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[3/06/2002; Court of Appeal (England); Appellate Court]
Re S (A Child) (Abduction: Grave Risk of Harm) [2002] 3 FCR 43,
[2002] EWCA Civ 908

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

3 June 2002

Ward, Sedley, Dyson LJJ

Charles Howard QC and Marcus Scott-Manderson for the mother

Henry Setright QC and Anita Guha for the father.

WARD LJ:

THE PROBLEM

[1] Reports and pictures of events in Israel and the West Bank have filled our newspapers and television screens for months. Now this court is asked to decide whether there is a grave risk that the return of a child to Israel would expose that child to physical or psychological harm or otherwise place her in an intolerable situation. On 14 March 2002 Hogg J ordered that a mother who had wrongfully removed her baby daughter from Israel should return her forthwith to the jurisdiction of Israel pursuant to arts 3 and 12 of the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33) (the Hague Convention). The question is whether she was wrong to do so. She also ordered that the identity of the parties, of the town in which the family home is situated and of the child are not to be disclosed. That order remains in force.

THE BACKGROUND

[2] The mother was born in the United Kingdom 29 years ago. She went to Israel in 1995 and lived on a Kibbutz but later began to read at an Israeli University for a master's degree in molecular biology. The father is 36. He was born in Australia but took up residence in Israel in 1992. Both mother and father later became Israeli citizens. They met in February 1999 and after a very short acquaintance became engaged and then married in Jerusalem on 26 August 1999. The mother soon became pregnant and gave up her studies. They moved into a suburb of Jerusalem. On 20 July 2000 their daughter was born.

[3] It does not need much imaginative reading of the papers before us to appreciate that this was an ill-starred couple. The marriage was soon in difficulties and there were increasing problems between them. The detail of the deterioration in their marriage is not material to the present issue. It is sufficient to record that on the day after their second wedding

anniversary matters came boiling to a head and the mother and child left the father. On the following day, 28 August 2001, she and the child left Israel for the United Kingdom. They have since then lived with her parents in this country. All attempts to effect reconciliation have failed.

[4] On 15 October 2001 the father issued an originating summons under the Hague Convention on the Civil Aspects of International Child Abduction seeking an order for the return of the child to Israel. The mother has never disputed that the father was exercising rights of custody under the Convention, that the child's habitual residence was in Israel and that her removal of the child was wrongful within the meaning of the Convention. She raised a defence under art 13(b) alleging that --

'There is a grave risk that the minor's return to Israel would expose the minor to physical and psychological harm and otherwise place the minor in an intolerable situation.

(a) The minor is at risk of psychological and physical harm in the jurisdiction of Israel given the current and ongoing security situation.

(b) The defendant is the minor's primary carer. The defendant is at grave risk of physical harm if she were to return to the jurisdiction of Israel. Further the defendant is at grave risk of suffering further psychological harm if she were to return to Israel and this in turn will cause harm to the minor. Medical evidence will be filed in this regard.

(c) The plaintiff is unable to provide primary care for the minor. The minor would suffer grave harm without the day to day care of the defendant.'

THE INTERLOCUTORY DIRECTIONS

[5] The matter came before Dame Elizabeth Butler-Sloss P, on 11 December 2001 for the purpose of giving directions for the full hearing of the matter. Dame Elizabeth Butler-Sloss P observed in the course of argument:

'The next point is that I cannot see at the moment that under Article 13(b) the psychiatric problems of the mother, or probably quite justified fears of the mother, shared by every other citizen of Israel, is in itself a reason for not returning. That seems to be possibly a matter of law rather than a matter of fact . . .'

She considered that a further hearing should be fixed for the mother 'to demonstrate that this is a case which can be run'. She also directed in para 4 of the order that was made that the parties were to attend for the judge to consider whether oral evidence should be given by the parties and she also directed Dr M, a consultant psychiatrist instructed on the mother's behalf, and Mrs W, her psychodynamic counsellor, to attend to give oral evidence if necessary.

[6] That further directions hearing came before Bracewell J on 4 February 2002. She identified the issue before her in this way:

'This case is listed before me for directions on the order of the President of this Division, who dealt with the matter on 11 December 2001 and ordered that a further directions appointment should be heard after the filing of evidence in skeleton arguments in order to determine whether prima facie there could be a valid defence to the application for the return of a child . . . to the state of Israel.'

[7] She characterised the mother's first defence in this way:

'Firstly, she relies upon her own psychological problems in seeking to oppose a return of the child to Israel, on the basis that her particular disturbance would adversely affect her ability to return and care for the child, that this is a very young child (only 18 months old) and she has always been the main carer.'

[8] Having identified the second defence (a grave risk of physical harm if returned), she went straight into her judgment which was no more than this:

'I do not consider that the mother has raised a prima facie defence in relation to her psychological problem. It has been made clear in many cases, and in particular in a Court of Appeal decision Re C (see Re C (abduction) (grave risk of psychological harm) [1999] 2 FCR 507), that a very high threshold has been set in order to establish a defence of a grave risk of physical or psychological harm, or of a placement of a child in an intolerable situation. The court needs to have clear and compelling evidence, and it has to be substantial evidence and of a severity which is much more than inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return, and mother is not allowed to rely on adverse conditions which she has created. I find within the papers there is nothing that would justify the putting of that particular argument.'

She dealt with the second part of the defence which related to the current position in Israel which she considered to be 'truly alarming in relation to loss of life and injury' and she held that that defence was available to the mother to put forward 'although I am not optimistic about the outcome'. Although the order as drawn simply discharged the paragraphs of Dame Elizabeth Butler-Sloss P's order requiring the attendance of the parties and their witnesses, it has been agreed between counsel that they readily understood and proceeded upon the basis that the effect of Bracewell J's order was that she had struck out the mother's defence under art 13(b) in which she sought to rely on her own psychological problems.

[9] No application was made to Bracewell J for permission to appeal her judgment. No application for permission was made within time to this court. Instead the case proceeded to a final hearing in the Family Division.

THE FINAL HEARING BEFORE HOGG J ON 14 MARCH 2002

[10] In the skeleton argument prepared for that hearing, counsel for the mother said:

'The mother seeks to make a further application to rely on the report of Dr M, consultant psychiatrist, dated 15th November 2001 and a letter from Mrs R.W., counsellor, dated 18th November 2001, based upon the change in circumstances evidenced by the considerable escalation in terrorist atrocities currently pertaining in Israel at the date of this hearing

. . . It is therefore submitted that the evidence supports the concern being rightly held that this mother is not in a fit state to endure the obvious pressures of accompanying a child to Israel at the present time.'

There was no formal application setting out the grounds upon which the defendant would be entitled to re-open the matter not having sought to appeal Bracewell J's order. Counsel for the father was somewhat taken by surprise.

[11] Hogg J correctly directed herself in accordance with recent observations of this court, including Re C (abduction) (grave risk of psychological harm) [1999] 2 FCR 507, the case to which Bracewell J had referred. After a review of the earlier cases, Ward LJ said (at 517):

'There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'

[12] She noted a comment of Hale LJ in TB v JB (abduction: grave risk of harm) [2001] 2 FCR 497 at 509 that --

'it is possible to hypothesize circumstances in which events since the departure have created such a risk: obvious examples are the outbreak of civil war or the destruction of the children's home and livelihood.'

