Hilary Term
[2012] UKSC 10
On appeal from: [2011] EWCA Civ 1385

JUDGMENT

In the matter of S (a Child)

before

Lord Phillips, President
Lady Hale
Lord Mance
Lord Kerr
Lord Wilson

JUDGMENT GIVEN ON

14 March 2012

Heard on 20 February 2012

Appellant
James Turner QC
Geraldine More O'Ferrall
(Instructed by Rosleys Solicitors)

Respondent
Anthony Kirk QC
Nicholas Anderson
(Instructed by Lyons Davidson)

Intervener (Reunite International Child Abduction Centre)
Henry Setright QC
Edward Devereux
(Instructed by Dawson Cornwell)

LORD WILSON (DELIVERING THE JUDGMENT OF THE COURT)

A: INTRODUCTION

1. A mother appeals against an order of the Court of Appeal (Thorpe, Longmore and McFarlane LJJ), [2011] EWCA Civ 1385, dated 14 December 2011, that she should forthwith return her son, WS (whom I will call W), and who was born on 13 November 2009 so is aged two, to Australia. The order was made pursuant to article 12 of the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 ("the Convention") and to section 1(2) of the Child Abduction and Custody Act 1985 which gives the Convention the force of law.

2. In making its order the Court of Appeal set aside an order of Charles J, made in the High Court, Family Division, [2011] EWHC 2624 (Fam), dated 30 August 2011, that the application of W's father for an order for his return forthwith to Australia pursuant to the Convention should be dismissed.

3. In this court the mother is therefore the appellant and the father is the respondent. But there is now also an Intervener, namely Reunite International Child Abduction Centre ("Reunite").

4. The mother and father have not been married. The mother is British but now also has Australian citizenship. The father is Australian. They lived with W in Sydney until, on 2 February 2011, the mother removed W to England, specifically to the home of her mother, where they have since remained. So Australia was the state in which W was habitually resident immediately prior to his removal. In removing W from Australia the mother lacked both the father's consent and the permission of an Australian court. In such circumstances her removal of W was in breach of rights of custody attributed to the father in relation to him under Australian law and it was therefore wrongful for the purpose of article 3 of the Convention.

5. The only defence raised by the mother to the father's application for an order for the summary return of W to Australia under the Convention was that provided by article 13(b) of it, namely that:

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

Statistics published by the Permanent Bureau of the Hague Conference on Private International Law indicate that article 13(b) provides the defence against an order for summary return which succeeds more often than any other: see "A Statistical Analysis of Applications made in 2008 under the 1980 Hague Convention", Lowe and Stephens, Cardiff Law School/The Permanent Bureau. Technically the establishment by a respondent of the grave risk identified in article 13(b) confers upon the court only a discretion not to order the child's return. In reality, however, it is impossible to conceive of circumstances in which, once such a risk is found to exist, it would be a legitimate exercise of the discretion nevertheless to order the child's return: see *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, para 55 (Baroness Hale).

6. Nine months ago, in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, this court delivered a judgment in which it attempted to set out in clear terms the proper approach to a defence under article 13(b). It held, at paras 31 and 52, that the terms of the article were plain; that they needed neither elaboration nor gloss; and that, by themselves, they demonstrated the restricted availability of the defence. The court did not expect so soon to entertain a second appeal about the effect of article 13(b). It granted permission for the bringing of the present appeal largely out of provisional concern that, by the judgment delivered by Thorpe LJ (with which Longmore and McFarlane LJJ agreed), the Court of Appeal had expressed what it called "the crucial question" in terms which arguably represented not only a fresh gloss on the meaning of the article but one which happened to run directly counter to this court's analysis of its meaning in *In Re E.* Following announcement of this court's grant to the mother of permission to appeal, Reunite made its application for permission to intervene. In explaining the basis of its application, Reunite expressed identical concern about the Court of Appeal's formulation of "the crucial question"; and it postulated the risk of confusion about the proper approach to a defence under article 13(b) in the absence of clarification by this court.

