http://www.incadat.com/ ref.: HC/E/UKe 85
[07/03/1994; High Court (England); First Instance]
Re O. (Child Abduction: Undertakings) (No. 1) [1994] 2 FLR 349, [1994] Fam Law 483

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

7 March 1989

Singer J

In the Matter of O.

N Sanders for the father

M Everall for the mother

R Spon-Smith as amicus curiae

SINGER J: This is an application under the Child Abduction and Custody Act 1985, whereby the father of two Greek children has invoked the Hague Convention and seeks an order for their return to Greece.

The father, who is Greek, and the defendant mother who is English, married in April 1987, and on 24 September 1987 their daughter K was born. She is almost 6 1/2. A younger brother S was born on 25 March 1989. He is just short of 5. The children lived with their parents in Greece throughout their lives, they speak both Greek and English, went to Greek schools or playgroups and have been brought up in the Greek way of life.

That has, for them, been an affluent way of life: the parties lived in a select part of Thessaloniki in a fine-looking modern and extensive property. Domestic staff and nannies were employed. Private schooling was afforded. The mother had the use of her own Alfa Romeo car. The father's business interests lie in shipping, and his income appears to be substantial. The mother has produced documents declaring his income in 1993 to be of the order of £120,000. He says the documents were produced by companies with which he is concerned to facilitate possible borrowings for a house the parties at one time thought of buying in England, but he has not said that the stated income is inaccurate.

Clearly then, these were children who were habitually resident in Greece, and who had the benefit of a financially secure and comfortable lifestyle in Thessaloniki. But the marriage became unhappy and the mother decided to leave the father. That she did on 18 November 1993. She took the children and flew to England. She went to live at her father's home in Worcestershire, and has lived there since.

She obtained ex parte orders the next day in the Canterbury County Court on applications under the Children Act 1989 for interim residence and to prohibit the father from removing the children from her and from England. Those orders play no part in the decision I have to make, for it is conceded that the children's removal from Greece was wrongful in terms of Art 3 of the Hague Convention, and that this court is obliged to order the children's return to Greece forthwith under Art 12 unless that, as an otherwise automatic consequence of wrongful removal, may be averted upon the mother establishing the Art 13(b) defence that:

'. . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'

I have not found the issues raised by this application easy to resolve, and for that reason I hope to explain carefully how I have arrived at my conclusion, which will be at greater length than I would have liked. The parents have waited long for an outcome to this case and I cannot see how they would be assisted (particularly the father, whose spoken English is imperfect) by having the suspense prolonged in that way. I shall therefore announce my decision at the outset, which is that the order I shall make is for the children to be returned to Greece subject to the undertakings offered by the father.

The father launched this application very promptly on 24 November 1993. In his first affidavit sworn that same day he expressed his desire for a reconciliation, but said that he appreciated the strength of the mother's feelings at that time. He volunteered undertakings pending any agreement they might reach between them or any order made in the Greek courts:

(a) to permit the mother and children to live at the former matrimonial home while he lived elsewhere;

(b) to support the mother financially, paying running expenses of the former matrimonial home and her car, school fees and a reasonable figure for general maintenance for her and the children; and

(c) to pay the costs of the mother's and the children's return to Greece.

It has never been suggested that if the children are to return to Greece the mother would not return with them, for she has had the primary, indeed she would say virtually the sole, responsibility for their day-to-day care throughout their lives.

In proffering those undertakings at the forefront of his case, so to speak, the father was recognising that it would not be appropriate to produce a return to the status quo ante which prevailed immediately prior to the children's removal. His offer of undertakings was no doubt in part pre-emptively intended to ward off the thrust of an Art 13(b) defence.

The hearing before me commenced on 15 December 1993 by which time there had been filed an affidavit by the mother, and supporting affidavits of witnesses on each side. At the hearing a second affidavit of the father was filed, sworn that day.

In the mother's affidavit she did indeed assert that it would be intolerable for the children as well as her to return to Greece. She summarised the considerations which at that stage she relied upon. They were that:

(a) she did not believe the father would move out and leave her in exclusive occupation of the former matrimonial home for if he were to move out he would return regularly, as would members of his family who own adjoining properties. She explained at para 26 why she believed this would be so;

(b) she did not believe she would be permitted use of the car, without which she would for many practical purposes be disabled and isolated, given the location of the former matrimonial home;

(c) she believed the father would put pressure on her and pester her to agree to a reconciliation, and in para 30 she gave examples of previous episodes of persistence by him in their relationship;

(d) she alleged she had been the victim of violence by him;

(e) she expressed her anxiety at being financially dependent upon him;

(f) she asserted that in the past he had promised to mend his behaviour but had not done so. She doubted he would regard himself as constrained to honour promises made to a court. She referred in somewhat indirect support for this proposition to an 18-month period of alleged imprisonment in Saudi Arabia 'for dealing in illegal substances', and suggested that in Greece he had falsified insurance documents to avoid prosecution and to make a fraudulent insurance claim;

(g) she said that she had been made uneasy by suggestions he had made to her that he would be in a position by bribery to influence the exercise of the Greek judicial system in his favour. If he did say that one could well understand her unease, even though the suggestion that justice could be purchased in that way is, I make it plain, entirely unsubstantiated.

The father's affidavit dealt summarily with her allegations, and said that he would abide by the undertakings he had offered, and that he accepted his attempts at a reconciliation had failed, and that he would not continue with those attempts. As to the allegation concerning criminal activities, he denied any period of imprisonment, and denied that he had falsified insurance documents or made a fraudulent insurance claim. Similarly, he denied suggesting that he could improperly influence decisions in the Greek courts.

At the outset of the hearing I was told that the father had expanded his offer of undertakings, and that, he maintained, those revised undertakings were sufficient to meet the mother's suggestion (which he said was in any event unfounded) that there was a grave risk that the children would find themselves in an intolerable situation if returned to Greece. With only a modest subsequent amendment (as to the mother and children's sole occupation of the matrimonial home pending the provision of a three-bedroomed apartment in Thessaloniki) those undertakings remained on offer, and remain on offer. They fall into three groups, and I shall set them out in what became in the course of the December 1993 hearings their final form, which was referred to as Sch B. In the first group the father has offered seven undertakings which are to run until such time as a Greek court makes any different order at a hearing of which the mother has received notice. Those undertakings are:

(1) not to remove or seek to remove the children from the care and control of the mother;

(2) to provide a car for the mother and pay all running costs, including petrol, maintenance and insurance;

(3) to provide as soon as possible for the mother a three-bedroomed apartment in Thessaloniki for the sole occupation by her and the children and to pay all the running costs of such property and not to enter such property, and until the provision of such property to permit the mother to reside at 36 Nymphon and to pay all the running costs of 36 Nymphon and not to enter 36 Nymphon;

(4) to pay all school fees including school books for the children and all medical expenses for the mother and children;

(5) to pay all travel costs for the return of the mother and the children to Thessaloniki together with the cost of the return of the mother's and children's personal belongings;

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

(7) to pay maintenance to the mother at the rate of £1000 per calendar month.

