Trinity Term
[2011] UKSC 27
On appeal from: [2011] EWCA Civ 361

JUDGMENT

E (Children) (FC)

before

Lord Hope, Deputy President
Lord Walker
Lady Hale
Lord Kerr
Lord Wilson

JUDGMENT GIVEN ON

10 June 2011

Heard on 23 and 24 May 2011

Appellant
Henry Setright QC
David Williams
(Instructed by Freemans Solicitors)

Respondent
James Turner QC
Ian Cook
(Instructed by TLT LLP)

Respondent

Baroness Scotland QC
Edward Devereux
(Instructed by Dawson Cornwell)

Intervener (The AIRE Centre)
Deirdre Fottrell
Radhika Handa
(Instructed by Mishcon de Reya)

Intervener (Reunite International)
Richard Harrison
Jennifer Perrins

(Instructed by Bindmans LLP)

Intervener (Women's Aid Federation of England)
Stephen Knafler QC
Teertha Gupta
Irena Sabic
Neil Jeffs
(Instructed by Sternberg Reed)

LADY HALE AND LORD WILSON, DELIVERING THE JUDGMENT OF THE COURT

1. The decision of the European Court of Human Rights in *Neulinger and Shuruk v Switzerland* [2011] 1 FLR 122 was greeted with concern, nay even consternation in some quarters, because of its possible impact upon the application of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Convention"). The Swiss Federal Court had rejected a mother's claim, under article 13b of the Hague Convention, that there was a grave risk that returning the child to Israel would lead to physical or psychological harm or otherwise place him in an intolerable situation. Nevertheless, the Grand Chamber of the European Court held that to enforce the order would be an unjustifiable interference with the right to respect for the private and family lives of mother and child, protected by article 8 of the European Convention on Human Rights ("the ECHR").

2. The Court of Appeal granted permission to appeal in the case before us, because "it was high time for this prominent case to be considered by the full court [of Appeal] for the guidance of the judges of the Division and specialist practitioners": [2011] EWCA Civ 361, para 5. This Court gave permission for essentially the same reason, as we thought it inevitable that sooner or later the inter-relationship of these two international instruments, both of them now translated into the law of the United Kingdom, would have to be resolved. But there were two other considerations. First, article 3(1) of the United Nations Convention on the Rights of the Child 1989 ("the UNCRC") requires that in all actions concerning children, their best interests shall be a primary consideration. That obligation formed a prominent part of the Strasbourg court's reasoning in *Neulinger.* Its inter-relationship with article 8 of the ECHR was recently considered in this Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 WLR 148. Second, article 13b has not previously been directly in issue in this Court or in the House of Lords, although there were important observations about it in two House of Lords cases, *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619 and *Re M (Children) (Abduction; Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288.

3. In essence, Mr Henry Setright QC, launches a three-pronged argument on behalf of the abducting mother:

> (i) Article 3(1) of UNCRC applies just as much to the decision to return a child to her place of habitual residence under the Hague Convention as it

does to any other decision concerning a child. The current approach to article 13b, at least in the courts of England and Wales, does not properly respect the requirement that the best interests of the child be a primary consideration.

(ii) That argument is supported by the decision of the Grand Chamber in *Neulinger*, which is the principal authority on the primacy of the best interests of the child in the interpretation and application of the Convention rights.

(iii) In any event, the purposes of the Hague Convention are properly achieved if article 13b is interpreted and applied in accordance with its own terms. There is no need for the "additional glosses" which have crept into its interpretation in English law. It is quite narrow enough as it is.

4. In these arguments, he is supported by Baroness Scotland QC, on behalf of the half-sister of the two children whose return is sought. She points out that the decision to return those children to Norway does "concern" their older sister, who is closely involved in their day to day care, so that their sister's welfare should also be a primary consideration. They also enjoy family life together, so that to separate them would amount to an interference in their right to respect for that family life.

5. Ultimately, as we shall see, there is a great deal of common ground between Mr Setright and Baroness Scotland, on the one hand, and Mr James Turner QC, who appears for the father, on the other. They differ, of course, on the outcome of the case. We have also had written and oral interventions from Reunite and from the AIRE Centre and a written intervention from the Women's Aid Federation of England.

