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[06/07/2004; Court of Appeal (England and Wales); Appellate Court]
Re W (A Child) [2004] EWCA Civ 1366

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

6 July 2004

Thorpe, Sedley LJJ, Wall J.

W (a child)

COUNSEL: MR A KIRK QC (instructed by Bindman & Partners of London) appeared on behalf of the Appellant/Defendant ; MR H SETRIGHT QC (instructed by Dawson Cornwell of London) appeared on behalf of the Respondent/Claimant

LORD JUSTICE THORPE:

[1] The parties to today's proceedings began to cohabit in 1993. Their only child, S, was born in the United States of America on 21 May 1994. That was during the course of a brief visit that the parties made to Texas to explore business opportunities. Both parties are essentially South African through and through. It was from South Africa that the respondent mother left with S on 3 February 1997, marking the first separation in the family. There was, on any view, a great deal of volatility and turbulence in the relationship between the parents. The mother's second departure from South Africa with S took place in July 1997. Again she came to the United Kingdom, but, having briefly visited the Republic of Ireland, moved to Australia where she has family. Proceedings resulted in Australia which were compromised in a consent order of 11 December 1997 which essentially provided for shared parenting of S.

[2] Pursuant to the agreement, the mother left S in the father's charge on 15 January for a period that was due to terminate on 30 March. On that date the father failed to return S to the mother, and, over the course of the following 28 days, moved rapidly between a number of African countries, then ultimately choosing Dubai, all of these being countries that were not signatories to the 1980 Hague Convention. This third period of unilateral separation ended with a telephone discussion between the parents on 1 May. The father's proposal was that they should marry without delay. The mother agreed on condition that the family should quit South Africa and move to the United Kingdom. The marriage took place in South Africa on 9 May, and the family moved to the United Kingdom on 10 June.

[3] After six months in Europe, during which the family did not take root, they returned to South Africa in December 1998 and that remained the centre of family life until the fourth

unilateral separation brought about by the mother's third return to the United Kingdom with S on 23 January 2004.

[4] During these ten years of S's life the obvious hallmarks are the extent to which the child's upbringing has been disrupted by the adults' decisions to move across continents. The other hallmark has been the highly charged emotional relationship between the parents.

[5] The mother's account of the marital history is that the father is an inherently violent, manipulative and abusive male. She says that in his early adult life he was diagnosed as suffering from a disordered personality which has found expression in his physical and sexual violence.

[6] The father's account of the marital history is less clear, because to date he has only responded to the mother's allegations and either denied or taken issue with the scale of her charges. However it is, on his side of the story, the fact that in 1997 he was shot by the mother during the course of a violent altercation. As a result of the shooting, he suffered moderately serious injuries for which he was hospitalised for some time and which had to be corrected by three separate operations. The mother's admission of the shooting is mitigated by her assertion that she acted in self-defence during the course of what was a characteristically violent assault.

[7] I move from that very brief review of the marital history to record the father's reaction to the mother's flight to the United Kingdom in January 2004. He reported her disappearance to the authorities in South Africa, as a result of which an application for summary return was transmitted to the Central Authority in London who issued an originating summons under the Child Abduction and Custody Act 1985 on 12 February 2004. At that stage the mother's and S's whereabouts were unknown.

[8] The service of the proceedings on 22 February was upon solicitors and was the prelude to an application for a location order listed before Her Honour Judge Pearlman on 11 March. At that hearing the issues of location were resolved and directions were given for the filing of a CAFCASS report and for the father's evidence. The originating summons had been supported by an affidavit by the father's solicitor, Mrs Hutchinson, sworn on the same day as the originating summons. The mother's principal affidavit in defence was filed on 11 March. The father's detailed response to her 83 paragraphs of history came on 21 April. That was perilously close to the fixture which had been given by the Clerk of the Rules on 23 April before Mr Justice Wood. He did not embark on the case as a result of pressure on his list. It was re-listed before Mrs Justice Baron on 6 May. She heard submissions over two days and on 7 May pronounced her conclusion that a return order should be made on the originating summons, subject to a raft of protective conditions without which the order was not to go. She reserved her judgment, that is to say her reasons for making the order, which was handed down on 28 May. She extended the mother's time for applying for permission for 14 days and the appellant's notice was duly filed in this court on the last day, 10 June.