B: THE CONDUCT OF THE PARTIES

7. In her evidence, which, in that Charles J did not receive oral evidence, was only in writing, the mother sought to explain in great detail why, as she alleged, her life with the father in Sydney had become so intolerable that on 2 February 2011 she had returned, with W, to her country of origin. In doing so she made a large number of serious allegations against the father; but she linked her allegations against the father with important evidence about the state of her

psychological health while she had been living in Australia. One of the unfortunate features of the proceedings in the Court of Appeal seems to this court to have been an erroneous assumption that the mother's allegations against the father were in effect entirely disputed and thus that, in the absence of oral evidence, an assessment of their truth had lain beyond the judge's reach. In fact, however, the careful study by Charles J of the witness statements, and in particular of about 300 text messages and emails passing between the parents from January until June 2011, which were attached to them, revealed that a number of important allegations made by the mother against the father were admitted or at least, in the light of what he had said in the texts and emails, could not, as his counsel had conceded, realistically be denied.

8. It was in 2005 that, with her British husband, the mother had gone to live in Australia. They were both nurses; indeed the mother has specialist qualifications in cancer and palliative care. They had no children; separated in 2007; and were divorced in Australia in 2008. In October 2008 the mother began her cohabitation with the father.

9. It is agreed that, at an early stage in their relationship, the father informed the mother that between 1994 and 1998 he had been a heroin addict and had contracted Hepatitis C. Unfortunately the beginning of their relationship, and of the mother's pregnancy in February 2009, was a period of impending financial disaster for the father; and in May 2009 his import business finally collapsed with massive debts. Indeed the father's mother had offered her house as security for the debts and ultimately, a few months after the mother's departure, his mother reluctantly accepted the need for her house to be sold; she now occupies rented accommodation. Following the collapse of his business the father found poorly paid work as an estate agent. From then onwards he contributed little to the parents' finances and the burden of meeting their household expenditure fell largely on the mother who, other than for several months following W's birth, was working as a specialist clinical nurse in Sydney. But the parties got into debt; and the mother still remains liable to an Australian bank in a sum equal to about £8000.

10. It is agreed that the father's grave financial problems led to serious alcohol and drug relapses on his part during the two years from early in 2009 until the mother's departure. The extent of his relapses is formally in issue but his emails to the mother impel a conclusion that his formal admission in a witness statement of alcohol abuse only on several occasions and of use of cocaine only on three occasions during that period is far from frank.

11. The texts and emails begin in January 2011 when the relationship between the parents was breaking down. The father's messages to the mother on 13 January 2011 to "get fucked, bitch" and "I'll ... belt ya" were sent when, in fairness to him,

he may not have been fully in control of his faculties. On the following day he wrote that he had made terrible mistakes. On 18 January he offered to submit to drug-testing. On any view the evening of 19 January was a crucial day in the breakdown. The mother contends that she found the father injecting himself in the car in their garage and that such was the reason why, as is agreed, she called the police and told him not to enter their flat again. The father admits only that he had been out drinking that day. But, in some of his 14 texts sent to the mother that day, the father offered to go to meetings of Alcoholics Anonymous and/or Narcotics Anonymous every night if necessary; pleaded for another chance; asked for forgiveness and threatened to kill himself. A month later, from England, the mother wrote to the father:

> "Those last few weeks in Sydney were literally hell. I was terrified and devastated as well as penniless. You left me with not even enough money to buy nappies for [W]... But you managed to get cash from your credit cards to buy drugs... Even the birth of your son was never enough to stop you drinking and using drugs... That night I found you using in the garage you could have come upstairs and done anything to us – that is why I called the police. [W] deserves to be safe and so do I."

The father's reply was:

> "I understand all that but I still need my family and my son needs his father."