6. All parties recognise that the context in which these cases arise has changed in many ways from the context in which the Hague Convention was originally drafted. There is every indication that the paradigm case which the original begetters of the Convention had in mind was a dissatisfied parent who did not have the primary care of the child snatching the child away from her primary carer (see, eg, *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515, para 43; PR Beaumont and PE McEleavy, *The Hague Convention on International Child Abduction* (1999), p 3). Hence the Convention draws a deliberate distinction (in articles 3 and 5) between rights of custody and rights of access, and (in articles 3b and 13a) between rights of custody which are being exercised and rights which are not, and protects the former but only to a limited extent the latter. Including a non-custodial parent's right to veto travel abroad within "rights of custody" has been a more recent interpretation (discussed in *Re D*). Nowadays, however, the most

common case is a primary carer whose relationship with the other parent has broken down and who leaves with the children, usually to go back to her own family. There are many more international relationships these days than there were even in the 1970s when the Convention was negotiated, so increasingly returning to her own family means crossing an international boundary. International travel is also much easier and cheaper, especially within the European Union where border controls are often non-existent.

7. It is also common for such abducting parents to claim that the parental relationship has broken down because of domestic abuse and ill-treatment by the other parent. That is why – she says - she had to get away and that is why – she says - she had to do so secretly. She was too afraid to do otherwise and she is too afraid to go back. Critics of the Convention have claimed that the courts are too ready to ignore these claims, too reluctant to acknowledge the harm done to children by witnessing violence between their parents, and too willing to accept that the victim, if she is a victim, will be adequately protected in the courts of the requesting country: see, for example, M Kaye, "The Hague Convention and the Flight from Domestic Violence: How Women and Children are being returned by Coach and Four" (1999) 13 Int J Law, Policy and Family 191. In particular, it is said, the courts in common law countries are too ready to accept undertakings given to them by the left-behind parent; yet these undertakings are not enforceable in the courts of the requesting country and indeed the whole concept of undertakings is not generally understood outside the common law world. At all events, the change in the likely identity of the abductor places a premium on the efficacy of protective measures which was not so apparent when the Convention was signed.

8. Yet the parties also understand that there is no easy solution to such problems. The first object of the Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there. The left-behind parent should not be put to the trouble and expense of coming to the requested state in order for factual disputes to be resolved there. The abducting parent should not gain an unfair advantage by having that dispute determined in the place to which she has come. And there almost always is a factual dispute, if not about the primary care of the children, then certainly about where they should live, and in cases where domestic abuse is alleged, about whether those allegations are well-founded. Factual disputes of this nature are likely to be better able to be resolved in the country where the family had its home. Hence it is one thing to say that the factual context has changed and another thing entirely to say that the change should result in any change to the interpretation and application of the Hague Convention.

9. These are issues of general principle, of importance in the great majority of Hague Convention cases, because article 13b is pleaded in the great majority of statements of defence in such cases. Yet they arise for decision in the context of a real case, involving real people, three of whom were in court while we heard the oral argument. We shall come to the detailed facts of the case when we come to consider what the outcome of the appeal should be. For the time being, a simple summary will suffice.

10. We are concerned with two little girls, whom we shall call Livi and Milly, to make them real while respecting their anonymity. Livi is seven and Milly is four. They were born in Norway to a British mother and a Norwegian father, who married shortly after Livi's birth. They have lived all their lives in Norway until they were brought to this country by their mother in September last year. Their mother has an older daughter, Tyler, who is now nearly 17 and lived with the family in Norway, going to school there and helping to take care of her little half-sisters. The mother claims that they were all very frightened of the father because of his temper and his violent behaviour, especially towards their pets, although he was only once physically violent towards her. Tyler supports her mother's claims. The father denies them. The mother is suffering from an adjustment disorder, precipitated by the effect of these proceedings upon a number of pre-disposing factors. A psychiatrist has warned that her condition may deteriorate into self-harm and suicidality if she has to return to Norway, unless certain protective measures are in place. The trial judge, Pauffley J, decided that the protective measures were sufficient, such that there was "no substance in the suggestion that because of the mother's subjective reaction to an enforced return there would be a grave risk of physical or psychological harm for the children". Indeed, from the children's point of view, it was "overwhelmingly in their best interests to return to Norway for their futures to be decided there": paras 36, 37.

11. In the Court of Appeal, all three judgments were devoted to the *Neulinger* issue. As Thorpe LJ pointed out, at para 85, the appeal was necessary to provide the court with an opportunity to review the recent decisions of the European Court of Human Rights. The court reached the conclusion that those cases required no change in the current approach. The present case was "a very standard Hague case" (para 84). The judge had delivered "an admirably fair and clear conclusion on the issues that she had to decide" (para 85).

Article 3(1) of UNCRC

12. Article 3.1 of the UNCRC provides that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Although the UNCRC has not been incorporated into our domestic law, there are many examples of domestic statutes requiring courts and public authorities to have regard to the welfare of the children with whom they are concerned. Sometimes, as in section 1(1) of the Children Act 1989, the court is required to treat the welfare of the child as its "paramount" consideration; sometimes, as in section 25(1) of the Matrimonial Causes Act 1973, it is the "first" consideration; sometimes, as in section 11 of the Children Act 2004 and section 55 of the Borders, Citizenship and Immigration Act 2009, a public authority is required to perform its functions having regard to the need to safeguard and promote the welfare of children. The last two, in particular, are clearly inspired by our international obligations under UNCRC. As was pointed out in *ZH (Tanzania)*, para 25, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". The Court went on to endorse the view taken in the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 292, that a decision-maker "would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it".

