Neutral Citation Number: [2023] EWCA Civ 1415

Case No: CA-2023-001779

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION
Her Honour Judge Sonia Harris (sitting as a DHCJ)
FD23P00338

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2023

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE LEWIS
and
MR JUSTICE COBB

- -

Between :

G	**Appellant**
- and -	
T	**Respondent**
-and-	
Reunite International Child Abduction Centre	**Intervenor**

- -

Re T (Abduction: Protective Measures: Agreement to Return)

- -

James Turner KC and **Maria Scotland** (neither of whom appeared below) and **Adal Ibrar** (instructed by **HAB Law Solicitors**) for the **Appellant (mother)**
Teertha Gupta KC (who did not appear below), and **Paul Hepher** (who appeared below on 22 August 2023) and **Emma Spruce** (who appeared below on 24 August 2023) (instructed by **Williams & Co.**) for the **Respondent (father)**
Jacqueline Renton and **Mani Singh Basi** (instructed by **Dawson Cornwell**) for **Reunite International Child Abduction Centre,** intervening on the appeal

Hearing dates : 14 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Honourable Mr Justice Cobb:

Introduction

1. This is an appeal against two related orders, one of which was expressed to be 'By Consent', made in proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 Hague Convention"). At the centre of the appeal is a purported agreement reached at court between the parties to resolve the application, on the basis that the subject child would be returned to the requesting state (the United States of America) ("USA").

2. The appeal gives rise to the following questions:

   i) Can a court determine that a concluded agreement has been reached between the parties to an application under the 1980 Hague Convention for the return of the subject child to the requesting state, when article 13(b) has been raised as an issue, but where there is no consensus between them about the effectiveness of proposed 'protective measures' in that state?

   ii) A subsidiary question arises as to whether a court can conclude that an effective agreement has been reached on such an application, when there is consensus between the parties about the arrangements for the return and for the effectiveness of 'protective measures' in that state, but no agreement about 'soft landing' provisions?

   iii) Arising within the consideration of (i) above (and to a lesser extent (ii)), does the approach to inter-partes agreements discussed by the Court of Appeal in *Rose v Rose* [2002] EWCA Civ 208, [2002] 1 FLR 978 ('*Rose*'), and *Xydhias v Xydhias* [1999] 2 All ER 386; [1999] 1 FLR 683 ('*Xydhias*') apply to agreements or purported agreements reached in proceedings brought under the 1980 Hague Convention?

   iv) How should the court determine an application under the 1980 Hague Convention for the return of a child to a requesting state if, during the hearing but before an order is made, the taking parent retracts their offer to accompany the subject child back to the requesting state in the event of a return order, and asserts that they will not after all travel?

3. By Notice of Appeal dated 11 September 2023, the Appellant (hereafter the "mother") appeals against the consent order made on 22 August 2023 by Her Honour Judge Sonia Harris sitting as a Deputy High Court Judge ("the Judge"), and against an order made two days later dismissing her application for permission to instruct an expert in mental health, predicated on an asserted change of circumstances. A stay of the return order was granted by Moylan LJ on 21 September 2023, and permission to appeal was

granted by Moylan LJ on 20 October 2023. By direction given on 10 November 2023, Reunite International Child Abduction Centre ("Reunite") was given leave to intervene.

Background

4. The father is 29 years old and is a US citizen. The mother is 25 years old. She was born in England and is a British citizen; she also has a permanent US resident card. The parties were married in 2018. T is the parties' only child, and was born in 2020 in the USA; like his mother, he has dual nationality (British/American).

5. On 3 February 2023, the mother brought T to this country, ostensibly for a holiday with her family; she was due to return with him on 1 March 2023. Once here, she contacted the father and advised him that she regarded the marriage as at an end, and she wished to remain in England with T.

6. The statements and other documents filed in the proceedings in this jurisdiction make clear that the parents' relationship had been a difficult one. The mother alleges that she was the victim of repeated domestic abuse, particularly physical and emotional abuse. Both parties appear to have suffered from bouts of mental ill-health; there are suggestions in the filed evidence that the father suffers from PTSD following his period of military service, and that the mother suffers from depression.

7. It is pointed out by the father that the mother had been intending to leave T with him when she came to England in February 2023, but in the end she brought him to this country when the father had failed to make suitable arrangements for his nursery care; later, once here, the mother suggested that the father may wish to collect T and take him back to the USA. This, it is said by the father, somewhat undermines the mother's case now that T would be at grave risk of physical or psychological harm if he were to return to the USA.

8. In the face of the mother's apparent refusal to return to the USA, the father issued proceedings in his home-state, Texas, and a 'temporary' court order was made on 15 May 2023. That order, which was expressed to last until the conclusion of the divorce or further order, runs to 22 pages; it contains the following key provisions:

    i) It declares that the USA is the country of T's habitual residence, and that his home state is Texas;

    ii) It appoints the father as 'temporary sole managing conservator', which vests him with significant and senior parental responsibility for T, and the right to determine where and with whom T lives (a later provision places T in his 'possession'); the mother is appointed as the 'temporary sole possessory conservator';

    iii) The mother was required to execute a bond in the sum of $4,000 to secure T's return to the USA;

    iv) The mother was ordered to return T to the father by 31 May 2023;

v) Thereafter the mother was to have supervised contact/'visitation' only; insofar as this was to be professionally supervised, this was to be at the mother's expense;

vi) The mother was to pay child support to the father for T;

vii) The father was to have exclusive use of the family home;

viii) Many of the mother's assets were frozen, and she was placed under various other injunctive orders.

9. T did not return to the USA by 31 May 2023, as ordered by the Texas court.

10. On 22 June 2023, the father filed an application under the 1980 Hague Convention in this jurisdiction, seeking T's return. Directions were given for the filing of an Answer from the mother, and the filing of evidence; the application was listed for final hearing on 22 August 2023. The mother did not, in fact, file an Answer (as directed, and as she was obliged to do under rule 12.49 Family Procedure Rules 2010: 'FPR 2010') but her statement of evidence contained multiple grounds on which she intended to defend the application. At the conclusion of her statement, she raised the need for 'protective measures' to address: (a) the risk of domestic abuse from the father, and (b) her concern that T would be removed from her care on return. Had the mother filed an Answer, and had her Answer clearly spelled out the article 13(b) exceptions on which she wished to rely, then the father's legal team may, indeed should, have taken steps to ensure that information was obtained from Texas about the protective measures which are available there, or which could be put in place, to meet the alleged identified risks (see [2.11(f)] Practice Guidance: PFD: 2023 below). This did not happen.

11. On 9 August 2023, following the pre-hearing review, the mother filed and served an application for 'directions' which included a request for disclosure of the father's "US Army records", the child's GP records, the father's US Bank records (unspecified), and the child's health records from the UK. She maintained that this was necessary to ensure that she could have a fair trial. She further sought a direction for the preparation of a "welfare assessment" by Cafcass; the proposal for Cafcass involvement had been considered and explicitly rejected by the judge at the pre-hearing review. At no point prior to the final hearing had a direction been given for the father and mother to have the opportunity to speak separately with a mediator (to enable the mediator to discuss with them the possibility of mediation under the Child Abduction Mediation Scheme). I return to this in conclusion.