[13] The judge took account of the problems and dangers that have faced generations in the Middle East. She observed the advice of the Foreign and Commonwealth Office of 12 March that the risk of terrorist bomb attacks is 'very high'. She noted the chronology of incidents of terrorist attack killing and maiming many people in the recent months. She set herself this question:

'I have to ask myself what is the actual risk to this child of returning to Israel, the country of her birth and of her habitual residence, and I feel I must look at the realities of the situation which would present to her.'

[14] She took account of the fact that the mother could return to a comparatively safe area of the country and that 'life continues in Israel'. She noted 'an interesting document' setting out that the number of deaths from road traffic accidents exceeded the number of deaths from acts of terrorism. She observed that:

'There is no organised state evacuation or mass exodus. There is no direct threat to [the child] or her parents. No one has threatened them specifically. The threat, if there is one, is one of a general risk of harm, of being caught up in an unpredictable attack, being in the wrong place at the wrong time.'

[15] She came to this conclusion:

'How great is that risk? Is it a risk which falls within the test set out by Ward LJ in Re C? I acknowledge the situation has worsened since the mother and child left Israel in August 2001. But, is it so great a risk of real or actual harm being caused to [the child] which would prevent me from ordering the child's return? I come to the conclusion that, while the population of Israel has to be watchful, and there must be anxieties and uncertainties in everyone's mind who live in that country, the risk of direct harm befalling [the child] as a result of acts of terrorism is not as great as the mother would wish me to believe. Accordingly she has not made out that part of her case.'

[16] During the course of that hearing the mother had assured the judge that if the child were ordered to be returned to Israel, then she, the mother, would accompany her and care for her pending the outcome of any welfare hearing as to the child's future. That led the judge to consider the application to rely upon the mother's psychological state as a reason for not returning the child. Hogg J categorised that as follows:

'The mother now, through counsel, asserts that such is her psychological state that were she to return to Israel she would become so anxious that she would be unable to fully engage in any litigation relating to [the child] or even be a witness.'

[17] She dealt with that as follows:

'A further report and addendum has been produced, and I allowed it in de bene esse, from the counsellor who reported in November and whose report was before Bracewell J. Those extra documents add little, but confirm that, in addition to the mother's anxiety and fears of returning to Israel, many of the mother's current and continuing problems relate to the deterioration and breakdown of her relationship with her husband; the circumstances of that breakdown, as viewed by the mother; the anxiety relating to this hearing, and, no doubt, the future care of [the child], and her own future; and of contact to [the child] with the father. Moreover, the report reads that:

"On reflection, the mother recognises that she may have acted hastily in leaving the country, but she was so distressed by the strain she had been living under and the incident with her husband and her daughter, she could stay no longer."

And later in the report:

"The counselling sessions have allowed the mother to get in touch with her inner fears. The trauma and anxiety she experienced as a result of the political situation is not affecting her to the same degree."

While the mother may have anxieties concerning the security situation in Israel, as many in that country must do, she undoubtedly has no motivation to return there, her marriage having ended in animosity. The new reports have not caused me to reconsider the view and decision expressed by Bracewell J, and there is no evidence before me to suggest that the mother would not fully engage in litigation over [the child's] future, give her instructions, and give evidence.'

[18] Finally the judge considered whether the return of the child would place her in an intolerable position. She concluded that none of the anxieties and tensions in Israel generally and for the mother in particular nor the unpredictable and sporadic attacks, 'individually or cumulatively', would place the child in an intolerable situation.

[19] Accordingly she was 'entirely satisfied' that she should order the child's return. As is customary in this jurisdiction the order contained a number of undertakings by both parties to provide a satisfactory basis for the return which it was agreed should be no later than 5 April 2002. The mother did not seek permission from the judge to appeal her order. Instead she appeared to accept it. Plans were accordingly made for the return journey.

THE CHANGE OF HEART

[20] On Thursday, 4 April, the mother informed the father that the worsening situation in Israel and the dramatic events that had happened after the order of Hogg J had effected a fundamental change and exacerbated her fears and anxieties. She applied to Wall J for a stay of execution of Hogg J's order pending an appeal. Wall J accepted undertakings which gave her time to move this court. On 15 April we granted a stay pending her applications for extensions of time and for permission to appeal not only Hogg J's order but also Bracewell J's much earlier order. That came before the full court on 29 April when we heard full argument even though we had reserved our decision on whether or not to extend time and grant permission actually to appeal. We allowed fresh evidence to be put in in order that we could be fully informed as to the up-to-date position. Furthermore, since judges, contrary to widespread popular belief, do live in the real world, we cannot be unaware of nor fail to take account of dramatic changes in the Middle East which occur almost daily.

PROCEDURAL ISSUES FOR THE COURT OF APPEAL

[21] Before turning to the merits, it may be useful to set out the principles which must inform our decision. We begin with the applications to extend time. The time for appeal prescribed by the rules is 14 days. The court has the power, conferred by CPR 3.1, to extend time. In considering such an application, the court must always bear in mind that time requirements laid down by the rules are not merely targets to be attempted; they are rules to be observed. Justice may be defeated if there is laxity in that observance. If, as here, the sanction imposed in the event of non-compliance is that a party may be shut out from an appeal, then any application to extend time involves the seeking of relief from that sanction and that brings CPR 3.9 into play. That provides:

'(1) On an application for relief from any sanction imposed for a failure to comply with any rule . . . the court will consider all the circumstances including --

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other Rules :

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.'

[22] An additional consideration for the Court of Appeal to bear in mind may also be the merits of the proposed appeal and its prospects of success. Time will not be extended to pursue a hopeless appeal. A more benign approach will be taken if the prospects of success are high. The application must be judged with the overriding objective of rules as set out in CPR Pt 1 in mind. Justice is the ultimate criterion.

[23] Permission to appeal will only be given under CPR 52.3(6) where:

'(a) The court considers that the appeal would have a real prospect of success; or

(b) There is some other compelling reason why the appeal should be heard.'

The test is whether the prospects are realistic as opposed to fanciful.

[24] Under CPR 52.11 appeals are usually limited to a review of the decision of the lower court, not a rehearing, and the Appeal Court will allow an appeal only where the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court. The Appeal Court may draw any inference of fact which it considers justified on the evidence.

[25] Although it is possible to appeal against a finding of fact, it is notoriously difficult to succeed in so doing. Where findings of fact are made based on the demeanour of a witness,

the Appeal Court will seldom interfere because the trial judge has a special advantage over the appellate judge. Where, however, the evidence is written, the Appeal Court is in as good a position to decide the facts as the court below with this reservation. It should always be remembered that all international child abductions cases are tried in the High Court and the President and the 17 judges of the Family Division have built up a wealth of expertise which is probably unique. There is a steady stream of applications under the Hague Convention. During the past four years the United Kingdom annual average has been 179. Since that work is handled by a comparatively small number of specialist solicitors and barristers and is heard by the limited number of judges, the judges have unrivalled experience and whilst the Appeal Court will not surrender its duty to review the matter, it must pay full respect to the decisions of the judges of the Family Division and should interfere only where plainly satisfied the judgment was wrong.