Next, the father is willing to undertake until the final resolution of any proceedings in Greece for the dissolution of the marriage and issues of custody including an application for leave to remove the children from Greece and contact and also proceedings in respect of finance including maintenance of the mother and children:

(1) to pay the mother's reasonable legal costs of the proceedings in Greece; and

(2) not to pester her.

Finally, the father offers to undertake to use his best endeavours to give undertakings or obtain orders in a Greek court to similar effect as set out in the seven undertakings in the first group above.

The mother remained for her part dissatisfied in some respects with what was offered. She would have preferred to live at a distance from what she regards as the father's sphere of influence in Thessaloniki, but if in that town then in a defined part of it. I do not regard an obligation to reside in the same town pending the resolution of Greek proceedings as subjecting the children to an intolerable situation. Nor do I regard £1000 per month (in addition to the running costs of home and car, and education and medical expenses) as constituting such a situation.

Mr Everall for the mother submitted that grave risk of an intolerable situation for the children would be constituted in this case by an accumulation of factors, many of which in isolation or even in partial combination would not be intolerable, but which all cumulatively did cross the threshold and push the door open to the Art 13(b) discretion not to order return. Moreover, he argued that even allowing for that degree of protection which the undertakings on offer should afford mother and children in attenuating if not eliminating the gravity of the risk, there were factors inherent in the legal system under which the family would find itself reunited which constituted risk factors legitimately to be taken into account, and against which no sufficient assurance could be provided to neutralise their effect.

Those matters which he asserted and upon which he relied are these:

(a) he entertained grave doubts, upon the expert evidence as it became available, whether there was any reasonable prospect that the Greek courts would ever give her leave to remove the children to England to live here;

(b) the length of time proceedings in Greece relative to the children might take to reach finality;

(c) the difficulties envisaged in securing the dissolution of the marriage through the Greek courts;

(d) the fact that there is no equivalent to the legal aid system so that representation might not be available to her; and

(e) difficulty or inability to enforce undertakings which might, if complied with, meet what would otherwise be intolerable aspects of the children's situation.

At the conclusion of the somewhat disjointed hearing over parts of 3 days in December 1993 which other commitments of counsel involved in the case and of the court unfortunately made unavoidable, the state of the expert evidence of Greek law was far from satisfactory and not at all cogent. For instance, there was great controversy as to the effect, if any, in terms of the enforceability of undertakings in Greece of a document which the father had executed at the Greek Embassy in London on that third morning. The opinion of the father's Greek lawyer was that that document would be recognised and enforced in Greece; the lawyer in Greece retained to advise the mother maintained it was utterly inappropriate and that its use was limited to certain dealings between individuals and the Greek State rather than for dealings between private individuals. Now, however, it is conceded that that document would afford the mother no protection should the undertakings be breached.

For reasons upon which I shall expand I was concerned that the effect of the undertakings in Greece and their enforceability there might be material to the Art 13(b) question. I therefore adjourned the hearing for enquiries to be addressed through the English Central Authority to the Greek Central Authority requesting the latter to 'provide information of a general character as to the law' of Greece in connection with the application of the Convention, as provided for by Art 7(e). I have in a number of respects been greatly assisted by the exchanges which then followed, but it remained the case that each party, for reasons which seemed to me to be good, wished to have the opportunity to file expert evidence of their own. Thus the effective resumption of the hearing was delayed for these steps to be completed until 28 February 1994.

The exercise overall has been helpful and has assisted me to reach a conclusion with a far greater degree of confidence that an important issue has been properly investigated, as indeed I am satisfied that in the interests of the children it needed and deserved to be.

I do not propose to analyse in unnecessary detail, in relation to those of Mr Everall's potential ingredients of risk about which I am unpersuaded, the conclusions which can be gathered from the body of evidence as to Greek law and practice thus garnered.

As to (a), the question as to leave to remove the children from Greece being granted or refused by the courts there, the Greek Central Authority in an official translation of a response received on about 26 January 1994 advises that:

'. . . if the Greek court decides that the appropriate person to get custody of the children is the mother and since the separation and separate residence of the spouses is certain, we think that it would most probably grant her permission for permanent residence in England. The latter issue certainly depends on the decision of the judge since, in order to grant custody to her, he would certainly take into account her request for permanent residence in England.'

In a helpful passage at para 2 of her affidavit the father's expert, Maria Triantopoulou-Capsaskis, sets out what are the relevant provisions of the Civil Code, comments upon them and concludes that the crucial issue in the consideration of the Greek court may well be the quality of communication with the children available to the father if they are removed to England. At one stage (at p 44, para 11 of the bundle of expert evidence) Mr Philotheidis instructed for the mother suggests that it is very likely that the Greek court would give permission, and he clearly does not regard it as a foregone conclusion that it would never do so in a case such as this. Indeed at p 50 he refers to reported decisions of the Greek court where that has been the result.

In my judgment it would only be if it were established in relation to a given country that there was some fixed embargo on allowing the removal of children, or perhaps precluding the removal of children by a parent who had once wrongly removed them, that reliance could be placed on this consideration. It would not be enough that the inability of the mother to gain the permission of the Greek court to remove the children would cause her such upset as seriously to affect her ability to care for them in that country. True it is that in a line of decided cases in England the courts have had regard to that likely discontent on the would-be removing parent's part and its effect on the children as a very relevant consideration tending towards permitting that parent to go abroad with them. But to follow that reasoning in this context would be to thwart the object of the Convention that the courts of the country of a child's habitual residence should be the forum where decisions concerning him are taken. It would also come close in effect to substituting the opinion a judge here might have upon the merits for that which he thinks (rightly or wrongly) the requesting State's court may reach, a course expressly prohibited by Art 16.

