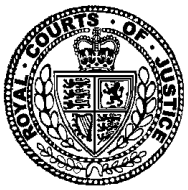

Neutral Citation Number: [2024] EWCA Civ 1296

Case No: CA-2024-001700

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mr David Lock KC (sitting as a Deputy High Court Judge)
FD24P00737

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 October 2024

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ELISABETH LAING

- -

R (Child Abduction: Parent's Refusal to Accompany)

- -
- -

Ruth Kirby KC and Frankie Shama (instructed by **Dawson Cornwell LLP**)
for the **Appellant Father**
Jennifer Perrins and Elle Tait (instructed by **TV Edwards Solicitors**)
for the **Respondent Mother**
Teertha Gupta KC and Mani Singh Basi (instructed by **Brethertons LLP**)
for the **Intervenor, Reunite International Child Abduction Centre** (written submissions only)

Hearing date: 8 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 30 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Introduction

1. This appeal arises from the refusal of a father's application for the summary return of his three daughters to France under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. By his order of 26 June 2024, Mr David Lock KC (sitting as a deputy High Court judge) dismissed the application in a reserved judgment after a two-day hearing. The father now appeals.

2. The appeal raises several issues, but at its core it concerns the judge's treatment of the mother's case under Article 13(b), and in particular his approach to her assertion that she would not accompany the children if a return order was made.

3. Submissions have been made by Ruth Kirby KC and Frankie Shama for the father and Jennifer Perrins and Elle Tait for the mother. Mr Shama and Ms Perrins appeared before the judge. We have also had the benefit of written submissions on matters of principle and practice from Reunite International Child Abduction Centre ('Reunite'), who were granted permission to intervene and did so through Teertha Gupta KC and Mani Singh Basi, instructed by Brethertons LLP. We are grateful to them all.

4. I would dismiss the father's appeal for the reasons that follow.

The background

5. The mother is British, while the father is Algerian by origin but was living and working in France when the parents' relationship began. They married in 2015 in France, where the children were born, the eldest now being 7 and the youngest just 2. The children lived all of their lives in France, visiting the mother's family in England from time to time, until 23 October 2023, when the mother brought them to England.

6. The judge found that by the time the mother left the parents were having frequent extended arguments and that the mother was deeply unhappy, had resolved to end the marriage and had decided that she needed to leave the father and move to England. The father drove the mother and children to the airport at half-term. They went to stay with the mother's parents. The mother's account was that the father knew they would not be returning, while his was that they were expected back after two weeks, as had happened in the past. The judge found that the father knew that the mother wanted to leave the marriage and go to England but that he closed his eyes and did not engage.

7. On 1 November 2023, the mother texted the father to say that she had decided to stay in England with the children. Exchanges between the parents then included a message from the father on 5 November in which he said that he would respect the mother's decision but wanted contact. In later messages, he wrote that he was not asking the mother to return and that he could go back and forth to England to see the children.

8. However, having concluded that this approach was not going to lead to a reconciliation, the father changed his position. On 17 January 2024, he told the mother that he wanted his family back again and on 20 February 2024 he issued his application for summary return.

The judge's decision

9. The final hearing took place on 17-18 June 2024. The mother accepted that the children had been habitually resident in France until October 2023 and that the removal had been legally wrongful. She advanced three bases on which a return order should be refused: consent, acquiescence and Article 13(b).

10. The judge heard evidence from both parents on the issue of consent. He did not find them to be wholly reliable witnesses. He considered that the truth lay somewhere between their accounts and that both, perhaps without deliberately trying to mislead, were being selective and seeking to interpret events in a way that supported their case. In the result, he found that the father had not consented to anything other than the children coming to England for a short holiday. The mother has not appealed from that finding.

11. On acquiescence, the judge found that the father's messages indicated that he was accepting that the mother and the children would not be returning at the end of half-term and, while he may have preferred that to happen, he was not pressing for it. He held that the mother had proved her case that, from about 5 November 2023 to 17 January 2024, the father's state of mind was to acquiesce in her wrongful decision to take the children to live in England, albeit he may have hoped that he could eventually persuade her to agree to return to France with the children. The judge noted that this left him with a discretion to exercise.