[9] On 22 June I made an order for this oral hearing on notice with appeal to follow if permission granted.

[10] The skeleton argument in support of the application was settled by Mr Mark Everall QC, who appeared for the mother in the court below. A number of points are raised in the skeleton which are plainly arguable, and effectively we have treated this as the hearing of an appeal. Mr Anthony Kirk QC has appeared today to argue Mr Everall's skeleton argument, which he has done with his customary skill and precision.

[11] The case for the father has been argued today, as it was argued below, by Mr Henry Setright QC. He has assisted the court with a skeleton argument that recognises the misgivings and anxieties expressed by the judge in her reserved judgment and seeks to state, and to a degree explain, the basic principles that determine the practice and the approach of the court in deciding applications for summary return under the Convention, and particularly in addressing defences raised under Article 13 (b).

[12] As the judge recorded at the outset of her judgment, the defences raised by the mother to the originating summonses were two-fold. First, pursuant to Article 13 (b), it was asserted that S would suffer grave risk to her physical or psychological health if she were returned. Secondly, it was asserted that S objects to returning and, at the age of 10, is old enough and of sufficient maturity for her views to be taken into account. Those views had been elicited by Mr Dermot Reilly, the CAFCASS officer appointed to the case, whose report was dated 25 March. Mrs Justice Baron had the advantage of highly specialist representation on both sides of the court. She had of course submissions of the highest calibre from Mr Everall in advancing his defences and from Mr Setright in responding. She did not have any oral evidence from either of the parents. No application was made to her for either of the parents to go into the witness box despite their presence in court throughout the trial. She did not have any oral evidence from the CAFCASS officer, who stood by his written report. She had to make an evaluation of the mother's case on the written material that had been prepared and filed, supplemented by the CAFCASS report which went essentially to the second rather than the first ground of defence.

[13] The reserved judgment explaining the judge's conclusions starts with a record of the history. This is contained in paragraphs 3 a) to z), which run from pages 11 to 16 inclusive of our bundle. Then the judge set out the relevant Articles of the Convention, namely Articles 3, 12 and 13 (b). She then analysed the mother's defence under Article 13 (b) in paragraphs numbered (i) to (viii) on pages 17 and 18 of the bundle. At page 19 she reviewed the law in a single paragraph. In the following paragraph she stated her conclusions and then, at page 20, she set out her concerns which lead her to impose very stringent protective conditions to accompany the order for return. Indeed the order as drawn only provides the obligation to return if the protective conditions have been satisfied.

[14] The judge then turned to the second ground of defence, namely S's objections. Again she reviewed the authorities. She then set out the facts, which are essentially drawn from the observations and conclusions of Mr Reilly, and stated her conclusion. In a schedule to her judgment she set out the unusually extensive protective conditions. Indeed Mr Setright has said that they are more extensive and more stringent than any protective conditions he has encountered previously in his long specialist practice in this field.

[15] Having set out the structure of the judgment below, I want to draw attention to a number of specific passages. The judge's record of the history is interrupted in paragraph w) by what is an interjection that, first, states the proper approach of the court to the evaluation of evidence and then expresses two misgivings at the consequences of applying that law. I will therefore cite these two paragraphs in full:

"3 w) .....

