Neutral Citation Number: [2019] EWHC 56 (Fam)

Case No: FD18P00719

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2018 and 15/01/19

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

S (Father)	**Applicant**
- and -	
D (Mother)	**Respondent**

- -

S v D (Hague Convention: Domestic Abuse: Undertakings: Return to Third State)

- -

Poonam Bhari (instructed by **Birmingham Legal Limited**) for the Applicant (father)
Naomi Scarano (instructed by **Charles Strachan Solicitors**) for the Respondent (mother)

Hearing dates: 14 December 2018 and 15 January 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb :

1. This case concerns one child, A, a boy aged 4 years 3 months. He is the only child born to the relationship of the Applicant (who I shall refer to as "the father") and the Respondent ("the mother"). The mother and father are married; each parent has children from previous marriages and/or relationships. They are Hungarian nationals, and last lived together in March 2018 in the Federal Republic of Germany.

2. The application before the court has been brought by the father pursuant to the provisions of *Child Abduction and Custody Act 1985* (incorporating the Convention on the Civil Aspects of International Child Abduction 1980 ("The *Hague Convention*")), and under *Article 11* of *Council Regulation (EC) 2201/2003*. The application is dated 24 October 2018; he seeks the return of A to Hungary.

3. For the purposes of the proceedings, I have read the statements of the parties and various supporting documents, and have received the able submissions of counsel for both parties. I am bound to observe that the general preparation of the Applicant's case was not the finest example of its type. The father failed to comply strictly with the direction (Order 6.11.18) to provide a list of the protective undertakings he was prepared to offer, and his generalised comments (cited below at [33]) fell rather short of the onus on him to "establish that adequate arrangements have been made to secure the protection of the child after his return" (*Art.11.4 BIIR*). Furthermore, his statements contained internally contradictory information, reflective, I believe, of a lack of care in their preparation. I make these points as the deficits in the preparation of his case – uncharacteristic of the generally high quality of case preparation which the Courts are accustomed to seeing from solicitors on the ICACU accredited panel – have rendered my task, in this essentially summary process where heavy reliance is placed on the filed documents, all the more difficult.

4. There is no dispute in this case that the A's removal from Germany (and if not removal certainly his retention from Germany) was wrongful. In her statement of evidence, and in the preparatory documents for this hearing, the mother tentatively suggested that the father had consented to or acquiesced in her removal or retention of A in this jurisdiction, but she does not pursue either argument at the hearing.

5. The mother nonetheless seeks to establish that there is a grave risk that the return of A to Germany (where they were last habitually resident) or Hungary (where the father now lives) would expose him to physical or psychological harm. In evaluating whether that *Article 13* exception is established, the case raises some interesting evidential and legal difficulties.

Background facts

6. The father is 53 years old, the mother is now just 40. Both have had previous partners. The father has three adult children who live independently, but with whom he says he maintains a good relationship; the mother has two teenage children who live with their father in Hungary. The mother last saw her older children in April 2018, but I am told by her counsel that the mother speaks with them every day.

7. The parents' relationship commenced in or about 2009/2010, and they apparently lived together from about that time. A was born in 2014; he suffers from hypotonia

(low muscle tone, often involving reduced muscle strength) and apparently has poor eye sight; he is otherwise a healthy little boy.

8. In early January 2017, when A was 2½ years old, the parties married. At or about the time of their marriage they moved to Germany[1]. Until that point both parents had lived all their lives in Hungary. No steps have been taken, so far as I am aware, to dissolve the marriage.

9. During the marriage, the father was variously a courier or truck driver; the mother was studying. A attended nursery.

10. The parties give rather different accounts about their relationship. The mother describes it as emotionally and physically abusive. The father denies this, pointing out that the couple were together for some eight years before the mother agreed to marry him – inconsistent, he says, with a chronic history of abuse. That said, he accepts in a statement he gave to the police after the abduction (on 3 April 2018) that "they (sic.) were conflicts, but such degree the problem no I thought (sic.)".

11. Shortly before the hearing the mother filed and served evidence from her GP in Germany in the form of an undated letter. Although there was a translation of the letter this was not certificated, so I caused the mother's court interpreter to provide a sworn translation from the witness box at the hearing. It reads as follows (the words in [square brackets] are those used by the interpreter in court):

> "In February (2018) this patient visited me in desperation. She felt intimidated by [in fear of] her husband who regularly abused [assaulted] her both verbally and physically, threatening her and her child by saying that if they tell anyone or see a doctor or get outside help, then he will pull [tear] them apart and wherever they go he will find them and ruin their lives.
>
> After each abuse where there were visible signs on the body my patient stayed in her apartment restricting social relationships until her body had recovered [was completely healed]. This is why recorded diagnosis did not happen and on the other hand I patient was so badly frightened that she did not dare to undertake the procedure involved.
>
> Several times we talked [we had many conversations] about looking for a way out of this situation, taking into account the possibilities and their consequences."