As to (b), the length of time it may take in Greece to decide the issues concerning the children, the evidence of the mother's experts suggested that, allowing for an appeal, 18 months to 2 years might be needed irrespective of any additional delay which the incidence of strike action affecting the courts might produce. The argument for the mother is again in part that during such a period of uncertainty the anxiety produced in the mother would transmit itself to the children with harmful effect. But I must also not exclude the possibility when considering that period that it could be shorter, if for instance there is no appeal. I do not find this consideration is an ingredient to be taken into account in this case, though I am mindful that in C v C (Abduction: Jurisdiction) [1994] 1 FCR 6, Cazalet J. in a non-Convention case which he dealt with as though Art 13(b) did apply, found as part of the intolerable hardship the child in that case would suffer the delay of one year which it would take to obtain a decision on custody in Brazil, compared with the 'matter of weeks' it would take here given that arrangements for a hearing were already well in train. So clearly the time consideration cannot be excluded as always immaterial.

For reasons which will become apparent, however, it is material to consider how long after a return of the mother and children to Greece it may be before the court there is in a position to consider and in a manner consonant with its procedures to regulate practical issues concerning the children. The Greek Central Authority in a letter dated 7 January 1994 states that pending final settlement (of a custody issue, for example) 'the spouses may submit a petition for a provisional order to settle these relations, and these will be settled under emergency procedures in accordance with the provisions governing injunctions (within 1 or 2 months)'. And at the end of the 26 January 1994 letter the Central Authority states that:

'. . . if the mother really wants to get custody of the children, she can claim it by following very brief procedures which will lead to a provisional decree, provided that the ordinary procedures for the final award of custody are simultaneously followed.'

As to (c), the time it may take to finalise divorce proceedings in the absence of agreement between the parties, I accept that could well cause the mother stress and difficulty, as can happen here for up to 5 years under our present law if there is implacable opposition and an inability to establish another basis upon which irretrievable breakdown can be proved. But I am unable to regard that fact and the possible transmission to the children of the mother's feelings as carrying weight in the balance of what does or does not in this case add up to an intolerable situation for these children.

As to the accepted non-availability of free or subsidised legal aid for the mother if the father does not abide by his undertaking to meet her reasonable legal costs in Greece, I accept the submission of Mr Spon-Smith (who appeared as amicus in response to a request for assistance I made at the end of the December 1993 hearings) that such a disadvantage is subsidiary to the

objective of the Convention that the courts of the country of a child's habitual residence should decide issues relating to his welfare.

The matter which has caused me most concern is to decide what weight I should give to the limited extent to which the Greek courts may give effect to the undertakings offered by the father, if I conclude that they are a necessary protection for the children against what would otherwise be a grave risk that they would find themselves in an intolerable situation.

As to the undertakings, the Central Authority in its letter of 23 February 1994 refers to the father being obliged by this court to sign undertakings. I am sorry that it has apparently not been understood that the father has throughout offered not only to give undertakings to the English court, but try his hardest to obtain court orders to the same effect in Greece. Thus when I invite him to give undertakings, as I shall, I will not be requiring from him anything which he has not volunteered.

That having been said, the letter goes on to state that the Greek judge will be sure to take the undertakings into consideration, and will estimate them with the other relevant facts, although it does not follow that he will necessarily 'accept the undertakings or part of it'.

I turn next to the understanding I have gained about how and how far a Greek court may have power to enforce the specific undertakings which the father has offered. As a general proposition it does appear that Greek law and procedure has no place for the concept familiar to the English courts and (one may assume) to those of other countries which have adopted the common law legacy of litigants binding themselves by promises directly entered into with the courts, with the consequence that breach subjects the person giving the undertaking to the risk of fine or imprisonment, or to the threat of imprisonment if he does not thereafter keep his promise to the court.

The expert evidence canvassed a number of theoretically possible alternative methods for the father to subject himself to the possibility of enforcement of his undertakings in Greece. No advocate before me suggested that any of them offered the mother much by way of reassurance if her fears are well-founded, in effect that the father would promise whatever he felt might help towards the children's return, but on the basis that once they and the mother arrived he need not feel obliged to comply.

So, for instance, it seems that there may be no provision for the court in Greece to regulate contact, such as visits and phone calls to the mother and pestering of her generally, which can occur to the detriment of children. An action for damages for breach of a promise would hardly constitute practical redress. Whether the court would make an order preventing the father from visiting the home (on occasions other than those provided for in an access order) may depend crucially upon whether the parties agree that there should be such an order. It appears that a Greek court cannot order one spouse not to assault the other (not in itself a likelihood which I find is reasonably in the forefront of the mother's anxieties), because assaults are the exclusive province of the criminal law. Whereas it might be possible to provide by notarial deed that the father should meet those of his undertakings with quantifiable financial consequences, the procedure is cumbrous, the cost very considerable, and the enforcement procedure would depend upon a court in Greece first declaring that the deed is indeed enforceable. Recourse to the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children 1980 is precluded by Art (10)(1)(c)(i) thereof, for which see Sch 2 to the Child Abduction and Custody Act 1985, because the children are both Greek nationals and habitually resident there. Recourse to the Brussels Convention looks mildly less impracticable, but quite apart from any other difficulty (of which it seems to me there might be many), the father's expert suggests enforcement may prove long-winded. I must emphasise that, from first to last in terms of the English court proceedings before me, the father's stated position has been

that he is voluntarily offering effectively to bind himself in these terms not only here but also, to the extent that it is practicable to do so in Greece, to the Greek courts.

That he is prepared to offer these undertakings does not, of course, necessarily imply that they are needed to induce him to behave (or to refrain from behaving) in the manner they postulate or inhibit. Nor indeed do they constitute any admission by him that contrary conduct would render the situation of the children intolerable. Therefore, I must consider in the context of the circumstances of this case and of the life the children have led whether the return of the children to Greece with none of the assurances offered by the father would place them in an intolerable situation.

I approach that assessment with the benefit of guidance provided by authoritative decisions of the Court of Appeal.