12. The mother's case under Article 13(b) had two elements:

    (1) Non-return. In her statement, the mother said that she was not prepared to return to France under any circumstances. She explained in some detail why she had reached that position and she argued that, as she had been the children's main, if not sole, carer it would be intolerable for them to be separated from her.

    (2) Father's behaviour. The mother asserted that the father had subjected her to abusive and controlling behaviour in a number of ways. He had very little experience of hands-on parenting, and would be unable to give three distressed girls the care that they would need, individually and collectively. Further, his own emotional needs would take precedence and, based on past behaviour, there would be a risk of him losing his temper with them.

13. The father replied:

    (1) He denied the mother's allegations about his behaviour and parenting capacity. He pointed out that she had agreed to him having the children for a week's holiday in England alone.

    (2) The mother's evidence about non-return was disingenuous, but, even if she meant what she said now, it was inconceivable that she would not accompany the children if a return order was made.

14. The judge offered the father the opportunity to cross-examine the mother on her evidence about not returning, but his counsel, Mr Shama, declined the offer.

15. The judge directed himself carefully on the approach to Article 13(b). He considered the guidance given in the following cases, among others:

Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144, [2011] 2 WLR 1326 at [14, 32, 34, 36] ('*Re E*')

Re K (1980 Hague Convention: Lithuania) [2015] EWCA Civ 720 at [53]

In re A (children) (Abduction: Article 13(b)) [2021] EWCA Civ 939, [2021] 4 WLR 99 at [87-88, 92, 95] ('*Re A'*)

In re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51; [2007] 1 AC 619 at [52]

C v C (Minor: Abduction: Rights of Custody) [1989] 1WLR 654, at p.661D/E ('*C v C*')

S v B (Abduction: Human Rights) [2005] EWHC 733 (Fam); [2005] 2 FLR 878, at [49] ('*S v B'*)

In re W (Children) [2018] EWCA Civ 664; [2019] Fam 125 at [57] ('*Re W*')

Re B (Children) [2022] EWCA Civ 1171 [2022] 3 WLR 1315 at [64] ('*Re B*')

16. The judge summarised the position in this way:

> "65. Where allegations of domestic abuse are made, I must conduct an "evaluative assessment of the allegations": see *re A* at para 92. If, having conducted that assessment, the evidence before the court enables me confidently to discount the possibility that the allegations give rise to an article 13(b) risk, then the defence is not established. However, if I remain satisfied that there is a grave risk, I next have to go on to ask myself whether, on the basis the allegations are true, the children can nonetheless be protected from being exposed to physical or psychological harm or otherwise placed in an intolerable situation as a result of the protective measures that the remaining parent is able to put in place.
>
> 66. Applying those principles to the facts of the present case is not entirely straightforward. It seems to me that these cases explore the tension between, on the one hand, not allowing a parent to thwart the policy of the Convention by creating the intolerable situation by the parent's own choices and, on the other hand, recognising that characterising a parent's refusal to return as being a "choice" may be simplifying a far more complex decision which can fall to be taken by a parent who claims to have been a victim of domestic abuse. On the facts of this case, the evidence makes it clear that the Mother's case is that she has made her decision to stay in England for the reasons she has given. Accepting her case at its highest as I am bound to do, it does not appear to me to be appropriate to characterise the

> Mother's decision as being an entirely free choice or a decision she has made with the purpose of limiting the choices available to the Court. She says that it is a response to the emotional effects on her created by the Father's conduct towards her during the marriage. I make no findings of fact on her motivations but, taking her evidence at its highest as I am bound to do, I have to accept that at least a substantial part of her reasoning underlying her decision to stay in England is connected to her experiences in the marriage and that she is not deliberately seeking to frustrate the policy objectives of the Convention.
>
> 67. The final position of the Father was, as I understood it, that I could not confidently discount the possibility that the Mother would carry through her threat to remain in England even if this court made a return order. However, the Father's position was that, even assuming that position, the evidence led by the Mother was insufficient to enable the court to say that, if the children were to return to France without the Mother and were to resume living with the Father, there was a grave risk that they would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. He said that part of the reason I should reach that conclusion is that no mother would permit her children to be placed in circumstances were there was such a grave risk of physical or psychological harm or which would be intolerable to them. That is a factor I have taken into fully into account."

