

**RE W (ABDUCTION: DOMESTIC VIOLENCE)**  
**[2004] EWHC 1247 (Fam)**

Family Division

Baron J

28 May 2004

*Abduction – Defences – Grave risk or intolerable situation – Domestic violence – Evidence available to court – High threshold*

The mother had abducted the child from South Africa and the father was applying for the return of the child. The mother raised a twofold defence to the child's return: first, pursuant to Art 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) that the child would suffer a grave risk to her physical and psychological health if returned and, secondly, that the child objected to a return. The relationship between the mother and father had been extremely turbulent, both before and after the marriage. Before the marriage, at a time when the father had no rights of custody, the mother twice removed the child from South Africa, going first to England and then to Australia. When the child was 3 years old, the father abducted the child by failing to return her to the mother following contact, in contravention of an agreement reached between them and endorsed by the English, Australian and South African courts. The father then disappeared with the child for a month, passing through a series of non-Hague Convention countries until reaching Dubai, when he contacted the mother. It was the mother's case that she agreed to marry the father principally in order to see the child again. After the marriage the family spent a brief period in Europe, then returned to South Africa, remaining there for 5 years. The mother's evidence was that her life in this period was increasingly intolerable, in that she had been subjected to regular abuse, including violence, threats with a firearm and demeaning sexual practices. There were photographs showing extensive bruising to the wife, which were supported by contemporaneous medical records. The mother also accused the father of using his wealth and connections to manipulate the due process of law by influencing potential witnesses and even lawyers. There was evidence that on at least two occasions a lawyer who had at first been working for the mother had later acted on the father's behalf. There was also evidence that the father had sent the mother an email with an attachment designed to allow the sender to receive all emails sent to the recipient computer, undetected, which would have given him access to privileged information.

**Held** – ordering the return of the child on certain conditions –

(1) Given the very high threshold, and the requirement that the evidence must support a grave risk of harm to the child, rather than to the returning parent, the defence of grave risk or intolerable situation under Art 13(b) of the Hague Convention was difficult to make out, even in a case of serious domestic violence. Domestic violence was not of itself enough, because it was presumed that the courts of the foreign jurisdiction would assist a battered wife. There was no real evidence of the child's distress, and the court did not have any evidence about the psychological impact of the life that she had led to date, and the effect on her of a return to a country where her mother would be very unsettled and unhappy. The defence had not, therefore, been made out in this case (see para [4](c)(viii)).

(2) The child's objection defence under Art 13 was also dismissed principally because her objection was more to do with concerns about her mother than an objection to returning to South Africa per se.

(3) The father's denials were not satisfactory, and it was appropriate to put in place a raft of protective measures designed to ensure that the mother and child could

live separately from the father, in another town, with sufficient financial independence and access to legal representation (see para [4](c)(viii)).

**Per curiam:** a court of first instance ought to be in a position to make findings when an Art 13(b) defence of this type was raised, by making directions, inter alia and at the very least, for appropriate psychological assessments to be made of the parties and the child before sending the child back to a potentially abusive situation. The law might be failing in those cases where the allegations were of very oppressive conduct, because the judge was not permitted to give any proper consideration to the long-term psychological effects on a wife and child of having lived in traumatic, violent circumstances, and of being returned to the country of origin. The damaging scenario might obtain even if parties lived in separate households on return and even if the local court put in place protective measures (see paras [3](w), [4](c)(viii)).

#### **Statutory provisions considered**

Child Abduction and Custody Act 1985

Children Act 1989, s 1

Hague Convention on the Civil Aspects of International Child Abduction 1980,  
Arts 3, 12, 13(b), Art 13, second paragraph

#### **Cases referred to in judgment**

*C (Abduction: Grave Risk of Psychological Harm), Re* [1999] 1 FLR 1145, CA

*C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, [1989] 1 FLR 403, [1989] 2 All ER 465, CA

*H (Abduction: Grave Risk), Re* [2003] EWCA Civ 355, [2003] 2 FLR 141, CA

*H (Child Abduction: Mother's Asylum), Re* [2003] EWHC 1820 (Fam), [2003] 2 FLR 1105, FD

*R (Child Abduction: Acquiescence), Re* [1995] 1 FLR 716, CA

*T (Abduction: Child's Objections to Return), Re* [2000] 2 FLR 192, CA

*Henry Setright QC* for the applicant

*Mark Everall QC* and *Caroline Willbourne* for the respondent

*Cur adv vult*

#### **BARON J:**

[1] This is an application under the provisions of the Child Abduction and Custody Act 1985 (and its Schedule – the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention)) by which Mr Clint W (to whom I shall refer as the father) seeks the return of the parties' daughter, S, who was born on 21 May 1994 (and thus is approaching 10 years old) to the country of her habitual residence – namely the Republic of South Africa.