13. There is no provision expressly requiring the court hearing a Hague Convention case to make the best interests of the child its primary consideration; still less can we accept the argument of the Women's Aid Federation of England that section 1(1) of the Children Act 1989 applies so as to make them the paramount consideration. These are not proceedings in which the upbringing of the child is in issue. They are proceedings about where the child should be when that issue is decided, whether by agreement or in legal proceedings between the parents or in any other way.

14. On the other hand, the fact that the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, does not mean that they are not at the forefront of the whole exercise. The Preamble to the Convention declares that the signatory states are "Firmly convinced that the interests of children are of paramount importance in matters relating to their custody" and "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention . . .". This objective is, of course, also for the benefit of children generally: the aim of the Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child. It does so by making certain rebuttable assumptions about what

will best achieve this (see the Explanatory Report of Professor Pérez-Vera, at para 25).

15. Nowhere does the Convention state that its objective is to serve the best interests of the adult person, institution or other body whose custody rights have been infringed by the abduction (although this is sometimes how it may appear to the abducting parent). The premise is that there is a left-behind person who also has a legitimate interest in the future welfare of the child: without the existence of such a person the removal is not wrongful. The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution. Hence the next assumption is that the best interests of the child will be served by a prompt return to the country where she is habitually resident. Restoring a child to her familiar surroundings is seen as likely to be a good thing in its own right. As our own Children Act 1989 makes clear, in section 1(3)(c), the likely effect upon a child of any change in her circumstances is always a relevant factor in deciding what will be best. But it is also seen as likely to promote the best resolution for her of any dispute about her future, for the courts and the public authorities in her own country will have access to the best evidence and information about what that will be.

16. Those assumptions may be rebutted, albeit in a limited range of circumstances, but all of them are inspired by the best interests of the child. Thus the requested state may decline to order the return of a child if proceedings were begun more than a year after her removal and she is now settled in her new environment (article 12); or if the person left-behind has consented to or acquiesced in the removal or retention or was not exercising his rights at the time (article 13a); or if the child objects to being returned and has attained an age and maturity at which it is appropriate to take account of her views (article 13); or, of course, 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" (article 13b). These are all situations in which the general underlying assumptions about what will best serve the interests of the child may not be valid. We now understand that, although children do not always know what is best for them, they may have an acute perception of what is going on around them and their own authentic views about the right and proper way to resolve matters.

17. This view, that the Hague Convention is designed with the best interests, not only of children generally, but also of the individual child concerned as a primary consideration, is borne out rather than undermined by the provisions of article 11 of Council Regulation (EC) No 2201/2003 ("Brussels II revised"), which strengthens and (under article 60) takes precedence over the Hague Convention in cases between member states of the European Union (apart from Denmark).

Recital (12) to the Regulation points out that "the grounds of jurisdiction in matters of parental responsibility . . . are shaped in the light of the best interests of the child, in particular on the criterion of proximity." Article 11.2 requires that the child be given an opportunity to be heard, unless this appears inappropriate having regard to his or her age or maturity; and this is now routinely done in this country, not only in EU cases, but in all Hague Convention cases, following the decision of the House of Lords in *Re D.* Further, article 11.4 provides that a court cannot refuse to return a child on the basis of article 13b of the Hague Convention "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return". As was said in *Re D*, para 52, this means that it has to be shown that such arrangements will be effective to protect the child. And it emphasises that the purpose of article 13b is to ensure that a child is not returned to face a grave risk of harm. But where a child is not returned because any of the exceptions contained in article 13 is established, article 11.6 to 11.8 contains a procedure whereby the courts of the requesting state may nevertheless make a decision about the custody of the child, which decision will be enforceable in the requested state.

18. We conclude, therefore, that both the Hague Convention and the Brussels II revised Regulation have been devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration. There may well be ways in which they could be developed further towards this end: see, eg, R Schuz, "The Hague Child Abduction Convention and Children's Rights" (2002) 12 Transnational Law and Contemporary Problems 393. But if the court faithfully applies their provisions, as to which we shall say more later, we believe that it too will be complying with article 3.1 of the UNCRC. We note that the Strasbourg court has reached the same conclusion: see, eg, *Maumousseau and Washington v France*, App no 39388/05, 6 December 2007, para 68.