Of course, with disputed written evidence and no opportunity for cross examination, the Court is placed in a real difficulty in seeking to resolve the points which she raises. Whilst, the court can make findings if there is reliable, corroborative evidence, the Court of Appeal have indicated Re H (Abduction: Grave Risk) [2003] 2 FLR 141 that Judges at 1st instance should not seek to make findings on disputed written evidence of this sort. For my part,

although I regard myself as bound by the recent decisions (which I outline below), I find myself very troubled by this stricture when allegations of this type of abuse are made. To my mind, if proven, this category of allegation will gravely affect a mother's and therefore a child's ability to withstand pressure from a domineering presence in their life. Moreover, there will often not be a great deal of third party evidence in the country of origin of such matters which, by their very nature, remain hidden as the injured party is often too afraid and/or ashamed to make complaint. I consider that a Court of 1st instance ought to be in a position to make findings when an Article 13 (b) defence of this type is raised by making directions, inter alia and at the very least, for appropriate psychological assessments to be made of the parties and the child before sending the child back to a potentially abusive situation, I consider that the damaging scenario may obtain even if parties live in separate households on return and even if the local Court puts in place protective measures.

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

[16] In relation to those two paragraphs, points need to be made on the judge's analysis of the authorities. In saying, as she did, that with disputed written evidence and no opportunity for cross-examination the court is constrained not to make findings on such evidence the judge over-simplifies the effect of the authorities.

[17] As Mr Setright has demonstrated, the judgment as to the proper approach to evidence in Article 13 (b) cases have both been delivered by Lady Justice Butler Sloss, as she was in 1992 or the President, as she was in 2003. The case of Re F (a minor) [1992] 1 FLR 548 finds her in the Court of Appeal in her former capacity. In that case the trial before Mr Justice Johnson in the Family Division had proceeded on strongly contested factual issues. No application was made to the judge for oral evidence. In the Court of Appeal Lady Justice Butler Sloss said:

"In this case, there are irreconcilable issues exposed in the affidavits of the parents as to the reasons for the visit to Australia. The disputed evidence goes to the heart of the issue to be resolved and undoubtedly placed the judge in a difficult position. But the criticisms of the judge are entirely unwarranted, when the transcript of the proceedings is read. The question of oral evidence was raised by Mr Setright for consideration by the judge. Mr Setright did not ask the judge to hear oral evidence on behalf of the wife and had no wish for him to do so. The judge consulted Miss Rodgers, acting for the father, who launched immediately into her general submissions without giving the judge an answer to the question on oral evidence. Early in her submissions, she undoubtedly gave the impression that the disputes of fact were de minimis and the issues were those of law and not of fact ..... Clearly, Miss Rodgers did not seek either to call her client or cross-examine the mother. In those circumstances, the judge was entirely justified in hearing the matter on the affidavit and documentary evidence and coming to a conclusion on the available material. Having said that, the task of rejecting the sworn evidence of a deponent on contested issues of fact without hearing oral evidence, and, in particular, cross-examination on the affidavits, is not one lightly to be undertaken, where, in a case such as this, the resolution of the disputed facts is crucial to the decision whether the Convention applies at all. If the facts in issue are not crucial, oral evidence would not be necessary. Equally, as in Re E ..... , if only one side is present and able to give evidence, that evidence, in the absence of the other side, is unlikely to resolve the issue. But if both parties are present in court, some limited oral evidence relevant to the issue would clearly be helpful

in certain cases. With hindsight, it would have been helpful in this case. But the admission of oral evidence in Convention cases should be allowed sparingly."

[18] Fortuitously Mr Setright in the present case finds himself in rather similar circumstances. In the course of his written submissions in the court below he did draw attention to the decision of the court in Re F, which I have just cited, and thus to the opportunity for oral evidence to be taken. He then wrote:

" ..... for the reasons set out above, an adjudication of the welfare-linked factual disputes between the parties is neither necessary nor appropriate in summary proceedings under the Convention."

[19] So the judge's attention was drawn to the opportunity for the admission of oral evidence, but also to the restriction on the court's resort to oral evidence. It was not a case in which Mr Setright was seeking to call his client and it was not a case in which any application came from Mr Everall.