[26] Fresh evidence will be admitted by the Court of Appeal in the exercise of the court's discretion if it is necessary to inform the court of new facts and matters which have arisen since the decision under appeal. Even though the welfare of the child is not the paramount consideration in this case, the interests of the child are engaged, as are our International Treaty obligations, and the court is not likely to refuse to admit that fresh evidence. The approach of the Court of Appeal is to consider first whether or not the appeal should be allowed on the facts as they appeared to the judge. If so, there is no need to take the fresh evidence into account. If, however, the appeal would otherwise be dismissed, then the court must assess whether the fresh evidence should lead to the appeal being allowed.

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

[27] The purpose of the Convention is well known. Nevertheless it is important that it should not be forgotten, especially in a case like this where delicate judgment is required on political events in the Middle East which, whilst they may be at the centre of a world stage, are material for present purposes only in so far as they have an impact on the life on this child. This is a judgment about the risks to which the child would be exposed: it is not a political judgment. It is a judgment which must strive to give effect to the predominant objective of the Convention which is that a child wrongfully removed from the country of her habitual residence should be promptly returned there so that the courts of that country can resolve with whom the child is to live. For reinforcement of the view that the prompt return of the child is a primary purpose of the Convention, one need only look to the article 'The Hague Convention on International Child Abduction' (1981) 30 ICLQ 537 at 542-543 by AE Anton, the chairman of the Special Commission responsible for drafting the Convention. He wrote:

'The Special Commission also considered-and, until recently, this would have been an equally novel proposition for judges in common law countries-that the courts of the State addressed should order the return of the child, subject to certain limited exceptions, despite the possibility that further enquiries might disclose that the child's welfare would be better secured by its remaining in that State . . . the primary purpose of the Convention [is], namely, as Article 1(a) states, to secure the prompt return of the child wrongfully removed to or detained in a Contracting State. The Commission started from the assumption that the abduction of a child will generally be prejudicial to its welfare. It followed that, when a child has been abducted from one country to another, international mechanisms should be available to secure its return either voluntarily or through court proceedings.'

[28] This rule of prompt return is subject to very limited exceptions provided by arts 13 and 20. Article 20 does not apply here. Article 13 provides:

'Notwithstanding the provisions of the preceding Article [requiring the return of the child forthwith], the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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

[29] In this appeal three aspects of art 13(b) need to be considered. These points have arisen. (i) Is the case advanced by the mother capable in law of amounting to an art 13(b) defence? (ii) Is there, to use Mr Howard QC's phrase, some linkage between the elements of art 13(b)? (iii) Are the defences to be narrowly circumscribed?

First, are the facts sufficient to found an art 13(b) defence?

[30] We refer back to Dame Elizabeth Butler-Sloss P's observation at an early directions appointment questioning whether the mother's case was capable in law of amounting to an art 13(b) defence. The argument was not developed before her and we can only guess that she was concerned whether the case here was similar to the well known case of Re C (a minor) (abduction) [1989] FCR 197; sub nom C v C (minor: abduction: rights of custody abroad) [1989] 2 All ER 465 where a mother refused to accompany a young child back to Australia and asserted that the child would suffer harm if he returned without her. The court would have none of it. The President, then Butler-Sloss LJ, herself said:

'The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him . . . Is a parent to create a psychological situation and then rely upon it? If the grave risk of psychological harm to the 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.' (See [1989] FCR 197 at 205, [1989] 2 All ER 465 at 471.)

That view has been universally adopted. A mother, who is the author of her own misfortune, cannot rely on her own wrongdoing to justify the child's non-return.

[31] This case is quite different. The mother is not refusing to return. She has not by the taking of some unreasonable stance created a psychological situation. The situation has been imposed upon her by external circumstances. She is, arguably at least for the purpose of the present discussion, suffering a recognised psychiatric condition, namely a moderate to severe panic disorder and agoraphobia of which the precipitating cause was the security situation in Israel. It is, thus, a reaction to the troubled times in Israel, not a self-centred flight from or refusal to return to a place of unhappy memories.

[32] Arden LJ put the point slightly differently in TB v JB (abduction: grave risk of harm) [2001] 2 FCR 497 at 524 when she said:

'The policy of the Convention as set out above seems to me to require that the evaluation of risk is carried out on the basis that the abducting parent will take all reasonable steps to

protect herself and her children and that she cannot rely on her unwillingness to do so as a factor relevant to risk.'

This mother is not demonstrating an unwillingness to take all reasonable steps to protect herself and her child. Her condition is an illness, not an act of unreasonableness. Consequently we would not bring her within the group which deserves such castigation.

[33] Subject to that self-centred category, we would not find it necessary further to confine the identification of harm or intolerability. We find sympathy with the views of La Forest J in the Supreme Court of Canada in Thomson v Thomson (1994) 119 DLR (4th) 253:

'. . . from a child-centred perspective, harm is harm. If the harm were severe enough to meet the stringent test of the Convention, it would be irrelevant from whence it came.'

[34] Thus in Friedrich v Friedrich (1996) 78 F 3d 1060 at 1069 the United States Court of Appeals, Sixth Circuit held that --

'there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute-e.g., returning the child to a zone of war, famine or disease.'

[35] Hale LJ expressed similar views in TB v JB (abduction: grave risk of harm) [2001] 2 FCR 497 at 509. She was commenting on an observation of Thorpe LJ in Re C(B) (child abduction: risk of harm) [1999] 3 FCR 510 at 520 where he said:

'In my opinion art 13(b) is given its proper construction if ordinarily confined to meet the case whether mother's motivation for flight is to remove the child from a family situation that is damaging the child's development.'

[36] Hale LJ said:

'It is important not to take this too far. It is not an addition to the statutory text. It is merely guidance on what is more likely to surmount the high hurdle presented by art 13(b). It is a useful way of distinguishing those cases where the abduction itself has caused the problems feared from those cases where it has not. But it is possible to hypothesize circumstances in which events since the departure have created such a risk: obvious examples are the outbreak of civil war or the destruction of the children's home and livelihood.'

Arden and Laws LJJ agreed with that.

[37] Here it may be said, and is said on the mother's behalf, that the escalating violence in Israel was a feature of life there before the mother's departure and had its influence upon her and put her in fear even then. These terrorist attacks are events over which neither she nor the father have control and over which the courts in Israel have no control. They are external to the family dynamic and in our judgment a reactive illness which arguably impairs the mother's ability fully and properly to cope with her child of whom she is the primary carer can amount to an art 13(b) defence if as a result of her disabilities there is a grave risk of physical or psychological harm to the child or if the situation to which the child is being returned is intolerable within the meaning of that article. Consequently we respectfully disagree with Dame Elizabeth Butler-Sloss P when she doubted whether the facts pleaded by the mother were capable of amounting to a defence as a matter of law. Whether the case on its facts is strong enough is a matter to which I will return.

Secondly, is there a linkage between the defences in art 13(b)?

[38] Article 13(b) is dealing with grave risks to which the child may be exposed by her return. Those are grave risks of exposure first to physical harm, secondly to psychological harm, and then the more general risk that return would otherwise place the child in an intolerable situation. To the extent that three risks are named, there are three discrete defences. They are, however, interlinked by the use of the word 'otherwise'. To cite again from La Forest J's judgment Thomson v Thomson (1994) 119 DLR (4th) 253:

'It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation." The use of the word 'otherwise' points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation.'