The ECHR and Neulinger

19. Until recently, it has mainly been the left-behind parent who has complained to the Strasbourg court that the failure to return his child under the Hague Convention has been in breach of his rights under article 8. The court has held that the positive obligation under article 8, to bring about the reunion of parent and child, must be interpreted in the light of the requirements of the Hague Convention. Hence if the requested state has not sufficiently complied with its obligations under the Hague Convention, the court has found a breach of article 8: see, eg, *Ignaccolo-Zenide v Romania* (2000) 31 EHRR 212, paras 94, 95; *Monory v Romania and Hungary*, App no 71099/01, 5 July 2005; cf the follow-up to *Re D*, *Deak v Romania and United Kingdom* [2008] 2 FLR 994, where there was no breach of article 8 because both the requesting and the requested states had complied with their Hague obligations.

20. In *Maumousseau and Washington v France*, on the other hand, the complaint was that the effective operation of the Hague Convention, in ordering the return of the applicant's daughter to her habitual residence in the United States, the mother having taken her to France for the holidays and refused to return her afterwards, was in breach of their article 8 rights. The Court disagreed. The positive obligation of reuniting parents with their children had to be interpreted in the light of the requirements of the Hague Convention and the UNCRC (para 60). In deciding whether the interference was necessary in a democratic society, the decisive issue was "whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck" (para 62). There were a number of aspects comprised in the primary consideration of the best interests of the child (para 66): for example, "to guarantee that the child develops in a sound environment and that a parent cannot take measures that would harm its health and development; secondly, to maintain its ties with its family, except in cases where the family has proved particularly unfit" (para 67). The concept of the child's "best interests" was also a primary consideration in the context of the Hague Convention procedures (para 68). The Court was entirely in agreement with the philosophy underlying the Hague Convention (para 69). It could not agree that the domestic courts' interpretation of article 13b was necessarily incompatible with the notion of the child's best interests (para 71). There was "no automatic or mechanical application of a child's return" once the Hague Convention was invoked, because of the exceptions "based on objective considerations concerning the actual person of the child and its environment" (para 72). In the present case, the French courts had "conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person . . . In doing so, [they] did not identify any risk that [the child] would be exposed to physical or psychological harm in the event of her return . . . " (para 74). The Court was therefore satisfied that the child's best interests, which lay in her prompt return to her habitual environment, were taken into account in the French courts (para 75). Accordingly, there was no breach of article 8, considered in the light of article 13b of the Hague Convention and Article 3.1 of the UNCRC (para 81).

21. Then came *Neulinger*, where once again the complaint was that to enforce an order under the Hague Convention for the child's return to Israel would be in breach of article 8. This time, it came before the Grand Chamber, which agreed. It repeated much of what had been said in *Maumousseau.* The obligations of article 8 had to be interpreted taking account of the Hague Convention (para 132). But the Court was still competent to review the procedures of the domestic courts to see whether, in applying the Hague Convention, they had complied with the ECHR, and in particular article 8 (para 133). The decisive issue was whether a fair balance had been struck between the competing interests of the child, the parents and of public order, bearing in mind that the child's best interests must be the primary consideration (para 134). The child's interests comprised two limbs: maintaining

family ties and ensuring his development within a sound environment, not such as would harm his health and development (para 136). The same philosophy is inherent in the Hague Convention, which requires the prompt return of the abducted child unless there is a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation. In other words, the concept of the child's best interests is also an underlying principle of the Hague Convention. Some national courts have expressly incorporated it into their application of article 13b (para 137). Then come the two paragraphs which have caused such concern:

> "138. It follows from article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences. . .. For that reason, those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities . . .
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> 139. In addition, the court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully. . .. To that end the court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin (see *Maumousseau and Washington*, … para 74)."

22. It will be seen, as Aikens LJ pointed out in the Court of Appeal (paras 105 to 107), that in para 139 the Court has taken the factual description of what the French courts did at para 74 of *Maumousseau* and turned it into a requirement. In doing so, the Court gives the appearance of turning the swift, summary decision-making which is envisaged by the Hague Convention into the full-blown examination of the child's future in the requested state which it was the very object of the Hague Convention to avoid. Furthermore, in countries which are party to the Brussels II revised Regulation, the court of the requested state would not have jurisdiction to make that decision.