12. The final hearing of the father's application was listed before HHJ Sonia Harris, sitting as a Deputy High Court Judge, with a one-day time estimate.

13. At the outset of the hearing, counsel for the mother launched an application to adjourn, raising the points set out in the 9 August application. He raised several additional grounds for an adjournment, among them the fact that he had been instructed late and he had not had time to file a position statement (although I note that he had been instructed at the time of, and represented the mother at, the pre-trial review), the late delivery of the trial bundle, and (perhaps significantly) his view that there was a need to obtain an expert in Texan law (presumably, though it is not

altogether clear, to advise on the efficacy of protective measures). The Judge refused the applications to adjourn on all points. The mother's counsel orally and unsuccessfully sought the Judge's permission to appeal the refusal to permit the instruction of an expert in Texan law. The disposal of the various preliminary applications occupied almost the whole morning. The court adjourned at 12.50pm.

14. During the short adjournment the parties entered into discussions outside of court. What happened next requires reasonably detailed rehearsal in this judgment. When the parties returned into court, counsel for the mother addressed the Judge as follows:

> "[Counsel for mother]: …We have had… constructive discussion and we have reached what we believe is largely an accommodation on most issues. So, the agreement, as I understand it, is that the mother will return on terms and those terms broadly are that (1) the father will not pursue any civil or criminal proceedings against her in the US. … That (2) she will have sole occupation of what was the [former matrimonial home] ("FMH"). That the father will pay the bills and all the utilities and the mortgage and discharge the loan on the FMH. We have a dispute as to the period and I will come back to you on that.
>
> … The father has agreed to provide to the mother the sum of $7,500 so that she may seek legal advice and put into effect in the US court the order that encapsulates what we have agreed today. It is agreed that there will be an equivalent of a non-molestation order in, in the usual terms, as I, as I have put it. There will be provided by the father a vehicle for the mother ... There will be … a return of the mother's journal to her. That is not really a technical measure but it just forms part of the standard agreement. The issues of dispute, of significant dispute, unless I have missed anything, are two, (1) is the mother says that she will return upon the protective measures being enforced in the US court, i.e., that an order that encapsulates the agreement be mirrored in the US court. The mother will agree to, to do that immediately but she will not go back until she has the protection of the US court. The father's position is that the mother should return in two weeks". (Emphasis by underlining in all the extracts of transcript recited here has been added).

The mother's counsel identified that the second issue of dispute was the duration of any of the protective measures order, and continued:

> "… the mother is saying that it should be until further order of the Texas court or conclusion of the proceedings. The father is saying it should be three months or subject to any other agreement or order. That does appear to be the major hurdles that would prevent any settlement but save for those I believe we are agreed."

15. Counsel for the father then addressed the Judge. He referred to his client trying to meet the mother's concerns "to provide for that soft landing". Significantly, counsel for the father continued:

> "… we're really not very far apart, save for quite, quite an important issue. And that is that my learned friend seeks a precondition to the return that all of this in some way is turned into an order in the Texan court but for which [the mother] won't be coming back".

16. Counsel for the father continued:

> "… the Court need only require specific protective measures where it deems them strictly to be necessary. They patently aren't in this case in my submission. … the Court, in fact, has no power to be … imposing what I, in any event, say are entirely unreasonable preconditions that are now sought".

17. The Judge then responded to the arguments of both counsel, thus:

> "This Court is not going to attach any pre-conditions to an order in a situation where the parties have come sensibly to terms, agreed a way forward and therefore the Court has not undertaken any analysis of the evidence as to whether or not such preconditions are merited or not".

I return to this later, but the Judge's comments at this point were, in my judgment, significant. The mother, having alleged that an article 13(b) exception was made out on the basis of a grave risk of physical or psychological harm, was seeking enforceable protective measures in the Texas Court (described by the father's counsel as 'pre-conditions' – language later adopted by the Judge) prior to her return; it is clear that the Judge had not assessed whether enforceable US orders, or 'pre-conditions' were "merited or not" because (as she said herself) she had not "analysed the evidence".

18. The Judge then went on to give "indications" to the parties, proposing that the mother should forthwith be provided with funds, and that *she* should have three weeks to put in place any proposed protective measures in the Texas Court, adding:

> "… it remains open to Father to make application to the Texan courts should he seek any variation of those matters if there are grounds to do so, so he is not left without remedy".

19. Counsel for the mother addressed the Judge again, telling her that he was unsure how the Texas Court would "interpret undertakings" given in this jurisdiction in the English proceedings, adding:

> "I am mindful of having a case in the past that undertakings are simply not accepted by a foreign court".

Counsel for the father responded on this point about the recognition of undertakings (albeit actually later in the exchanges) as follows:

> "I appreciate my learned friend has got some sense that somewhere some country in some jurisdiction may find undertakings problematic and I, I don't dispute with him. I don't, I can't recall whether it's any of the states in the US but what I have done is looked up Texas and I cannot, I have not found any problem with Texas accepting undertakings".

20. The Judge suggested that a consent order be drawn up reflecting the father's proposals in relation to protective measures and/or soft landing provisions, with an annexe of his undertakings as a "belt and braces" exercise.

21. There was a short adjournment for counsel to take instructions from their clients. At 3.30pm the parties returned to the courtroom and there were further exchanges with the Judge. Two issues were placed before the Judge for her to consider: (i) whether the father's offers of support should be enshrined in undertakings or an order, and (ii) the duration of the undertakings/order reflecting these offers. Counsel for the father sought to persuade the Judge to state that undertakings would be sufficient to ensure that the offers of support were enforceable (he referred to two, unspecified, cases in which the English Court appeared to have accepted undertakings in order to achieve a return to Texas), and he sought to limit the duration of the undertakings to 4 months.

22. In his submissions, counsel for the mother commented on the two authorities in which it was said that undertakings were given in the English Court to achieve a return to Texas, and materially added:

> "… we only have the fact that those undertakings were made. We don't know how they were enforced. We don't know if they were enforced or accepted or rejected by the Texas court."

He continued:

> "[The mother] may not be in any position to actually get those orders registered and … we would say that both parties shall use [their] best endeavours to register the terms encapsulated within this order as a mirror order in the Texas court forthwith, within three weeks. The mother is not going to be returning, on my instructions, where there is no protection in place, so she will act immediately to get the orders and the protective measures registered".

And later:

> "Unfortunately, … you are now in some difficulty in that the parties, although have reached agreement on most of the issues, the two issues that they're not agreed on are significant as such that the Court has to make a

> determination and weigh the evidence before it, given that we are now at past 3.30pm in the afternoon that, that is unfortunate to say the least. So, I would invite my learned friend to take further instructions from his client as to resolution on this. As I say, if the mother is placed in a position where the undertakings are put forward by the father and those are not registered within the three weeks and the mother doesn't have those protective orders she won't be returning. It may be a case that the child will have to be returned with, without her or, or she'll have to seek an extension of time in this court and that is not, that is not, it's not the best outcome for anybody…
>
> … she has made it clear … that she would not return on the basis of undertakings that do not secure her protection. We have had a constructive discussion since then and we have reached a point where the protective orders as it were, the protective measures have been agreed but the mechanism of them has not been agreed and it would be unfortunate if we were left, effectively, hanging and adjourning this matter because we can't agree on the mechanism by which those protective measures are put forward."