17. This approach led him at [57] "to proceed on the basis that, taking the Mother's case at its highest in accordance with *Re E*, there is a real risk that she will follow through with this intention and, if I make a Return Order, she will remain in the UK."

18. As to the allegations regarding the father's behaviour, the judge accepted his devotion to the children but he drew a distinction between the ability to cope with them for a week's holiday and the stresses of working and caring for them alone for months. He concluded that, without making any finding to the civil standard, he could not confidently discount the possibility that the mother's allegations were true, and that the alleged physical and psychological conduct of the father towards the mother would not be replicated in his behaviour towards the children if he had the full-time care of them. He described that as a hugely difficult question.

19. He then concluded that separating the children from their mother and placing them in the sole care of their father would place them at grave risk of physical and psychological harm and put them in a position that they should not be expected to tolerate. He therefore considered whether there were any measures that could be taken to protect the children against those risks. Here, he found that the father had not provided any evidence about how he would arrange things if he were called upon to be a single parent. He did not accept the argument that there was no onus on the father to provide such information and he concluded that no protective measures had been put forward to meet the risks that had been identified.

20. Having reached this conclusion, the judge returned to the question of the exercise of discretion. In the light of his conclusion about Article 13(b), he was not prepared to

make a return order, and he added that if that conclusion was wrong he would not have made a return order in the exercise of his acquiescence discretion, based on the uncertainty about the domestic circumstances following any return. He therefore dismissed the father's summons.

21. After delivery of the draft judgment, the father sought permission to appeal, which was refused. The judge said that he would have reached the same decision even if he had concluded that there was no risk of physical harm to the children.

The grounds of appeal

22. The father now advances these grounds of appeal, with permission of Moylan LJ:

> 1. Although the Judge identified the correct legal principles relating to a defence under Article 13(b), he applied those principles in a manner which was wrong on the evidence and which would undermine the operation of the Hague Convention in this jurisdiction. He did this by:
>
> a. Wrongly concluding that there was a grave risk of psychological or physical harm to the children if returned to their father's sole care.
>
> b. Wrongly concluding that the mother would not return to France if he ordered that the children return thereby giving rise to an intolerable situation for the children.
>
> c. In undertaking his assessment of the Article 13(b) risk of psychological harm/intolerability, he attributed inappropriate weight to the source of the harm/intolerability, namely the mother's assertion that she would not return to France if the court ordered the children's return.
>
> 2a. In the Judge's analysis of Article 13(b), he was wrong to assess that the risk of physical harm to the children was grave or would give rise to an intolerable situation for the children.
>
> 2b. In any event, it was procedurally unfair for the judge to indicate to counsel for the father that he was not concerned with this issue and then to make a finding that the children would be at grave risk of physical harm if returned to France.
>
> 3. The Judge's approach to the issue of protective measures was wrong. If he had concerns about the protective measures offered by the father, he had available to him less draconian options than dismissal of the father's application including adjournment.

4. The Judge's approach to the issue of the mother's assertion that she would not return to France with the children was procedurally wrong.

5. The Judge was wrong to find that the father had acquiesced in the children living in England with their mother.

6. The Judge failed to give any reasons as to why he would exercise his discretion to refuse the father's application for the summary return of the children.

23. These grounds raise a number of intertwining issues. I will first consider acquiescence (ground 5), before coming to Article 13(b) (grounds 1-4) and discretion (ground 6).

Acquiescence

24. The father's case was that the messages between the parents, read as a whole, were simply negotiations for a hypothetical compromise, of the kind discussed by Hale J in *P v P (Abduction: Acquiescence)* [1998] 1 FLR 630 at 634-635. The judge should have taken this view of the exchanges, and his primary focus should have been on the subjective intention of the remaining parent: *In Re H (Minors) (Abduction: Acquiescence)* [1998] AC 72; [1997] 1 FLR 872 at 90E-G.