The intention of the States which are parties to the Hague Convention and its objectives are set out in the preamble to it and in Art 1, neither of which are in fact reproduced in Sch 1 to the Child Abduction and Custody Act 1985. Insofar as wrongful removal and retention in breach of rights of custody are concerned, the preamble states that the intention is:

'. . . to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence',

and Art 1 reflects that wording. In numerous cases the English courts have emphasised that the primary purpose of the Convention is to provide for that prompt return. See, for instance, the dicta to that effect of Nourse LJ in Re A (A Minor) (Abduction) [1988] 1 FLR 365 at p 368; of Lord Donaldson MR in the passage from Re C (A Minor) (Abduction) [1989] 1 FLR 403 at p 413 which I cite below; of Balcombe LJ in Re E (A Minor) (Abduction) [1989] 1 FLR 135 at p 142 which I also cite below; and of Sir Stephen Brown P in B v B (Abduction) [1993] 1 FLR 238 at p 247C.

The burden is upon the mother to establish the Art 13(b) defence to an order for summary return, and that burden is undoubtedly a heavy one for an abducting parent to discharge. Thus, in Re C (A Minor) (Abduction) (above) at p 410D-F Butler-Sloss LJ said (albeit in relation to the other limb of Art 13(b)):

'In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create a psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent.'

She then referred to the following dictum of Balcombe LJ in Re E (A Minor) (Abduction) [1989] 1 FLR 135 at p 142:

'. . . the whole purpose of this Convention is . . . to ensure that the parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence or, having taken the child, with the agreement of any other party who has custodial rights, to another jurisdiction, then wrongfully to retain that child.'

In his judgment in Re C, Lord Donaldson of Lymington MR said at p 413D: 'We have also had to consider Art 13 with its reference to "psychological harm". I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words "or otherwise place the child in an intolerable situation" which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the State to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, ie the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country - Australia in this case - can resume their normal role in relation to the child.'

In Re A (Abduction: Custody Rights) [1992] Fam 106 at p 118H, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 at p 25C, Balcombe LJ quoted from the judgment of Thorpe J. at first instance where he dealt with the Art 13(b) aspect which arose in that case. What he said was:

'The argument there is that on their arrival there is no home and there is no financial support forthcoming from the plaintiff who himself lives on State benefits. That is in contrast to the security that the mother has achieved since her arrival in this jurisdiction. Here she has the support of her parents. She is in a position to sign a lease immediately for the rent of a suitable home. There is a letter from the school showing that the children have apparently settled in well to a Church of England primary school. Therefore it is said that the situation on their return would be intolerable and pointless.'

Balcombe LJ was of the view 'that the matters (largely financial) upon which the mother seeks to rely as constituting an intolerable situation in Australia come nowhere near to establishing what the Hague Convention requires by that phrase', and he approved Thorpe J's rejection of that argument, which he had done as follows:

'I have reached the clear conclusion that the mother has not established a sufficiently grave risk of a sufficiently substantial intolerable situation. The fact is that between July and September 1991 the whole family was dependent on State benefits. In this jurisdiction, equally, the mother and children are dependent on State benefits. On their return, they would again be entirely dependent on Australian State benefits. So that can hardly be said, in itself, to constitute an intolerable situation.'

In that case, although on the main issue of acquiescence Balcombe LJ was in dissenting minority, on the Art 13(b) aspect of the case both his colleagues agreed his endorsement of the judge's decision.

Further assistance as to what constitutes intolerability of a degree sufficient to cross the threshold is to be found in the Court of Appeal decision in B v B (Abduction) [1993] Fam 32, [1993] 1 FLR 238, where Sir Stephen Brown P said (at pp 42B and 246H respectively) that the judge at first instance in that case did not have the material before him on which to find that there was a grave risk that the child would be placed in an intolerable situation if the court were to order his return to Canada. He continued:

'I stress what Balcombe LJ said in Re A [in the passage already cited], that a very high degree of intolerability must be established in order to bring into operation Art 13(b). It seems to me that the facts of this case do not come anywhere near to the level of intolerability which is required when considering the provisions of Art 13. It must also be borne in mind that Art 13 does not oblige the court to decline to order the return of the child even if grave risk of an

intolerable situation is established. It provides a discretion to the judge to consider whether the return is an appropriate order to make in all the circumstances.

At pp 42D-E and 247D respectively he continued:

'. . . it is important when considering applications under the Hague Convention that it should be borne in mind that these are matters which affect the comity of nations. It is a Convention on the Civil Aspects of International Child Abduction. Its purpose, as the preamble and Art 1 indicate, is to deal summarily with the mischief of taking children from the appropriate jurisdiction in a manner which is considered to be unlawful.'

On the issue of whether, but for all or some of the offered undertakings, an Art 13(b) defence arises in this case, Mr Sanders for the father submitted it did not. Many of them were of a financial nature and if breached could be remedied where appropriate by the Greek court when application could be made to it, which should on the evidence be within 2 months. And in any event, he argued, the children would suffer no hardship which could be described as intolerable even without the offered undertakings.

However, in my judgment the situation to which the children would return in Greece if none of these undertakings were on offer, or if they were not honoured, would be at grave risk of being intolerable. The extent of what is or is to be regarded as tolerable, if I may put it that way round, before the threshold is passed depends not only upon the negative circumstances which would or might arise, but also their duration. In my judgment the period with which I am concerned and with which a court should in the first instance in cases such as this be concerned, when considering the need for and the effect of undertakings, is the period until the courts of the requesting State could ordinarily take up or resume their proper role as the forum for decision-making in relation to the children. Why, in relation to undertakings, I focus on that period will be apparent from the dicta in Re C (A Minor) (Abduction) (above) and in Re G (A Minor) (Abduction) [1989] 2 FLR 475, to which I shall refer in due course.

In this case the children would find themselves in an intolerable situation if upon their return to Greece they were for any appreciable period to find themselves deprived of the continuity of day-to-day care hitherto afforded them by their mother. So would it be if they returned to live in a home shared contrary to her wishes by the father, or visited by him irrespective of her opposition. And whereas for many families financial constraints are inevitable (as in Re A and in B v B), were these children to be subject to a situation where the resources to finance their customary lifestyle risk being cut off, that would constitute a situation of hardship severe enough in the context of their experience to be described as intolerable. So would it be for them if their mother was unable effectively to function as their carer, as for instance if she were subject to the type of extreme emotional bombardment to which marital disharmony sometimes leads, or if she were subjected to penal sanction or civil penalty for her actions initially in removing the children wrongfully, or for the manner in which subsequently she had resisted an order for their return in these courts. In the local and social isolation in which the mother would find herself, so seemingly humdrum a facility as the use or the withholding of a car might well represent for the children, because of its direct and indirect impact on their daily lives, the difference between a tolerable situation and one that was not.