[2] There is no dispute but that the removal was contrary to Art 3 of the Hague Convention. But a twofold defence is raised to an immediate return: first, pursuant to Art 13(b) that the child would suffer a grave risk to her physical or psychological health if she were returned, and secondly, that she objects to returning and, at the age of almost 10 years, is old enough and of sufficient maturity that her views should be taken into account.

#### *The factual matrix*

[3] (a) The father was born in South Africa on 21 December 1961 (thus he is some 42 years old). He grew up in the Republic and

seems to have had a somewhat troubled childhood. He has a bad relationship with his own mother and sister. Indeed, he has a conviction for assaulting the latter. Despite difficult personal relationships with the female members of his family, he seems otherwise to be successful and is a wealthy businessman.

- (b) Melanie F (to whom I shall refer as the mother) was born in South Africa on 15 June 1969 (thus approaching 35 years old). The parties began to cohabit in March 1993. At that time the father was working – so far as I can tell – in his own casino business. In early 1994, the couple decided to emigrate to the USA to seek business opportunities and thus it was that S was born in Fort Worth, Texas. In fact, the parties soon decided that they did not wish to live in the USA and they returned to South Africa with their young baby.
- (c) It seems that from an early stage the relationship was very troubled. In January 1997, there was an incident with a firearm which resulted in the mother shooting the father. She claims that she acted in self-defence following domestic violence when he threatened her with the gun. The father says she simply acted with aggression against him. I do not seek to make any findings about the cause of that incident, but the effect is not in doubt – the father was taken to hospital and, as I understand it, required some three operations. The police were involved and the mother faced prosecution.
- (d) Shortly after this incident, the mother decided to leave South Africa with S. At that time, because the parties were not married, the father had no rights of custody (under the prevailing local law). On 3 February 1998 the mother and S travelled to England, where she went to stay with her own father who is of English origin and had settled in Dorking some time before. The mother wanted a permanent separation but the father followed her and promised that their relationship would improve. In addition, he assured the mother that he would ensure that no prosecution took place.
- (e) In consequence, the mother instructed a Mr M (a nephew of her stepmother) to prepare a statement to the effect that he would not give evidence against her. The father signed it. On this basis, the mother agreed to effect a reconciliation and travel to Durban.
- (f) Accordingly, in March 1997 the family returned to South Africa. Despite his assurances, the mother alleges there were soon further incidents of aggression/violence. For example, her car brakes were tampered with and she suspects the father. Moreover, she says that on her return she discovered that Mr M had ‘lost’ the statement that was to save her from prosecution. Consequently, for the next 3 months, she felt very vulnerable because of the pending criminal prosecution. It is her case that the father manipulated (or prevailed upon) Mr M (who she regarded as her lawyer) to misplace the document. Given Mr M’s later actions with regard to the Australian proceedings (of which more below) this allegation may have substance.

- (g) In the end, the father did not give evidence and the criminal proceedings were finally abandoned by the authorities in June of that year.
- (h) In July 1997, the mother and S left South Africa once again and travelled back to the UK. The father followed and there was another brief reconciliation.
- (i) In August 1997 the mother and S journeyed to Australia (where her own mother lives) with a possible view to settling – albeit they only had holiday visas. In September, the father briefly joined them in Australia but he then returned to South Africa on business. By October he was back in Australia. The parties then had another major disagreement and the mother made it clear that she did not intend to return to him or to South Africa.
- (j) In consequence, on 23 October 1997, the father applied to the Australian court for residence and obtained *ex parte* orders including: (i) an order that the mother be not allowed to leave Australia; (ii) an interim residence order to the mother with provision for contact; and (iii) an order that neither parent remove the child from Australia. He had wanted an order for peremptory return but the judge did not make such an order as the father did not have rights of custody and South Africa was not a signatory to the Hague Convention at that time.
- (k) In November 1997 the father returned to South Africa but there was a dialogue between the parties and their lawyers. As set out above, the father was assisted in the Australian proceedings by Mr M – who was, *inter alia*, a member of the legal firm instructed by the father and was the signatory of at least one letter to the father. The mother now uses this incident as a pointer to her husband's ability to manipulate even her lawyers against her. I can and do not seek to make any findings about this assertion. But it is certainly a matter of some concern that, *prima facie*, Mr M appears to have altered his primary allegiance. Moreover, it is clear from a letter which I have seen that the father offered his Australian lawyers a \$50,000 bonus if they secured a residence order in his favour; an unusual incentive in this type of litigation. Despite all these difficulties (or perhaps because of them) before the trial on the merits, the parties came to terms.
- (l) On 11 December 1997 a consent order was made by the Australian court which provided, *inter alia*, for there to be joint parental responsibility. It also included a form of shared care for a 9-month period until September 1998, when S was to live and be educated in England. Mirror orders were to be made in England and South Africa. There was also provision for S to have staying contact with her father once she commenced education in England.
- (m) On 21 January 1998 a mirror order was made in London and on 24 February 1998 a similar mirror order was made in South Africa. Part of the agreement was that the father was to have S with him in South Africa for a period ending on 30 March 1998.

