Neutral Citation Number: [2021] EWCA Civ 939

Case No: B4/2021/0321

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS JUSTICE JUDD
FD20P00589

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2021

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE BAKER
and
LORD JUSTICE ARNOLD

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A (Children) (Abduction: Article 13(b))

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Mr R Harrison QC, Ms K Chokowry and Mr G Gordon (instructed by **Lyons Davidson Solicitors**) for the **Appellant Mother**
Mr C Hames QC and Mr P Hepher (instructed by **MSB Solicitors**) for the **Respondent Father**

Hearing date: 31st March 2021

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Approved Judgment

Lord Justice Moylan:

1. The mother appeals from the order made on 5 February 2021 by Judd J ("the Judge") on the father's application under the 1980 Hague Child Abduction Convention ("the 1980 Convention"). The Judge decided that the mother had not established either of the grounds relied on by her in opposition to the application, acquiescence and Article 13(b), and ordered that the parties' children, A (aged 4) and B (aged nearly 3), be returned to the United States of America.

2. The factual background is more complicated than in many cases under the 1980 Convention. One of the main features is that the mother has made clear that she will not return to the USA with the children for a number of reasons including that she considers she needs to stay in England to care for her elder child by a previous relationship, who is aged 14. This child, C, is, of course, not subject to the father's application but she has always been part of this family and moved to the USA with the mother and her younger siblings in November 2019 and returned with them as set out below.

3. The mother relies on three Grounds of Appeal. First, that the Judge was wrong in the approach she took when determining whether Article 13(b) was established and in respect of her conclusion that it was not. Secondly, that the Judge was wrong in the approach she took to the issue of acquiescence and in her determination that the father had not acquiesced. Thirdly, that C's voice was inadequately reflected in the proceedings. Only the first two were substantively addressed during the hearing and, in my view, Ground 3 adds nothing of substance to this appeal.

4. The mother is represented by Mr Harrison QC (who did not appear below) and Ms Chokowry. The father is represented by Mr Hames QC (who did not appear below) and Mr Hepher.

Background

5. The mother was born in and, until she moved to the USA in November 2019, had always lived in England. She is a doctor. Her relationship with C's father broke down in 2010 (when C was 4) and they moved to live with her parents. C has contact with her father, including staying contact.

6. The father was born in the USA. He lived there until he relocated to England in 2014 to work in his employer's European office.

7. The mother and the father met in England in 2015. They began a relationship and married in December 2015. They bought a home together and lived there with C as a family. A was born in 2017.

8. During the course of 2017, the father's employer asked him to return to the USA as there was no longer a role for him in England. Ultimately, he and the mother decided that they would all move to live in the USA. The mother and the children (C and A) visited the USA in October 2017 to look at accommodation and schools (for C) and, the mother said, decided both where they would live and where C would go to school.

9. C's father did not agree to C relocating with them, so the mother made an application in 2018 for permission. It is clear, as set out in the father's statement in support of the relocation application, that "leaving (C) behind in the UK is not an option". They would either all move as a family or they would stay in England. Those proceedings were resolved in May 2019 with C's father ultimately agreeing to her relocation. Following this, it was not until October 2019 that the family received the required visas permitting them to move to live in the USA. The mother and the children finally travelled to the USA in November 2019.

10. In the meantime, in January 2018 the father had returned to live and work in the USA. This meant that between then and November 2019, he and the mother and the children were living apart. The father visited England every few months for short periods and spent 10 weeks here following the birth of B in 2018. The mother and the children also visited the father for a week in October 2018. As a result, the mother was the primary, and largely the sole, carer of the children during the period between January 2018 and November 2019 which included B's birth.

11. I deal below with the parties' accounts of events in the USA.

12. The mother and the children returned to England on 4 May 2020. This was a clandestine removal; the mother gave the father no prior indication that she was planning to leave the USA and misled him as to what she was doing on the day that they left.

Proceedings

13. The father made an application under the 1980 Convention in September 2020. In response, the mother contended that the children were not habitually resident in the USA at the date of their removal; that the father had acquiesced in their remaining in England (Article 13(a)); and that there was a grave risk that the children's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation (Article 13(b)).