It is axiomatic that disruption to children's lives of the sort provoked by a parent's wrongful removal of them from their home country produces hardship for them which will extend beyond the date of their return if that is ordered. Much more than that is signified by the Art 13(b) phrase 'an intolerable situation'. But in my judgment the circumstances which I have described and the situations envisaged cross the threshold between what would be tolerable for these children and what would not. If the undertakings to which I have referred are not only proffered but also honoured, that will alleviate the risk. But, it is submitted for the mother, if

they are proffered but not honoured, or if they are not honoured but cannot be enforced, then there is in this case a grave risk of an intolerable situation for the children.

It follows that the father and his advisers properly assessed the gravity of the risk which the terms of Art 13(b) levelled against the prompt return of the children under the Convention. Thus the concessions which he offered and the assurance which he promised by that offer were not, or certainly should not have been, a mere tactic to secure the children's return. In putting forward a cordon of protective measures such as these, the father and his advisers were not overreacting.

The undertakings had thus evolved into what is effectively their current form by soon after the commencement of the hearing. Now, at its end, I am satisfied that these undertakings are capable of alleviating what would otherwise be for the children an intolerable situation if the mother and the children can rely on them until such time as a Greek court can be properly seized of the issues relating to the children. Those issues are likely to be an application by the mother for permission to take the children to live in England, subject no doubt to such ample staying access in Greece and contact in England as practicalities and the ample means of the father permit. The father for his part may choose not only to oppose such a move but also to propose himself as the children's main carer, no doubt with family or other practical assistance. There may also be financial and possibly other issues concerning the children. His undertakings would not of course inhibit him from making those applications, nor would the undertakings he has offered affect their outcome as they are conditioned to run only until a Greek court, at an inter partes hearing on notice, orders otherwise.

There can be no argument (and there has been none) but that the mechanism of the English court accepting undertakings to alleviate what would otherwise be an intolerable situation is permissible. That is to say, it is a practice expressly approved by the Court of Appeal on at least two occasions.

Thus in Re C (A Minor) (Abduction) [1989] 1 FLR 403, that court considered the effect of a finding by the judge at first instance, Latey J, that unless the mother had a home to return to in Australia, financial support and the care of the child pending any further full investigation and decision there, Art 13(b) would apply so that the court would not be bound to order that return. Faced with that finding, the father offered undertakings to the Court of Appeal which he had not offered before. Butler-Sloss LJ described the situation thus (at p 408E):

'The father's position now is that, in order to facilitate the return of the child, he will give certain undertakings to this court and to the Australian Family Court.

These undertakings are crucial to the welfare of the child, who has been sufficiently disrupted in his removal from his home and his country and needs as a priority an easy and secure return home. The mother has been the primary caretaker throughout his short life, and since the parting of the parents when he was 3 for all but access periods his sole caretaker. If possible, she should for his sake and not for hers be with him and help him to readjust to his return. The father should not be instrumental in putting obstacles in the way of that easy return, nor make difficulties once the child is back. It is essential that the judge hearing the future issues of custody and access or indeed the Australian Family Court should have the opportunity to consider the welfare of the child as paramount without emergency applications relating to the manner of the return of the child.

The father has offered a number of undertakings. Those, as far as they go, are very valuable and, if I may say so, for my part, show the good intent that he has for the welfare of his child and to return him to the jurisdiction of the Australian court. In my view, those undertakings should go somewhat further, and the undertakings that I for my part think should be required

of this father, as a prerequisite of the return of the child, and without which I consider the child should not be expected to return, are as follows . . .'

Butler-Sloss LJ then set out details of the nine undertakings which she regarded as prerequisites to the child's return. It is significant to observe that they effectively deal with the same topics as are covered by the seven undertakings forming the first group of those offered by the father in this case. The Lord Justice continued:

'These undertakings cover, as far is I can see, all the entirely justifiable concerns of the judge. It will be a matter for the Australian Family Court as to with which parent in the future the child shall make his home, and nothing that I say in this judgment should be taken as in any way prejudging or affecting the decision that the Australian court may feel it necessary to make.'

At the conclusion of her judgment (at pp 410-411) she added this:

'When the undertakings which I have set out are given on behalf of the father to this court and, through this court, given to the Australian Family Court, I for my part, would allow this appeal, and order that [the child] do return to Sydney on the flight booked by the father.'

I have already quoted, but repeat, the last sentence of the judgment of Lord Donaldson MR at p 413D:

'Save in an exceptional case, our concern, ie the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country . . . can resume their normal role in relation to the child.'

The suitability and the extent of the use to which undertakings should be required in an appropriate case by the English court to facilitate the smooth return of the child to life in the requesting State was considered further by the Court of Appeal in Re G (A Minor) (Abduction) [1989] 2 FLR 475, again an Australian case. In the course of the leading judgment, Purchas LJ rejected the submission made on behalf of the mother in that case that once the judge had found there to be Art 13(b) circumstances, undertakings were not an appropriate vehicle open to him when exercising his discretion whether or not to order the return of the child. At p 483D, Purchas LJ said this:

'In view of certain things that have been said, I am anxious to emphasise that nothing done in this court . . . is directed to achieve anything other than the return at the earliest moment in time of the matter to the court which has, and which should have, jurisdiction to deal with the problem. The orders made by Thorpe J. [at first instance] -- and indeed as adjusted in minor details in this court . . . -- are in no way in derogation of the jurisdiction exercised under the Convention and according to the domestic law of Australia in the Australian Family Court. In my judgment it would be quite wrong for any order of this court to attempt to influence the proper resolution, as an inter partes matter between the parents, in the Australian court dealing with the future of [the child].'

The same point was emphasised by Butler-Sloss LJ in her judgment at p 485, which contains the following passages:

'I agree that the judge correctly exercised his discretion, being satisfied that on the giving of a suitable undertaking by the father, grave risk of psychological harm did not arise. As he found, the Australian Family Court is undoubtedly the appropriate court to decide the future of this boy. The undertakings given by the father, accepted by the judge and as amended . . . in this court, are not in any way designed to circumscribe or influence the hearing by the court of competent jurisdiction, the Family Court in Australia . . . In carrying out the Hague Convention, this court has the duty under Art 13, as indeed the Australian court would have if a similar application were made to the Family Court, to consider the welfare of the child. The

undertakings in this case are designed to protect the child from the grave risk of psychological harm . . . until, and only until, an application can be made to the Australian court.'