- (n) In contravention of the agreement, the father failed to return the child at the end of his allotted time. In fact, whilst in South Africa (and despite the mirror order) he applied to the local court for an order that S reside permanently with him. Not surprisingly, that court refused the application – no doubt, because it was in clear breach of the parties’ agreement. When thwarted, the father fled from Durban with S (then aged about 3 years old). He travelled through three African countries and eventually arrived in Dubai – all were non-Hague Convention destinations. For a period of about one month, the mother did not know the whereabouts of her child. (It is interesting to note that when the father made his original ex parte application to this court in these proceedings – where there is a particular duty of full disclosure – he failed to make any mention of this incident.)
- (o) In 1998, he simply abducted his daughter in contravention of court orders in no less than three jurisdictions.
- (p) In the light of S’s disappearance, the mother made an immediate application to the English court and on 2 April 1998 in the High Court under the Child Abduction and Custody Act 1985, Connell J declared that the defendant/father had wrongly retained the minor and made an order that the father do forthwith return the minor to the care of the mother.
- (q) The father and child were only discovered because he made contact with the mother. She says that the father made it clear to her that if she did not return and marry him, she would never care for S again. She says in the light of these threats, and for the sake of her child, she agreed to marry the father. A hurried, low-key ceremony took place on 9 May 1998 without friends or relations being present. The father says that there was no such intimidation. I am in no position to make any finding about this. However, the chronology of events speaks for itself.
- (r) Part of the agreement was that the parties would live either in the UK or in France. For a period they stayed in England then moved to Calais but, in the event, in December 1998 they decided to return to Durban. That city has been their home since that date – thus, for the last 5 years they have lived in South Africa.
- (s) The mother says that life at home became increasingly intolerable. It is her case that she was subjected to regular abuse, including violence, threats with a firearm, and demeaning sexual practices. She says that her husband was bullying, coercive and controlling. She says that, like many victims of domestic violence, she felt powerless to remove herself from the unbearable situation. She says that, whilst she sought to shield S from the worst excesses of the father’s behaviour, the child knew that life was very miserable. Moreover, the child suffered to a degree by witnessing scenes and was herself the butt of her father’s anger on occasion.
- (t) In about March 2000 the mother went to see a local attorney called Retha Meiring for advice about possible domestic

violence proceedings. She says that she took this action after she had been badly beaten. On this occasion, she sought medical assistance (as a result of which a report was prepared which I have seen) and photographs were taken which showed extensive bruising to her eye and marks to her neck (which she says were made when the father gripped her by the throat as if to strangle her). She gave the photographs to Ms Meiring for safekeeping. In the event, she decided against seeking court orders. In consequence, Ms Meiring closed her file, but kept the photographs, various documents and attendance notes. In the intervening period, the photos have become degraded with the result that it is not possible to see any injuries to the neck but I have seen the damaged photographs and they show clearly extensive bruising to the mother's eye. The contemporaneous medical records also confirm injuries which are consistent with the mother having been struck.

- (u) Despite the overall situation, the mother decided to persevere with the marriage. She went out to work – although, it seems, in accordance with the evidence of a Miss Wooll (which I have read) – she had to moderate her hours to accord with the father's wishes. Miss Wooll's evidence is to the effect that the mother was cowed and submissive in the father's company, that she witnessed his controlling behaviour and bad temper.
- (v) S went to a good, local girls' school. The mother says that the father controlled their social life. She says that both she and S were banned from seeing certain people of whom the father disapproved. These included a (former) babysitter called Michelle. The result was that the mother and child had to visit her on a clandestine basis. The mother was, therefore, surprised to discover that the father had apparently recently befriended Michelle, assisted her financially and, for some reason, had brought her to be present outside this court. I was informed by counsel on behalf of the father that there was nothing sinister in these actions but I have no doubt that the father appreciated that the mother would be unsettled by seeing her former babysitter (and one-time friend) apparently now siding with the father. The mother is concerned lest this means that the father has sought to subvert Michelle.
- (w) To return to the chronology, the mother maintains that her husband was habitually abusive towards her in a sexual manner. In particular, she says that he demanded anal intercourse and, if she refused, on occasion, forcibly had such intercourse without her consent – in effect engaging in anal rape. She says that this caused her pain, damaged her anus and caused her to bleed. She says that this allegation is corroborated, inter alia, by a document exhibited to her statement that was prepared by the father as a wish-list for his birthday. The document contains a number of requests but includes two particular phrases: (i) 'Trim the Amazon' (which she says is code for trim pubic hair) – against which she wrote 'DONE'; and (ii) 'All-areas certificate' (which she says is code for anal sex) – against the

latter she has written 'sorry but NO!!'. The husband denies the allegations of anal rape but he accepts that he has made videos of their lovemaking. The mother says that, until she read his statement, she was not aware of their existence.