14. Lengthy statements were filed by both the mother and the father, with a substantial statement from C as well. The mother said that she would not return to the USA with the children for reasons set out in her statement. A direction was made that a Cafcass officer should provide a report on C's wishes and feelings. This was subsequently discharged at the request of Cafcass on the basis that C was not "a subject child". C then filed a statement prepared by a solicitor instructed by her. Although this issue was not explored during the hearing and, of course, Cafcass has not been involved in this appeal, I can see that there might well be advantages if the wishes and feelings, or the views, of a child who is not within the scope of the application were provided through a Cafcass officer. If the court considers their views are relevant, and a court may well do so, this is a way of obtaining those views without involving them more directly in the proceedings.

15. In summary, the mother's case in respect of habitual residence was, as set out in the judgment at [27], that the children had not achieved "the requisite degree of integration into a social and family life in the US for a number of reasons". The father contended that the children had become sufficiently integrated in the USA to be habitually resident there by 4 May 2020.

16. In respect of acquiescence, the mother contended that the father had agreed to the children remaining in England and that he would move to live here. The father's case was that he had not acquiesced in the children remaining in England but had hoped that he and the mother would be able to reconcile. He said that communications between him and the mother after her removal of the children had to be seen in that context, as did his coming to England at the end of June 2020. This was to see if the marriage could be saved and also so that he could see the children.

17. The Judge summarised the mother's case under Article 13(b), at [56], as follows:

> "The mother's case with respect to Article 13(b) is that the father was guilty not only of serious domestic violence to her, but also of a highly abusive sustained course of conduct towards C. Additionally, she states that the father was abusive to A by smacking her, squeezing her ribs, and threatening her with a belt. The circumstances in which they had been living in the US are characterized by Ms Chokowry as intolerable."

As was made clear in the mother's written submissions for the hearing below, and as referred to in the judgment, at [57], her case in support of there being a grave risk within Article 13(b) was based on three elements: the father's allegedly abusive behaviour towards her, C and A in the USA; the separation of the children from their primary carer; and the separation of the children from C.

18. Whilst not directly responding to some of the mother's allegations, the father made clear that he strongly disputed her case. He accepted that there had been difficulties in his relationship with C but not of the nature or to the extent alleged by the mother and C. He also contended that the mother would return with the children to the USA and that her stated position was tactical and designed to put pressure on the court.

19. The application was determined by the Judge on 4 February 2021. She heard oral evidence from the parties on the issue of acquiescence. She found that the children were habitually resident in the USA on 4 May 2020; that the father had not acquiesced; and that the mother had not established the grave risk required by Article 13(b).

The Evidence

20. As referred to above, the father, the mother and C all provided written statements.

21. The mother relied on a number of matters in support of her case that "conditions" in the USA were "intolerable" and that the "circumstances were such as to prevent A and B from achieving the requisite stability in their lives so as to acquire the requisite degree of integration". These included that the father had rented a property in a "completely different" area to that "originally planned". In her statement, the mother said that the "move was a difficult one from the outset; (the father) seemed to hold a grudge against (C) and would frequently berate her over insignificant issues. He felt that, as he was now the sole breadwinner, he had full control of all our activities". The mother relied on messages with friends in England "which show just how unhappy and unsettled I was and the behaviour I was subjected to by" the father. In February 2020, the father told her "that he had looked into getting divorced" which

led to her sending a message on 24 February 2020 in which she said that she might be returning to England "sooner than expected" and that "Life is a total mess at the moment".

22. In March 2020, the father lost his job. The mother said that, after this, the father "became increasingly frustrated and began to regularly berate me, threaten me with divorce and tell me to leave the country. He would say things like 'go find a cliff and jump off it' or tell me repeatedly 'I hate hate hate you'".

23. The mother alleged that, towards the end of March 2020, the father "started to become physically aggressive towards me and this continued into April". She set out the details of specific occasions on which she said that the father had been physically and verbally abusive towards her. On 23/24 March, when the father "wanted to have sex" but the mother said no, he repeatedly "threw me out of the bed which really hurt". He told her "to pack my cases and leave to the UK immediately". On other occasions he would be verbally abusive and tell her to get out of the bed. Another specific incident was alleged to have occurred on 18 April when the father "wanted to have sex". When the mother said that she wanted to sleep, the father "became angry and physically pushed me out of the bed"; when she got back into the bed, he "grabbed me by the skin … and pulled me out"; he pushed her against a chest of drawers and she "fell to the ground". When she got up, he pushed her against the drawers again and she again fell to the floor. The youngest child, B, who slept in the same room, "woke up during this incident".

24. The mother also alleged that the father was physically abusive to her on 30 April 2020 during an incident when, she said, he thought she might have "recorded his threats". In the course of trying to get her phone, he "pushed me against the sideboard, trapping my arm". C was present for some of this incident and that night she "had a panic attack".