It is interesting and, I believe, reassuring to note in passing that there is at least one decision in another jurisdiction to the effect that the exacting of undertakings is legitimate in an appropriate case under the Convention. Thus in a case decided on appeal in June 1993 by the Full Court of the Family Court of Australia at Adelaide, Police Commissioner of South Australia v Temple (No 2) [1993] FLC 92, a father seeking the return of a child to England under the Convention was required by the Australian court to give an undertaking to an English court as a precondition of an order for the return of the child to England. Thus it can be seen that the permissible involvement of the English court extends beyond bluntly saying that there shall be a return or that there shall not. The court can influence the outcome by making clear that without undertakings, or with only the undertakings that are offered, Art 13 (b) will apply, but that further or other undertakings are a prerequisite for a child's return.

It is also to be observed that in Re C what was anticipated was that undertakings to the same effect should be given to the Australian Family Court as a precondition of ordering return.

Australia is a common law jurisdiction familiar with the concept of personal undertakings to the court and their enforcement in case of breach. One aspect of the difficulties in this case is that upon the basis of the evidence before me no such mechanism as an undertaking has evolved in Greek jurisprudence. Thus it is not clear to see (upon the basis of the expert evidence which I have summarised) whether, if at all, effect might be given to the undertakings in Greece, should the father's performance of his undertakings prove less than reliable in that interim period before the appropriate Greek court will be in a position to deal fairly between the parents with issues relating to the children, and thus be in a position to alleviate any hardship affecting them. The question does therefore arise, in evaluating the effect of undertakings which are properly regarded as a prerequisite to return, how far it is permissible or may in some cases be obligatory for an English court to investigate and to form what inevitably amounts to a value judgment upon the legal procedures of a co-signatory to the Convention, for differences there will inevitably be between one domestic jurisdiction and another. Similar questions may well arise in a case where (perhaps irrespective of or in the absence of undertakings) Art 13(b) is found to apply, when the English court considers how to exercise the discretion which then arises, whether or not to order return.

In a number of English authorities such inquiries and indeed value judgments have been undertaken or at least envisaged in cases where a parent sought the swift return of a child abducted from a non-Convention country.

Thus in Re F (A Minor) (Abduction: Jurisdiction) [1991] Fam 25, [1991] 1 FLR 1 a case involving Israel (which at that time was not, but in December 1991 became, a Contracting State for the purposes of s 2 of the 1985 Act) Lord Donaldson MR said at pp 31D, 31H, and 4D, 5A respectively:

'There is no evidence that the Israeli courts would adopt an approach to the problem of [the child's] future which differs significantly from that of the English courts . . .

Which court should decide depends . . . on whether the other court will apply principles which are acceptable to the English courts as being appropriate, subject always to any contra-indication such as those mentioned in Art 13 of the Hague Convention, or a risk of persecution or discrimination, but prima facie the court to decide is that of the State where the child was habitually resident immediately before its removal.'

In G v G (Minors) (Abduction) [1991] 2 FLR 506, the Court of Appeal was concerned with children removed from Kenya. At p 514F Balcombe LJ said that, having considered the

relevant Kenyan statutory provision, he could see no reason to believe that a custody hearing there would not be dealt with on the same basis and with the same fairness as it would be here, and in particular that one parent's adultery would not be decisive of the custody issue. At p 517B he said, of an undertaking as to maintenance in Kenya upon the mother's return, that he had:

'. . . no reason to suppose that the question of enforcement will arise because, if the father were to break those undertakings, even though this court may not be in a position to enforce them, it would not help his case before the Kenyan court and, therefore, I assume that if only out of self-interest he would observe those undertakings . . .'

In an unreported decision of the Court of Appeal in Re S (Minors), 29 June 1992, the judge at first instance had ordered the children's return to Italy without embarking on an investigation of the merits, on the father's undertaking to leave the home where he was in fact still living. The mother had indeed previously abducted the children to England and had previously, in 1989, been ordered to return the children upon the assurance of undertakings offered by the father, which included undertakings not to molest the mother and to let her and the children live without him at the matrimonial home. The Court of Appeal, on hearing an appeal from the second order, admitted evidence which had not been available to the judge below which, if true, would establish that the father had seriously breached his undertakings over a substantial period, that there were doubts about the degree of protection which the mother could rely upon receiving via the local courts, and which would require some investigation of the grave risk of harm to the children. In the course of her judgment, at p 6F of the transcript, Butler-Sloss LJ said that it was entirely reasonable for the judge 'to assume, in the absence of strong counter-indications, that the courts of a member of the European Community would be likely to adopt a similar approach to our own'. In the light of the additional evidence admitted on the appeal she went on to hold (at p 10C) that sufficient contra-indications had been raised to require some investigation, and the order for summary return was set aside.

Finally, in connection with non-Convention cases, I was referred to a recent decision of Cazalet J. in C v C (Abduction: Jurisdiction) [1994] 1 FCR 6. He had expert evidence as to Brazilian law from which it was not wholly clear what weight a court there might attach to the adultery of the mother during the marriage. He in fact declined to order return of the child to Brazil, applying Art 13 considerations by analogy, on the basis of acquiescence and/or the grave risk of placing the child in an intolerable situation which on the facts of that case a return would have involved. Had those not been his findings, he would have required more expert evidence as to the relevant criteria adopted by the Brazilian courts, as is clear from p 10F of the report of his judgment.

The Hague Convention operates as between Contracting States. The provisions of the Convention set out in Sch 1 to the Child Abduction and Custody Act 1985 have effect given to them in English law between the UK and other Contracting States for the time being specified in an Order in Council made under s 2 of the Act. Greece became a Contracting State for that purpose and by that process with effect from 1 June 1993.

Should the fact that the Convention thus applies mean that it is not open in an appropriate case for the English court to consider the domestic law of the requesting State, whereas in a non-Convention case it is clear that it may need to do so?