[20] Having drawn that parallel, I pass to the judgment of the President in Re H (Abduction: Grave Risk) [2003] 2 FLR 141. At the outset of her judgment, at paragraph 2, the judge recorded:

"There is conflicting evidence on many issues raised by the parents in a large number of supporting statements, which the judge was right, in my judgment, not to try to resolve by oral evidence. These are intended to be summary proceedings."

At page 146 the President recorded that the trial judge had accepted the mother's basic case on those conflicting written statements. At page 149 [paragraph 32] she said:

"In the absence of any testing of the conflicting affidavit evidence of the witnesses and taking into account the conclusions in the Belgian report of 15 May 2002, I am, I must confess, much less certain than the judge that the father was entirely to blame and that the mother was the innocent victim. I do not, for my part, consider that it is possible to form the firm conclusions to which the judge came and that the father dominated the family and exercised control through violence and threats or that the nature of the case was extreme in the irrationality and instability of the father or that he was proved to be an uncontrollable risk. He had never been the subject of any injunctive order nor in breach of court order. The assessment of the judge may be true but, in my judgment, he was not entitled to make those findings on contested and untested allegations."

[21] Against that background, I come to consider the judge's anxieties as expressed in the two paragraphs of her judgment that I have already cited. The judge clearly thought that the processes of summary trial that have been repeatedly upheld in the authorities in this jurisdiction risked results that were plainly incompatible with child welfare. She, in my opinion, envisaged or argued the merit of investigations which are manifestly incompatible with the proper approach ordained in English authority. Her statement that a court of first instance ought to be in a position to make findings when an Article 13 (b) defence is raised by making directions, at the very least, for appropriate psychological assessments to be made of the parties and the child before sending the child back to a potentially abusive situation is quite unacceptable. The judge's proposal would subvert the essentially summary nature of these special proceedings.

[22] Equally, in the following paragraph, her assessment that, as the authorities stand, there is no realistic chance of an Article 13 (b) defence being established without findings of violence or other specific abuse to the child himself is plainly an analysis that is not borne

out by the cases. Those of us who have sat in the Family Division trying cases brought under the Convention will have had direct experience of - albeit rare - instances in which an Article 13 (b) defence has succeeded without the essential foundation envisaged by the judge. So this is a case which has classically been determined on the written material that each party put before the court. In that classic determination the judge has correctly understood and applied the authorities, and particularly the authority in Re H which I have cited.

[23] As to her concerns, they are perfectly understandable given the responsibility that judges in the Family Division have to bear in these very exceptional cases. The experience and the instinct of the trial judge is always to protect the child and to pursue the welfare of the child. That instinct and experience some times is challenged by the international obligation to apply strict boundaries in the determination of an application for summary return. The authorities do restrain the judges from admitting oral evidence except in exceptional cases. The authorities do restrain the judges from making too ready judgments upon written statements that set out conflicting accounts of adult relationships. What the authorities do not do is to inhibit the judge from himself or herself requiring oral evidence in a case where the judge conceives that oral evidence might be determinative. The judge's conduct of the proceedings is not to be restricted by tactical or strategic decisions taken by the parties. However, to warrant oral exploration of written evidence, the judge must be satisfied that there is a realistic possibility that oral evidence will establish an Article 13 (b) case that is only embryonic on the written material.

[24] There is no doubt at all that the trial judge in the present case had real misgivings as to the reliability and credibility of the father's case. That is plain from the paragraphs which follow her conclusion. Her conclusion is expressed thus:

"Accordingly, I do not consider that the Article 13 (b) threshold has been crossed. There is no real evidence of S's grave distress because, I suspect, she has been shielded from a good deal of marital unpleasantness. Although she reported upset to the CAFCASS officer and told him how much happier her mother was in England - she did not report serious concerns about her own position upon return. The Court does not have the evidence about the psychological impact of the life that she has lived to date and the effect of a return to a country where her mother will be very unsettled and unhappy."