[39] In support of his conclusion he relied on the judgment of Nourse LJ in Re A (a minor) (abduction) [1988] 1 FLR 365 at 372. There are other dicta to the same effect in the judgments of our courts, see, for example, Lord Donaldson of Lymington MR in Re C (a minor) (abduction) [1989] FCR 197, [1989] 2 All ER 465 who said that the words 'or otherwise place the child in an intolerable situation' --

'cast considerable light on the degree of psychological harm which the Convention has in mind.'

[40] The Australian High Court take the same view: see for example the judgment of Gleeson CJ in DP v Commonwealth Central Authority (2001) 180 ALR 402 at para 9:

'The discretion not to make an order for return only exists where there is a grave risk of harm (the gravity being emphasised by the cognate reference to an intolerable situation) . . .'

Kirby J said (at para 132):

'Similarly, the use of the word "otherwise" in [art 13(b)] indicates that the types of "physical or psychological harm" referred to must also be such as to place the child in an "intolerable situation."'

[41] There seems to us, therefore, to be considerable international support for the view that there is a link between the limbs of art 13(b). In our judgment, the proper approach for the court considering a defence alleging a grave risk of exposure to physical or psychological harm should be to consider the grave risk of that harm as a discrete question but then stand back and test the conclusion by looking at the article in the round, reflecting whether the risk of harm is established to an extent which would lead one to say that the child will be placed in an intolerable situation if returned.

Thirdly, are the exceptions in art 13(b) to be narrowly construed?

[42] That was the question before the High Court of Australia. The majority appeared to be content to accept the views of this court in Re C (abduction) (grave risk of psychological harm) [1999] 2 FCR 507 at 517 (to which we have already referred) saying at para 43 with reference to Ward LJ's judgment:

'Because what is to be established is a grave risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence.'

[43] None the less the majority went on to hold in the next paragraph that:

'There is . . . no evident choice to be made between a "narrow" and a "broad" construction of the [Article]. If that is what is meant by saying that it is to be given a "narrow construction" it must be rejected. The exception is to be given the meaning its words require.'

[44] Although Gleeson CJ found no error of law in the Full Court's decision he thought in para 9 that:

'It is unhelpful to say that [art 13(b)] is to be construed narrowly. In a case where there is no serious question of construction involved, such a statement may be misunderstood as meaning that the provision is to be applied grudgingly. The task of the decision-maker is to give effect to the [article] according to its terms. The meaning of the [article] is not difficult to understand; the problem in a given case is more likely to be found in making the required judgment. That is not a problem of construction; it is a problem of application. It may exist at the level of finding the primary facts relevant to the judgement; or at the level of deciding the conclusion to be drawn from evaluating known facts.'

[45] Time did not permit full argument to be addressed to us on this point. Our tentative view is that we are not confident that this court would take the same view as the majority in the High Court of Australia. It seems to us to follow that since the court requires compelling and convincing evidence, then the court is imposing a strict test and, by being stringent, the court is drawing tight conditions for return. There is ample authority in this court that a stringent test is appropriate. For example, Sir Christopher Slade has said in Re F (a minor) (abduction: risk if returned) [1996] 1 FCR 379 at 391; sub nom Re F (a minor) (abduction: custody rights abroad) [1995] Fam 224 at 238:

'[The courts] are in my view quite right to be cautious and to apply a stringent test. The invocation of Article 13(b), with scant justification, is all too likely to be the last resort for parents who have wrongfully removed their children to another jurisdiction.'

In Re C(B) (child abduction: risk of harm) [1999] 3 FCR 510 at 520 Butler-Sloss LJ also spoke of the need to meet 'the stringent test required to produce [the Article 13(b)] defence'. In TB v JB this court approved Singer J's direction that:

'Authority is multiple in this jurisdiction for the proposition that this Article 13(b) defence represents a high hurdle for an abducting parent to clear in order to open the door to the discretion not to order return.'

In our judgment, that is now settled law in this jurisdiction.

[46] That seems to coincide with the judgment of Kirby J in DP v Commonwealth Central Authority (2001) 180 ALR 402 at para 142 who said:

'It is unprofitable to dwell too long on the complaint about the use of the adverb "narrowly" as it was used to describe the approach which the Full Court took to the construction of the exception invoked under [art 13(b)]. It is enough to say, that like all exceptions from a general rule, those in [art 13(b)] must be construed in their context so as to fulfil their function as a departure from the general rule but one that does not destroy or undermine the ordinary attainment of that rule. The Full Court was right to recognise the exceptional character of the derogation from the general rule of return afforded by [art 13(b)]. The overseas authorities to which the Full Court pointed confirmed this approach.'

[47] For our purposes we are not sure how profitable it is subject any differences of view in the High Court to minute analysis. We would agree that no serious question of construction of art 13(b) is involved and that it is to be given the meaning its words require. All that may be true, but every word has shades of meaning and the true colour of the word is given by the context. The context here is of an exception, restrictively phrased ('grave', 'intolerable'), to the general rule of prompt return. 'Grave' may have its dictionary meaning yet how grave is grave? When the Convention was drafted 'grave' was substituted for 'substantial'. In the United States, as explained in Friedrich v Friedrich, the United States Department of State issued an instruction that --

'The person opposing the child's return must show that the risk to the child is grave, not merely serious.'

In Re A (a minor) (abduction) [1988] 1 FLR 365 at 372 Nourse LJ said that-'not only must the risk be a weighty one, but it must be one of substantial, not trivial, psychological harm'.

[48] It seems to us, therefore, that deciding whether the proven facts fall one side of the line or another is a difficult problem of application where the court is entitled to look for some help in concluding where matters fall. Matters have to be shown to be really serious (running the risk of substituting other words for 'grave') before the exception can be enlivened. There are two justifications for that approach. The first is to say that the civil standard of proof on a balance of probabilities can be raised a notch commensurate with the gravity of the allegation to be proved: compare Re H and R (minors) (sexual abuse: standard of proof) [1996] 1 FCR 509, [1996] AC 563. Secondly the hurdle is high in order that the dominant purpose of prompt return be not frustrated. Support for that view is to be found in the Explanatory Report by Elisa Perez-Vera on the Convention. She says in para 34 with our emphasis added:

'To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception [in arts 13 and 20] to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them-those of the child's habitual residence-are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.'

[49] It seems to us to follow that even though the return of the child may seem to be contrary to her welfare, the court must steel itself against too freely allowing this exceptional defence and the defendant must be put to strict proof. With that introduction, we turn to the facts.

THE JUDGMENT OF HOGG J

[50] The first question is whether we should extend time and give permission to appeal. The delay in bringing this appeal is short. The reason for the delay is wholly understandable. The mother was girding her loins to return when, on 27 March 2002, the first night of Passover, 27 people were killed in a suicide bombing in a hotel in the coastal city of Netanya. It was a

cataclysmic event. It led to the Israeli tanks rolling into the West Bank and to the crisis which has filled our newspapers and television screens since then. It was enough to give this mother cause for renewed anxiety. We bear all the factors listed in CPR 3.9 and the overriding objective in mind and we have no difficulty in concluding that it is appropriate to extend time to appeal against the decision of Hogg J. For reasons which will become apparent, there are arguable grounds for appealing and we grant permission to appeal against her order.

[51] The approach of this court must be to review her judgment made in the light of the facts as they were before her. If our conclusion is that her judgment must be upheld, we are then bound to look at the material before us to ask whether that makes a difference.