This is a question of difficulty and delicacy, the resolution of which led me in December 1993 to invite the assistance of an amicus curiae. I have indeed been assisted by Mr Spon-Smith who has appeared in that capacity. Under the administrative arrangements which currently prevail, he is instructed by the Official Solicitor, but the Official Solicitor in instructing an amicus acts quite separately from his function as the administrative head of the Child Abduction Unit which operates from within his department and is responsible for the exercise of the powers

and duties of the Lord Chancellor as the Central Authority for England and Wales under the Convention. Nor does the Official Solicitor in instructing Mr Spon-Smith in any sense represent either child in this case, a function which in our domestic law he very frequently does undertake when invited to act as the guardian ad litem of a child. Finally, I should stress that Mr Spon-Smith has been scrupulous not to address me nor to venture the least opinion concerning the merits of this case or what should be its outcome. He has assisted in relation to the law alone.

The essence of the submission of the amicus to me was that if a point seemingly requiring investigation of the domestic law of a Contracting State is raised by the party resisting return, and if the English court considers that investigation necessary for the determination of an Art 13 defence to summary return, then such an investigation should and could properly take place, notwithstanding well-recognised principles of comity.

In a case where the court finds, as I have here, that an Art 13(b) 'grave risk' would be established unless alleviated by undertakings offered or required, and honoured or enforced, it is reasonable, so submitted Mr Spon-Smith, for this court to consider whether the undertakings will be adequately enforceable in the requesting State.

The best practice where such issues arise, he submitted, would be for general information concerning its available processes of enforcement of undertakings to be requested from the Central Authority of the home State, pursuant to the provisions of Art 7(e), and consistent with the relaxation upon the reception of evidence as to foreign law which Art 14 provides. However if, as here, sufficient information cannot be derived from that source then it may well be necessary to direct the parties to file expert evidence in the more conventional manner.

If in relation to any particular Contracting State that process revealed the absence of machinery adequate to give backing to undertakings the observance of which the English court relied upon to relieve the children of risk of an intolerable situation, then it would be relevant to consider whether the parent proffering the undertakings genuinely intended to honour them.

In the light of findings as to those considerations, the court has to conduct a balancing exercise to assess the gravity of the risk, in the setting of the facts of the case relevant to the Art 13(b) issue, but always bearing in mind the purpose and the international obligations involved in the Convention.

Thus in one case an inquiry into the bona fides of the parent offering undertakings might be unnecessary because of the high degree of probability that the court of the requesting State would require compliance, and indeed might co-operate in embodying the effect of the undertakings in its own orders to facilitate and as a prerequisite to return, whereas in another case the finding that the parent genuinely intends to honour the commitment of necessary undertakings could well suffice, notwithstanding that the requesting State's domestic law might not recognise the undertakings or indeed the need for them, and might not have any machinery for enforcement.

Yet in a third case the absence of such recognition and enforcement provisions might tip the balance of risk if the English court's assessment were that the undertakings were not genuinely intended but were advanced only tactically to secure the child's return. In such a case the English court should not ignore the reality of an Art 13(b) risk, and should proceed to consider whether or not to order return in accordance with the discretion which is thereby brought into operation.

I agree with those submissions, and I do so notwithstanding a passage in a judgment of Waite J. (as he then was) which might be read to the contrary effect. In P v P (Minors) (Child Abduction) [1992] 1 FLR 155, the mother resisted a Convention order for prompt return to

New Jersey upon the basis that she would become a deeply unhappy person once more if obliged to return to an unhappy situation, and that the unhappiness that would imbue in the children constituted an intolerable situation for them. The judge rejected that argument, and referred (at p 158B and again at p 161F) to what he described as 'an underlying assumption' of the Convention:

'. . . that the courts of all its signatories are . . . equally capable of ensuring a fair hearing to the parties, and a skilled and humane evaluation of the issues of child welfare involved.'

Whereas that is an assumption which should in my view most certainly be made if no issue is raised which might involve investigation of the sort I have postulated, once apparently cogent considerations pertinent to the Art 13(b) judicial assessment are raised, the assumption should not be treated as irrebuttable.

Although a number of questions touching upon Greek law and procedure were raised by Mr Everall as relevant or potentially relevant to the issue of grave risk of an intolerable situation, they would all to my mind be addressed adequately by the proffered undertakings. That leaves for consideration therefore the assessment of the balance of risk, having regard to the limited extent to which the undertakings could be enforced by the mother in the Greek courts should the father disregard them, the strength or otherwise of his commitment to abide by them, and the limited period of a month or so which on the evidence it might take until the Greek courts were in a position to regulate the family's affairs via its normal emergency procedures.

For the mother, Mr Everall raised a number of matters which he submitted in combination cast serious doubt upon the proposition that the father could confidently be expected to do what he promised.

A number of the factors upon which she relied are of negligible significance, in my judgment, such as her assertion that he broke his assurance to look after the children personally when she was temporarily away last autumn. In the same category comes her complaint that he has in the past acknowledged the error of some of his ways, has promised to change for the better, but has then broken those promises.

Nor is it surprising (though I do not for a moment suggest that it is reasonable) in the current state of distrust between the parents that her removal of the children has produced, that he has withdrawn all financial support from the children while they have been in England. The mother moreover asserts (and the father has not denied) that he has placed financial pressure upon her already by failing to discharge a joint credit card debt, and by emptying a joint account of the funds which would ordinarily have paid it. Thus, she argues, it is predictable what further pressures he may put upon her and the children while in her care if they return to Greece and he breaks his promises to this court.

It does appear from the expert evidence of Mr Philotheidis (at p 44, para 11 of the bundle) that one undertaking to which the Greek courts may pay little regard is the sixth of those offered by the father, so that the mother would be entirely reliant upon the genuineness of his expressed willingness not himself to institute such proceedings and to use his best endeavours to ensure that she is not subjected to proceedings for punishment or committal in Greece to which she may have rendered herself vulnerable by reason of her removal of the children. It is clear from a number of the English authorities how an undertaking to avoid provoking, for instance, the imprisonment of a parent has been regarded as a necessary safeguard to ward off a finding of Art 13(b) risk.

In this context it is concerning therefore to read in the father's final affidavit that if the mother will not withdraw certain allegations (as to his statement that he could and would use bribery to his advantage in Greek proceedings; and as to his alleged imprisonment in Saudi Arabia or

Kuwait), 'I will condition my undertaking not to institute proceedings in Greece to exclude matters relating to these two false allegations'. But at no time has he asked me through his counsel to add that limitation to undertaking number 6, and Mr Sanders on his behalf has made it clear from first to last that the father reiterates his willingness to give undertakings in the full terms of Sch B.