12. The father asserts that he enjoys good health, and has produced a letter from his Hungarian GP to confirm this. The mother challenges this, asserting that the father suffers from a bipolar disorder or personality disorder; there is no clear supporting or corroborative evidence of this, though there is a record of the father self-reporting to

[1] The mother says in her witness statement that the couple moved to Germany soon after A was born (#8) and that they had lived together for the majority of their relationship (#10); however, on taking specific instructions at the hearing Ms Scarano confirmed that the couple moved to Germany at the time of the marriage. This broadly corresponds with the father's evidence that they only moved to Germany after the marriage.

medical professionals in Manchester on 15 April 2018 (see [15] below) "Hx bipolar" which appears to offer some support for the mother's case.

13. In the same vein, the father asserts that the mother has been "treated for borderline personality disorder, and her behaviour is unpredictable"; he further states that the Hungarian court had previously ordered that her two older children live with their father because of the mother's "lifestyle", based in part on psychological evidence filed in those proceedings (on which, I infer, her former husband had relied). He refers to the mother's "psychological imbalance", adding

> "In the court case, the Judge ordered a full psychological report into her mental health due to her unstable behaviour and the psychologist found [the mothers] mood very changeable and erratic."

I have not seen this evidence, or anything like it, and the mother has not specifically addressed it in her evidence; I can, accordingly, reach no conclusion about it. The father further asserts that the mother has historically made (and continues to make) a living as a stripper, and that this lifestyle contributed to her former husband's success in his bid to care for her older children.

14. In March 2018, the parties travelled from Germany to Hungary for a short holiday. After a few days, the father returned to Germany. Shortly thereafter the mother and A travelled to England. There is a dispute on the face of the documents about whether the father knew or consented to the mother travelling to England; it is not necessary for me to determine this, as it is not now the mother's case that the father consented to her bringing A to this jurisdiction permanently. The mother travelled to visit her sister and the sister's partner who live in Manchester. It is the father's case that the mother's sister is a professional stripper, and that the sister's partner abuses drugs. Indeed, it is the father's case (as I mentioned at [13] above) that the mother continues to make a living from working in strip clubs; she claims to work in a restaurant.

15. The father was aware that the mother had left Hungary by 3 April; on that day he sent a report to the police (referred to at [10] above). The text of the report/statement is rather garbled, but the gist is clear enough. He rightly suspected that the mother had travelled to England, and indeed he followed her here. He booked into a hotel in Manchester. He asked for and was allowed contact with A. The mother and father had discussions about their future; the mother reports that she told the father that she wished the relationship to end. It was, apparently, in response to this news that the father made an attempt on his own life. On or about 15 April 2018, he took an overdose of the medication Xanax/Alprazolam[2] with alcohol, and he was found in a state of unconsciousness barricaded into his hotel room; he was conveyed to hospital for treatment. On the way to the hospital, the father appears to have given the history of a bipolar disorder (see [12] above).

16. Having been admitted to hospital, on 15 April, the father was visited by the mother and A. During this visit, the father seriously assaulted the mother on the ward; he attempted to strangle her. The mother had been holding A at the time of the assault

[2] Xanax is used to treat anxiety disorders, panic disorders, and anxiety caused by depression; it can also be used to aid sleep; the father says that he had this drug without prescription

and dropped him to the floor. Both the mother and A were medically checked and were found not to have sustained any serious or long-lasting injuries, but both were plainly shaken and understandably distressed by the events. The mother deposes to the fact that "A was very upset by the incident in the hospital". While in hospital after this incident, the father again made attempts on his own life: "At 16:35hs [the father] was found with his trouser belt around his neck, which he tied around the pipe from the ceiling and was about to jump off a chair that he had managed to put under the pipe". Later that day he was reported to have tissue in his mouth which he was trying to swallow.

17. In relation to the assault on the mother, the father was charged with an offence of assault contrary to *section 47 Offences Against the Person Act 1861*; on 17 April 2018, he pleaded guilty. He was given a 6-month suspended sentence (the court log records "serious assault, child present"), he was made the subject of a restraining order, and ordered to pay compensation and costs. He alleges that the mother or her agents (sister/sister's partner) removed his car and personal items while he was in hospital. I am unable to make any findings about this. He returned to Germany.