25. The mother also alleged that the father was physically and verbally abusive towards C. The father had made clear from soon after they arrived that he did not want C to remain in the USA. The mother relied on a message she sent to a friend on 7 December 2020 in which she said that the father had "made sure (C) heard when he said that she should go and live with her dad in England". She set out the details of an incident on 19 April 2020 in which the father was said to have grabbed C's arm and caused "a raised red lump". The father then told the mother that C "had to leave otherwise there was no future for us" to which she responded that if C left, she "would have to leave too". The father subsequently told C directly that "she needed to leave". According to the mother, C was not then "allowed to be present in the same room as (the father). She was not allowed to sit in the same communal areas, nor eat with the rest of the family. She remained, in essence, confined to her bedroom". C went to stay with the father's sister for five days. This did not improve matters and, on 30 April 2020, the father "said that we were getting a divorce and that (C) and I had to leave the house that night".

26. The mother also alleged that the father had "anger issues". He had threatened both A and B "with a belt if they cried". She relied on a recording in which she said the father could be heard "threatening (A) with a belt" one night when telling her to stop crying. He had slapped her (on her bottom) and had also disciplined her by

squeezing her ribs so hard that she cried. On one occasion he had "grabbed (A) by her arm and threw her out of the bedroom".

27. The mother contacted the local child protection services leading to a home visit on 28 April 2020 which, she said, "precipitated further anger and aggression from" the father. She also contacted the Police. The Police record contained details of the mother's complaint that on 23 April 2020 she had been assaulted by the father on 18 April 2020; that on 19 April, during an argument between them, the father had "grabbed" C's wrist causing a "mark"; and also that, not "recently but … in the past", the father had punished A "by squeezing her sides to the point that she cries".

28. When the mother left the USA, she left a letter for the father in which she said she felt that he had put her "in an impossible position". She referred to how she said he had treated C including that he had hurt C "both emotionally over the past six months, and now physically"; and that the "final straw has been the recent physical violence". She also said that the time apart was "temporary"; that he was an "integral part of our lives"; and that A and B "love you so much and I love seeing you play with them and care for them".

29. The mother set out the evidence she relied on in support of her case that the father had acquiesced to the children remaining in England. This included messages between them which, she said, showed that "he was very resolute in his own mind that he was going to move back to England so that he could spend time with children and see if we could make the marriage work".

30. The mother explained that she would not return to the USA if a return order was made. She was "in an incredibly difficult position" and had "agonised" over her decision because she would be forced to choose between the children. She could not "put (C) through any more upset and distress and uproot her again from her school to go back to a country she does not want to be in". C had been "through a traumatic time" in the USA and "would be distraught if she were separated from her siblings". C could not live with her father and had told the Guardian in the relocation proceedings that "she does not know what she would do without" the mother. Against this, the mother considered that it would be intolerable for A and B to go to the USA without her "as I am their primary carer and they would also be separated from (C) who they adore and are very close to". She also felt that she did "not have the emotional energy to be able to return to the USA".

31. The father challenged the mother's allegations. He said that the decision to move to the USA had not been taken "lightly" and had "included an extensive amount of research and investigation before the relocation took place". They had sold their home in England and had shipped all their belongings to the USA "demonstrating the move was permanent". He contended that they lived in the location which they had agreed "would be the best for the children" and not one chosen by him on his own.

32. The father also contested the mother's account of their lives in the USA and of his relationship with C. The suggestion that he held "any grudges against (C) is completely untrue". He had "never treated (C) differently". He had "never harmed" C; rather she had assaulted him and had "lied to avoid getting into trouble". He also

said that he had suggested that he and C should not be in the same room alone as she "had started to fabricate allegations" which the mother would believe.

33. The father denied the allegations about "alleged abuse". The mother "was in fact the violent one" and had assaulted him. He had "never reported her to the Police because I knew that this could lead to immigration issues" and "would also threaten her ability to" work as a doctor in the USA.

34. He also denied the mother's allegations that he had mistreated A. He was "appalled" by the suggestion that he had squeezed A's ribs. He also said that he and the mother had "jointly agreed to trial a number of different behaviour techniques with (A) after she was three". These had included "the quiet corner, discussion and slap to the bottom". The "only methods which gave positive results were retrospective discussions"; he "always reassured (A) and gave her affection".