The words at the end of the foregoing quote (i.e., "we can't agree on the mechanism by which those protective measures are put forward") are the mother's counsel's final words on this important point. Indeed, they represent almost his final submission of the entire hearing. He concluded by making a few remarks about the duration of any order, and the Judge's jurisdiction to make decisions about the less significant "soft landing" provisions, including medical care and financial provision.

23. The Judge responded to both counsel, indicating that a "pragmatic" solution needed to be found to resolve the issues, adding:

> "It is invidious to invite me to be making determinations on matters such as the enforceability or otherwise of undertakings in Texas, the need or otherwise for orders, what is the most effective mechanism when, quite frankly, I do not have the relevant material in front of me to make such a determination".

While the Judge did not identify what she was referring to by "relevant material", I suggest that she was likely to have been referring to assistance from an expert in the law of Texas, or other publicly available information about the enforceability of English orders/undertakings in the Texas Court by way of protective measures.

24. The Judge suggested that undertakings be taken and recorded from the father, and she directed that the duration of the undertakings should be "until further order" with a "safety backstop" of 12 months. Counsel for the father appeared to accept these indications and responded:

> "… what I was proposing was that … I'd do my best as Applicant now very quickly to draft and that we can conclude things, I hope, in an hour".

Counsel for the mother made no comment. The Judge concluded this part of the hearing with these words:

> "… it seems to me that that is the most sensible, pragmatic and child focussed way to resolve the case today. All right, I shall leave you to it again and I hope to have a draft order to (inaudible)".

The court then adjourned again.

25. At 4.47pm, the father's counsel sent an e-mail to the mother's counsel, with this message:

> "I attach the draft order as a working draft subject to amendments to be made when I go through this with my client".

There was no response. A further draft (with amendments) was sent through at 5.18pm. There was no response.

26. The mother, through counsel, then made (so it appears) several new requests of the father relevant to her return including: that the family car be available to her in Texas, and it be fully serviced, and that additional funds be available to her.

27. At 6.33pm, the father's counsel sent an e-mail to the Judge in these terms:

> "I apologise that the court has not had an update. A draft order was sent to [the mother's counsel] at 4:47pm. At gone 6:00pm I was told he was still working on it. At 6:31pm no draft has been returned to me. I am content to agree some amendments he has told me he wishes. He otherwise tells me he wishes to introduce some additional/further points, and needs more instructions…. I will shortly send to the court the draft order which I understand represents what was agreed before the court when the mother agreed to effect the return."

28. At 7:44pm the father's counsel e-mailed the Judge again attaching a draft consent order. He told the Judge that the mother's counsel was "raising additional terms", adding that:

> "He has spoken of the proceedings continuing now, given he is not agreeing to this order, and requiring re-listing. This is opposed on behalf of the father."

29. The Judge responded by directing that the case be brought before her again on the afternoon of 24 August.

30. On 23 August, the mother filed a fresh application, seeking permission to instruct an expert in relation to her mental health. In the application it was said that the parties were "very close to reaching a settlement", and that they had "almost reached settlement". She asserted that she could not herself return to the USA "due to the severe impact such a return would have on her mental health". She described aggravated symptoms of mental illness triggered by the events at court on the previous day, and "severe flashbacks" to the allegedly abusive relationship with the father. The application was not compliant in any material respect with the requirements of part 25 and PD25C of the FPR 2010.

31. A short hearing was conducted on the afternoon of 24 August; there is no transcript. Following further submissions, the Judge gave a short *ex tempore* judgment.

The Judgment: 24 August 2023

32. In her judgment, the Judge briefly set out the background facts, before going on to describe the events at court on the afternoon of 22 August 2023:

> "[6] When the court returned from lunch it was pleased to be advised that the parties had been able to reach agreement in discussions outside of court and that matters were no longer contested – court was advised that the mother had agreed to return [T] to Texas and that counsel were dealing with details of that agreement. The parties requested to see the court after some time had passed to deal with one or two remaining matters which were yet to be resolved, specifically those matters which remained in dispute: (1) the length of undertakings that the father should give – 3 months or of indefinite duration; and (2) whether the protective measures should be enshrined in undertakings or orders annexed to the court's order… As regards the length of undertakings, it indicated that these being protective measures to ensure a soft landing, it was appropriate that any application to vary be dealt with on the merits by the Texan courts, with a longstop of 12 months. As to whether the protective measures should be enshrined in undertakings or orders, the court indicated to the father that these being measures to reassure the mother, that he should be minded to place them both in undertakings and order whichever made recognition the most straightforward and the father accepted the court's indication on that". (Emphasis by underlining in the judgment has been added).

The Judge recorded that she then let counsel "draft and finalise" the order.

33. The Judge continued by describing the e-mail correspondence which I have set out above (§25-28), and the subsequent filing of an application for an expert assessment, saying:

> "[11] In terms of the issue for this court, it is therefore whether the mother had reached an agreement on Tuesday

> afternoon [22 August] that was placed on the court record and she should be held to it. That is the position supported by the father and opposed by the mother.
>
> [12] The mother's position is that while it was accepted an agreement was reached and presented to the court and placed on the court record, it is the position of [mother's counsel] that there were a number of details which needed to be agreed. He today identifies the rate of child maintenance, whether the mother's occupation of the FMH is tied to [T] remaining in her care, concerns regarding the sufficiency of a 3 week pause on enforcement of the Texan orders and the mother's fear that [T] will be removed from her care. He also raised concerns regarding the extent of the sum of money to be provided by the father to the mother and whether sufficient to obtain legal representation. [Mother's counsel] therefore says there was agreement but wasn't a complete agreement and therefore the agreement must fall, those details remaining in dispute".

34. The Judge observed that the issue which she was required to determine "must be placed within the context of Hague proceedings and the summary nature of those proceedings" ([13] of her judgment), given her concern that the mother appeared to be wishing to delay their resolution. She referenced the decision of Mostyn J in *B v B* [2014] EWHC 1804 at [2] and [3]. She then went on to consider the decisions of *Rose* and *Xydhias* to which counsel for the father had drawn her attention in submissions; accordingly, the Judge added:

> "[19] In my judgment those authorities clearly establish that where an agreement is reached on the essential fundamental terms, placed on the court record and approved by the court, it should be deemed as so ordered by the court, the details thereafter to be enshrined within the perfected order. Anyone seeking to resile would need to establish strong reason to do so. Mindful of antics of a litigant seeking to resile from an agreement reached at court".

Adding:

> "[21] With those authorities in mind, I turn to the court's decision – an agreement had been reached on Tuesday afternoon and that decision was on all core essential matters. It met with the court's approval. Counsel as of course is standard and usual practice went outside to draft the detailed terms of the order. The court is satisfied that agreement was reached on all core points of issue and dispute. Had there been matters of importance which stood in the way of agreement, they would have been raised when the court reconvened during the afternoon to hear from counsel. As I say only two matters were dealt with by the court and favourably for the mother in terms of the court's

> indication. In terms of the various issues now raised regarding the details of the undertakings – longevity, whether or not [T] may be removed from the mother's care and maintenance, they are all to engage, within the context of Hague proceedings, in unhelpful crystal ball gazing. The Texan courts, properly [seised], are able to fairly and justly deal with such matters when proceedings are restored before them".