12. On 27 January 2011 the Australian police obtained on the mother's behalf, without formal notice to the father, an Apprehended Violence Order in the local court. It is analogous to our non-molestation order. On 30 January they served it on the father and, during the following three days until the mother's departure, he was not in significant breach of it.

13. In addition to the incontrovertible evidence before Charles J about the father's substantial descent into abuse and his inability to make a proper financial contribution to the family, there were allegations by the mother of occasions of serious violence on the part of the father towards her (including a threat to kill her) and counter-allegations of violence on her part towards him.

14. The text and email traffic between February and June 2011 demonstrated to Charles J not only how hurt the mother had been by the collapse of her relationship with the father but how desolate he had been as a result of the mother's removal,

with W, to England. Although it was inappropriate – as well as impossible - for the judge to make any assessment of his qualities as a parent, the father's love for W as well as for the mother and his pain at their loss were manifest. On 26 May 2011 he told the mother that he had driven to The Gap, which is Sydney's equivalent of our Beachy Head, and had come as close as ever to committing suicide; and, in evidence, he confirmed that he had indeed genuinely contemplated suicide. Understandably the father also demonstrated anger. On 27 June, following receipt of the mother's first witness statement, he wrote to her that he was constantly on the edge of a nervous breakdown. He also wrote:

> "Who are you to decide that I am no longer eligible to be in [W's] life. I hate you. You are evil. I want a court-ordered mental health assessment for you when you're back. I don't want you hurting my son. Awful despicable evil person."

15. Also before Charles J were numerous emails to the mother from the father's father, his mother and his sister, and copies to her of emails from them to the father himself, all sent during the months following the mother's departure. They expressed unequivocal sympathy for the mother's plight in Australia in the light of the father's condition and at length lamented his renewed descent into addiction. When, however, the mother attached their emails to a witness statement, the father's mother and sister signed statements in which they protested that she had substantially misled them about the extent of his problems.

C: THE MOTHER'S PSYCHOLOGICAL HEALTH

16. The mother put before Charles J letters from Dr McGrath, her GP in Sydney. Dr McGrath wrote that the mother had been her patient since January 2007; that she had then prescribed anti-depressant medication in order to combat the mother's anxiety and depression related to separation from her husband; that the mother had continued to take the medication until (as the mother was to clarify in her evidence) she became pregnant in February 2009; that she had seen the mother on 24 January 2011 when she was tearful and agitated; and that, in the light of the mother's depression, which in her opinion might easily recur in a stressful situation, she considered that her health would suffer greatly if she was required to return to Australia.

17. But the mother put in further medical evidence of a feature which is highly unusual in applications under the Convention. It was to the effect that the mother had had extensive psychotherapy in Australia. The evidence, in the form of a report by Ms MacKenzie, a psychologist, was that, from June 2010, she had seen the mother face-to-face on eleven occasions in order to address her chronic anxiety

symptoms and to offer her cognitive behavioural therapy and supportive interpersonal therapy; and that, following the mother's removal to England, she had conducted nine further sessions of counselling with her by telephone.

18. Charles J was understandably critical of Ms MacKenzie for stating as facts the allegations about the father which the mother had made to her and indeed for venturing even a provisional clinical opinion about him. But Ms MacKenzie's professional conclusions about the mother, born of extensive attendance upon her, remained of great relevance. She wrote that, from childhood, the mother had had an underlying and chronic anxiety condition; that she was subject to panic attacks; that she had seen the mother unravel; that the mother's affect of fear overwhelmed her; that fear of the father's mental instability, added to the stress of isolation in Australia from her family, might well undermine the mother's capacity to hold herself together; that her likely clinical depression could diminish her secure attachment to W; and that, in that (so Ms MacKenzie said) the father was capable of being impulsive and dangerous towards her, the mother would be in a constant state of hypervigilance, this being the very condition which would trigger an anxiety state. Ms MacKenzie wrote:

> "Should [the mother] be forced to return to Australia, I am concerned her anxiety will become crippling."