25. I can find no fault in the judge's careful self-direction and analysis of the evidence on this issue. He was fully alive to the father's case about acquiescence and he reached a conclusion that was open to him. Repetition of the same essential arguments gives us no basis for interfering.

Article 13(b)

26. Ground 2 concerns the judge's approach to physical risk to the children and protective measures.

27. In my view there is force in ground 2a. While an assessment of harm must take account of all aspects of the matter, the evidence of a risk of physical harm to these children was on any view slight. The judge's view during the hearing can be seen in the next paragraph, and it is difficult to sustain his later and, in my view, unnecessary conclusion that a risk of physical harm to the children from their father added to the mother's case under Article 13(b).

28. Ground 2b arises from an exchange in Mr Shama's closing submissions. The transcript reads:

> "THE DEPUTY JUDGE: No, I am concerned purely whether there is a grave risk of psychological harm.
>
> MR SHAMA: Let me take physical harm, first of all. Just to discount that. *[continues for 14 lines]*
>
> THE DEPUTY JUDGE: I think the case on physical harm is thin if *[sc. not]* non-existent.

> MR SHAMA: Physical harm, the mother's case in my submission falls at its first hurdle because she has allowed the father unsupervised contact for a period of a week. And again, in any case, if you establish the burden, if the mother established the burden of saying that there was a grave risk of harm or intolerable situation arising from any physical harm to the children, in my submission that would be raised before the court in France. And I will go on to the authorities in a moment but there is no evidence to suggest that the father is a physical risk to these children in any sense. No third-party evidence, no social services reports, and a number of these authorities where there is a difficulty in returning child --
>
> THE DEPUTY JUDGE: Mr Shama. I have indicated I am with you on that point so further --
>
> MR SHAMA: I will move on.
>
> THE DEPUTY JUDGE: Further submissions to try and persuade me do not help."

Against that background, the father has good reason to complain that the judge went on to find that the mother's case on physical risk to the children had to be accepted.

29. However, ground 2 on its own does not advance the father's appeal. The issue of physical harm was on any view peripheral to the decision, and the exchange with counsel did not in itself amount to a serious procedural irregularity rendering the overall decision unjust.

30. Ground 3, concerning protective measures, is not made out. The mother set out her case on non-return in her statement, months before the hearing. The father dismissed it in his statement in reply, but that did not exempt him from having to deal with the issue if the judge decided otherwise. I would reject the submission, made to the judge but not repeated on appeal, that this placed an improper onus on the father. Once the court concluded that a return without the mother would be intolerable for the children, the father had the opportunity to suggest any countermeasures to reduce the risk to an acceptable level, but he did not take it. There was no application for an adjournment, and no good reason to adjourn to give him further time to make his case.

31. I turn to the heart of the appeal, situated in grounds 1 and 4.

32. The father's broad argument is that the refusal of a summary return based on an assertion by an abducting parent that they would not accompany a young child on return could open the floodgates for such claims and undermine the entire purpose of the Convention.

33. That apprehension was felt by this court in *C v C*, an early decision under the Convention. A mother said that she would not accompany the parties' six-year-old child if the court ordered his return to Australia, where there had been long-running proceedings. The judge found that the mother had reasonable grounds for refusing to return and that to return the child without her would expose him to a grave risk of

psychological harm. The father appealed and for the first time offered undertakings amounting to protective measures for the mother and child. Butler-Sloss LJ accepted the judge's view that the mother's grounds for refusing to return had been reasonable, but found that the undertakings changed the position. As to the substance of the grounds, she said this at 656G:

> "The mother has made in her affidavits various allegations against the father and has given explanations for her action in removing T. from Australia. They are not, in my judgment, relevant to an application under the Act of 1985, save as in so far as they may affect the approach of the Australian authorities to the mother's return."