18. At some point during the next five months, the father moved to Hungary, where he now lives. On 21 August 2018, the father contacted the Hungarian Central Authority seeking assistance with the return of A. On 28 August 2018 he contacted a lawyer and on 17 September 2018 wrote directly to the Family and Child Welfare Centre in his local town in Hungary asking them to investigate. On 24 October he made an application under the Hague Convention. By his application he sought A's return to *Germany*, and this outcome was confirmed by his solicitor (per first statement). However, when he filed his own statement, the father deposed to seeking A's return to *Hungary*. In his second statement he invited the court to return A to *either Germany or Hungary* – and it was this option which Ms Bhari presented to the court at the outset of the hearing.

19. It is pertinent to remark at this stage that on the evidence before me I am satisfied that both parties have, for their own reasons, abandoned their home and habitual residence in Germany. The mother had on her case never been happy there; she maintains in her written evidence that she was "not entirely happy about [the move to Germany in 2017] but felt I had no choice" and she left in March 2018 not intending to return. Of course, some time shortly thereafter she decided to pursue her life in England. Although the evidence is a little confusing, I proceed on the basis that the father left Germany during the summer of 2018 to resume his life in his home state of Hungary and has retained no home in Germany[3], nor any intention to return there.

20. There has been no direct (i.e. face-to-face) contact between the father and A since April 2018; I understand that the father has spoken with A by telephone though it is not clear how frequently (the mother says that this has happened daily until the launch of these proceedings when she was advised not to permit this contact).

[3] In his second statement the father says "I can provide a home for [A] in *Hungary* where I am now…" [50] and later says that he can provide a safe and secure home and life "abroad in *Germany* where I am now, or I can rent back in Hungary…" [60]. He gives an address in Hungary at the front of the statement, and Ms Bhari has presented the case on the basis that the father is in Hungary. This is one of the unhelpful contradictions to which I referred at [3] of this judgment

21. The father was not present during the hearing, he was in Hungary, but the mother was in Court. I adjourned part-way through the hearing for Miss Bhari to take instructions by telephone; I was concerned that the father had not had the chance to respond to the recently filed evidence from the mother's GP. I also wanted him to clarify his case in relation to the country to which he would seek the 'return' order should I be minded to grant it. His written evidence, as I say, was equivocal on the point and I indicated my discomfort with his approach. I further wanted clarification on the issue of protective measures. Following her conversation with her client Ms Bhari confirmed that:

    i) the father would wish me to consider A's return to Hungary;

    ii) the father would, within reason I dare say, offer any undertakings which the court reasonably required in order to secure the return of A.

Hague Convention & the law

22. **Article 1, 3 and 12**: This application must be determined by reference to the provisions of the Hague Convention. One of the key objectives of this Convention is to secure the prompt return of children wrongfully removed to or retained in any Contracting State (*Article 1*). This objective was discussed by Baroness Hale in the decision of *Re D (A child) (Abduction: Custody Rights)* [2006] UKHL 51, wherein she said (at paragraph 48)

> "The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed."

23. The language of this passage highlights one of the unusual features of this case, namely that the father does not now seek the return of A to Germany, the country where he and the mother and A had their home and were habitually resident when A was removed to or retained in England, but to Hungary. It is accepted that this is a perfectly legitimate approach, and had been recognised as such by Keehan J in *O v O* [2013] EWHC 2970 (Fam) in a judgment which drew from para.110 of the explanatory report of Dr Perez-Vera (see [57] of *O v O*):

> "The Convention did not accept a proposal to the effect that the return of the child should always be to the state of its habitual residence before removal. … including such a provision in the Convention would have made its application so inflexible as to be useless. … When the applicant no longer lives in what was the state of the child's habitual residence prior to its removal, the return of the child to that state might cause practical problems which would be difficult to resolve. The Convention's silence on

> this matter must therefore be understood as allowing the authorities in the state of refuge to return the child directly to the applicant, regardless of the latter's present place of residence".

24. Keehan J added at [67], in a passage with which I agree, and adopt in the instant case:

> "In a world where there is such regular, global travel and where families, such as this one, regularly settle and then move between different countries, it would be manifestly wrong to take a narrow interpretation of the Convention and to order the return of a child to a jurisdiction with which the parties now have no ties and no connections at all."

25. This is a case in which no issue has been taken with the proposition that the father had rights of custody at the material time jointly with the mother (by reason of their marriage), and that he was actually exercising those rights (*Article 3* Convention).