19. There was to be still more evidence about the mother's psychological health: see para 25.

D: THE PRELIMINARY ISSUE

20. In *In re E* this court said:

> "36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. [Counsel] submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country... Without such protective measures the court may

have no option but to do the best it can to resolve the disputed issues."

21. Among directions given by consent on 30 June 2011 in the father's application for an order under the Convention, issued 15 days earlier, Coleridge J appointed a hearing on 27 July 2011

> "(a) for consideration of whether, taken at their highest, the allegations made by the mother would come within the article 13(b) exception having regard to the proposed undertakings/protective measures;
> (b) ...
> (c) subject to the court's conclusion as to (a)... above, [for] summary disposal or directions to enable a further hearing with such oral evidence as the court considers appropriate to take place."

22. At first sight the direction appears to be a reasonable attempt by counsel, endorsed by Coleridge J, to follow the guidance set by this court in *In re E*. It met, however, with criticism both by Charles J and, in arrestingly vehement terms, by Thorpe LJ, who observed that it had "bedevilled" the hearing before Charles J and that, if a practice of making such a direction had arisen, it should be "immediately stifled". Although this court is less clear that the direction had any such dramatic ill-effects, it accepts that, for two reasons, to both of which Charles J referred, it would have been better for the direction not to have been given. First, at a general level, the approach commended in *In re E* should form part of the court's general process of reasoning in its appraisal of a defence under the article and does not require formal identification as a preliminary point. Second, and more importantly, the guidance given in para 36 of *In re E* relates to factual "disputes" and to resolution of the "disputed" issues. At the time of the hearing before Coleridge J, prior – among other things - to the adduction by the mother of any medical evidence, counsel may well have supposed that all the material to be relied on by the mother in aid of her defence would be disputed. Such a supposition may have endured long after the invalidity of it should have been recognised; and, as we will demonstrate, it seems to have lulled even the Court of Appeal into considering the defence as resting merely on disputed allegations by the mother, albeit as countered, in its view, by adequate protective measures offered by the father.

E: THE FURTHER EVIDENCE

23. On 28 July 2011 Charles J adjourned the hearing until 30 August 2011. He did so because he considered that in two respects he needed further evidence. The

first was a more detailed presentation by the father of the "practical and financial safeguards which would be available to the mother and [W] in the event of their return to Australia". The second was a report by a psychiatrist, to be instructed by both parties, upon:

> "(i) the mother's current psychiatric or psychological condition;
> (ii) the psychiatric or psychological impact on the mother of a return to Australia;
> (iii) what if any protective measures, such as psychological interventions, accommodation the address of which was unknown to the father, support from the mother's close family, or any other measure, would it be necessary to put in place to safeguard the effect on the mother's mental health of a return to Australia?"

24. At the adjourned hearing on 30 August 2011 the father duly put forward, by undertakings, a comprehensive raft of measures suggested to be protective of the mother and W in the event of a return to Australia. He undertook to pay for their flights and, in advance of their return, to deposit a sum which would cover the rent of their reasonable accommodation for two months. Additionally, until an Australian court should otherwise order, he undertook

> (a) to make a specified contribution towards their further rent and by way of periodical payments for W;
>
> (b) to comply with the terms of the Apprehended Violence Order, which had been expressed to continue until 27 January 2012;
>
> (c) not to remove W from the mother's care save for the purpose of any agreed contact with him;
>
> (d) not to approach within 250 metres of their accommodation save as might be agreed in writing for the purpose of any contact with W; and
>
> (e) not to seek to contact the mother save through lawyers.

The father further undertook to lodge a signed copy of his undertakings with his local family court in advance of the return of the mother and W.