And then:

> "[22] In order to ensure a soft landing again the court reminds itself that those protective measures are to ensure that the mother is safe and has appropriate support and means for sustaining herself. That is the purpose of those undertakings and as I have noted it is unhelpful to engage in crystal ball gazing regarding longer-term issues".

35. The Judge concluded (at [26] of her judgment) that agreement had been reached on 22 August "subject only to the detail of the perfected order".

36. Finally, having found that there *was* an agreement between the parties on 22 August, the Judge reviewed whether it was open to the mother to "renege" on the agreement on the basis that "there had been a material change of circumstances". The Judge was referred to *Thwaite v Thwaite* [1981] 2 FLR 280. She concluded that the asserted deterioration in the mother's mental health after the court attendance on 22 August did not constitute such a material change of circumstances on these facts given that "those matters [i.e., the mother's fragile mental health] were already before the court" (judgment [24]); the Judge did not investigate further, and accordingly dismissed the application to adjourn for medical assessment.

The Orders: 22 and 24 August 2023

37. Two orders were drawn, or at least approved, by the Judge on 24 August 2023. A short order dated 24 August 2023 was drawn, simply dismissing the mother's C2 application. That order recorded as recitals that:

    i) "The mother could not return to the United States herself and would not be returning the child to the United States on grounds of intolerability";

    ii) "The mother accepted that there had been an agreement put before the court to return the child to the US but that the details/specifics were yet to be set out in the order, which was a position rejected by the court, it having made findings that the court had approved the agreement between the parties on 22 August 2023".

38. The court also drew a separate order which was dated 22 August 2023 (i.e., purportedly two days' earlier), and approved by the Judge. There are at least four troubling features of this order:

i) It is expressed to be 'By Consent'. However, it was known at the point at which it was drawn, approved by the Judge and sealed, that the mother was not in fact – in material respects – consenting to the order;

ii) It required the mother to "effect the return of the child … by way of accompanying him". There are two problems with this part of the order: (a) there is no power in the court to compel a parent to return with a child to the requesting state, and (b) the contemporaneously drawn order dated 24 August was wholly incompatible in declaring on its face that the mother "could not return … herself" (see §37(i) above);

iii) It was said that the father had given undertakings to the court and these had been accepted; in fact, the father had not given his undertakings to the court on 22 August, nor had the court accepted them. When the court had risen for the final time on 22 August, the father's counsel still needed to 'double check' whether the father was prepared to give the undertakings;

iv) The final paragraph of the order reads:

> "AND THE COURT ORDERS BY CONSENT, on the basis that it is intended that the above provisions [i.e., the father's undertakings] should take effect in the Texas Court as orders, … such orders to take effect until further order of the Texas Court, and in default of any such further order, to expire in any event by 4pm (US central time) 22 August 2024" (Emphasis by underlining added).

Through this order it will be noted that the court had merely expressed an 'intention' that the key protections should be effective.

The arguments on appeal

39. The mother concedes that T was habitually resident in the USA before their visit to England on 3 February 2023; Mr Turner KC on her behalf accepts that this was a "classic case" of wrongful retention of T in this country after 1 March 2023. He nonetheless argues that the mother had a proper case for the court to exercise its discretion not to order T's return; she would have been able to satisfy the court of one of the exceptions under article 13(b), for which protective measures would have been relevant.

40. He contends that while the mother engaged in discussions at court during the lunch hour on 22 August in good faith, no concluded agreement was in fact reached, because there was no accord between the parties about one of its fundamental terms – namely, the effectiveness or efficacy of the proposed protective measures (see for example §22 above). Those protective measures were required, he argues, to address: (a) the allegation of domestic abuse, and (b) the impact of the Texas court order, which radically circumscribed the mother's role in T's life, even temporarily. He argues that the Judge could not deem an agreement to have been reached on a return under the 1980 Hague Convention where a core element of the return 'package' (i.e., the efficacy of the protective measures) was missing. Mr Turner argued that the decisions of *Rose* and *Xydhias* are of limited if any value to a case concerning a child.

He further contends that the court had wrongly referenced and relied upon the fact that these were summary proceedings under the 1980 Hague Convention when considering whether there was a concluded agreement.

41. Mr Turner further submits that *if* there was an agreement for the return of T to the USA, it was wrong to hold the mother to that agreement, once she had indicated (on or before 24 August) that she herself could not return to the USA, on grounds of mental ill-health. From T's point of view, the situation had changed radically.

42. Mr Gupta KC for the father contends that a complete, or sufficiently complete, agreement was reached on 22 August; the hearing had concluded on that day with the parties drafting what was to be a consent order. He surmises that the mother had had second thoughts after the hearing, but argues that she should nonetheless be held to the deal. He asserted that the Judge was right to adopt the broad discretionary approach to declaring a concluded agreement endorsed by the Court of Appeal in *Rose* and *Xydhias*, given that there was very substantial, indeed near-complete, agreement between the parties. Mr Gupta points out that when the matter came back to the court on 24 August 2023, the mother was *not* saying that there was no agreement, and/or that she was not satisfied about the effectiveness of the protective measures, but was claiming that she was too unwell to return. This, he says, gives the lie to her current position.

43. Ms Renton, for Reunite, makes general observations on the issues arising in this appeal; Reunite is neutral as to outcome. She observes that:

i) It is common for parties to enter negotiations in relation to 'protective measures' and 'soft landing provisions' at the door of the court; often, respondents ask for undertakings to be given which go outside of what is *required* to be placed into the return order in order to mitigate the asserted harm under article 13(b); this is where confusion frequently arises;

ii) There are risks in adopting the principles of *Rose* and *Xydhias* in relation to proceedings under the 1980 Hague Convention; that said, the court should be reluctant to permit litigants to derail and delay litigation after they have reached an agreement as to the core issues in a case, or a concluded agreement in relation to all issues;

iii) The court does not simply apply a 'rubber stamp'. The court has an independent obligation carefully to scrutinise agreements – and draft orders - irrespective of what has been agreed between the parties: in this regard she relied on *Re H (A Child) (International Abduction: Asylum and Welfare)* [2017] 2 FLR 527;

iv) The extent to which the court can decide whether it can finalise a court order, based on the agreement (or agreements) that have been reached between the parties, depends on the individual circumstances of the case, and specifically whether or not agreement has been reached in relation to the main issue/s in the case;

v) The court should be slow to permit a litigant to resile from an agreement. To say otherwise, would be to undermine the integrity of the negotiation process, and risk derailing the course of 1980 Hague Convention proceedings;

vi) If parties engage in the Child Abduction Mediation Scheme at an early stage of proceedings, as is encouraged by the court, there is much greater prospect of parties reaching measured and unpressured agreement, or at least of narrowing the issues.