If she is correct about these matters, then the treatment which she received at the hands of her husband is shameful, degrading and debasing. It is her case that in consequence her self-esteem was, piece by piece, destroyed by him and that she felt increasingly powerless. She submits that, because of her treatment, she will find it almost impossible to withstand the pressures of litigating in South Africa – where, although it is her homeland, because of the manner in which she has lived, she feels isolated and weak.

Of course, with disputed written evidence and no opportunity for cross-examination, the court is placed in a real difficulty in seeking to resolve the points which she raises. Whilst the court can make findings if there is reliable, corroborative evidence, the Court of Appeal has indicated, *Re H (Abduction: Grave Risk)* [2003] EWCA Civ 355, [2003] 2 FLR 141, that judges at first instance should not seek to make findings on disputed written evidence of this sort. For my part, although I regard myself as bound by the recent decisions (which I outline below), I find myself very troubled by this stricture when allegations of this type of abuse are made. To my mind, if proven, this category of allegation will gravely affect a mother's and, therefore, a child's ability to withstand pressure from a domineering presence in their life. Moreover, there will often not be a great deal of third-party evidence in the country of origin of such matters which, by their very nature, remain hidden as the injured party is often too afraid and/or ashamed to make complaint. I consider that a court of first instance ought to be in a position to make findings when an Art 13(b) defence of this type is raised by making directions, inter alia and at the very least, for appropriate psychological assessments to be made of the parties and the child before sending the child back to a potentially abusive situation, I consider that the damaging scenario may obtain even if parties live in separate households on return and even if the local court puts in place protective measures.

As the law now stands it seems to me (for reasons which I set out below), the Art 13(b) defence which, in itself, demands a high threshold has no realistic chance of ever being established unless there has been violence (or other specific abuse) to the child him/herself. This may fail to recognise the inter-relationship and important inter-dependence between a mother and child who have lived in an abusive situation for a long period.

- (x) It is the mother's case that the father's actions were fuelled by an abuse of alcohol. Her plan was to try and remain in the marriage until her daughter was 12 years old when, she believed, S's wishes (as to where she wanted to live) would be

taken more fully into account. The mother states matters unfortunately came to head when the father left messages telling her that she should leave. She regarded this as, in effect, an order and said that she feared for her life if she remained in situ. On 23 January 2004, when the father went on a business trip, she took the opportunity to make her way to England with S. She says that she came to this country because she felt unsafe and unsupported in South Africa. As such, she did not believe that she could withstand her husband's power and influence. She considers that he can (and will) use his wealth and connections to manipulate the due process of law. By that, she does not mean the court, but rather potential witnesses and even lawyers. She prays in aid that he was able to persuade the lawyer who she had instructed in 2000 – Ms Retha Meiring – to act on his behalf. The evidence about Ms Meiring's involvement was unclear until I insisted upon unambiguous information from the father's advisers.

- (y) It seems that, despite her previous involvement in and knowledge of the case, Ms Meiring thought that it was appropriate to act for the father. Her position being that her previous instructions were some time ago in relation to a different matter. I find her assertions to be remarkable. I would expect any responsible professional to see an immediate conflict of interest. I am not surprised that the mother was unnerved by this turn of events. Moreover, when the mother's advisers asked for her old file, they received only part. There was some rather unsatisfactory evidence from a Mr Govender (Ms Meiring's assistant) which asserted that the file had been handed over. Later this was shown to be inaccurate as other documents were revealed. The mother also asserts that some photographs have gone missing. The photographs showing her injuries (left for safekeeping) have become degraded – apparently because the humidity in Durban has affected the prints whilst in storage. The problems of humidity are so well known in Durban that I would have expected simple precautions to be taken to store potential evidence in a safe manner. It is still possible to see the black eye but the marks to the neck are no longer visible. As a result of inquiries in relation to this aspect of the case, the father now accepts that he should use a new lawyer and he has agreed that he will not reinstruct Ms Meiring.
- (z) The father's case and evidence are to the effect that the mother removed S from the family home while he was away on business, without his prior knowledge or consent, in a manner that was calculated to avoid contemporaneous detection, and to a location in England that was kept secret.

*The law*(a) *Article 3 – wrongful removal*

[4] There is no issue as between the parties as to the habitual residence of S in the Republic of South Africa at the material time, as to the extant Hague Convention rights of custody of the father, and as to the fact that the mother removed S from the Republic of South Africa to England on or about 23 January 2004. Accordingly, I find that there has been a wrongful removal in the terms of Art 3 of the Hague Convention.