26. As I said at [4] above, there is no dispute that A was wrongfully retained in England. *Article 12* is drafted in uncompromising terms:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith".

27. **Article 13(b)**: Focus is brought in this application to the provisions of *Article 13* which provides:

> "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) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
> >
> > (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.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of

> the child provided by the Central Authority or other competent authority of the child's habitual residence.

28. As Dame Elizabeth Butler Sloss P said in *Re M (Child Abduction: Undertakings)* [1995] 1 FLR 1021 at 1024:

> "Article 13, if invoked, deals with specific instances where the welfare of the child may inhibit an order for return under Art 12. Article 13 has to be raised as a defence to the Convention application, and a court has to be satisfied that the matters raised are so important as to displace the prima facie requirement to return the child under Art 12 upon proof of wrongful removal or wrongful retention under Art 3" (emphasis added).

The mother's case (with regard to *Article 13(b)*) is that A would be likely to be exposed to domestic abuse perpetrated by his father if returned to Hungary; in this regard, the mother refers (as I indicated above) to a history of domestic violence and of course to the father's recent conviction following the assault on 15 April 2018. In considering this issue, I have much in mind what was said by the Supreme Court Justices in *Re E (Children) (Abduction: Custody Appeal)* [2011] 2 FLR 758 at [31-35], specifically:

i) The words of *Article 13* are clear; they should not be given any 'gloss' [31];

ii) The burden of proof lies with the 'person, institution or other body' which opposes the child's return; the standard of proof is the ordinary civil standard [32];

iii) The risk to the child must be serious enough to be classified as 'grave', not just 'real'. Although 'grave' characterises the risk rather than the harm, there is a link between the two. Thus, a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm [33];

iv) The words 'physical or psychological harm' are not qualified. However, they gain colour from the alternative 'or otherwise' placed 'in an intolerable situation' [34]. There are some things which it is not reasonable to expect a child to tolerate. Among these are physical or psychological abuse or neglect of the child himself/herself, and exposure to the harmful effects of seeing and hearing the physical or psychological abuse of his/her own parent [34];

v) The situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home [35].

29. It is incumbent on me (per *Re E*) to consider whether the allegations if true would expose A to a grave risk of physical or psychological harm; in short, I believe that a recurrence of domestic abuse would cause him harm. Indeed, it is fair to observe that it already has caused A harm. If so, then I must consider what protective measures

might be available, and their efficacy, and in the absence of protective measures, I must do what I can to resolve disputed issues (see *Re E* at [36]).

30. I further note (per *Re S (A Child)* [2012] UKSC 10) that the subjective anxieties of a respondent (the mother in this instance) can found an *article 13(b)* exception. As Lord Wilson said in that case at [34]:

> "The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their 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". (my emphasis).

I accept that the mother, subjectively, is likely to fear a repeat of the domestic abuse.

31. **Undertakings**: Although not specifically addressed by either counsel on the point, I start by considering the provisions of *Article 11.4* of *BIIR*, which are to the effect that a court cannot refuse to return a child on the basis of *Article 13(b)* of the *1980 Hague Convention* if it is "established that adequate arrangements have been made" to secure the protection of the child after his return.

32. The proven history of violence in this case has firmly focused the Court's mind on what concrete protections are available to the mother in the event that she is to return to Hungary. The father was directed by order of 6 November 2018 (Mr Garrido QC sitting as a DHCJ) to set out in a statement "what protective undertakings he offers in the event that the child is summarily returned either to Germany or Hungary". He had responded in his statement by saying "I am prepared to give all of the usual and any undertakings after the A's (sic.) return, required by the respondent or the court to protect the mother and the child A in the short term if the mother returns with the child". In his second statement he confirms: "I will offer any undertakings further to assist in A's return". I am conscious that I should not require the father to offer undertakings which are so onerous or elaborate that their implementation may delay a return, but the father's very generalised offer here falls far short of what a court would need to see. I am only expecting that the undertakings should provide for the necessities of A, such as a roof over his head, protection from harm, and adequate maintenance until, and only until, the court of habitual residence (or the court of the country to which the return order is made, if different) can become seised of the proceedings brought in that jurisdiction (see *Re M (Child Abduction: Undertakings)* [1995] 1 FLR 1021):

> "Undertakings have their place in the arrangements designed to smooth the return of and to protect the child for the limited period before the foreign court takes over, but they must not be used by parties to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child. It would be helpful if realistic

> time-limits for the compliance with the undertakings were included in the orders to return the child, but in the absence of a specified time, clearly the court would consider a reasonable time and not allow the case to drag on with repeated applications to the court" (ibid.) (see Dame Elizabeth Butler Sloss P).