Legal principles

44. In answering the questions set out at §2 above, I have had regard to a number of the authorities cited to us including: *Re A (Children) (Abduction: Article 13b)* [2021] EWCA Civ 939, ("*Re A*"); *Re B* [2022] EWCA Civ 1171 ("*Re B*"); *Re C (Article 13(b))* [2021] EWCA Civ 1354 ("*Re C*"); and the Supreme Court decisions of *Re D (A Child)(Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 AC 619 ("*Re D*"), and *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144 ("*Re E*"). I have further considered (and make reference below to) the following useful guidance which addresses many of the issues in play here: the '1980 Child Abduction Convention: Guide to Good Practice: Part VI: Article 13(1)(b)' published by the Permanent Bureau of the Hague Conference on Private International Law: October 2020 ('HCCH 2020 Good Practice Guide'); the Practice Guidance Case Management and Mediation of International Child Abduction Proceeding: President of the Family Division (1 March 2023); ('Practice Guidance: PFD: 2023'); the Conclusions and Recommendations of the Eighth Meeting of the Special Commission on the practical operation of the 1980 Hague Convention and the 1996 Hague Convention: October 2023 ('Special Commission Conclusions: 2023').

Agreement: Enforcement of Protective Measures

45. Five short points about 'protective measures' merit some consideration within this judgment arising from the appeal:

i) The requirement for the parties to address protective measures early in the process;

ii) The importance of the court identifying early in the proceedings what case management directions need to be made, so that at the final hearing the court has the information necessary to make an informed assessment of the efficacy of protective measures;

iii) The need for the court to be satisfied, when necessary for the purposes of determining whether to make a summary return order, that the proposed protective measures are going to be sufficiently effective in the requesting state to address the article 13(b) risks;

iv) The status of undertakings containing protective measures, and their recognition in foreign states;

v) The distinction between 'protective measures' and 'soft landing' or 'safe harbour' provisions.

46. (i) *Early pleading*: In cases under the 1980 Hague Convention, when the article 13(b) exception is raised as an issue, the court invariably needs to consider 'protective measures'. It has been emphasised repeatedly that the parties must address this issue early in the proceedings so that each party has an adequate opportunity to adduce relevant evidence in a timely manner in relation to the need for, and enforceability of, such measures (see HCCH 2020 Good Practice Guide at [45]). There is a risk that if this step is not taken in a timely way (as happened here), delays later in the process could frustrate the objectives of the Convention. The *applicant's* evidence should therefore always include:

> "…. a description of any protective measures (including orders that may be subject to a declaration of enforceability or registration under Art 26 of the 1996 Hague Convention or, where appropriate, undertakings) the applicant is prepared, without prejudice to his or her case, to offer for the purpose of securing the child's return, including the extent to which any undertakings offered and accepted in this jurisdiction are capable of enforcement in the requesting jurisdiction". Practice Guidance: PFD: 2023 ([2.9(b)]). (Emphasis by underlining has been added in all citations in this section of the judgment).

And the *respondent's* evidence should always include:

> "… details of any protective measures the respondent seeks (including, where appropriate, undertakings and the extent to which any undertakings offered and accepted in this jurisdiction are capable of enforcement in the requesting jurisdiction) in the event that the court orders the child's return" (ibid. [2.9(d)], and (see also Practice Guidance: PFD: 2023 [2.9(e)]).

47. It is important to note the passages of the text which I have underlined in the paragraph above, because the court will be required to examine "in concrete terms" at the final hearing (see *Re B* at [22]/[23]) the situation which would face a child on a return being ordered:

> "In deciding what weight can be placed on undertakings as a protective measure, the court will take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance. The issue is the effectiveness of the undertaking in question as a protective measure, which is not confined solely to the enforceability of the undertaking" (Practice Guidance: PFD: 2023 [3.11]).

It follows therefore that where the respondent's Answer raises an exception under article 13(b), the applicant should give immediate consideration, and take steps in the most expeditious way available, to ensure that information is obtained, whether from the Central Authority of the requesting state or otherwise, about the protective measures that are available or could be put in place to meet the alleged identified risks

(see the Practice Guidance: PFD: 2023 at [2.9(f)]). As Moylan LJ pointed out in *Re C* at [11] (referencing the predecessor guidance to the Practice Guidance: PFD: 2023), adherence to the guidance is essential to avoid delay.

48. Protective measures are those measures which are designed to address the issues of grave risk or intolerability raised within the article 13(b) exception; they may take one of many forms. In this regard, the HCCH 2020 Good Practice Guide offers this view at [44] and [47]:

> "Protective measures may be available and readily accessible in the State of habitual residence of the child or, in some cases, may need to be put in place in advance of the return of the child. In the latter case, specific protective measures should only be put in place where necessary strictly and directly to address the grave risk. They are not to be imposed as a matter of course and should be of a time-limited nature that ends when the State of habitual residence of the child is able to determine what, if any, protective measures are appropriate for the child" (HCCH 2020 Good Practice Guide at [44]).
>
> "Whether in the form of a court order or voluntary undertakings, the efficacy of the measures of protection will depend on whether and under what conditions they may be rendered enforceable in the State of habitual residence of the child, which will depend on the domestic law of this State. One option may be to give legal effect to the protective measure by a mirror order in the State of habitual residence – if possible and available. But the court in the requested State cannot make orders that would exceed its jurisdiction or that are not required to mitigate an established grave risk. It should be noted that voluntary undertakings are not easily enforceable, and therefore may not be effective in many cases. Hence, unless voluntary undertakings can be made enforceable in the State of habitual residence of the child, they should be used with caution, especially in cases where the grave risk involves domestic violence" (HCCH 2020 Good Practice Guide at [47]).

Moreover, the Special Commission recently:

> "… underlined the importance of obtaining information on available measures of protection in the State of habitual residence of the child before ordering them, when necessary or appropriate". (Special Commission Conclusions: 2023 at [33]).

49. (ii) *Case Management and protective measures*. It is crucially important that the court identifies at an early stage in the proceedings what case management directions are needed so that at the final hearing the court has the information necessary to make

an informed assessment of the efficacy of protective measures. This is emphasised throughout the Practice Guidance: PFD: 2023 as is apparent from the relevant references contained in [2.9(b)], [2.9(d)], [2.11(e)], [2.11(f)], [2.11(g)], [3.5], [3.9], [3.10], and [3.11]. For emphasis in this judgment, I reproduce [3.10] below:

> "[3.10]. With respect to protective measures (including orders that may be subject to a declaration of enforceability or registration under Art 26 of the 1996 Hague Convention or, where appropriate, undertakings) the court is required to examine in concrete terms the situation that would face a child on a return being ordered. Where the court considers that further information is required to answer these questions case management directions should be given, as referred to above, as early in the proceedings as possible".

50. (iii) *Protective measures: Effective measures.* The guidance and the authorities referred to above are clear. Protective Measures need to be what they say they are, namely, *protective*. To be protective, they need to be *effective*. This issue has been addressed in a number of authorities and in the HCCH 2020 Good Practice Guide and it is not, therefore, necessary to deal with it at any length in this judgment. I would just like to make the following points.

51. First, as Baroness Hale said in *Re E* at [52]:

> "The clearer the need for protection, the more effective the measures will have to be".

52. Secondly, as Moylan LJ observed in *Re C* at [49]: "[a]rticle 13(b) is forward-looking" (see also HCCH 2020 Good Practice Guide at [35]-[37]). Thus, when the English court is considering article 13(b), it needs to look at the *future* risk, and:

> "… the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home." (*Re E* at [35]).