As to her judgment on the grave risk of physical harm

[52] Mr Charles Howard QC, who did not appear in the court below, makes two preliminary submissions. The first is that the judge was wrong to return this child to a country which was always treating itself as a country in a state of war. He takes that fact from publicised comment by the Israeli authorities. For example on 7 March 2002 The Times reported Mr Sharon's spokesman as saying 'We are in the middle of a war'. Four days later the Chief General Staff Lt-Gen Shaul Mofaz was reported in the Jerusalem Post as repeatedly calling the campaign a war, instead of combat as he had often said in previous meetings. He is reported as saying:

'This is not a war of choice. This is a war of attrition. And contrary to the previous wars, it is on our doorsteps everywhere.'

[53] Mr Howard then submits that the judgments of the United States Court of Appeals in Friedrich v Friedrich and of Hale LJ in TB v JB establish a principle that a state of war justifies not returning the child to her homeland.

[54] In our judgment it is not as simple as that. We may since 11 September have become used to the rhetoric of a war on terrorism. Whether Israel is truly in a state of war may equally be a matter of semantic debate. All of that misses the point. The issue is not whether there is a state of war in Israel but whether there is a grave risk of harm to this child if she is to be returned there. If conditions of war do exist then the risk of harm is amplified. What is actually happening on the ground determines the extent of the risk, not the label which is given to that prevailing state of affairs.

[55] The second submission is that because art 13(b) gives the court limited powers to protect the child from harm, the welfare of the child is thereby engaged so as to require the court to address the question from the viewpoint of a 'protective parent without the motives of an abductor'. He supports that submission by reference to para 29 of the Explanatory Report by Eliza Perez-Vera to the effect that --

'Paragraphs 1(b) and 2 of the said Article 13 contain exceptions which clearly derive from a consideration of the interests of the child.'

He also refers to para 41 of the judgment of the majority in the High Court of Australia in DP v Commonwealth Central Authority where it was held:

'What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in "an intolerable situation". That requires some prediction, based on the evidence, of what may happen if the child is returned. In a case where the person opposing return raises the

exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to enquire into the best interests of the child. The exception requires the court to make the kind of enquiry and prediction that will inevitably involve some consideration of the interests of the child.'

[56] We have no difficulty in agreeing with those views. Of course the interests of the child are engaged but the consideration of those interests is either specifically whether there is a grave risk of physical or psychological harm or more generally whether the return would place the child in an intolerable situation. The task of the court is the standard task of finding the relevant facts and making the necessary value judgment. Because protection of a child is at issue, the court will inevitably be concerned and vigilant to ensure that protection is afforded where it is appropriate to do so. This delicate process of adjudication will not, in our judgment, be aided by the incantation of a mantra that the court is to approach the matter as a protective parent without the motives of an abductor, or of any other rubric apart from the words of art 13(b) itself.

[57] Mr Howard is, however, perhaps on firmer ground in some respects in his criticisms of the judge's approach and her analysis of the material before her. He makes a number of points.

[58] First he draws attention to this passage:

'For generations, throughout time, certainly since the end of the Second World War, the area has been subject to problems [and dangers]. There have been wars and acts of terrorism. Yet, with this knowledge, both the parents chose to make their lives and their home there.'

Mr Howard submits that in choosing to refer to that history, the judge was both unfair to the mother and, moreover, set the scene in a way which made it difficult for her to accept the scale of the dramatic changes in recent times. When the mother moved to Israel in 1994, there were only four bomb attacks throughout the whole year. When the child was born, the intifada had not yet begun. Since September 2001 nearly 500 Israelis and over 1,500 Palestinians have died in the conflict. The position then and now is incomparable. We see some force in this submission but it does not carry great weight overall because the judge was clearly mindful of the obvious worsening in the situation after the mother's departure from Israel and expressly said so. She had full regard to all the material placed before her including both the views of the Foreign Office who assessed the risk of terrorist bomb attacks in Israel and the Occupied Territories, to be 'very high during the present crisis in the Middle East peace process'. She also had regard to the view of the Consul General to the Embassy of Israel that the six million citizens and other residents lead normal daily lives and that the current situation presented no justification for preventing return to Israel of the child, an Israeli citizen, to her country.

[59] Secondly Mr Howard submits that the judge erred in holding that the family home was not within the specified areas of particular danger and the mother could return to that area or indeed to the former matrimonial home. Mr Howard submits that the Convention operates by way of return to a country, not to a specific place. He also correctly observes that some at least of the attacks have occurred within a reasonable distance of their home and that residents of that area have been killed or injured going about their business elsewhere in Israel. As to the former point, Mr Howard is correct, but so was the judge in holding that it lay within the mother's power and it was accordingly her duty to take reasonable steps to keep her daughter as free from harm as was reasonably possible.

Although the terrorist attacks are random and indiscriminate and no one can be guaranteed to be safe anywhere in Israel, the larger towns and the public places and public transport are most prone to be targets and to some extent they can be avoided. As to the latter point, the family home is in as safe an area as one can expect in these uncertain times.

[60] Thirdly Mr Howard criticises the judge's observations that 'Life continues in Israel. The services and infrastructure remain'. We agree that those observations offer little help to the essential question whether there is a risk of harm to this child. We do not, however, regard the criticism as one of great weight.

[61] Fourthly Mr Howard makes a similar complaint about the judge's observation that 'there is no organised State evacuation or mass exodus'. He submits again that that signifies nothing. Once more we see some force in his criticism. For many in Israel there is no option but to remain and for many, no doubt, there always will be an overwhelming desire to remain. After all, the source of the conflict is the aspiration of both peoples to be there. The comment does not assist in assessing the degree of risk to this child. It does not even bear much upon the question whether it would return her to an intolerable situation. The fact that many do tolerate what is happening may be a factor to take into account but it is not determinative of the quite separate question which this court has to ask itself, namely, whether this court judges the situation to be objectively intolerable.

[62] Fifthly Mr Howard submits that for the judge to observe that 'there is no direct threat to [the child] or her parents' is not to the point as the horror of the present attacks is their indiscriminate nature. Save, perhaps, for the assassination of the Israeli Cabinet Minister, few of the attacks seem to be directed at individuals. The judge did, however, recognise that the threat was 'one of a general risk of harm, being caught up in an unpredictable attack, being in the wrong place at the wrong time'.

[63] Finally Mr Howard submits that the judge erred in taking into account the 'interesting document' produced by the father which showed that the death rate from road traffic accidents exceeded the death rates caused by acts of terrorism. We agree that little weight should be attached to such a comparison. Whilst it is obvious that even the most careful driver can become involved in a road traffic accident due to a want of care from another road user, there is no reason to doubt that this mother is likely to drive her beloved daughter with special care. On the other hand, although she will be equally on guard against terrorist attacks, her vigilance may not be enough to steer her away from that source of danger. The statistical information is, moreover, affected by the assiduous efforts by the authorities to thwart the number of attacks and so reduce their devastating consequences. We find this comparison between road accident fatalities and terrorist fatalities unhelpful. The father clearly thinks that he has made an impressive point; we rather think it is something of an own goal. If the road traffic risks are as high as the terrorist risks, then cumulatively the risks to the child are all the greater. The argument has a complete air of unreality about it. The risk of harm upon which the mother relies and with which the court is concerned is the risk of harm arising out of the conflict. There clearly is some risk. The court must evaluate whether that risk is one which can be said to be grave.