In relation to the mother's refusal to return, she said this at 661B-E:

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

34. These words have been considered in subsequent decisions. It is convenient to refer to this passage from the judgment of Sir Mark Potter P in *S v B*:

> "[48] … In that passage, Butler-Sloss LJ was drawing attention in forcible terms to the undesirability of permitting a situation where the mother, as Thorpe LJ put it: 'is in reality relying upon her own wrongdoing in order to build up the statutory defence.' However, I am satisfied she did not intend that, in relation to the risk of psychological harm or an intolerable situation arising in respect of the child, the court must ignore the effect on the mother's psychological health in a case where it is clear that her health might become such that the mother as primary carer would face real and severe difficulty in providing for the child's needs on return: cf *TB v JB (Abduction, Grave Risk of Harm)*

> [2001] 2 FLR 515 at [44] and [95] per Hale LJ. So to hold would be to place a gloss on the words of the Art 13(b) defence which they do not bear.
>
> [49] The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation which she has herself created by her own conduct is born of the proposition that it would drive a coach and horses through the 1985 Act if that were not accepted as the broad and instinctive approach to a defence raised under Art 13(b) of the Convention. However, it is not a principle articulated in the Convention or the Act and should not be applied to the effective exclusion of the very defence itself, which is in terms directed to the question of risk of harm to the child and not the wrongful conduct of the abducting parent. By reason of the provisions of Arts 3 and 12, such wrongful conduct is a 'given', in the context of which the defence is nonetheless made available if its constituents can be established."

35. In *Re E* at [34], the Supreme Court endorsed the proposition that, if a grave risk exists, its source is irrelevant, and in *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 WLR 721 at [34], that a parent's subjective perception of risks must be taken into account. This court has confirmed that the effect of the separation of a child from the taking parent can in itself satisfy the terms of Article 13(b). In *Re W (Children) (Abduction: Intolerable Situation)* [2018] EWCA Civ 664, [2018] 3 WLR 1819, the mother had created a situation where she was unable to return with the children, while in *Re A*, the mother had expressed herself as unwilling to return.

36. Drawing matters together, Article 13(b) requires the parent opposing a child's return to establish that there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Where that parent asserts that they will not accompany the child to return, the court will scrutinise the assertion closely, because it is an unusual one for a main carer of a young child to make. The court will therefore make a reasoned assessment of the degree of likelihood of the parent not returning. Relevant considerations will no doubt include the overall circumstances, the family history, any professional advice about the parent's health, the reasons given for not returning, the possibility that the refusal is tactical, and the chance of the position changing after an order is made. The court will then factor its conclusion on this issue into its overall assessment of the refusing parent's claim to have satisfied Article 13(b). By this means, it will seek to ensure that the operation of the Convention is neither neutralised by tactical manoeuvring nor insufficiently responsive to genuine vulnerability.

37. We were taken to instances where judges have grappled with this task. In *R v P* [2017] EWHC 1804 (Fam) at [129], Theis J concluded, having heard evidence, that it was more likely than not that the mother would not return with a five-year-old child, and she refused to make a return order. In *Re C (A Child) (Child Abduction: Parent's refusal to return with child)* [2021] EWCA Civ 123 ('*Re C'*), the trial judge, Cohen J, had asked himself what in reality the mother would do, and found (without hearing evidence) that the reality was that she would return. This court upheld his finding [22, 62]. In *NP v DP (Hague Convention; abducting parent refusing to return)* [2021]

EWHC 3626 (Fam), Holman J heard oral evidence and found at [40-41] that there was a high degree of likelihood that the mother would not, in fact, return even if the child was required to return. In *Z v Z* [2023] EWHC 1673 (Fam), Peel J found at [30] after hearing evidence that a mother undergoing cancer treatment would not return with the children, and that this was based on a genuine decision and not on tactical manoeuvring. In *Re A (Retention: Article 13(b): Return to Israel)* [2024] EWHC 1879 (Fam) Mr Nicholas Allen KC declined to hear oral evidence and at [85] found on the balance of probabilities that a mother would return with the children.