To like effect, the Supreme Court in *Re E* pointed out that "specific protective measures as necessary" should be in place "before the child is returned" (at [37]; emphasis added). In other judgments, it is said that the courts need to examine "in concrete terms" what will happen to the subject child if a return is ordered (see *Re B* at [22]/[23]).

53. Thirdly, determination by the domestic court of the *effectiveness* of protective measures in the court of a requesting state can be established in one or more of a number of ways, including:

i) The parties and the court may consider it necessary to obtain short and focused expert advice from a lawyer specialist in the laws of the requesting state on whether, and if so how, orders which have been made and/or undertakings given in 1980 Hague Convention proceedings in this jurisdiction can be

converted into effective (possibly 'mirror') orders in the court of the requesting state;

ii) The parties may be able to invoke the ordinary administrative, judicial and social service authorities of the requesting state to provide protective measures. Publicly-available information may be available to outline the range of services to assist families where a child may be exposed to domestic abuse – police and legal services, financial assistance schemes, housing assistance and shelters, and health services (see in this regard *G v D (Art 13(b): Absence of Protective Measures)* [2021] 1 FLR 36 at [39] (quoted with approval by the Court of Appeal in *Re C* at [60]);

iii) Some states, at present only Australia, may produce their own fact-sheets (available through the International Hague Network of Judges) which address the availability of protective measures;

iv) Direct international judicial liaison can have a role, as set out in the Practice Guidance: PFD: 2023 at [3.19];

v) In many cases, parties may be able to rely on the arrangements contained within the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ("1996 Hague Convention")). The 1996 Hague Convention can add to the efficacy of some protective measures by ensuring that they are recognised by operation of law in other contracting states and can be declared enforceable at the request of any interested party in accordance with the procedure provided in the law of the state where enforcement is sought (see Article 26). As it happens, this is not relevant in this case, as the USA has not ratified the 1996 Hague Convention.

54. (iv) *Undertakings containing protective measures*: A formal undertaking given by a party and recorded in court is equivalent to an injunction (see *Gandolfo v Gandolfo (& o'rs)* [1981] QB 359). Undertakings are often formally given and accepted in the English Courts in order to formalise arrangements for the return of children under the 1980 Hague Convention; this may be entirely appropriate on the facts of a given case, particularly where the undertakings would be enforceable in this jurisdiction. However, both counsel at the hearing on 22 August 2023 expressed reservations about the recognition and/or enforceability of undertakings in some foreign states (see §19 above). They were right to be cautious. As Baroness Hale said in *Re E* at [7], critics of the 1980 Hague Convention have observed that:

> "… the courts in common law countries are too ready to accept undertakings given to them by the left-behind parent; yet these undertakings are not enforceable in the courts of the requesting country and indeed the whole concept of undertakings is not generally understood outside the common law world. At all events, the change in the likely identity of the abductor places a premium on the efficacy of protective F measures which was not so apparent when the Convention was signed".

55. This is echoed in the HCCH 2020 Good Practice Guide at page 11 (glossary) and at [47], and in the Practice Guidance: PFD: 2023 at [3.11]:

> "… There is a need for caution when relying on undertakings as a protective measure, and undertakings that are not enforceable in the courts of the requesting State should not be too readily accepted. There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the child. The efficacy of the latter will need to be addressed with care.".

56. (v) *Protective measures and 'soft landing' provisions*. Protective measures are those which address the issues of grave risk or intolerability raised by the asserted article 13(b) exception; they are to be distinguished from what have commonly become known as 'soft landing' provisions, which are directed more towards facilitating and/or rendering more comfortable a child's return. A degree of discipline is required to ensure that these provisions are considered and treated separately; it is not helpful if the terms are used interchangeably, as they were at times during the hearing below.

57. This distinction is reflected in the HCCH 2020 Good Practice Guide, which distinguishes between protective measures and "Practical arrangements" (the equivalent of soft landing provisions) which, as set out in the glossary, "are not intended to address a grave risk and are to be distinguished from protective measures". An example given, at [49], is the purchase of travel tickets.

Agreement: the relevance of Rose and Xydhias

58. The Judge was encouraged by father's counsel at the hearing on 24 August 2023 to rely on the Court of Appeal decisions in *Rose* and *Xydhias* in order to find, and hold the parties to, an agreement. Those decisions both arise in the context of financial remedy proceedings; they discuss the role of the court in reviewing and endorsing an apparent agreement as to division of assets and financial relief. In *Rose*, the parties had reached an agreement within a Financial Dispute Resolution ('FDR') appointment conducted by Bennett J. The husband later sought to resile from it. On the facts, the Court of Appeal found that an "unperfected order of the court" had been achieved.

59. In *Xydhias*, extensive negotiations between counsel in relation to a financial remedy dispute over several days had led to an agreement, achieved through counsel, reflected by 'draft 4' of a proposed consent order. As in *Rose*, the husband later sought to resile from it. The District Judge found for the wife. The circuit judge dismissed the husband's appeal. The Court of Appeal dismissed the husband's further appeal. It was pointed out that a financial remedy order is "always fixed" by the court; the process by which this is achieved can be abbreviated if the parties agree an outcome, but the ultimate independent discretionary review, and responsibility for the order, remains with the Judge (see p.385H), and the judge at first instance was entitled to approve the agreement. Thorpe LJ said (at 396D-E):

> "In my opinion, there are sound policy reasons supporting the conclusion that the judge is entitled to exercise a broad discretion to determine whether the parties have agreed to

> settle. The [financial remedy] scheme depends on judicial control of the process from start to finish. The court has a clear interest in curbing excessive adversariality and in excluding, from trial lists, unnecessary litigation. A more legalistic approach, as this case illustrates, only allows the inconsistent or manipulative litigant to repudiate an agreement on the ground that some point of drafting, detail, or implementation had not been clearly resolved. Ordinarily, heads of agreement signed by the parties, or a clear exchange of solicitors' letters, will establish the consensus. Hopefully, a case such as this requiring the exercise of the judge's discretion will be a rarity."

60. While *Rose* and *Xydhias* remain indisputably of value in the field of financial remedy, they are in my judgment of limited application to the consideration of an apparent agreement reached in contested 1980 Hague Convention proceedings. I say so for the following reasons:

i) In both *Rose* and *Xydhias* what was at stake was the parties' marital assets, and the arrangements for post-separation financial support; this field of family law is in my judgment more susceptible to the exercise of a "broad [judicial] discretion" to find completed and irrevocable agreement, than the case where the future of a child or children is in issue;

ii) As Thorpe LJ said in the passage cited above (§58), there are 'policy reasons' for "curbing excessive adversariality" and in excluding from trial lists "unnecessary litigation" where (as was shown in each case) the prelude to the purported agreement on financial issues is often long and drawn-out, with the lawyers involved in the preparation of detailed documents and schedules, and draft orders (*Xydhias*). In both *Rose* and *Xydhias*, the parties had been actively and extensively engaged in negotiation prior to the agreement being reached; in each case the focus of the lawyer's activity for a period prior to the agreement had been on trying to achieve settlement;

iii) Prior to any FDR meeting "details of all offers and proposals, and responses to them" (rule 9.17(3)) will have been filed with the court, so that when the court gives its indication as part of the neutral evaluation, it is able to see the development of the negotiations; the approach to compromise, which may be appropriate for dividing assets and resolving finances, is unlikely to be transposable to a determination governed by the best interests of a child;

iv) The FDR process which led to the agreement in *Rose* is specifically designed for early neutral evaluation and "for the purposes of discussion and negotiation" (rule 9.17(1) FPR 2010); the very objective of the FDR is for the parties to "use their best endeavours to reach agreement on matters in issue between them" (rule 9.17(6)). This is to be contrasted with last minute negotiations at the door of the court prior to, or in the middle of, a contested hearing.