Conclusions on the judge's evaluation of the risk

[64] She clearly took all relevant information into account. She correctly asked herself what was the actual risk to this child of returning to Israel. She correctly asked whether the risk fell within the tests established by this court. She took account of the worsening situation. She recognised that 'there must be anxieties and uncertainties in everyone's mind who live in [Israel]', but she concluded that 'the risk of direct harm befalling [the child] as a result of

acts of terrorism is not as great as the mother would wish me to believe'. On the evidence before her that was a conclusion to which she was entitled to come. After a careful review of that evidence we are not persuaded that she was wrong-indeed we would have come to the same conclusion ourselves. Unless the fresh evidence compels a different conclusion the mother has, in our judgment, failed to establish any ground for upsetting that part of the judgment.

As to Hogg J's judgment on the mother's psychological frailty and the 'linkage' argument

[65] The mother's submission is that the learned judge failed to give sufficient weight to her evidence as to her personal anxieties and fears and to the medical and psychological evidence relating to the pressures that would be placed upon her in accompanying the child back to Israel with the consequent risk of harm to the child if that were to happen. The real complaint is that the judge's hands were tied by Bracewell J's order so that she could not consider all the material as she ought to have been able to do. Notwithstanding Bracewell J's order and the understanding of counsel that the mother was not entitled to run the defence that she would be unable properly to care for the child, Mr Scott-Manderson, appearing on her behalf in the court below, did indicate in his skeleton argument, but not by way of any formal application, that he wished to rely on the consultant psychiatrist's report and the letter from the counsellor to support her case that she was not in a fit state to endure the obvious pressures of accompanying the child back to Israel and remaining in Israel with her. Hogg J allowed a further report from the counsellor dated 8 March 2002 to be admitted de bene esse. We refer back to para 17 where we set out her judgment. Mr Howard complains that the judge failed to take all of the relevant evidence into account, and especially failed to have regard to the psychiatrist's report. She appeared to fail to have regard to material parts of the counsellor's report, for example:

'If the court ordered [the mother] to return to Israel then she would be without support as most of her friends have left the country. If she did return to [Israel], her anxiety is such that she would not leave the house and in my opinion it would be detrimental to the attachment process for the child to be kept indoors with an anxious mother . . . however if [the mother] plummeted into a depression this would have a negative affect on her daughter's wellbeing.'

Although the judge did have regard to the progress made in the counselling sessions, she failed to note that the mother followed the news of the political situation in Israel closely and the continued reports of killings, especially of civilians, caused her further stress. The judge also failed to refer to the addendum which noted the mother's being unable to sleep, having flashbacks of the bombing incidents that took place while she was in Israel, and being haunted by a photograph of a dead child's shoe left on the pavement after a recent incident. The conclusion was that the mother would not be able to function and that in turn would have a detrimental affect on her daughter. Mr Howard complains that the judge misunderstood the thrust of the mother's case as it was set out in the skeleton argument and wrongly concentrated on her inability properly to conduct the likely litigation in Israel.

[66] Once again there is considerable force in Mr Howard's submissions. The judge's focus was narrow. She did not appear to link the mother's psychological difficulties to her ability properly to care for her child nor to take this into overall account when looking at the case in the round and as a whole and asking whether it would amount to returning the child to an intolerable situation. The problem with Mr Howard's submission is, however, the one he recognises, namely that the judge's hands were tied by Bracewell J's order. Although there is no respondent's notice, we consider that the father might well have had real grounds for cross- appealing if Hogg J had engaged in the full review of all the medical evidence which Mr Scott-Manderson would have wished her to undertake. That would have been

tantamount to ignoring Bracewell J's ruling. We doubt if it lay within Hogg J's power to set Bracewell J's order aside. There may be some power to vary interlocutory orders and directions for trial but usually only if there has been some change of circumstance. Ordinarily we would expect that only the Court of Appeal could have interfered with Bracewell J's order which in effect struck out part of the defence. Hogg J very understandably and sensibly had some, albeit incomplete, look at the new material de bene esse and it would, in our judgment, be quite wrong to criticise her for failing to do that which Bracewell J had held should not be done at that final hearing.

[67] On this aspect of her judgment we would likewise be disposed, subject to what follows, to dismiss the appeal against Hogg J's order.

THE APPLICATION FOR PERMISSION TO APPEAL OUT OF TIME AGAINST THE ORDER OF BRACEWELL J OF 4 FEBRUARY 2002

[68] We begin with the application to extend the time for the appeal. The matter is governed by CPR 3.9 which we have already set out. We have regard to all the circumstances of the case and especially to the fact that this is an appeal where the interests of the child are engaged. Even though her welfare is not a paramount consideration, the question of whether or not she runs a grave risk of harm is sufficiently compelling for her interests to weigh heavily in the scales. The court will be slow to sacrifice her protection for a slavish adherence to time limits.

[69] That may be our starting point for this particular case but we must also have regard to the listed factors in CPR 3.9. The interests of the administration of justice demand not only regard for the interests of the child but also regard for the fact that this is an International Treaty obligation which we must honour, respecting the predominant objective of the prompt return of children for their future to be decided by the courts of their habitual residence. Undue delay defeats that purpose.

[70] This application to extend time has not been made promptly. The time for appeal is 14 days. The application is made nearly nine weeks out of time. The philosophy underpinning CPR Pt 3 is that the rules are there to be obeyed.

[71] The failure to comply with rules was intentional in that a deliberate decision must have been taken not to seek permission to appeal this order. Even when the appeal was mounted against Hogg J's order, there was originally no application to appeal Bracewell J's order. That decision was taken after some prompting by Hale LJ when we granted a stay of execution of the order.

[72] There is no good explanation for the failure. We can understand why it happened. The mother, being compliant to the practice of the Family Division to move these matters quickly to a final hearing, accepted Bracewell J's ruling and concentrated on the gravity of the risk of harm. Perhaps the mother hoped to persuade the trial judge to consider the matters again, as Hogg J did. That was, in our view, a misconceived expectation. Thereafter the order made by Hogg J became the primary focus of the appellant's attention.

[73] So far as we are aware the applicant has complied with the other rules, practice directions and court orders.

[74] We assume that the failure to comply was caused by the legal representatives, rather than the mother herself. They were tactical decisions taken in the course of the litigation. Although the applicant is bound by the acts of her representatives, one has more sympathy if she is not herself at fault.

[75] The failure to comply with the time limit has had no significant effect on the father. He was relieved of having to meet one defence the mother wished to raise and his life was made the easier as a result. He had no added burden of worry because the mother was appealing Hogg J's judgment in any event.

[76] The effect which the failure to comply has had on the mother could be much more serious because the result of that failure is that she lost the right to apply for permission to appeal and the child will have to return unless she obtains an extension of time. We have already indicated our preliminary view that her appeal against Hogg J's order is likely to fail unless fresh evidence requires us to come to a different conclusion. Appealing Bracewell J's order may be her last hope. It is, therefore, necessary to evaluate the merits of this proposed appeal. The test is whether the appeal would have a real prospect of success. In our judgment there is an arguable appeal on the ground that the judge did not give adequate reasons for her conclusion that the mother had not raised a prima facie defence in relation to her psychological problem. The judgment merely recites the test to be applied but does not explain why no case is made out. If she was asserting in line with Dame Elizabeth Butler-Sloss P's observation that the defence failed as a matter of law rather than as a matter of fact, then we would respectfully differ for the reasons we set out earlier. This was not self-induced anxiety. If, which appears to us to be more likely, Bracewell J was holding that the evidence was so weak as to have no reasonable prospect of establishing the defence, then arguably she erred in striking it out and in not leaving it to the trial judge since, as we shall show, the psychiatrist was clear in his opinion that --

'The precipitating cause was the security situation in Israel, and that contributory factors included the birth of her child, the deterioration of her marital situation, and her increasing sense of isolation.'