33. Having regard to the comments of Thorpe LJ in *Re K (Abduction: Case Management)* [2010] EWCA Civ 1546[4], I specifically asked Ms Bhari to take instructions on the same, and she did so during the hearing (see [21] above and [44] below). I would like to remind practitioners that in a case such as this:

> "It is conventional … for undertakings to be proffered and accepted. It seems to me that in any case where a defence is being raised under *Article 13(b)*, and more particularly in a case where *Article 11.4 of Brussels II Revised* applies, and especially in a case such as this where the defendant appears in person, to be desirable that the claimant at the outset of the final hearing should be able to produce, formulated in writing, those protective measures, including such undertakings as are proffered, as are being relied upon by the claimant as meeting the defence under Article 13(b) or as meeting the requirements of Article 11.4" (emphasis by underlining added) (Munby LJ as he then was in *Re K* at [43]).

It is regrettable that these reasonably rudimentary steps were not taken here.

34. In taking the course I have in this case, I have also had regard to the decision of Singer J in *Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349, where the judge referred to the permissible involvement of the English court extending beyond bluntly saying that there shall be a return or that there shall not. He there acknowledged that the court could influence the outcome by making clear that without undertakings, or with only the undertakings that are offered, *Article 13(b)* will apply, but the further or other undertakings are a prerequisite for a child's return. I find myself in that territory here.

35. Finally, in this regard, I am entitled to assume that the mother would take all reasonable steps to protect herself and A in the event that I ordered A's return to Hungary or Germany (*TB v JB (Abduction: Grave risk of harm)* [2001] 2 FLR 515; *Re W (Abduction: Domestic Violence)* [2004] EWCA Civ 1366. The burden is on the mother (here) to show that even if she took all reasonable steps she would not be adequately protected from the risk of domestic abuse; I should proceed on the basis that the courts in Hungary could make protective orders, extending to a to a full prohibition on any form of contact

[4] "If the judge felt that [the undertakings] were minimal then he still had an obligation to spell out to [Counsel for the Applicant] the undertakings that he felt were necessary and the undertakings with which he would be satisfied in order to give [Counsel for the Applicant] and his client the opportunity to increase and improve the offer." [28]

36. **Discretion**: If the mother were to persuade me that the *Article 13(b)* 'exception' is made out in this case, then I would proceed to consider how I would exercise my discretion on the important question of whether A should be returned to Hungary. The discretion afforded to me is "at large", and I am:

> "… entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare" (see [43] in *In re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288,).

37. Black LJ more recently observed (*Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26 at [71]), that at the discretion stage of a case the list of matters contained in [46] of *Re M: Zimbabwe* was not "exhaustive":

> "… because it is difficult to predict what will weigh in the balance in a particular case. … The court has to have regard to other welfare considerations, in so far as it is possible to take a view about them on the limited evidence that will be available as part of the summary proceedings. And importantly, it must give weight to the Hague Convention considerations. It must at all times be borne in mind that the Hague Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned and returned promptly. To reiterate what Baroness Hale said at §42 of *Re M*, "[t]he message must go out to potential abductors that there are no safe havens among contracting states".

The parties' cases

38. As is apparent from my rehearsal of the background history, the mother's case is that the father has a history of violence, and mental ill-health. She maintains that the father has:

i) Failed in his statement of evidence to face up to the seriousness of the 15 April 2018 assault, reflective of the fact that he cannot acknowledge responsibility for what he has done; indeed, by his evidence he appears to blame the mother for what happened: "unfortunately, my wife handled the issue in a highly negative manner and ***because of her behaviour*** I acted headlong what I deeply regret" (sic.); in the same statement, he refers to the mother being "sarcastic, gloating and humiliating… verbally abusing… taunting me" as an explanation for his actions;

ii) Not expressed true remorse or insight into the harm he has caused the mother and/or A;

iii) Not been honest with the court about his mental health;

iv) Offered undertakings which are vague, non-specific, and not supported by evidence (of ability to pay rent for her, to access the Hungarian court etc).

Accordingly, she maintains, she cannot really rely on the father's assurances of protection in the event that she was to be returned to Hungary.