23. It is of interest that the principles adopted in *Neulinger* were summarised in almost exactly the same terms as we have summarised them above in two later cases: *Raban v Romania*, App no 25437/08, 26 October 2010, where a father was complaining that the Romanian courts had not ordered the return of his daughter when in his view they should have done; and *Van den Berg and Sarri v The Netherlands*, App no 7239/08, 2 November 2010, where a mother was complaining that the Dutch courts had ordered the return of her daughter and had rejected her case under article 13b. There is another more recent case along similar lines, *Lipkowsky and McCormack v Germany*, App no 26755/10, 18 January 2011. But in all of these cases, the Strasbourg court did not find a violation of article 8 – indeed it found the complaints inadmissible. It was not the Court's role to question the judgments reached by the national courts under article 13b, and in examining whether the outcome was in breach of article 8, it was clearly prepared to accord the national court a wide margin of appreciation in assessing the facts of the concrete case.

24. It becomes important, therefore, to understand what the Grand Chamber in fact decided when holding that there would be a breach in the *Neulinger* case. The Swiss courts had been divided in their opinions as to whether the return of the child to Israel would put him at grave risk of harm, especially in the light of the mother's adamant refusal to return with him. But they eventually concluded that it was reasonable to expect her to do so. It is important to realise that the Grand Chamber held that this decision was within the margin of appreciation afforded to national authorities (para 145). The mother however applied to Strasbourg for interim measures to prevent the enforcement of this order, which were granted. The Swiss did not enforce the order and the Grand Chamber did not decide the case until three years after the Swiss Court's decision and five years after the child's removal from Israel. In those circumstances, and given the subsequent developments in the applicants' situation, the court was not convinced that it would be in the child's best interests for him to return to Israel and the mother would sustain a disproportionate interference with her right to respect for her family life if she were forced to return with him (para 151).

25. As the President of the Strasbourg court has acknowledged extra-judicially (in a paper given at the Franco-British-Irish Colloque on family law on 14 May 2011), it is possible to read paragraph 139 of *Neulinger* as requiring national courts to abandon the swift, summary approach that the Hague Convention envisages and to move away from a restrictive interpretation of the article 13 exceptions to a thorough, free-standing assessment of the overall merits of the situation. But, he says, "that is over-broad – the statement is expressly made in the specific context of proceedings for the return of an abducted child. The logic of the Hague Convention is that a child who has been abducted should be returned to the jurisdiction best-placed to protect his interests and welfare, and it is only there that his situation should be reviewed in full". *Neulinger* "does not therefore signal a

change of direction at Strasbourg in the area of child abduction". The President has therefore gone as far as he reasonably could, extra-judicially, towards defusing the concern which has been generated by, in particular, para 139 of *Neulinger*. It is, of course, as Aikens LJ pointed out in the Court of Appeal, not for the Strasbourg court to decide what the Hague Convention requires. Its role is to decide what the ECHR requires.

26. The most that can be said, therefore, is that both *Maumousseau* and *Neulinger* acknowledge that the guarantees in article 8 have to be interpreted and applied in the light of both the Hague Convention and the UNCRC; that all are designed with the best interests of the child as a primary consideration; that in every Hague Convention case where the question is raised, the national court does not order return automatically and mechanically but examines the particular circumstances of this particular child in order to ascertain whether a return would be in accordance with the Convention; but that is not the same as a full blown examination of the child's future; and that it is, to say the least, unlikely that if the Hague Convention is properly applied, with whatever outcome, there will be a violation of the article 8 rights of the child or either of the parents. The violation in *Neulinger* arose, not from the proper application of the Hague Convention, but from the effects of subsequent delay.

27. It is possible to imagine other, highly unusual, cases in which a return might be in violation of the ECHR. As the AIRE Centre point out, a person cannot be expelled to a country where he will face a real risk of torture or inhuman or degrading treatment or punishment or the flagrant denial of a fair trial (a possibility discussed in *Maumousseau*). That could, in theory, arise where the abducting parent would face such a risk and the child could not safely be returned without her. In such a case, as the House of Lords pointed out in *Re D*, para 65, and again in *Re M*, para 19, it would be unlawful for the court, as a public authority, to act incompatibly with the Convention rights. But that is a far cry from the suggestion that article 8 "trumps" the Hague Convention: in virtually all cases, as the Strasbourg court has shown, they march hand in hand.

28. With that conclusion we turn at long last to article 13b of the Hague Convention.

Article 13b

29. Article 12 of the Hague Convention requires a requested state to return a child forthwith to her country of habitual residence if she has been wrongfully removed in breach of rights of custody. There is an exception for children who

have been settled in the requested state for 12 months or more. Article 13 provides three further exceptions. We are concerned with the second:

> ". . . 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) . . . ; 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." (emphasis supplied)

30. As was pointed out in a unanimous House of Lords decision in *Re D*, para 51, and quoted by Thorpe LJ in this case:

> "It is obvious, as Professor Pérez-Vera points out, that these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated: [Explanatory Report to the Hague Convention] para 34. The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of article 13b, which focuses on the situation of the child, could lead to this result. Nevertheless, there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of article 13 does not mean that it should never be applied at all."

