Court criticised the Court of Appeal's sparse reference to the history to the matter and failure to refer to key factual elements of the case. The assessment of the mother's case was inadequate and it treated the basis of her defence as being merely her 'subjective perception of risk which might lack any foundation in reality'. The Supreme Court recognised that a respondent's subjective perception of risk could found a defence. In any event, Charles J had found (after careful assessment of the evidence) that the mother's subjective perception of risk was founded on objective reality.

The Supreme Court clearly affirmed *Re E*'s authority that the source of the article 13(b) risk is irrelevant and disagreed with the Court of Appeal's 'crucial question' of whether the risk was realistically and reasonably held in the face of the protective package. Clarifying the position the court proposed what it considered to be the 'critical question':

> What will happen if, with the mother, the child is returned? If the court concludes that, on return, the mother will suffer such anxiety that the effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned.

On that reasoning, it was clear therefore that in *Re S* the mother's perception of risk did not need to be objective for her to successfully plead an article 13(b) defence.

Conclusion

Re S was an unusual case by the Supreme Court's admission and it was in the context of the Court of Appeal failing to appreciate that the mother's fears rested more than on disputed allegations. The case was unusual in that it had powerful medical evidence of a pre-existing mental health problem and like all cases it was decided on its particular facts. One needs to consider how protective the protective measures need to be and are the usual undertakings enough in a case where the abductor has met the article 13(b) threshold.

In Re S *the mother's perception of risk did not need to be objective for her to successfully plead an article 13(b) defence.*

One potential consequence of this decision is an opening of the floodgates to abductors simply raising an article 13(b) defence and their subjective anxieties more frequently. Arguably, however, the court adopted the same approach as *Re E* in *Re S*. It is anticipated that the court will become acutely aware to subjective anxieties being raised inappropriately in an article 13(b) defence.

A further potential consequence of this decision is that it may encourage psychiatric reports being ordered as standard practice when an abductor pleads article 13(b) based on mental health problems. It is suggested that given the court'shistoric caution in relation to such defences, psychiatric reports will only be ordered where appropriate. ■

Re D (A Child) (Abduction: Rights of Custody)
[2006] UKHL 51
Re E (Children) (Abduction: Custody Appeal)
[2011] UKSC 27
Re S (A Child)
[2012] UKSC 10
Neulinger & anor v Switzerland (Application 41615/07)
[2011] 1 FLR 122