It is to be observed that he did not in his affidavit say he intended to introduce the same condition unless the mother withdrew her allegation concerning an insurance fraud. In fact, in the affidavit she swore on 22 February 1994 she had at paras 16 to 19 given an expanded account of what she said had happened, and in paras 15 and 20 related that in recent telephone conversations he had threatened her that as it was her car to which the fraud related, he could take steps to have her imprisoned on her return.

In para 12 of his final affidavit the father deposed as to the fraud that 'these statements are simply not true and I cannot imagine how and why my wife has imagined all of this'.

That that was a lie was conceded by the father after his counsel had had an opportunity (as have I) to listen to the tape-recording of their telephone conversation which, unbeknown to him, the mother made on 5 February 1994.

Although it is the case that the initial allegation that the father had behaved fraudulently was not of itself relevant to the return of the children, and though it may be understandable, though in no way excusable, that he persisted in his false denial, what is most serious is the thinly veiled threat by this father to put the mother at risk of imprisonment for what I assume is a criminal offence in Greece. The passage in question is to be found at p 25 of the transcript of that conversation which has been produced, and the accuracy of which is admitted for all relevant purposes.

The tape was played in court before me in the presence of the parties. It is vivid testimony to the bitterness unleashed by family breakdown and by wrongful removal of children from their home country. The helplessness of each party in the dilemma that removal caused came clearly through. She fears that she may have forfeited any sympathy and goodwill she might have hoped for. His sense of frustration and anger is understandable.

The transcript has to be read in the knowledge that the mother, of course, knew she was recording the conversation and hoped to elicit useful evidence from it. So that there are questions designed to lead the father on to damaging admissions, and there are topics she raises knowing that he will find them provocative. For the most part the father is in emotional control of himself. Mr Everall said that in the father's side of the conversation there was evident an undercurrent of threat and menace, and though that can be said it is also the case that for the most part, as Mr Sanders emphasised, he was making it plain that what he intended to do would be done in accordance with Greek law.

From p 9 of the transcript there is some discussion between them about the undertakings. It is clear that the father is aware of the view of the Greek Central Authority, which is plain from their communications with the English Central Authority, that it is unnecessary if not indeed inappropriate that undertakings should be accepted or required as a precondition for return. He seems to believe that therefore a Greek court would disregard them, which is of course not what the Central Authority has written in the letter of 23 February 1994 to which I have referred.

At the end of the relevant exchange (at the bottom of p 10) the father says of the undertakings that he will 'change it in 5 days'. In view of the repeated references he makes to doing everything according to the law, I do accept that what he meant by that was not that he would disregard the undertakings unilaterally, but rather that within a short period (and 5 days may

have been a figure of speech) the Greek court would make orders which would relieve him of the responsibility of his promises. And it is of course the fact that, in conformity with the approach of the Court of Appeal in the passages from Re C (A Minor) (Abduction) which I have cited, the first group of undertakings are to run only 'until otherwise ordered by a Greek court at a hearing of which the mother has had notice'.

How in the light of all that should I approach Mr Sanders' submission that if without the protection of these promises there would be grave risk of an Art 13(b) situation (which his client does not concede but which I have found is the case), nevertheless sufficient assurance of protection from that exists for the limited period of one to 2 months which on the evidence may elapse before a hearing on notice in the Greek court?

I have found that assessment the most difficult aspect of this case, and I have to say that I have reservations which I hope will prove unfounded. I hope that once the mother and the children are back in Greece the father will put the children's interests first, as I am sure the Greek court will do, and not succumb to a desire to have revenge and to punish the mother (and inevitably through her the children) for removing the children and opposing his application for their return.

I am, however, prepared to trust him to keep to the terms of what he has promised. In particular, I believe that the risk that he might actively institute proceedings in defiance of his sixth undertaking is now limited if not altogether removed by the consideration that he has had to admit to swearing falsely in this court, and has accepted responsibility for the insurance fraud.

I have to bear in mind as I do the limited extent if at all to which the Greek court is likely to come to the mother's aid in support of the undertakings. But I do of course accept as a correct statement of the position that the Greek judge will have regard to the undertakings when he takes control of the children's case.

Such reservations as I retain about the risk to the children in the final analysis are tempered by this consideration. It is the underlying thrust of the Convention that children wrongly removed from their home country should be returned there promptly. Where there are doubts such as I retain they should be resolved in a manner consistent with that policy. In this case the mother has failed to persuade me that the risk the children run on their return can properly be categorised as 'grave' in all the circumstances which I have described.

I have been concerned in this case by how easy it is for misunderstandings to arise between the two Contracting States involved. I intend and imply no criticism of those who have responded to my request for assistance under Art 7(e), and I make the following observations quite generally and without specific reference to this case.

Misinterpretation and misunderstanding of another country's system of law and their approach to the resolution of delicate questions, such as those which can arise under Art 13(b), can easily develop. That risk exists between any two States, but must be higher when their jurisprudence has developed down different paths, their language may not be shared, and their concepts may not even be readily translatable.

Article 7 requires Central Authorities to co-operate with each other and to promote co-operation amongst the competent authorities in the Contracting States. That can include (see Art 7(b)) taking appropriate measures 'to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures'. That may be as apt in the requesting State to secure the welfare of a child when returned there as plainly it is in the requested State before an order can be made for that return. Similarly under Art 7(c) measures 'to bring about an amicable resolution of the issues' are encouraged, which undertakings or

some other form of commitment intended to be binding in a proper case may promote rather than hinder. And under Art 7(i) the Central Authorities are to take all appropriate measures 'to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application'.

These provisions prompt me to volunteer the suggestion that there may be some scope for developing, probably on a bilateral basis at least to start with, communication and discussion between Central Authorities so that each may have the opportunity of explaining and, it may be, justifying the approach their domestic courts take to issues which commonly arise in Convention cases. Such an issue may well be these courts' use of undertakings designed to smooth the speedy passage home and to the door of the proper court of children who should never have been taken from its jurisdiction. By such discussions and the exchange of views and information it may be that comity would be strengthened, and an understanding achieved that neither country wishes to cause any offence to the courts of the other, nor to seek to interfere with or to influence what that court then does.

Moreover, it may well be that if such opportunity for the exchange of views does assist to promote co-operation, it should be possible in an appropriate case for the Central Authority of the requested State to liaise with its counterpart in the requesting State to put in place measures agreed by the parties or reasonably required as a proper precondition of return.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]