38. The summary assessment of whether a parent is likely to return and how they will react to the court's decision will not always be easy, and a reasoned conclusion is unlikely to be disturbed on appeal. In some of the above cases, conclusions were expressed as findings of fact, made on a balance of probabilities. That was unobjectionable in the individual cases, but in assessing the likelihood of a parent not returning, the court is not addressing a binary issue of fact (such as consent: see *Re W* at [58]). Instead, it is asking whether, factoring its assessment on this issue into the evidence as a whole, that parent has established an Article 13(b) grave risk to the child if a return order is made. In that context, the court is assessing likelihood on a summary basis, not finding facts.

39. The question of whether oral evidence should be heard on this issue was considered by Sir Andrew McFarlane P in *Re C* at [59-61]:

> "[59] On the question of whether the judge fell into error by not requiring the mother to give oral evidence, it is clear that there is no reported authority on the point in this context. Hague Convention proceedings are summary and, save where it is necessary to do so on issues of habitual residence or consent and acquiescence, oral evidence is not adduced. In the present case, neither party either applied for, or even suggested, the mother to be called to give oral evidence. Against that background, it is very difficult to understand how the judge can be held to be in error by not himself requiring her to be called.
>
> [60] In addition, I do not accept Mr Gupta's premise that any oral evidence that the mother might have given would have been short. On the contrary, it would seem likely that, if the mother were to be asked 'why?' she would not return to France, her testimony would have opened up and led to her listing all of her complaints about the father's past behaviour. Such a development would be wholly contrary to the approach taken to Hague cases in this jurisdiction.
>
> [61] Whilst, in a case such as this where the issue is one of whether a parent is, or is not, likely to return to the home country with their child if the child is ordered to do so, it may be open to a court to receive oral evidence from that parent on the point, to do so is by no means a requirement. In the present case, the judge is not, therefore, open to criticism for making his determination in the absence of oral evidence."

40. Judges should therefore ask whether oral evidence is necessary in the case before them. As stated in *Re B* at [57], the threshold for permitting oral evidence remains a high one. I would agree with the submission of Reunite, supported by the parties, that where the court detects that a taking parent may refuse to return, it should act early to ensure that the position is addressed in statements, so that oral evidence is less likely to be appropriate. This would include addressing the issue of protective measures as required by the *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings of 1 March 2023.*

41. Against that background, I turn to the remaining grounds. Ground 1 opens with the proposition that the judge identified the correct legal principles relating to a defence under Article 13(b). In one important respect, I disagree, and Ms Kirby KC, in her submissions on behalf of the father, did not seek to uphold the proposition, though Ms Perrins, for the mother, continued to defend it. The judge's error, relying on an agreed position of the parties, was to consider, in reliance on *Re E*, that he was bound to take at its highest the mother's assertion that she would not return. As I have explained, that is not the correct approach. It transposes, for the first time so far as I am aware, the approach to the summary assessment of allegations of domestic abuse that was endorsed in *Re E* at [36] into a different context. If the court was obliged to take that approach, there is an obvious risk that the effective operation of the Convention would be hindered.

42. Ms Kirby argued that the court should operate a rebuttable presumption that a parent will return with children, and that this should prevail unless there is cogent contrary evidence. That would be to substitute an equally unhelpful test for the one employed by the judge.

43. Ground 1a is that the judge wrongly concluded that there was a grave risk of psychological or physical harm to the children if returned to their father's sole care. I have already addressed the issue of physical harm. As to psychological harm, it is right that the judge addressed this issue, but his conclusion was also significantly based on his assessment of whether, if the children returned alone, there was a grave risk that they would be placed in an intolerable situation. The judge set out his reasoning in respect of the latter at [77-79], with reference to *Re W*. This was a conclusion reached after careful consideration and there is no basis on which we could properly intervene.

44. I do not consider that any separate argument arises under Ground 1c, which charges that the judge attached undue weight to the source of harm/intolerability, namely the mother's decision. The court must assess the actual risk, whatever its source. Ms Kirby observes that the mother's assertions about the father's behaviour were uncorroborated by evidence such as police reports, but this is something that the judge considered and did not regard as determinative.