25. The jointly instructed psychiatrist was Dr Kampers who interviewed the mother and wrote a report dated 10 August 2011. He suggested that, on the basis of the written evidence and of the long history which the mother gave him orally, much of which he set out, the mother had, when in Australia, suffered Battered Women's Syndrome, being a form of Post-Traumatic Stress Disorder, followed, after 19 January 2011, by an acute stress reaction. His report on the first point identified in the order of Charles J was as follows:

> "[The mother's] current psychiatric and psychological condition is stable and healthy and she does not display any current features of depression, nor of Post-Traumatic Stress Disorder. Her symptoms of acute stress have resolved."

His report on the second point identified in the order was as follows:

> "The likely psychiatric and psychological impact on [the mother] of a return to Australia is significant and severe. The source of her stress ([the father]) is in Australia. Contact with this source of stress (re-exposure to [him]) puts her at risk for further Acute Stress and Post-Traumatic Stress. She has a prior history of anxiety and depression which not only lowers her threshold for acute stress and Post-Traumatic Stress but also increases the likelihood of a recurrence of her anxiety and depression."

26. The case has proceeded on the basis that Dr Kampers failed to address the question which represented the third point identified in the judge's order. We are not convinced, however, that he failed to do so. For, following his reports on the first and second points, he referred to the need for a partner's abuser to undergo specialised counselling; observed that, given that both alcohol and drug addictions figured in his history, the father should also be treated for them; and concluded by saying "the most protective measure would be psychological intervention for the father, as detailed". We think therefore that there are grounds for concluding that Dr Kampers' answer to the judge's question about necessary "protective measures such as psychological interventions..." was that it was necessary for the father to get treatment. We accept, however, that Dr Kampers could more clearly have addressed the question. Following receipt of the report, neither side asked him to clarify his answer to it; indeed they joined in telling him that he was no longer required to attend the adjourned hearing. The decision on behalf of the father not to ask him to clarify his answer was tactical; and the decision on behalf of the mother was at any rate partly tactical. Each was apparently fearful of collecting an unhelpful response. But the burden of establishing her defence rested upon the mother; and her advisers were – perhaps – taking a substantial risk in choosing not to ask Dr Kampers to do so. The parties might also have anticipated that, at the

adjourned hearing, Charles J would insist upon an immediate and clearer answer by Dr Kampers to his question, for example by email. In the event the judge did not insist on it but expressed regret about the absence of Dr Kampers from court.

F: SUBJECTIVE PERCEPTIONS

27. In *In re E* this court considered the situation in which the anxieties of a respondent mother about a return with the child to the state of habitual residence were not based upon objective risk to her but nevertheless were of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to the point at which the child's situation would become intolerable. No doubt a court will look very critically at an assertion of intense anxieties not based upon objective risk; and will, among other things, ask itself whether they can be dispelled. But in *In re E* it was this court's clear view that such anxieties could in principle found the defence. Thus, at para 34, it recorded, with approval, a concession by Mr Turner QC, who was counsel for the father in that case, that, if there was a grave risk that the child would be placed in an intolerable situation, "the source of it is irrelevant: eg, where a mother's subjective perception of events lead to a mental illness which could have intolerable consequences for the child". Furthermore, when, at para 49, the court turned its attention to the facts of that case, it said that it found "no reason to doubt that the risk to the mother's mental health, whether it be the result of objective reality or of the mother's subjective perception of reality, or a combination of the two, is very real".

28. In the present proceedings considerable reference was made to the mother's subjective perceptions both of past events and – no doubt linked yet importantly different – of future risks. It began in the interlocutory judgment, [2011] EWHC 2625 (Fam), dated 28 July 2011, in which Charles J twice referred to the mother's "perception" of the father's attitude and likely reaction.