[77] So arguably causation is established. Since he also expressed the view that she would suffer 'a massive reinforcement of her anxiety symptoms and avoidant behaviour' and that that would have 'a significantly detrimental effect' on both her mental health and the proper upbringing of her child, the basis of the defence is arguably established. Arguably the judge was wrong to conclude no prima facie defence was made out. Whether the case was strong enough to make a difference is a matter to which we will return later but for present purposes and for the exercise of this discretion we conclude that if time is extended, then permission to appeal would be granted. For reasons we will later explain, we also have to conclude that eventually the appeal would be more likely to fail on the merits than to succeed.

[78] Finally, the effect of granting the extension of time and of allowing the appeal would be to cause very substantial delay to a case which has already taken more time than usual in this field of work. If the mother's original application were to be granted in full, she would wish to call both the psychiatrist and her counsellor to give oral evidence and each of them would need to provide up-to-date reports. The father would then seek permission to have his own psychiatrist examine the mother and then to give evidence. That examination could take more time. The time for hearing would be substantially increased. The state of listing in the Family Division is such that no early date could be given. The child could well be in this country for over a year before matters are finally resolved. That is an unacceptable prospect given that time is of the essence in these applications.

[79] Our conclusion is that the overwhelming weight of those factors compels us to dismiss the mother's application for an extension of time and accordingly dismiss her application for permission to appeal against Bracewell J's order. In reaching that conclusion we are

satisfied that no injustice is done to the mother or to the child for we are satisfied that this appeal does not have sufficient prospects of success on the merits to allow it to proceed.

DOES THE FRESH EVIDENCE JUSTIFY OUR ALLOWING THE APPEAL AGAINST HOGG J'S ORDER?

First: the risk of physical harm

[80] Despite being 'devastated' by the order that the child should return to Israel, the mother made the necessary travel arrangements to fly with her parents to stay in Tel Aviv until such time as she could find suitable accommodation. Tension in Israel was mounting during March. There were apparently 129 victims of Palestinian violence in March. The culminating atrocity was the bomb which killed 27 people and injured many more in Netanya in the midst of the Passover supper. The Israeli response was to mount Operation Defensive Shield, surround Yassir Arafat's compound in Ramallah, move into Nablus and Jenin and keep a number of wanted Palestinians under siege in Bethlehem. The world watched and waited anxiously. In her affidavit sworn on 15 April the mother said she was --

'fraught with dread and fear for the safety of [my daughter] and myself . . . I have tried to convince myself it is possible to keep safe by taking personal security measures and avoiding certain places. I am unable to believe that is the case. Since the making of the order the situation in Israel has changed dramatically. Israel is now, to all intents and purposes, at war. I am paralysed with fear at the very thought of going to Israel with [my daughter] . . . I do not believe I could summon sufficient resolve to board the flight. [The child] has always been in my primary care. She is wholly dependent upon me for her care and security.'

[81] We can well understand her fear and anxiety. Any reasonable parent would be troubled. On 29 March a suicide bomb attack on a supermarket in West Jerusalem killed two Israelis; on 31 March a suicide bomb attack on a Haifa restaurant killed 16; on 10 April a suicide bomb attack on a bus near Haifa killed seven passengers and injured 20; and on 12 April a suicide bomb attack killed five near a crowded Jerusalem market and injured 50 others. On 25 April days before the hearing before us Operation Defensive Shield ended and the Israeli tanks withdrew from the West Bank. For a while it almost seemed that the suicide bombings had ended. That was not to be. We cannot ignore the fact that since the hearing before us 15 were killed and 60 injured in a suicide bomb attack on a snooker club near Haifa on 7 May. Three were killed and 50 injured in a market in Netanya on 19 May. Two more were killed and 27 injured in a repeat attack near the snooker club on 22 May. On 27 May an elderly woman and a two-year-old girl were killed and 50 wounded in a suicide bombing outside a shopping centre north-east of Tel Aviv. As we write this part of the judgment The Times tells us that a car bomb exploded next to a bus at Megiddo (the site of Armageddon) killing at least 16 people and injuring nearly 40. As we prepare this judgment to hand it down, we read that on 18 June at least 19 Israelis, many teenagers, were killed in or near a bus in Jerusalem. Mr Howard painted the change dramatically. He pointed out that between 17 October 2001 and 14 March 2002 there were 60 incidents, approximately three per week. Between 14 March and 22 April there were 36 incidents, one per day. A table in The Times on 19 June 2002 showed that since the start of the second intifada in September 2000 there were nine fatal suicide bombings (including those where only the bomber was killed) up to the end of August when the mother left Israel; there were nine more to the date of Hogg J's judgment; another five in the short time before the mother was expected to return; and ten more to 20 June. Yassir Arafat has, at least in recent days, condemned these bombings but the fact is they have happened and the only sensible conclusion for this court to draw is that such horrors will continue to happen.

[82] Mr Howard invited comparison between the official assessments of the situation before and after the hearing. The travel advice issued by the Australian government for Wednesday, 13 March, noted that 'the escalation in Israeli- Palestinian violence has increased the already high risk of terrorist attacks against civilian targets throughout Israel especially in population centres such as Tel Aviv and Jerusalem'. Australians then considering travel to Israel were advised carefully to review their plans. By contrast on 4 April the advice was to defer all travel to Israel because 'all population centres in Israel are at a very high risk of terrorist attack at the present time'. On 11 March the Canadian Department of Foreign Affairs was advising its citizens to consider deferring tourist travel to Israel whereas on 4 April the advice was to defer all tourist travel to Israel. Mr Howard submits the opinions of the Australian and Canadian authorities are objective and compelling evidence of the deterioration. The Department of State warned United States citizens on 3 January to defer travel to Israel because the potential for further terrorist attacks remained high but their concern appears to have been directed more at the West Bank and Gaza. By 2 April the situation in Jerusalem was causing concern. Our Foreign Office described the risk of unpredictable and indiscriminate bomb attacks as being very high and the same assessment was given on 11 April.

[83] Mr Setright QC for the father invites us to have regard to a letter dated 25 April from the Israeli Embassy repeating the view placed before Hogg J that the citizens and residents are leading normal lives and going about their daily business. For our part we view that with a little scepticism. Life in Israel at the moment is anything but normal.

[84] Normality is not the touchstone. The question is whether there is a grave risk of harm to this child. The court's approach is similar to that which engaged the House of Lords in a very different question in Davies v Taylor [1974] AC 207 at 213, [1972] 3 All ER 836 at 838 where Lord Reid said:

'You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is evaluate the chance. Sometimes it is virtually 100%: sometimes virtually nil. But often it is somewhere in between.'

It is trite to say that in this case it is 'somewhere in between'. It is a matter of judgment whether the risk of harm is sufficiently high to constitute a grave risk.