45. So, after this extended treatment of the issues, we come to the central and decisive issue on the appeal. Ground 1b asserts that the judge was wrong to conclude that the mother would not return to France. At paragraph 36 above, I have explained how the court should approach this issue by making an assessment, and not an assumption. The approach taken by the judge and the parties at the time of the hearing was a material misdirection, appearing at paragraphs 57, 66 and 81 of the judgment.

46. That leads to the difficult question of what course this court should take. These are summary proceedings that have already been on foot for eight months. The prospect of their being remitted for rehearing is unattractive, and the continuation of the proceedings is clearly hampering the parents' ability to achieve the best welfare outcome for the children.

47. Fortunately, we do not in my view have to remit the proceedings on the basis of the legal error. Ms Kirby argues that this was a classic premeditated child abduction and points out the mother's assertion that she would not return was unsupported by any professional evidence about her mental state. However, reading the judgment as a whole, it is clear that the judge saw no reason to doubt the genuineness of the mother's stated intention. He set out her evidence in full at [55-56] before observing that "this is a case where the Mother's evidence is that she has thought very carefully about whether she is prepared to return to live in France or not." He went on to caution himself about the risk of the Convention being tactically circumvented at [63], before coming to the extended passage that I have cited above at paragraph 16. He then returned to the issue at [77-79], concluding:

> "79. It seems to me that the Mother has made good her case that, in the particular facts of this matter, a prolonged separation from the Mother is something that these 3 children should not be prepared to tolerate substantially for the reasons that the Mother has explained, which chime with the reasoning in both Re W and Re A. I accept her case is that separating them from their virtual sole carer who has been there for them on a full time basis would be likely to be intolerable for the girls, particularly for the baby who is only 22 months and will have the greatest difficulty understanding what has happened to her mother. I don't consider that the Mother's own decision negates that conclusion."

I accept that this conclusion is based on the contested premise that the mother would not return. However, if the judge had found any reason to doubt the genuineness of her position, he would certainly have expressed it somewhere in the course of this substantial judgment. His recitation of the mother's case at face value and without any adverse comment leads me to the conclusion that, applying the correct test, he would have found that there was a high degree of likelihood that the mother would not return. In the result, his decision would have been the same.

48. Turning to Ground 4, the judge gave the father the opportunity to cross-examine, but that was declined. The father argues that, against the background of an agreed position that the mother's case about non-return had to be taken at its highest in the absence of cross-examination, this placed an improper burden on him to prove that she would return. Ms Kirby argues that this is a working out of the misdirection referred to in paragraph 45 above. I can understand the argument, but it does not assist the father because it does not add to the matters advanced in support of Ground 1b. I have addressed the consequences of that misdirection and this additional point does not affect my conclusions in that respect. I would in any event add that, having agreed to the common approach to Article 13(b) that was adopted by the judge, and having declined the opportunity to have oral evidence, it would be rare for this court to permit a party to complain about the course the proceedings then took. As I have explained,

there is no justification for doing so in this case as it would not affect my conclusion on the substantive challenge to the judge's decision.

Discretion

49. In the light of the above conclusions under Article 13(b), Ground 6 cannot avail the father. The discretion under each limb of Article 13 had to be exercised on the footing that the mother would not be returning, and it was accordingly just as unlikely that it would be exercised in favour of a return after a finding of acquiescence as it would be after a finding of intolerability. The judge did not say much about this, but he did not need to on the facts of this case. Had the father asked for fuller reasoning, as the mother pointed out when resisting the grant of permission to appeal by the judge, it would no doubt have been provided.

Conclusion

50. None of the grounds lead to a successful appeal. On the central issue of the mother's return, the judge, abetted by the parties, materially misdirected himself, but I am satisfied that the result would have been the same had he directed himself correctly. I would therefore dismiss the appeal.

Lady Justice Elisabeth Laing:

51. I agree.

Lord Justice Moylan:

52. I also agree.