29. In his substantive judgment dated 30 August 2011 Charles J sought faithfully to follow the guidance given by this court at para 36 of its judgment in *In re E*, set out in para 20 above. Thus

(a) he began by *assuming* that the mother's allegations against the father were true;
(b) he concluded that, on that *assumption*, and in the light of the fragility of the mother's psychological health, the protective measures offered by the father would not obviate the grave risk that, if returned to Australia, W would be placed in an intolerable situation; so

(c) he proceeded to consider, as best he could in the light of the absence of oral evidence and the summary character of the inquiry, whether the mother's allegations *were* indeed true; and

(d) following a careful appraisal of the documentary evidence, including the mass of emails between the parents, he concluded that, as counsel for the father had been constrained to acknowledge, the mother had "made out a good prima facie case that she *was* the victim of significant abuse at the hands of the father" (italics supplied).

In the light of his conclusion at (d), which on any view was open to him, it seems to us that it was unnecessary for Charles J to have continued to address the mother's subjective perceptions. For the effect of his conclusion was that the mother's anxieties were based on objective reality. So it added nothing for him to refer, as in effect he did in three separate paragraphs of his substantive judgment, to the mother's "genuine conviction that she has been the victim of domestic abuse", by which he implied that she was convinced about something that might or might not be true.

30. The only reference by the Court of Appeal to the history between the parents was in the judgment of Thorpe LJ as follows:

> "4. The parents' relationship was a stormy one and, on the mother's case, the father behaved very badly towards her. In January 2011 the mother called the police who took out an Apprehended Domestic Violence Order against the father on 27 January."

There was no reference in his judgment to:

(a) the father's descent into alcohol abuse;

(b) his descent back into drug abuse;

(c) the absence of evidence that he had surmounted these problems;

(d) the likely effect of them on his ability to comply with Australian court orders and, to which Charles J had referred, the possible need for the mother to take enforcement proceedings;

(e) his contemplation of suicide;

(f) his failure to maintain the family properly;

(g) the likely effect of his failure on the ability of the Australian courts to devise a secure financial foundation for the household of the mother, with child care responsibilities, in Australia;

(h) the many admissions made by the father in the texts and emails;

(i) the judge's finding, on the necessarily provisional basis, that the mother had indeed been the victim of significant domestic abuse at the hands of the father; and

(j) the fact, to which Charles J had also referred, that, however effective the steps to be taken by the Australian courts to protect the mother, she and the father would probably need to have a degree of personal communication for the purposes of his contact with W and of her likely application for permission to remove him back to England.

31. Thus, with respect to them, the hard-pressed judges in the Court of Appeal made an entirely inadequate address of the mother's case. Instead they treated the foundation of her defence as being merely her subjective perception of risks which might lack any foundation in reality. Thus, in para 26 of his judgment, Thorpe LJ described the father's first ground of appeal as being that Charles J had erred in concluding that the effect of the judgment in *In re E* "was to raise the bar against applicants seeking a return order where the respondent relied on a subjective perception of the risks and consequences of return". We should add that Charles J had nowhere said that the effect of that judgment had been to "raise the bar" and we do not agree that it did so. Nor, for that matter, do we agree with the suggestion of Thorpe LJ in paras 34 and 36 that the judgment in *In re E* had been no more than a "restatement" of the law of the Convention: it was primarily an exercise in the removal from it of disfiguring excrescence. But, as we have shown in para 27 above, the court did recognise the possibility that a respondent's merely subjective perception of risks could, as a matter of logic, found the defence.

32. Unfortunately in the present case the Court of Appeal found difficulty in accepting that part of the decision in *In re E*.

33. Thus Thorpe LJ said:

> "43. Nor would I accept Mr Turner's submission that his recorded concession in paragraph 34 of the judgment in Re E is authoritive [sic] for the proposition that it is unnecessary for the court to weigh objective reality of asserted anxiety. The crucial question for the judge remained: were these asserted risk, insecurities and anxieties realistically and reasonably held in the face of the protective package the extent of which would commonly be defined not by the applicant but by the court?"

And Thorpe LJ added:

> "49. This is a paradigm case for a return order to achieve the objectives of the Convention. Although Mr Turner asserts that the effect of a respondent's clearly subjective perception of risks on return leading to an intolerable situation for the child is a permissible ground for refusing a return order he has been able to cite no reported case with that characteristic."