That conclusion is preceded by the single paragraph in which the judge distilled the effect of authority, and that distillation seems to me to be above criticism.

[25] But the conclusion led to the judge's third criticism of the consequences of the authorities when she said:

"I am concerned that the Law may be failing those cases where the allegations are of oppressive conduct because the authorities do not permit the judge at 1st instance to give any proper consideration to the long-term psychological effects on a wife and child who have lived in traumatic, violent circumstances and are being returned to the country of origin - even if to a separate household."

Those misgivings are the prelude to the judge's stipulation of the protective conditions.

[26] It does not seem to me that the judge's concerns as expressed allow sufficient weight to the reality that in these cases the abducting mother will almost invariably present to the court that weighs her Article 13 (b) defence an account which seeks to justify the unilateral and wrongful removal, a removal which, in the present case, is an apparent breach of the South African criminal code. The judge did not have sufficient regard to the obligation on the adult to seek the protection of the courts in the jurisdiction of habitual residence, to the

obligation on the parent to seek the permission of the courts of habitual residence to make the unilateral move, and to the reality that the South African courts are the more appropriate venue for the determination of the merits.

[27] The manner in which the judge has evaluated the father's case is perfunctory in comparison with the three pages that she has given to the summary of the mother's assertions. All she said in relation to the father's relatively extensive affidavit was that she did not regard his bland denials as satisfactory. She also commented adversely on his demeanour in court, but in relation to any assessment of his demeanour it must surely be emphasised that he was only there to sit behind his counsel and to participate to that limited extent during the course of the submissions.

[28] It is very important to stress that at the end of her review of the mother's Article 13 (b) defence the judge added this to her conclusion:

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

[29] The judge went on to deal with the second ground of defence briefly and impeccably. She reviewed the law. She recited the relevant passages in Mr Reilly's report, and concluded that such misgivings as S expressed were more to do with the concerns which she had for her mother in cohabitation with her father than for any concerns at returning to South Africa. The judge did say, in rejecting this defence:

"Thus, even though she was voicing objections, I consider that S was prepared to return and so I would have exercised my discretion in this case to order a return in this case."

[30] So that analysis of the judgment satisfies me that the judge has dealt impeccably, and in accordance with authority, with the issues raised on the defence and on the evidence filed in support. As my Lord, Sedley LJ, has observed, the judge's anxieties and misgivings deserve consideration given that she brings to this Convention and the consequences of its strict application a fresh eye. But, for the reasons which I have expressed, it seems to me that those misgivings have no validity other than to return to the debate issues that have been aired extensively during the course of the negotiation of this Convention and in the ensuing decade of its international use. These issues have been debated repeatedly at Special Commissions convened by the Permanent Bureau and there can be no doubt at all that the conclusion of the international community is that only the robust construction and application of the Convention will serve to militate against the risks and dangers of the wrongful removal and retention of children.

[31] I add to my conclusions only two footnotes. The first is an important one. The appellant has produced and relied upon fresh evidence that was not before the trial judge. It takes the form of e-mail communications to the mother, to her current employers, and to the agency that she has been using to find employment. The e-mails attach photographs which are extremely embarrassing and indeed humiliating to the mother. They are drawn from videos that must have been produced, in circumstances which have not been investigated, during the course of the sexual relationship between the parties. Where do these communications come from? The mother's plausible case is that they can only have come from the father. His response in a recent letter from his solicitors is to assert that they have certainly not come from him, and he raises alternative suggestions which do not, on their face, seem to be equally plausible. But the danger of drawing a conclusion from material of this sort is

precisely the same as the danger of drawing a conclusion from the material that was before the judge.

[32] The judge has set up a future for this family which includes rigorous investigation by the courts of their jurisdiction of habitual residence. The judge has put in place protective measures until that investigation can be undertaken.

[33] In my judgment, the additional evidence is not in itself sufficient to turn the tide of this appeal.