A party who changes their position on returning to the requesting state prior to final order

61. It is clear that if the taking party changes their mind on whether to return to the requesting state with the subject child *after* the return order has been sealed, and therefore wishes to apply to set aside the order on the basis of a material change of circumstances, they must do so in accordance with the rules – namely, rule 12.52A FPR 2010, supported by PD12F FPR 2010. In this regard, Moylan LJ made clear in *Re B (A Child: Abduction: Article 13(b))* [2021] 1 FLR 721 [2020] EWCA Civ 1057 at [81] and [83] that the bar will be set high to avoid the risk of a party seeking to take advantage of a mere change of circumstances such as a simple change of mind.

62. It is also clear how the court should assess the case of a taking parent who asserts that he/she will not return with the child to the requesting state: see [72] of the HCCH 2020 Good Practice Guide, the judgment of Sir Andrew McFarlane P in *Re C (A Child) (Child Abduction: Parent's refusal to return with child)* [2021] EWCA Civ 1236, and the passage on this point in *Re B* at [88] – [90].

63. But what about the parent who changes her position on return mid-way through the hearing, and crucially before the final order has been made? In these circumstances, the court in my view must consider the changed situation on the new facts, paying close regard to how the new position affects the issue of intolerability for the subject child(ren). In this exercise, the court is bound to need to examine closely the reason(s) *why* the taking parent has changed their mind in retracting their plan to return with the child(ren); the court should be astute to discern the antics of a litigant on whom there is a dawning realisation of an unwelcome decision; the court should consider, from the point of view of the child(ren), what this now means to the application for return.

64. While it is acknowledged that a refusal to return could represent an altogether new basis for asserting that the exception to return under article 13(b) is made out, as referred to above, the court will be cautious when considering such a case which the taking parent will have created by their own asserted decision not to return. The following passages from the HCCH 2020 Good Practice Guidance are also relevant:

> "… the circumstances or reasons for the taking parent's inability to return to the State of habitual residence of the child may in particular be relevant in determining what protective measures are available to lift the obstacle to the taking parent's return and address the grave risk" (HCCH 2020 Good Practice Guide [65]);

And later:

> "It needs to be emphasised that, as a rule, the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child" (HCCH 2020 Good Practice Guide [72]).

Conclusion

65. The two orders made on 24 August 2023 cannot, in my judgment, stand. In making those orders, I regret that the Judge fell into error in the following ways:

    i) By holding the parties to what she regarded as a concluded agreement on 22 August 2023 to dispose of the application under the 1980 Hague Convention for the return of T to the USA, when the parties had not in fact reached accord on a core, fundamental, ingredient of the arrangements for T's return, namely the implementation of the proposed protective measures in Texas;

    ii) By relying on *Rose* / *Xydhias* to support her approach – namely, that the court could exercise a 'broad discretion' to hold parties to an agreement which was, in material respects in any event, incomplete;

    iii) By failing to address adequately or at all the mother's change of position on 23/24 August, and failing to consider it on its merits;

    iv) By approving two orders simultaneously (purporting to be of different dates) which were in some respects incompatible, and in others inherently defective.

66. While counsel are to be commended for attempting to resolve this application by agreement at court on 22 August 2023, I am of the clear view that their efforts were in the event in vain. After the first round of negotiations in the short adjournment, the mother made clear to the Judge, through counsel, that she required protective measures to be in force and effective in Texas before she could contemplate a return; she wanted a 'mirror' order to be in place (see the transcript extracts at §14 and §22 above). It is clear that her position did not fundamentally shift in this regard throughout the hearing that afternoon. Accordingly, in order to achieve a clear and concluded agreement between the parties, the mother's position was that there would need to be in place in Texas by the time the mother and T returned *effective* protective measures to address the asserted grave risk of harm to T.

67. On the written evidence, the mother had raised a valid article 13(b) exception based on a grave risk of physical/psychological harm and/or the placing of T in an intolerable situation. She was also subject to a detailed court order of the Texas court which radically changed the care arrangements for T, limited her contact with him, and exposed her to significant financial penalty. In the circumstances, she was entitled, indeed obliged, in the context of her case to put before the court the need for the Judge to consider effective protective measures if T was to return. The absence of agreement about effective protective measures in Texas deprived the so-called agreement of one of its essential building blocks.

68. Early in the exchanges, the Judge told counsel (see §17 above) that she had not undertaken "any analysis" of the evidence to see whether "preconditions" (by which I understand was meant the suite of protective measures) "are merited or not". This was understandable as she had not been asked to determine the application. However, she also said that she was "not going to attach any pre-conditions" to any order for return because "the parties … have agreed a way forward". With all due respect to the Judge, in saying this she went too far. First, the parties had not "agreed a way forward" as there remained, as accurately described by the mother's counsel, "issues … of significant dispute". Secondly, just as she could not say that 'pre-conditions' *would* be merited, she could not say that they would *not* be.

69. Both counsel and the Judge in my view then became side-tracked into a debate about whether the father's offers to facilitate the mother's return should be expressed as undertakings or orders of the English Court; this missed the point that either way (undertakings or orders) the protection that the mother sought under the agreement which was in discussion needed to be *effective* in Texas. In respect of this, the Judge was right to say (§23 above) that she did not have "the relevant material" available to her on which she could make a decision. She needed it; it was not there.

70. It was as a result of this exchange that the Judge finally approved a form of words which are found at the end of the 'consent order' dated 22 August 2023 and approved by the Judge two days later. This provided (see §38(iv) above) that the parties and the court "intended" that the father's undertakings "should take effect in the Texas Court as orders". Again, the Judge was, I regret, in error in approving such an order in the absence of evidence on which she could satisfy herself whether, and if so how or when, this intention could be turned into a reality. Quite apart from the fact that the father had not in fact formally given the undertakings to the court (thereby calling into question their enforceability at all), the 'intention' offered neither T nor the mother the protection which was claimed. Not only was this an insecure basis on which to make such an important order, but it was, in any event, not what the mother had agreed.

71. Had the essential building blocks of the agreement been in place, and had the parties merely been in disagreement about 'soft landing' provisions (such as the cost of T's flight, or the provision of a car for the mother on return), it may well have been appropriate for the judge – if invited to do so – to adjudicate shortly on these discrete points in order to resolve the overall dispute. If that had been the limit of the dispute in this case, the agreement could have been saved. The answer to question 2 in §2 above in those circumstances would have been 'yes'.