34. In the light of these passages we must make clear the effect of what this court said in *In re E*. The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned.

G: CONCLUSION

35. As we have explained, the Court of Appeal failed to appreciate that the mother's fears about the father's likely conduct rested on much more than disputed allegations. Equally it paid scant regard to the unusually powerful nature of the medical evidence about the mother, in particular of her receipt of regular psychotherapy while in Australia. This conferred an especial authority on Ms MacKenzie's report, of which the court scarcely made mention. Overarchingly, however, it failed to recognise that the judgement about the level of risk which was required to be made by article 13(b) was one which fell to be made by Charles J and that it should not overturn his judgement unless, whether by reference to the law or to the evidence, it had not been open to him to make it. Charles J was right to give central consideration to the interim protective measures offered by the father. But his judgement was that, in the light of the established history between the parents and of the mother's acute psychological frailty for which three professionals vouched, they did not obviate the grave risk to W. It must have been a difficult decision to reach but, in the view of this court, it was open to him to make that judgement; and so it was not open to the Court of Appeal to substitute its contrary view. The fact that Charles J had not received oral evidence did not deprive his judgment of its primacy in that sense. The decision of the House of Lords in *In re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80, concerned the Court of Appeal's reversal of a judge's discretionary dismissal of an application under the Children Act 1989 for a specific issue order that a child be summarily returned to Saudi Arabia. Baroness Hale, with whose speech all the other members of the committee agreed, said:

> "12...Too ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by the law. In short, if trial judges are led to believe that, even if they direct themselves impeccably on the law, make findings of fact which are open to them on the evidence, and are careful, as this judge undoubtedly was, in their evaluation and weighing of the relevant factors, their decisions are liable to be overturned unless they reach a particular conclusion, they will come to believe that they do not in fact have any choice or discretion in the matter. On that ground alone... I would allow this appeal."

36. This court allows the appeal and restores the order of Charles J.

H: POSTSCRIPT

37. In *In re E* this court addressed a decision of the Grand Chamber of the European Court of Human Rights ("the ECtHR") which it understood had caused widespread concern and even consternation about such approach to the determination of an application under the Hague Convention as was necessary in order to avoid infringement of the rights of the child and/or of the parents under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The decision was *Neulinger and Shuruk v Switzerland* [2011] 1 FLR 122. In particular, as this court pointed out at para 21 of its judgment in *In re E*, the Grand Chamber had suggested, at para 139, that article 8 required the court to which an application under the Hague Convention was made

> "[to conduct] an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and [to make] a balanced and reasonable assessment of the respective interests of each person".

In *In re E*, building on helpful comments about the decision which had been made extrajudicially by the then President of the ECtHR, this court stressed, at paras 22 to 27, that it had been the very object of the Hague Convention to avoid an in-depth examination of the child's future in the determination of an application for a summary order for return to the State of the child's habitual residence; that a properly careful determination of such an application did not equate to the in-depth examination described in para 139 of the judgment in the *Neulinger* case; that the reference to an in-depth examination should not be taken out of context and applied generally; and that it would be most unlikely that a proper application of

the Hague Convention would infringe the rights of any members of the family under article 8.

38. In the present appeal Reunite has drawn to this court's attention that on 13 December 2011, in *X v Latvia* (Application No.27853/09), the ECtHR (Third Section) has unfortunately reiterated, at para 66, in terms identical to those in para 139 of the *Neulinger* case, the suggested requirement of an in-depth examination in the determination of applications under the Hague Convention. With the utmost respect to our colleagues in Strasbourg, we reiterate our conviction, as Reunite requests us to do, that neither the Hague Convention nor, surely, article 8 of the European Convention requires the court which determines an application under the former to conduct an in-depth examination of the sort described. Indeed it would be entirely inappropriate.