39. The mother maintains that her mental health will be seriously affected if she is to return to Germany or Hungary, though she has not supported that assertion with any direct medical or other corroborative evidence, and I am not satisfied that any distress would be so significant that it cannot be ameliorated by suitable assurances provided by the father. She maintains that she will have no home, job, or means of paying rent in the event of a return; I will address the provision of financial support in the proposed undertakings. Although the mother tentatively inferred in her written evidence and in her defence that she may not return to Hungary herself if I ordered A's return (and would therefore have to send A back accompanied by the father and into the father's care) her statement was not internally consistent in this regard, and in any event her case was not presented in this way at the hearing.

40. She further protests (per her defence) that because A is settled and thriving in England, he would be "psychologically affected" to be uprooted again; this argument plainly cannot and will not succeed given that she has created the situation (if indeed such exists) by her own wrongful acts.

41. The mother's final point (should I reach the stage at which I would be exercising my discretion) that she has no meaningful connections with Hungary (to which country the father proposes that A is returned) and no recent experience of living there. I reject this; she has family in Hungary (including her father and her two older children), and has lived there all of her life until two years ago.

42. While accepting, as he has to, the seriousness of the assault on the mother on 15 April 2018, the father maintains that he acted "completely out of character and I have deep remorse for what happened. I have insight and that is why I did not contest the restraining order". Later he says: "I made a mistake because of my emotional breakdown … [the mother] taunted me in my vulnerable state … This ungraceful act was deeply regretted from my heart and from the very first time I took the (sic.) responsibility in front of the criminal court... I deeply regret what happened which was completely out of character for me and at a time when I was very fragile and vulnerable… I am deeply sorry and can only repeat that I am very remorseful for what happened … I was devastated at the thought of not seeing my son again … I swear and promise never to commit such a shameful act again and be able to control my emotions."

43. He refutes the mother's case that the relationship has been characterised by chronic domestic abuse; he rejects the GP letter (see [11] above) as one written "by a friend" of the mother's and it is simply the product of the mother's "self-reporting". He disputes that he has any history of mental ill-health. He now lives in Hungary, where he says that he has an "excellent job with a good income" and proposes that A is 'returned' there, given the parties' significant connections with the country. Later he says:

> "I am financially secure…. I can provide a home for [A] in Hungary where I am now… I can provide everything that is required for a healthy child's upbringing … I can provide good circumstances for [A] everything what is required to be a healthy child … I work and can easily pay for childcare and would rent a two-bedroom house for me and [A] to live in. I live presently in a high standard house with a garden… [A] will want for nothing…. I will pay for the respondent to come back with [A] if I need to, I will do anything for [A]"

44. Having taken detailed instructions at court during the hearing, Miss Bhari confirmed that the father is content to offer the following assurances to the mother and to the Court –

    i) to submit to supervised contact with A for the time being,

    ii) to pay for the mother to have accommodation (he will need 10 days' notice to get this sorted out);

    iii) to submit to any parenting or other social work assessment in Hungary,

    iv) to submit to the jurisdiction of the Hungarian court, and

    v) not to assault, molest, threaten, harass the mother or A.

    The father points to the fact that the maternal grandfather lives in Hungary[5] (in the same town where the father is living) as do the mother's older children, and that the mother will therefore have some support there on her return. He has a good relationship, he says, with members of the maternal family.

Conclusions

45. I am satisfied first and foremost (indeed it has not been in issue) that the removal of A from Germany in March 2018 was wrongful and in breach of the father's rights of custody. The evidence taken overall is inconsistent with the mother's case that the father knew that the mother was intending to travel to England, certainly on a permanent basis. If I am wrong about wrongful *removal*, I am absolutely satisfied that the *retention* was wrongful; there is no evidence that the father agreed to a permanent relocation, and it is not said that he acquiesced in the same.

46. It is difficult to form a confident view about domestic violence during the parties' relationship and marriage. There is, however, incontrovertible evidence of a serious act of violence perpetrated on the mother after the wrongful removal or retention which lends some weight to the mother's case that this was an abusive relationship. Although at her visit to her GP in February (prior to the removal) the mother's complaints of a history of violence were all self-reported (there was no independent contemporary verification of her account), the history certainly coincides with the father's undoubtedly abusive conduct on 15 April. I am therefore unpersuaded by the father's case that in visiting her GP to make complaint, the mother was merely laying false ground for her departure, and his protestation that his conduct was 'out of

[5] The mother says that the property is very small, but there is no evidence about this either way

character' is less convincing than the mother's account that this was part of a pattern. Whether the domestic abuse was as bad as she says it was is a matter on which I cannot reach any firm adjudication, but I proceed on the basis that she has established to my satisfaction that the father has displayed violence to her both historically and recently.