72. It will be apparent from my comments above (§60) that I do not believe that the decisions of *Rose* and *Xydhias* transpose well to the jurisdiction of the 1980 Hague Convention, to support the exercise of judicial 'broad discretion' to determine whether the parties had reached agreement. In any event, I consider that *Rose* and *Xydhias* would be materially distinguishable, for the following reasons:

    i) In *Rose* the agreement was indisputably complete when it was announced to the FDR judge; the parties were *ad idem*; there was no issue on which they were not agreed and it was expressed to the judge unconditionally. This was not so here;

    ii) In *Xydhias* the District Judge had found that the essential building blocks of the agreement had been agreed. In the instant case, the absence of agreement about the manner in which the protective measures were to be implemented rendered absent one of the essential building blocks. The judge was wrong in the circumstances to say in her judgment that agreement had been reached in this case on 22 August on "all core essential matters" (see [21] of her judgment, §34 above); it had not. Furthermore, the Judge was not, in my judgment, right to describe the issue of T's future care on return to the USA as a "detail" which engages "crystal ball gazing"; the issue of T's future care was a key concern of the mother, understandably so given the wide-ranging terms of the 15 May 2023 order. The mother sought an effective 'protective

measure' in this regard (i.e., the discharge of the order before T's return) and yet the Judge could not say with any confidence what would happen "when proceedings are restored" back before the Texas court;

iii) This was not a case (as per *Rose*) in which there was any judicial led early neutral evaluation which stimulated the so-called agreement; in the instant case, the judge had avowedly not 'analysed' the evidence, and was therefore not in a position to steer the parties, let alone satisfy herself of the appropriateness of the agreed order.

73. The Judge was right to state (at [22] of her judgment: see §34 above) that the protective measures were "to ensure that [the mother] is safe" but was wrong to conclude that the father's undertakings given in *this* jurisdiction would meet that requirement. The Judge paid insufficient attention to the submission of counsel for the mother that undertakings may not be recognised in the Texas Court (see §19 above). She was wholly wrong in my judgment to find that there was agreement on all 'core' matters, and characterise (as she did repeatedly) the mother's demand that protective measures must be effective in Texas as a disputed "detail" of what would otherwise be an agreement or order (para [12], [21] and [26] of her judgment: see §33-35 above).

74. I recognise that the Judge – who had had no case management involvement in this case – was put in a very difficult situation at this final hearing. First, there was the inherent pressure to reach a conclusion having regard to the provisions of article 11 of the 1980 Hague Convention, and para.2.14 PD12F FPR 2010. The fact that the Judge referenced the summary nature of the proceedings when considering the terms of the proposed agreement is a hint of this; in fact, in my view the "summary nature" of the proceedings should not have weighed in her reckoning in deciding to hold the parties to their agreement. Secondly, there had been a low level of adherence to directions orders, Practice Directions, and good professional practice in the preparation of the case. The mother had failed to file an Answer, and had then presented a somewhat incoherent collection of 'defences' (some of which were as a matter of law not open to her) in her written evidence. At the pre-trial review there had been no obvious attempt to define and/or reduce the essential issues. There is no evidence that the mother's counsel ever prepared and/or filed a position statement or skeleton argument; applications were made on behalf of the mother to adjourn the final hearing on multiple grounds, some of which were not foreshadowed by any written notice. Regrettably, it appears (perhaps unsurprisingly in the circumstances) that there was a lack of focus in oral argument on what I regard as the key issue(s) – the effectiveness of the proposed protective measures. When the mother filed an application on 23 August 2023 for expert instruction, it was not compliant in any material respect with the requirements of part 25 and PD25C of the FPR 2010.

75. When presented with the so-called 'agreement' at shortly after 2pm on 22 August 2023, the Judge could, it seems to me, have taken one of a number of different courses:

i) She should have recognised there and then that one of the fundamental blocks of the so-called agreement was not in place (the absence of accord on effective protective measures). She may have therefore advised the parties to re-consider the so-called 'agreement', or pressed on to hold a contested hearing at

which she would have considered and formed an assessment of the mother's case under article 13(b) and the efficacy of any protective measures proposed by the father;

or

ii) She could have adjourned the application at that stage, and granted permission to the parties to obtain information/advice from a Texan law expert on the method for enforcement of orders (or undertakings) which had been offered in this country (as per the conclusion/recommendation [33] of the recent Special Commission meeting, see §48 above); she would have done this reluctantly given that this could/should plainly have been considered sooner;

or

iii) She could have encouraged the parties to consider that any return of T be conditional upon the father himself applying to vary or discharge the Texas court order of 15 May 2023 order in material respects, and putting in place (or otherwise facilitate by assisting the mother to obtain) effective protective measures in the court in Texas to provide protection against domestic abuse. This may in fact have been quicker, neater, and overall cheaper, than going down the route of obtaining legal advice (as per (ii) above).

76. As I referenced above (§74) the requirement for expeditious determination of these applications under the 1980 Hague Convention will inevitably weigh heavy on a judge at final hearing who is keen to bring them to a conclusion. But the speed of resolution should not take precedence over achieving the right result, which must – it should be emphasised – be in the interests of the child. While the 1980 Hague Convention has no inherent 'welfare' test as such, it is crafted on the basis that "the interests of children are of paramount importance in matters relating to their custody" and is designed "to protect children internationally from the harmful effects of their wrongful removal or retention" (preamble to the 1980 Hague Convention). Mr Turner reminded us of the passage in *Re E* above at [14] at which Baroness Hale describes the objective of the 1980 Hague Convention, which:

> "… is, of course, also for the benefit of children generally: the aim of the Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child."

The 1980 Hague Convention should not itself become an instrument of harm (*Re D* at [52]). If *effective* protective measures are not in place at the point of return in a case where otherwise a grave risk exists, it is reasonable to infer that harm to the child may well follow.

77. Finally, by 23 August 2023 at the latest, the mother had effectively confirmed a position which her counsel had hinted at to the Judge on the previous day – that she would not return to Texas with T if a return order were to be made. However, this was not now being presented on the basis of her concern about the effectiveness of protective measures, but on the basis that her mental health had (as a result of the

events of 22 August) deteriorated. When this was presented to the court on 24 August 2023, the Judge should in my view have considered, among other points:

i) The basis for the changed position, and whether there was evidence to support it, and/or whether there was reason to believe that the mother was prevaricating;

ii) From the point of view of T, what this now meant to the application for his return.

The Judge approached the mother's new position on 24 August on the basis that she was applying to set aside a final order which had effectively been made two days earlier. For the reasons I have already given this was an inappropriate starting point. Thus, in disposing of this application, I find that the Judge was wrong simply to adhere to her finding (a) that a "complete" agreement had been "reached" on 22 August 2023 "subject only to the detail of the perfected order" ([26] of the judgment), and (b) that the mother's deteriorating health was not a basis for interfering with that agreement, as her mental ill-health had already been before the court.

78. It is most regrettable that the parties had not been pointed towards mediation under the Child Abduction Mediation Scheme (see Practice Guidance: PFD: 2023 [2.9(a)]) at the outset. Early alternative dispute resolution and/or mediation should have been considered well before the final hearing date. Had it been so, it is possible that the spirit of compromise which prevailed in the middle of the day on 22 August may have been better harnessed. That all said, it is not too late.

79. For the reasons set out above, I would allow the appeal. Subject to my Lords' views, I propose that the application is listed urgently for case management directions before a Judge of the Family Division, with a view to a final hearing being listed as soon as practicable thereafter.

Lord Justice Lewis

80. I agree.

Lord Justice Moylan

81. I also agree.