(b) *Article 12*

As less than 12 months have elapsed between that removal and the commencement of proceedings, accordingly there is only discretion not to return S forthwith to the Republic of South Africa if the mother is able to establish one of the defences under Art 13 of the Hague Convention.

(c) *Article 13(b)*

This Article provides that the court need not order the child to return to the place of her habitual residence if:

‘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.’

*The mother’s defence under Art 13(b)*

- (i) It is plain that the mother is not saying that she refuses to return to South Africa (if she did, the ratio of the case of *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, [1989] 1 FLR 403 would apply). She accepts – as she should – that the South African court can be trusted to make good, reliable welfare-based decisions and put safeguards in place designed to protect her. But it is her case that S will be harmed by continued exposure to the father’s conduct towards the mother (as set out in detail under the factual matrix) because it will:
  - (i) affect the mother’s ability to care for S; and
  - (ii) psychologically/emotionally damage the child to see her mother under continual stress as the litigation continues in circumstances where she feels isolated and under continued threat.
- (ii) Moreover, she says that the father will seek to engineer the removal of S from her care or will seek to control her care of S, denying the mother the ability to care for the child independently of the father. All this she maintains will affect the child and place her in an intolerable position.
- (iii) The mother further asserts that it will be difficult (if not impossible) to protect her in South Africa because the father pays no regard to court orders and will simply act as he sees fit. She fears that the father will sabotage attempts by her to seek protection from the South African court because no legal system can easily protect a citizen from a party who seeks to subvert the

proper use of court proceedings. In particular she relies upon the following factors:

- (i) The father's previous failure to comply with orders and undertakings in 1997/1998.
- (ii) The father's application in South Africa, unsuccessfully, to vary the South African mirror order.
- (iii) The father's failure to return S to her mother on 31 March 1998 at the end of the contact period spent with him was in breach of the three mirror orders made in: (a) the Family Court of Australia (made on 11 December 1998); the Family Division (made by Hale J (as she then was) on 21 January 1998); the High Court Durban (made on 24 February 1998) and, even when ordered by Connell J in the Family Division on 2 April 1998, forthwith to return S to her mother in England he simply disobeyed that order.
- (iv) There appear to be criminal proceedings in being or contemplated in South Africa. The mother points to visits by Officer Darren Naidoo to family members and visits by the police to Belinda White. She considers that the father will seek to take advantage of this situation and she may find herself in jeopardy of imprisonment.
- (v) Whilst these proceedings were underway the father sent the mother an email with an attachment marked 'Re S'. In fact, she failed to open it and so sent it on to her solicitor. The technical department of the firm discovered that the attachment was in fact a programme called 'E Blaster' which has the ability to worm its way, undetected, into a computer allowing the original sender to receive all the emails that have been sent to the recipient. In this way, it is asserted that the father expected to have knowledge of all the mother's communications – including those with her solicitor. If this allegation is proved, it is very serious because it means an attempt was made to gain access to privileged communications. The mother surmises that he will undertake similar acts in South Africa and she will not have the expertise to know what is happening.
- (vi) The mother is also concerned about the nature of proceedings that have been commenced against her in South Africa, because no papers have been served and the father (and his advisers) have been coy about the precise nature of the case that has been made against her. This is of particular concern because there is an interim hearing on 4 June 2004 about which, at present, she knows little. The father did not supply his solicitors with copy documents about either hearing; accordingly they have been unable to send them to the mother's solicitors despite requests and an order made by His Honour Judge Pearlman on 11 March 2004. I considered that these concerns were justified and in the light of this, the father instructed Mr Setright QC (who appears on his behalf) to inform the court that he had (a) commenced divorce proceedings (on grounds presently unknown) and (b) proceedings seeking the sole custody and sole

guardianship of the minor child S. I have required that full details with service and disclosure of all documents be undertaken forthwith.

- (vii) The mother is also worried that she will have no legal representation in South Africa because she was not eligible for legal aid in South Africa and had no funds with which to pay lawyers.
- (viii) Finally, she prays in aid all the factors set out in the written evidence as to his degrading and dehumanising treatment of her which she considers has affected her daughter as she has inevitably become more aware of her father's character as she has grown and matured.

I have taken all these matters fully into account.