47. I also proceed on the basis that the father has formally indicated his deep remorse at his conduct on 15 April 2018 (see [42]), and has, I am advised, and I have heard nothing to the contrary, complied with the restraining order.

48. The essential question is whether protective measures are, or could be, robust and efficacious[6] enough to protect A from the grave risk of physical or psychological harm in the event of a return. Although the father has been frustratingly vague in making proposals, I see no reason in principle why I should not consider favourably the father's general offer of a range of undertakings as to non-molestation, threats to the mother or violence to her going forward, and his assurances about providing accommodation for her and A.

49. Subject to my being satisfied that the father offers suitably detailed and concrete undertakings to reflect relevant protective measures, I propose to order A's return as requested by the father. I will be so satisfied if the father voluntarily gives the following undertakings (or undertakings of a similar nature) *in writing and signed by him*, which would be in force pending determination of the issues by a court in Hungary:

    i) To pay for the respondent mother to return to Hungary with [A]; (he specifically makes this offer in his statement: see [43] above);

    ii) Not to assault, harass, threaten, or molest the mother or the child; (he offered this on instructions to Ms Bhari during the hearing);

    iii) Not to remove A from the care and control of the mother, save for the purposes of any agreed contact; (he inferentially offers this, given his agreement to supervised contact only for the time being);

    iv) To submit to supervised contact with A for the time being, until the issue can be considered through the Hungarian Court (he offered this on instructions to Ms Bhari during the hearing);

    v) To provide as soon as possible for the mother a two-bedroomed apartment in the city in Hungary where the father lives for the sole occupation by her and A and to pay the deposit and all the running costs of such property and not to enter such property; this property is to be in a reasonable part of the town/city, not more than 15 minutes by public transport from the maternal grandfather's home; the details to be provided by 7 January 2019; (he offered this in principle – not detail – on instructions to Ms Bhari during the hearing);

    vi) Not to approach within 250 metres of their accommodation save as might be agreed in writing for the purpose of any contact with A;

[6] See Re E quoted at [29] above.

vii) Not to seek to contact with the mother save through lawyers;

viii) To make reasonable financial provision by way of maintenance to the mother for herself and A until the Hungarian courts can be seised of the issue of financial support (inferentially he can afford to honour this: see [43] above);

ix) Not to institute nor voluntarily support any proceedings for the punishment or committal of the mother in respect of any criminal or civil wrong which the mother may have committed by reason of the child's removal from Hungary or Germany and to use his best endeavours to ensure that such proceedings do not happen

x) To co-operate with any parenting or other social work assessment in Hungary; (he offered this on instructions to Ms Bhari during the hearing);

xi) To submit to the jurisdiction of the Hungarian court; (he offered this on instructions to Ms Bhari during the hearing);

xii) To use his best endeavours to give undertakings or obtain orders in a Hungarian court to similar effect as set out in the undertakings above (this is not a condition precedent to the return of the child with his mother).

50. I propose to adjourn the application for a return order to 15 January 2019 at 10am to await formal *written and signed* confirmation (or otherwise) that the father is willing to make the undertakings set out at [49] above or undertakings which reflect these intentions. Any written undertakings are to be served on the mother and filed with the court by noon on 11 January 2019, together with evidence in support.

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

52. That is my judgment.

Post Script: 15 January 2019

53. On the day on which I delivered judgment in this case (20 December 2018), the Court of Appeal coincidentally handed down judgment in *Re C (Article 13(b))* [2018] EWCA Civ 2834. Having now reviewed the judgments in *Re C*, I am satisfied that my approach to the *Article 13(b)* issues raised in this case (above) is consistent with the guidance offered by the Court of Appeal in that case. The appeal in *Re C* had

largely centred on the first instance judge's failure to consider adequately the *future* grave risk of harm, and his flawed concentration on the history of past harm. In this case, it is clear that there has been domestic abuse (see [46] above); my focus has been on considering whether protections are available in the future in the event of a return (see in particular [48] ibid.) which could address or ameliorate the risk of future harm.

54. Moylan LJ at [40] (*Re C*) discussed how a judge should appraise a defence under *Article 13(b)*, saying this:

> "This appraisal is, itself, general in that it has to take into account all relevant matters which can include measures available in the home state which might ameliorate or obviate the matters relied on in support of the defence. As referred to in *Re D*, at [52], the English courts have sought to address the alleged risk by "extracting undertakings from the applicant as to the conditions in which the child will live when he returns *and* by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient" (my emphasis)". (and my emphasis by underlining).

The case of *Re D* referred to in the quote above is *Re D (Abduction: Rights of Custody)* [2007] 1 AC 619. Moylan LJ also drew on the passage at [22] of *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 AC 257.