[34] The last thing I say is a word about time-tabling. The expectation of the international community is that applications for summary return will be completed in the trial court within a period of six weeks. The same requirement will be imposed by the Brussels Regulation 2A when it comes into force next March. The imperative need has been expressed in this jurisdiction in Part VI of the Family Proceedings Rules 1991 headed "Child Abduction and Custody Act 1985". I draw attention to one aspect of the regime that the Rules impose as an illustration of the gulf between the target set by the Rules and the reality that results. Rule 6.7 (2) provides:

"A defendant to an application under the Hague Convention may lodge affidavit evidence in the Principal Registry and serve a copy of the same on the plaintiff within seven days of service of the originating summons."

In this case the originating summons was served on 22 February; the rule would have required the mother's evidence by 29. But, in reality, the case did not come before the court on the location application until 11 March, and it might be said that the mother's solicitors did well to have served her defence by 15 March and her affidavit in support some few days earlier. As Mr Kirk has pointed out, only the plaintiff in Hague Convention proceedings receives automatic public funding without merit or means testing. The respondent to the application has to undergo the investigation of both merit and means.

[35] Given that reality, the requirement of the Rules seems to me quite unrealistic. I do not see how the six-week target in the High Court is achievable so long as the practical reality is that the respondent's solicitors must put in place public funding before they can embark on the preparation of the defence. It can be said - if any criticism is to be levelled on the preparation of the defendant's case - that her first statement running to 83 paragraphs was unnecessarily extensive and should have been confined to the essential issue, namely whether a return of S would expose her to grave risk of harm. The whole apologia canvassing the history of the relationship of the parents from its first beginning does seem to be of only indirect relevance to the point before the court to decide.

[36] The obligation is equally upon the appellate court to complete its review within six weeks. Accordingly, if the judge in the court of trial reserves judgment for three weeks and then extends time for the filing of notice for a further two weeks, that which might seem no luxury in any ordinary case, does in Hague Convention cases torpedo or at least jeopardise this court's prospect of acheiving its six-week target.

[37] All that said, I would grant permission but refuse the appeal.

[38] LORD JUSTICE SEDLEY: Given that, as my Lord has indicated, oral evidence will be appropriate in an Article 13 (b) case only where the judge is satisfied that it is realistically capable of establishing the risk and degree in kind which the Article envisages, I do not find it surprising that neither the mother's counsel nor the judge proposed it here. There is no sign, for example, of the kind of strident self-condemnation which satisfied the Ontario

Court of Appeal in Pollastro v Pollastro (1999) 171 DLR (4th) 32 that to return the child to the jurisdiction where the father lived would violate Article 13 (b). Nor do I consider that the further evidence now put before us would be likely to do more than produce another evidential stand-off of the kind my Lord has described. That it may one day be resolved on a balance of probabilities in full proceedings is another matter.

[39] The circumspect conditions attached by the judge to her order for the return of the child to South Africa are, I think, significant for two reasons. One is that they represent, at least in my view, a justifiable endeavour to ensure that nothing untoward happens to the child or the mother on return to South Africa. The other is that they implicitly acknowledge that it is possible to assure a measure of legal protection for them in South Africa, which is at least equivalent to that which they would enjoy in England. This, it seems to me, is not a merely consequential matter arising only when return has been decided upon. It goes to the initial question whether a sufficient objection to return has been made out under Article 13 (b).

[40] For these reasons, as well as for the reasons given by my Lord, Lord Justice Thorpe, I concur in the disposal which he proposes.

[41] LORD JUSTICE WALL: I also agree. I am quite satisfied that the judge reached the right conclusion in this case. I find myself unable, however, to agree with a number of things which she said on the way.

[42] Cases under the Hague Convention are often hard. Although this mother is not English, the English mother returning to this jurisdiction with her children in the belief that she is doing the right thing by her children in coming home has become a commonplace of the Hague Convention, as Mr Setright indicated to us in the course of argument.