[5] In every domestic case in respect of a child, the guiding principle is s 1 of the Children Act 1989 – thus, when determining most English applications the welfare of the child is my paramount consideration but this is not the case in child abduction proceedings. In these cases, the authorities make it clear that in normal circumstances the courts of the country of habitual residence are best to determine issues relating to the welfare of the child, primarily because the best outcome for the child's future will be identified by reference to past events and the physical, emotional, social and cultural milieu in which the family have lived. All these matters, including in particular any resolution of factual disputes relating to past events, are, *prima facie*, more easily addressed in courts of that State. Where two States might exercise jurisdiction over a child, one of them should, as early as possible, cede jurisdiction to the other, so that an even rule of law across both jurisdictions is thereby achieved – see *Re H (Child Abduction: Mother's Asylum)* [2003] EWHC 1820 (Fam), [2003] 2 FLR 1105. Moreover, the ratio of *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 provides that a very high threshold has to be set to establish defences of a grave risk of physical or psychological harm or of the placement of the child in an intolerable situation. The defence requires clear and compelling evidence of a grave risk of harm or other intolerability to be measured as substantial, not trivial and of a severity which was much more than is inherent in the inevitable disruption, uncertainty and anxiety which followed an unwelcome return to the country of the habitual residence. In short, it is a stringent test.

[6] The principles that can be drawn from all these cases are clear – first, the threshold is very high and the evidence must support a *grave* risk of psychological harm to the *child* or otherwise place her in an intolerable situation. Domestic violence by a father to a mother is not, of itself, enough because it is presumed that the courts of the foreign jurisdiction will assist a battered wife and protect her. Moreover, the mother's distress is not relevant to the test – it is only its possible impact on the child which is important. I accept that this is law. Accordingly, I do not consider that the Art 13(b) threshold has been crossed. There is no real evidence of S's grave distress because, I suspect, she has been shielded from a good deal of marital unpleasantness. Although she reported upset to the Children and Family Court Advisory and Support Service (CAFCASS) officer and told him how much happier her mother was in England – she did not report serious concerns about her own position upon return. The court does not have the evidence

about the psychological impact of the life that she has led to date and the effect of a return to a country where her mother will be very unsettled and unhappy.

[7] Although, because the English law is so strict, I do not consider that the threshold has been passed in this case, I am concerned that the law is adhering to a very laudable principle that children should not be unilaterally removed from the place of their habitual residence and should, in normal circumstances, be returned without any real consideration of the impact of domestic violence on a family. I am concerned that the law may be failing those cases where the allegations are of oppressive conduct because the authorities do not permit the judge at first instance to give any proper consideration to the long-term psychological effects on a wife and child who have lived in traumatic, violent circumstances and are being returned to the country of origin – even if to a separate household.

[8] I am very troubled by the evidence which I have read in this case. I do not regard the father's bland denials as satisfactory and, although I have not heard evidence, I have been able to watch his demeanour in court over 2 days and I have observed how he looked at the mother. In the circumstances, I am of the firm view that the mother and S require a raft of protective measures to be in place before they have to return. Indeed if these are not in place prior to return I would be more concerned about the Art 13(b) threshold. During the course of the hearing, I had a dialogue with counsel for both parties in which I ventilated the basic measures which I considered were important prerequisites. As a result, most of the raft of measures were volunteered by the father. Eventually, the parties reached agreed terms – depending on my decision. A copy of those measures is annexed to this judgment. In addition, the father has accepted that he will not use Ms Meiring and will not reinstruct her. These measures are designed to ensure that the mother and S will be able to live separate from the father in a town – Kloof has been mentioned – which is some way out of Durban. She will have a sum of money to provide for her maintenance for the next 6 months (including high-level security if she wishes) and to fund litigation. Mr Everall QC, on behalf of the mother, sought high figures but I consider that the mother requires 200,000 South African Rand as a maintenance fund for the first 6 months and 300,000 South African Rand towards a litigation fund. I sought specific submissions whether the father could afford 500,000 South African Rand. Mr Setright QC, on the father's behalf, said that the father did not wish to make submissions (which I took to mean that he had no problems raising the funds) – nevertheless I sought clarification. After taking instructions, Mr Setright stated that he could afford the maintenance but could not afford the higher level of legal fees sought (given that an earlier – and I consider inadequate – figure had been given by the mother's South African solicitor). He did not seek to explain the reasons for this submission or give proper figures showing/proving that this sum was unaffordable. Accordingly, I do not accept that the father could not afford this sum. I made it clear to his counsel that he was not to seek a return of these funds whilst this case remained unresolved. By this, I do not seek to restrict the obvious right of the South African court to determine the final financial issues between these parties. I simply make it plain that, in front of me, the father made no suggestion that he would seek to sever or reduce the financial lifeline that has been put in place by agreement. Thus, it would be disingenuous if he applied for the release of any of these

funds on an interim basis or sought to suggest he did not have sufficient means.

[9] The situation to which S will return is fundamentally different to that which has obtained hitherto – the parents will be living apart, S will be living with the mother, and the South African court will be seised of the welfare dispute and will have put protective measures in place.

(d) *The child's objections*

‘The court may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.’