[85] Among the many factors we take into account after anxious scrutiny of all of the material before the judge and before us are these. The attacks are likely to continue. They are random and indiscriminate. No one is absolutely safe. The state cannot provide absolute protection. We are not dealing with the kind of harm which the court has power to control. The father cannot control it. The mother has a limited ability by restricting her freedom of movement to avoid obvious places of danger and she will no doubt do so. Her agoraphobia may lead her to be reclusive which may cause harm of a different kind being suffered by the child and we consider that in a moment. The Passover bombing changed the perceptions of many and fully justified the mother's concern. When the matter first came before this court on 15 April those concerns were mounting and at that point in time the mother's case was at its highest. Since then the frequency of attack may have diminished, perhaps only slightly. The Palestinian authorities profess to be making some attempts to control the suicide bombers but the dangers have not been eliminated. The position is hardly stable. At the conclusion of the hearing before us on 29 April we were satisfied that there was less risk for this child than a fortnight earlier when we granted the stay. There was less risk even, or certainly no more risk, to the child then than on the date Hogg J made her order. It is obvious that there is and was a real, as opposed to speculative or fanciful, risk of harm but,

if we ask, 'What is the actual risk of harm to this particular child?', we do not judge that risk to be unacceptably high for Convention purposes. We recognise it is unacceptably high to the mother and we are sympathetic to her personal predicament. We do not ignore the risk: indeed it is troublesome; but in our judgment it is not a grave risk of harm. There is, therefore, no reason to allow the appeal on the basis of the fresh evidence.

Secondly: the risk of psychological harm

[86] In her affidavit the mother raises again her own anxieties and her concern that her ability to care for the child will be impaired if she is compelled to return to Israel. She supports that assertion by producing a further letter from her counsellor dated 24 April 2002. That states that she saw the mother a few days after 4 April when she [the mother] decided she could not return to Israel. The report states:

'She was experiencing severe symptoms of panic disorder, with frequent panic attacks, constant crying and sleeplessness. The political situation had escalated with further attacks on civilians and suicide bombings. The imminent threat of returning to a country where there were continual bombings filled her with fear especially for the safety of her daughter.

I saw [the mother] again on 16th April 2002 following the court hearing. She continued to be acutely aware of the serious political situation in Israel but now that she had been granted leave to appeal (sic) her mental condition had greatly improved. She had not experienced any further panic attacks and was able to focus on the day to day caring of her daughter. Understandably she was showing some signs of anxiety re the outcome of the pending appeal but it is clear that a return to Israel will bring massive reinforcements of her anxiety symptoms and will impede her ability to care for her daughter.'

[87] The question is whether there is sufficient evidence to suggest that her impaired ability constitutes a grave risk for the child.

[88] In assessing that risk, we look back to the material that was before the court in March. In her affidavits she told how in July 2001 she was upstairs in a department store in Jerusalem when a bomb went off downstairs. The child was with her. She was shaking with fear, could not stop crying that night and for many nights following could not sleep. Shortly after that a massive bomb went off in the centre of Jerusalem at a pizza restaurant which they were used to frequenting. She was 'paralysed with fear' and became 'a prisoner in our home'. She said she had become afraid of driving and if she drove at all and a car driven by an Arab pulled alongside she would start shaking and crying. On another occasion she drove to Jerusalem with the child to a place near the Arab quarter and had to wait for her husband for nearly an hour. She said she was frantic with worry and was shaking for fear that she and the child would be attacked. She did not say that she sought medical advice. There is nothing internally inconsistent with her account and we would be inclined to accept it, though guarding against some possible exaggeration. In the exchanges which passed between the parties after she had left Israel there are some references to her fear but it is fair comment to say that the main thrust both of her affidavits and of that correspondence is her explaining the reasons for her unhappiness in her failing marriage. The father has a more fatalistic view about the chances of being involved in a terrorist attack believing, says the mother, that 'when your time's up, your time's up'.

[89] Doctor M, the consultant psychiatrist, reported on 15 November 2001. He diagnosed her to be suffering from a panic disorder with agoraphobia. We have already quoted passages from his report. He also said:

'It is clear that the original stressor was a fear of being involved in a terrorist act, this fear was precipitated by the perceived vulnerability of her child. The environment in which she continued to live, both in the marital situation and the general living environment, contributed to a perpetuation and accentuation of that fear response.'

He expressed the view that --

'a forced return to Israel would lead to a massive reinforcement of her anxiety symptoms and avoidant behaviour. It would have a significantly detrimental effect on both her mental state and the proper upbringing of her child. Her continued experience of extreme anxiety and panic would in my view have a long-term detrimental effect on [her] capacity to engage in routine activities with her child, such as bringing her to public places to play or in escorting her to a nursery school.'

[90] That diagnostic report is of greater cogency than the letters from the counsellor who was offering psychotherapeutic treatment. The counsellor did however confirm the diagnosis, the cause and the consequence. In an addendum to her report dated 21 February she said on 8 March:

'I do not consider that she would be able to function and this in turn would have a detrimental effect on her daughter. [The child] would not meet other toddlers as is the case at present, but far more serious would be the emotional affect of [the mother's] anxiety on her child's development.'

[91] We bear these observations fully in mind. We are prepared to accept that the mother does suffer as has been described and that the situation in Israel is worrying enough to her for that suffering to be exacerbated if she returns. There is, however, no evidence before the court which would suggest that she is not likely to receive satisfactory medical attention there though we accept that she will need more treatment in Israel than in this country. The question is whether the child is at grave risk of harm from the breakdown in the mother's health. She has not satisfied us that the child will suffer to that extent. The matter will be reviewed by the Israeli court and full account will be taken, we have no doubt, of the difficulties she is there experiencing. We emphasise that we are not deciding this question with the welfare of the child our paramount consideration. We have to suppress the views we might hold were that the question we have to resolve. We are, however, clear that an art 13 (b) defence is not made out on that ground. That is why we took the view that an appeal against Bracewell J's order would eventually fail.

Thirdly: is the situation in Israel intolerable for the child?

[92] We turn to consider finally whether or not, looking at the matter in the round, we are persuaded that the return of this child to Israel would be a return to an intolerable situation. We are satisfied the mother will find it intolerable but that is not the test. The question is whether, having regard to the purpose of the Convention, the limited exception with which we are dealing and the international obligations that arise under it, this court can be satisfied that the scale of violence and the mother's reaction to it have produced a situation which this young child should not be required to endure. The word 'intolerable' is so strong that by its very meaning and connotation it sets the hurdle high. We are not satisfied that the very real and worrying problems which will confront mother and daughter in Israel do produce a situation which can be said to be intolerable.

CONCLUSIONS

[93] This is the judgment of the court. We have borne in mind a number of comparable decisions provided by the Israeli Central Authority of cases in different jurisdictions and at different times when children have been returned to Israel. The circumstances of those cases were different and although they are of interest, they do not affect our judgment. The mother has produced a recent decision of the United States District Court of Minnesota where the art 13(b) defence did succeed although we are informed that the matter is under appeal. We have read that case with equal interest and respect. Nothing in the voluminous papers has persuaded us that the fresh evidence placed before the court should lead us to allow the mother's appeal. We therefore dismiss her application to extend time for appeal and for permission to appeal against the order of Bracewell J. We also dismiss her appeal against the order of Hogg J. Counsel will be able to address the court on the suitable arrangements to be made for the return of the child to Israel and we hope that there will be a measure of agreement about this.

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