[43] To fulfil the court's international obligations under the 1980 Hague Convention, judges often have to return children to the country of their habitual residence in circumstances in which, were they hearing proceedings under the Children Act 1989, they would almost certainly investigate the facts in great detail and in all probability grant residence orders to the abducting parent. That however is not the function of the court in a Hague case.

[44] In my judgment, it is always of the utmost importance to remember, as my Lords have indicated, that these are summary proceedings, and that the object of the proceedings, subject to the defences under Article 13, is to ensure that the child or children concerned are returned swiftly to the country of their habitual residence for their futures to be decided in that country where, of course, the relevant welfare investigation will take place.

[45] I entirely agree with what both my Lords have said about the question of oral evidence and will not seek to repeat it. I simply reiterate that in the instant case both parents were represented by specialist counsel and by specialist solicitors. Furthermore, as Thorpe LJ has pointed out, Mr Setright QC in his skeleton argument in the court below reminded the judge of the decision of this court in Re F. Neither party sought oral evidence, nor did the judge require it, and as a consequence no legitimate criticism can result from its absence.

[46] In my judgment oral evidence was not required to adjudicate on mother's Article 13 (b) defence. That was the conclusion to which the judge came, and she came to it particularly bearing in mind her finding that -

"The situation to which S will return is fundamentally different to that which has obtained hitherto - the parents will be living apart, S will be living with her mother, and the South

African court will be seised of the welfare dispute and will have put protective measures in place."

That conclusion of course is to be read with the judge's specific finding in relation to Article 13 (b) that the mother accepted, as she was bound to, that a South African court could be trusted to make good, reliable welfare-based decisions and to put safeguards in place designed to protect her. I respectfully agree with my Lord, Lord Justice Sedley, that the imposition of conditions of this sort is frequently a mechanism for ensuring that the threshold for the Article 13 (b) defence is not reached.

[47] Although my Lord, Lord Justice Thorpe, has cited both passages, I wish to return briefly to two propositions which the judge enunciated in the course of her judgment. She said (and I appreciate that it has been quoted once):

"I consider that a Court of 1st instance ought to be in a position to make findings when an Article 13 (b) defence of this type is raised by making directions, inter alia and at the very least, for appropriate psychological assessments to be made of the parties and the child before sending the child back to a potentially abusive situation, I consider that the damaging scenario may obtain even if the parties live in separate households on return and even if the local Court puts in place protective measures."

There may be cases in which a psychiatric report or psychiatric reports on one or both of the parties are necessary, but I entirely agree with my Lord that the preparation of such reports as a matter of routine would be wholly inconsistent with the summary nature of Convention proceedings and contrary to the intention and spirit of the Convention which is, as I indicated earlier, designed to ensure the swift return of children to the country of their habitual residence.

[48] It is in South Africa that these matters will fall to be investigated and decided. The judge, as I have already indicated, put in place stringent conditions, not only for the protection of the mother but to ensure that she had access to lawyers and the courts.

[49] The second proposition with which I find myself unable to agree is the judge's suggestion that an Article 13 (b) defence, which in itself demands a high threshold, as the law now stands, has no realistic chance of ever being established unless there has been violence or other specific abuse to the child himself/herself. In my judgment, this proposition is not an accurate statement of the law. The court in a Hague case is entitled to recognise the inter-relationship and important inter-dependence between a mother and child who have lived in an abusive situation over a period of time. In my experience, it is well recognised, both in the domestic and the international jurisdictions, that in the context of domestic violence, the position of the child is vitally affected by the position of the child's mother. If the effect on the mother of the father's conduct is severe it is, in my judgment, no hindrance to the success of an Article 13 (b) defence that no specific abuse has been perpetrated by the father on the child.

[50] These comments made, I am of the clear view that the judge reached the right conclusion in this case and, like my Lord, I would grant permission but dismiss the appeal.

Order: Application granted, the appeal was refused

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