*The law*

[10] The approach to child's objections is summarised in *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192, per Ward LJ:

‘Thus it seems to me that the matters to establish are:

- (1) Whether the child objects to being returned to the country of habitual residence, bearing in mind that there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated. Hence there is a need to ascertain why the child objects.
- (2) The age and degree of maturity of the child. Is the child more mature or less mature than or as mature as her chronological age? By way of example only, I note that in *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 Ewbank J's decision that boys aged 7½ and 6 were mature enough was upheld by Balcombe LJ and Sir Ralph Gibson, Millett LJ dissenting. I would not wish to venture any definition of maturity. Clearly the child has to know what has happened to her and to understand that there is a range of choice. A child may be mature enough for it to be appropriate for her views to be taken into account even though she may not have gained that level of maturity that she is fully emancipated from parental dependence and can claim autonomy of decision-making. The child's “right” – and I use the word loosely – is, consistently with Art 12 of the United Nations Convention on the Rights of the Child 1989, to have the opportunity to express her views and to be heard, not a right to self-determination. Article 12, which is often judged to be one of the most important in that Convention, assures to children capable of forming their own views:

“... the right to express those views freely in all matters affecting [them], the views of the child being given due weight in accordance with the age and maturity of the child.”

The sentiments in both Conventions are the same and they give strong support to the idea that the purpose of the exception to the general rule of immediate return is to defer to the wishes of the child.

- (3) So a discrete finding as to age and maturity is necessary in order to judge the next question, which is whether it is appropriate to take account of the child's views. That requires an ascertainment of the strength and validity of those views which will call for an examination of the following matters, among others:
- (a) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is her views which have to be judged appropriate.
  - (b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?
  - (c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?
  - (d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?

[11] In essence, the 'child's objections' exception is separate from the Art 13(b) exception; there is no requirement to establish that return would place the child at grave risk or in an intolerable situation but the objection must be to a return to the country. There are cases where a return to a country is so inevitably and inextricably linked to a return to the left-behind parent that they cannot be separated; and where that is the case, the objection still falls within Art 13, second paragraph, see – *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716 at 730C–G and 737B–E (the consequences of being returned in the circumstances of the particular case).

*The facts*

[12] S was seen by the CAFCASS officer – Mr Reilly. He attended court but was not required for cross-examination. When asked by me, he said that he had nothing to add to his written report. In that document he reports S as having allied herself with her mother. He says that she had nothing good to say about her father – to whom she referred as Clint. She appeared to be anxious about the interview because she was worried about getting it wrong. She was throwing darts (available as play material) whilst talking and was crying at times. The main parts of the report which reflect her position are as follows:

'She indicated clearly her desire to stay in England with her mother, but acknowledged that she could quite happily live with her paternal grandmother in South Africa, of whom she is fond, if she had to return. S said that she does not want her mother to return there because she fears for her happiness. She spoke of her mother smiling in England

but always crying in South Africa ... S made the point that she could live with her mother in South Africa on their own, as long as it was away from her father and he did not know of their whereabouts. She was not willing to think of living on her own with her father, suggesting that, if she did, she would be exposed to his accusations and nasty behaviour.'

He continued:

'In my view S is a reasonably mature girl, who regards herself as bright. She objects to a return to South Africa, expressing the clear wish to remain in England with her mother. Her resistance to the prospect of a return to her home country seems to be based on her fears for her mother's happiness and well-being.

She voices concern about her mother returning and says that she would not want to return. However, if S and her mother were to live separately and some distance from the father, I think she could, with some reluctance, accept this.'

The conclusion which I draw from this report is that, although S was voicing an objection to returning, her objection was more to do with concerns about her mother than an objection to South Africa per se. She was prepared to return provided that she was with her mother – albeit that she would prefer to live in England. I do not consider her objections to be overriding. Thus, even though she was voicing objections, I consider that S was prepared to return and so I would have exercised my discretion in this case to order a return. It is poignant that this little girl was genuinely worried about her mother and the sadness which she had seen her suffer whilst living with the father. I consider this to be a revealing piece of evidence.

#### *Conclusion*

[13] In all the circumstances of this case, I will make an order that, provided all the conditions set out in the annex have been complied with in full, S should return to the Republic of South Africa and I make no order as to costs.