55. Moylan LJ went on to consider the practice of an applicant volunteering undertakings as to protective measures in this context, and said this at [43]:

> "… it is clear that, in deciding what weight can be placed on [undertakings], the court has to take into account the extent to which they are likely to be effective. This applies both in terms of compliance and in terms of consequences, including remedies, in the absence of compliance. The issue is their effectiveness which is not confined to their enforceability: see, for example, *H v K and Others (Abduction: Undertakings)* [2018] 1 FLR 700, at [61]." (my emphasis by underlining).

He reminded the parties in that case (and practitioners more generally) of the contents of the *Practice Guidance* on *Case Management and Mediation of International Child Abduction Proceedings* issued by the President of the Family Division on 13th March 2018, and the importance of offering protective undertakings at the earliest opportunity (note in particular paras. 2.5(b)/(d), 2.9(b)/(d), 2.11(b)/(d)/(e)[7]). This was an issue I raised at [33] above. He emphasised (inferentially aswell as explicitly)

[7] "Where the respondent's answer raises a defence under Art 13(b) the applicant should give immediate consideration to, and take steps, in the most expeditious way available, to ensure that information is obtained, whether from the Central Authority of the Requesting State or otherwise, as to the protective measures that are available, or could be put in place to meet the alleged identified risks"

that the court is concerned with the *grave* risk of *future* abuse (see [28] and [48] together, and [50][8]).

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

57. By contrast, the mother should have been present at court at this hearing in accordance with the *Family Procedure Rules 2010*; Ms Scarano expected her to be present today. She did not attend, and has not been contactable by telephone during the day. She has not therefore been apprised of refinements to the proposed undertakings made during the day, nor has Ms Scarano been able to gather up-to-date instructions from her on the undertakings offered. Ms Scarano continues to argue that I should not activate the return order, submitting that the father is not someone on whom I can rely to honour the undertakings, given that he has been (she says) "contradictory" and "fluctuating" in what he has proposed; she further maintains that the undertakings do not provide the mother with sufficient reassurance (including short term accommodation in the first instance, modest financial support) about what lies ahead for her back in Hungary.

58. It is unnecessary for me to rehearse the full list of undertakings (fourteen in number) here in this judgment, but I am satisfied that they materially ameliorate the future risk of harm to the mother and/or A, and they are sufficiently "effective" (per Moylan LJ in *Re C*) to neutralise the mother's contention that A would be exposed to the grave risk of physical or emotional harm in the event of a return. I am satisfied that the undertakings are sufficiently "detailed and concrete" ([49] above), as I expected them to be; while Ms Scarano plainly had a point in criticising the presentation of the father's case initially (I too criticised this – see [3] and [21] above), I do not accept Ms Scarano's current complaints about the presentation of the father's case on undertakings since the 20 December 2018 hearing. Moreover, I remind myself, as I reminded Ms Scarano, that the arrangements set out in the undertakings are designed to provide short-term protection to the mother and to A only pending the engagement of the Hungarian Court. In my judgment, they do so.

59. In this case the undertakings offered by the father are reinforced by my knowledge (all of this is evidenced in writing) that:

    i) The father has notified the relevant social services department in Hungary of the likely return of A, and has indicated his willingness to co-operate with their assessment;

[8] "He would have needed to analyse why there would be a risk of sufficient gravity to come within the scope within Article 13(b)" [50]

ii) The father's lawyer has apparently initiated child welfare court process in the Courts of Hungary, and has confirmed that "if the Honourable English Court imposes further conditions on the return of the child of course we act in accordance with these conditions";

iii) The father remains bound in this jurisdiction by the terms of the Restraining Order, by which the father is "prohibited from making any contact directly or indirectly with [the mother] save via her solicitors, social services, or Family Court proceedings/order for the purpose of child contact"; whatever the territorial limitations of this provision going forward, it is material to note (in terms of 'effectiveness' of the undertakings) that there is no evidence that over the last nine months the father has breached that order.

60. I am satisfied that the undertakings proposed are voluntarily and freely given, and I accept them. The Applicant father should consider himself bound by them until the matter is put before the Hungarian Court; his Hungarian lawyer confirms that the father knows the likely impact on the father's substantive case in Hungary were he not to honour them.

61. With those undertakings in place, I am satisfied that it is appropriate now to make the order for return of A to Hungary as foreshadowed by the judgment which I delivered a little less than 4 weeks ago.

62. That brings to an end this litigation in this jurisdiction, and my judgment.