31. Both Professor Pérez-Vera and the House of Lords referred to the application, rather than the interpretation, of article 13. We share the view expressed in the High Court of Australia in *DP v Commonwealth Central Authority* [2001] HCA 39, (2001) 206 CLR 401, paras 9, 44, that there is no need for the article to be "narrowly construed". By its very terms, it is of restricted application. The words of article 13 are quite plain and need no further elaboration or "gloss".

32. First, it is clear that the burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the

evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination.

33. Second, the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language 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.

34. Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or *otherwise*" placed "in an intolerable situation" (emphasis supplied). As was said in *Re D*, at para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

35. Fourth, article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, 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. Mr Turner accepts that if the risk is serious enough to fall within article 13b the court is not only concerned with the child's immediate future, because the need for effective protection may persist.

36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and

pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues.

37. To this Mr Setright would add that it would be even more helpful if there were machinery in place for recognising and enforcing protective orders (and, between common law countries at least, undertakings given to the courts) made in the requested state in order to protect the children on their return to the requesting state at least until the courts of the requesting state are seized of the case (if they ever are). The Brussels II revised Regulation clearly contemplates that adequate measures actually be in force and without some such machinery this may not always be possible. We therefore take this opportunity to urge the Hague Conference to consider whether machinery can be put in place whereby, when the courts of the requested state identify specific protective measures as necessary if the article 13b exception is to be rejected, then those measures can become enforceable in the requesting state, for a temporary period at least, before the child is returned.

38. We turn, therefore, to the application of these simple principles to the facts of this case.

Application to this case

39. The parents met in Spain in 2001 and set up home together in Norway. Tyler lived with them. The father has been married before and has three older children living in Norway, who were frequent visitors to the family. Livi was born on 19 May 2004 and they married on 16 December 2004. Milly was born on 10 April 2007. Tyler left Norway in August last year to live with her maternal grandparents in England. Shortly afterwards, on 7 September, the mother also left, bringing the children here with a view to staying here permanently. The father was working in Sweden at the time and she did not seek his permission. It is common ground that this was a wrongful removal within the meaning of the Hague Convention. The father applied to the Norwegian central authority on 17 September 2010 and these proceedings were launched on 6 October. The mother relies on article 13b to resist the children's return.

40. She (with support from Tyler) makes allegations against the father which, if true, amount to a classic case of serious psychological abuse. She says that he was never physically violent towards her (apart from one incident when he knuckled her head), but that she always felt that he was on the verge of extreme violence and that if he was violent he would kill her. She recounts incidents of physical violence towards other people, and towards property, of ill-treatment of pets, killing the family's cat, spraying the family's budgies with bleach, and killing a rabbit which Tyler kept as a pet while they were away. She alleges that the father was domineering and controlling, buying the family's food, keeping her short of money, and not wanting her to work outside the home. She says that the children were frightened of his anger, that he was rough with them and smacked them too hard, and she recounts one particular incident when he lost his temper with Livi and kicked her bottom with his workman boots so hard that she flew up into the air and landed in the snow.

41. The father denies all these allegations, although he accepts that he can get angry from time to time and that he did kill the cat which had become dangerous and Tyler's rabbit because the mother had asked him to do so. In turn he says that he had become increasingly concerned about the mother's drinking and use of drugs. He suggested that she seek help from their GP. But the GP says that there is nothing about this in either his or her records. Nor is there any record of complaints about domestic violence either to the GP or the police. Although the father does not accept that he has subjected either the mother or the children to any physical or emotional abuse, he has been prepared to make arrangements and give undertakings to reassure her. He would withdraw the complaint he had made to the police about the abduction; he would not use or threaten violence to, or harass or pester or molest the mother, or contact her save through lawyers; he would not remove or seek to remove the children from her care pending an order of the Norwegian court or by agreement; he would vacate the matrimonial home pending an order of the court in the child custody case, and would not go within 500 metres of it without the court's permission; he would pay all household costs and 1,000 Norwegian krone to the mother as child support, less any benefits which she received. He has deposited 4,000 krone with his solicitors to make good this promise for four weeks.

42. On 5 November 2010, Pauffley J gave two directions. One was that Tyler be joined as a party to the proceedings. Her main reason for doing so was the mother's mental state. There was support for the suggestion that Tyler herself had precipitated the family's move here. She had a day-to-day protective role in relation to the younger children. And she "may be able to add to the judge's sum of knowledge in a way that her mother because of her depression and depletion, perhaps will not". At the same time, the judge gave permission for the mother and father jointly to instruct a psychiatrist to report upon the mother's current

psychiatric or psychological condition, the impact upon her of a return to Norway and what might be done to ameliorate it.