#### *Annex*

[14] S shall not be returned to Republic of South Africa unless and until:

- (1) The father, Clint W (the father), has obtained in the High Court of South Africa an order, until a contrary order of that court made at a full inter-partes hearing after the return of S and the mother, Melanie W (the mother), to South Africa:
  - (i) providing that S be in the interim custody of the mother;
  - (ii) providing that S do reside with the mother in accommodation in a place/town she shall choose and which the father shall not occupy and into which he shall not enter;
  - (iii) restraining the father by injunction:
    - (a) from removing S from the care of the mother;

- (b) from removing S from the Republic of South Africa;
  - (c) from applying for a South African or any other passport for S or applying for S to be entered on his own passport;
- (iv) restraining the mother by injunction:
- (a) from removing S from the Republic of South Africa;
  - (b) from causing S to reside at an address in the Republic of South Africa which has not been disclosed in advance in writing to the father or to the South African court or to lawyers instructed by the mother whose identity, address and contact details have been disclosed in advance to the father;
  - (c) from applying for a South African or any other passport for S or applying for S to be entered on her own passport;
- (v) providing that, forthwith on arrival in South Africa with S, the mother do deposit all S's passports with her South African lawyers, to be held by them and not to be released save in accordance with an order of the High Court of South Africa or agreement in writing between the parties;
- (vi) providing that the father do not have contact with S save for such contact as is either agreed in writing between the parties and is supervised or is ordered by further order of the court;
- (vii) providing that, for the purposes of the proceedings in South Africa, there be a psychiatric assessment of the father and of the mother by a psychiatrist appointed jointly by the mother and the father; and that:
- (a) the mother do propose the names of three psychiatrists and the father do choose one of the said psychiatrists;
  - (b) the parties have permission to disclose any documents filed in the proceedings to the said psychiatrist;
  - (c) the mother and father do attend all appointments with the said psychiatrist as the said psychiatrist shall require;
  - (d) such psychiatrist do report to the court in writing.
- (2) The father (without admission by him as to his past behaviour) has obtained in the High Court of South Africa an order, until a contrary order of that court made at a full inter-partes hearing after the return of S and the mother to South Africa:
- (i) restraining the father from assaulting, intimidating, threatening or in any other way harassing, interfering with or molesting the mother by himself or by encouraging others to do so;
  - (ii) restraining the father, by himself or by encouraging others to do so, from entering or attempting to enter any

- accommodation in which the mother and S reside or approaching within 500 metres thereof;
- (iii) without prejudice to the generality of para (i), restraining the father, by himself or by encouraging others to do so, from intercepting any communications via any method to or from the mother (other than a communication from the mother expressly addressed to the father or his lawyers).
- (3) The father has given a written undertaking to the High Court of Justice of England and Wales that he will consent to the mother obtaining on her return to South Africa an order in the appropriate magistrates' court in South Africa:
- (i) restraining the father from assaulting, intimidating, threatening or in any other way harassing, interfering with or molesting the mother by himself or by encouraging others to do so;
- (ii) restraining the father, by himself or by encouraging others to do so, from entering or attempting to enter any accommodation in which the mother and S reside or approaching within 500 metres thereof;
- (iii) breach of which by the father will render him liable to immediate arrest.
- (4) The father has given a written irrevocable undertaking to the High Court of Justice of England and Wales and to the High Court of South Africa that he will not voluntarily instigate, support or pursue any application or proceeding, whether criminal or civil, for the punishment of the mother by imprisonment or otherwise arising from her removal of S from South Africa in January 2004 or her retention of S away from South Africa since then.
- (5) The father's English solicitors have written on the father's behalf to the appropriate authorities in South Africa a letter:
- (i) requesting that the authorities provide to the said solicitors and to the High Court of England and Wales information as to the current state of any criminal investigation and/or proceedings and/or intended proceedings; such letter to be submitted in draft to the English solicitors of the mother;
- (ii) indicating that the father does not wish voluntarily to instigate, support or pursue any application or proceeding, whether criminal or civil, for the punishment of the mother by imprisonment or otherwise arising from her removal of S from South Africa in January 2004 or her retention of S away from South Africa since then.
- (6) The father has paid to such lawyer in South Africa as the mother may appoint to act on her behalf:
- (i) the sum of 300,000 South African Rand towards her legal costs in South Africa;

- (ii) the sum of 200,000 South African Rand towards the maintenance of the mother and S during the first 6 months after their return to South Africa.
- (7) The father has given a written irrevocable undertaking to the High Court of Justice of England and Wales and to the High Court of South Africa that he will not seek in any way to have returned to him the sums of 200,000 and 300,000 South African Rand referred to in para (6) above prior to the conclusion of proceedings between the parties concerning divorce and the custody, guardianship, residence and future welfare of S.
- (8) The father has produced to the mother's English solicitors all the information and documentation relating to the proceedings in South Africa referred to in para (3) above.
- (9) The father has given a written undertaking to the High Court of Justice of England and Wales that he will pay for the cost of the flights and other travel costs to South Africa for S, the mother and a companion of the mother's choice.

*Order accordingly.*

Solicitors: *Dawson Cornwall* for the applicant  
*Bindman & Partners* for the respondent

PHILIPPA JOHNSON  
*Law Reporter*