43. The parties instructed Dr Kolkiewicz, who provided a principal psychiatric report and three short supplementary reports. She also gave oral evidence at the final hearing of the father's application, which took place on 24 and 25 November 2010 before Pauffley J. Dr Kolkiewicz diagnosed the mother as suffering from an adjustment disorder. This is a "state of severe distress and emotional disturbance arising from a period of adaptation to a significant life change". Individual vulnerability plays a greater role than in other psychiatric disorders. The mother was pre-disposed towards developing this disorder as a result of early separation from her father, long term exposure to severe domestic violence by her step-father towards her mother, witnessing her mother's inability to break away from this, and rejection by her father as a teenager. She adopted a philosophy of "anything for a quiet life" which left her unable to confront the problems in her own marriage. The final stressor was the bringing of these proceedings.

44. In the doctor's opinion, the disorder currently had a minimal impact upon the mother's ability to look after the two younger children. If an order were made for their return and appropriate support were not put in place, there was a "high risk of the severity of the Adjustment Disorder worsening, resulting in psychological decompensation associated with deliberate self-harm or suicidality". It would also significantly increase the risk of the disorder evolving into a depressive disorder. With appropriate support and a quick resolution of the issues concerning the care of the children, however, the disorder was likely to follow an uncomplicated course and resolve within six months. The specific protective measures which she recommended were: on-going psychological interventions, such as counselling or cognitive behavioural therapy (CBT); a court order preventing the father from knowing her address and physically approaching her; and support from close family, in particular her mother, and statutory agencies. These would need to be put in place before any return to Norway. Much would depend upon how long it took to resolve matters in Norway. During the hearing, Dr Kolkiewicz spoke to the family's GP in Norway, who indicated that he would be able to arrange for the mother to see a psychiatrist within a week and that she would be able to receive the necessary counselling or CBT.

45. During the hearing, the judge also sought information about the legal position in Norway from the Norwegian international liaison judge. Judge Selvaag replied, in summary: if both parents have parental responsibility, relocating the children to another country is not possible without agreement; but it is possible to apply for sole parental responsibility in order to do this; normally a mediation certificate is required but an interim order can be made without this; the court can prohibit a parent from visiting the property, in order to protect the children; there is also a power to prohibit this in the Marriage Act (presumably in order to protect

the wife); and it is possible to ask the local police for a restraining order. Means-tested legal aid is available. Pauffley J also asked what view the Norwegian courts would take of undertakings offered to the English court so as to ensure a "soft landing" for the children's return but it is fairly clear from the answer that the question was not understood: this was that the courts are not involved in the actual return of children under the Hague Convention. It was suggested that this be clarified but Thorpe LJ (in his role of arranging this international co-operation) indicated that he would be unwilling to ask further questions of a no doubt very busy Norwegian judge. Pauffley J herself considered that the information provided about the remedies available to keep a parent away from the home largely dealt with the issue.

46. The mother's principal argument in resisting return was and remains that the risk to her own mental health is such that, as she is and has always been the children's primary carer, there is a grave risk that they would be placed in an intolerable situation unless there are real and effective protective measures in place. The judge addressed that argument on its own terms and considered the evidence as to whether the protective measures available would be sufficient to avoid the risk. As to the first of Dr Kolkiewicz's recommendations, she was satisfied that the psychological interventions were available and would be in place within a few days of the mother's return; as to the second, the father's series of undertakings satisfied her that there would be a safe and secure home for the mother in which she could feel adequately protected from the father's unwelcome attention; she considered it a "near certainty" that the mother's family would ensure that she was adequately supported in Norway both during the initial stages of return and at important points along the way as the court proceedings unfold. She was further reassured by the Norwegian judge's account of the legal position there, the signs that legal aid would be available and the fact that a Norwegian lawyer had already been identified to act for the mother. She was also confident that, even if Tyler remained living in England, she would be back and forth regularly to see her mother and sisters.

47. All in all therefore, Pauffley J found "no substance" in the suggestion that because of the mother's reaction to an enforced return there would be a grave risk of physical or psychological harm to the children. She also concluded, at para 37, that "it is overwhelmingly in their best interests to return to Norway for their futures to be decided there. They are very young children. By no stretch of the imagination could it be said that they have put down roots in this country. They will be returning to an environment where both parents will be living, albeit at a little distance from one another. . . I consider their welfare needs point emphatically to a summary return". The Court of Appeal, having disposed of the *Neulinger* argument, obviously thought this a straightforward case.

48. Although the judge directed herself, at para 8, that "the risk must be grave and the harm serious", which is not quite what article 13b says, it is apparent that she was following the sensible and pragmatic course advocated before us in cases of alleged domestic violence. She declined to resolve the disputed allegations between the parents. But she accepted that the risk of deterioration in the mother's mental health, if she were forced to return to Norway, might also constitute a grave risk to the children. She therefore examined with some care how the protective measures recommended by Dr Kolkiewicz might be put in place.

49. We have no reason to doubt that the risk to the mother's mental health, whether it be the result of objective reality or of the mother's subjective perception of reality, or a combination of the two, is very real. We have also no reason to doubt that if the mother's mental health did deteriorate in the way described by Dr Kolkiewicz, there would be a grave risk of psychological harm to the children. But the judge considered very carefully how these risks might be avoided. The highest the case can be put is that part of her conclusion relies upon undertakings given to the English High Court, which could not be enforced in Norway, rather than upon any orders yet made in the Norwegian courts. But the judge was reassured by the answers given by Judge Selvaag as to the remedies which would be available if need be. Nor is there anything in the history to suggest that the father is not a man of his word. The judge trusted him to abide by the solemn promises which he was asked to make to her; he was asked to make them because the judge thought it in the best interests of the children he loves so much for him to do so; however little he understands or accepts the mother's feelings, he must accept what the judge thought best for his children. It is certainly not the task of an appellate court to disagree with the judge's assessment.

Tyler

50. Tyler, of course, is not the subject of these proceedings. No-one is ordering her to go back to Norway. She has, however, a keen interest in the outcome of the proceedings. Her evidence both supports her mother's case on the climate of fear within the family and adds some further reasons of her own for having wanted to leave. If it is ordered that her sisters return, her mother will undoubtedly return with them. Tyler will then be torn between her concern for her mother and her little sisters and her desire to lead her own life here. We are told that she too is under a great deal of stress but that she has decided that she cannot face going back to Norway and intends to remain here. This situation undoubtedly engages her article 8 rights, as well as the obligation under article 3.1 of UNCRC to make her welfare a primary consideration. But in the overall balance of all the article 8 and article 3.1 rights involved, the interference with her rights can readily be justified in the interests of the rights of others, and in particular those of her little sisters. She is at an age when she might well have left to come to college in this country whatever the situation at home and she will have ample opportunities of keeping in

close touch with both her mother and her sisters whether they remain in Norway or, as she and her mother hope, eventually move lawfully to this country.

51. Tyler could, of course, simply have filed evidence in support of her mother's case. Rule 6.5(e) of the Family Proceedings Rules 1991 (SI 1991/1247) (in force at the relevant time; see now rule 12.3 of the Family Procedure Rules 2010 (SI 2010/2955)) provides that "any other person who appears to the court to have a sufficient interest in the welfare of the child" shall be a party to child abduction proceedings. It was for the judge to weigh whether she had such a sufficient interest. Clearly, she had an interest; and the judge deemed it sufficient because of the mother's "depleted" mental state. It is not for us to disagree.

Conclusion

52. In summary, therefore, the whole of the Hague Convention is designed for the benefit of children, not of adults. The best interests, not only of children generally, but also of any individual child involved are a primary concern in the Hague Convention process. We agree with the Strasbourg court that in this connection their best interests have two aspects: to be reunited with their parents as soon as possible, so that one does not gain an unfair advantage over the other through the passage of time; and to be brought up in a "sound environment", in which they are not at risk of harm. The Hague Convention is designed to strike a fair balance between those two interests. If it is correctly applied it is most unlikely that there will be any breach of article 8 or other Convention rights unless other factors supervene. *Neulinger* does not require a departure from the normal summary process, provided that the decision is not arbitrary or mechanical. The exceptions to the obligation to return are by their very nature restricted in their scope. They do not need any extra interpretation or gloss. It is now recognised that violence and abuse between parents may constitute a grave risk to the children. Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be.

53. We would only add this. We start from the proposition that all parents love their children and want what is best for them. Even if the parents fall out with one another, they should be able to work out what will be best for the children. They, and not the courts, are the experts in their own children. They should be able to see their children's interests separately from their own. They should be able to negotiate the "least detrimental" solution for them, with the help of a skilled mediator if they need it. But they will only be able to do this if they are prepared to accord one another equal respect. Mediation will not work if one party is allowed to dominate or bully the other. That is why it is usually thought unsuitable in cases

of alleged domestic violence or abuse. Whatever the rights and wrongs between these parents, this is a mother who will need a great deal of understanding and support. But we continue to hope that, once the trauma of these proceedings is behind them, these parents can be helped – whether through the good offices of our colleagues in the family justice system in Norway or in some other way - to reach a sensible and practical solution for the good of the whole family.

54. We would dismiss this appeal.