35. As for the visit by child protection services in April 2020, the father countered that the "lies and false allegations made me worry constantly that further malicious allegations could lead to my children being taken away from me". He also relied on the fact that child protection services had concluded that the allegation of physical abuse (which they define as "physical injury that results in substantial harm to the child") of C "did not meet the preponderance of evidence standard and is not sufficient to state that" the father had physically abused C.

36. The father denied that he had looked into divorce proceedings in February 2020, as alleged by the mother, but he had "broached the idea of a trial separation in the same apartment complex" in March. Then, in April 2020, he and the mother had agreed a trial separation.

37. The father also denied that he had acquiesced in the children remaining in the UK. He pointed to his email of 28 May 2020 in which he had said: "I DO NOT AGREE to moving back to the UK"; and to his email of 3 July which, he said, also made this clear. When he had said that there was nothing left for him in the USA, this related to the children not being there.

38. In his second statement, the father said that he did not think the mother would let A and B return to the USA without her: "I do not think (this) will happen".

39. As referred to above, C also filed a statement. She referred to "different occasions" when the father hit A "several times" on her bottom. She also described other incidents when A was "hit" by the father. As for herself, she said that the father "made me feel like he didn't want me around" and she listed "mean things" he did. She described an incident in which she said that the father had "grabbed" her arm causing "pain" and which made her arm go red and a "lump" to form. After this, "things got a lot worse and (the father) did not want to see me at all"; she also overheard the father tell the mother that "I had to leave the apartment". She stayed with the father's sister for five days but, when she returned, the father still said he wanted her to leave and isolated her from the rest of the family.

The Judgment

40. The Judge summarised the law on the issues of habitual residence; acquiescence; and Article 13(b). On acquiescence, she referred to *In re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72; *Re G (Abduction: Withdrawal of Proceedings, Acquiescence and Habitual Residence)* [2008] 2 FLR 351; and *Re W (Abduction: Acquiescence: Children's Objections)* [2010] 2 FLR 1150. She highlighted what Lord Browne-Wilkinson had said in *In re H*, at p.88, namely that "judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child".

41. In respect of Article 13(b), the Judge quoted from *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 ("*Re E*") and referred to a number of other decisions. As part of her summary of the law she said, at [21]:

> "The summary nature of the process does not preclude the court carrying out an assessment (in an appropriate case) of the credibility or the substance of the allegations upon which the defence is based."

42. When determining the issue of habitual residence, the Judge took a broad range of factors into account. These included, at [29], that the children's "lives were very much centred around that of their primary carer who was their mother" and that the children (A and B) "were very close to C too". And, at [32], that the father "was very much involved in caring for the children, particularly after the mother started work". She referred to other aspects of the evidence, including that the "move to the US was well-planned" and summarised the mother's evidence as follows:

> "[27] … (Following the children's arrival in the USA) Difficulties emerged very quickly in the marital relationship and the mother and C were not happy. In December she suggested to her friends that she might not be staying in the US long term and in February she told them the father had spoken of divorce. In March the father lost his job, and the pandemic meant that everyone (including C) had to work from home. The relationship between the father and C was very difficult, especially as the father restricted access to the internet and did not allow them to have a television. As time went on the relationship between the father and C deteriorated further, leading to an occasion on 19th April when the mother said he was physically abusive to her. On 21st April the father asked C to leave the family home and she went to stay with the father's sister for a while. There was an escalating tension throughout this period which led to C not being able to leave her room, or participating in activities with the family. There was also incidents between the father and mother, whereby she says that he was violent to her by pushing her out of bed and pushing her against furniture when she would not have sex with him, and when he grabbed her phone. The mother characterizes these conditions as intolerable, and states that the circumstances were such as to prevent A and B from

> achieving the requisite stability in their lives so as to acquire the requisite degree of integration into a social and family environment necessary for habitual residence."

Ultimately, the Judge concluded, at [32], that the children "had attained a sufficient degree of integration" in the USA to have become habitually resident there by the date of their removal. As referred to above, there is no appeal from this determination.

43. In the next part of the judgment, the Judge analyses the issue of acquiescence. She referred to the oral evidence but, at [36], ultimately "found the contemporaneous material of more assistance in determining" this issue. She considered it "important to look at the tenor of [the messages between the mother and the father] overall as well as what is said in particular messages". This was because in "an emotionally highly charged situation a person may sometimes send a message which is borne of momentary exasperation or distress, which does not represent their real intention".

44. In the messages, the mother had made clear that her returning to the USA was "not an option". The Judge, at [43], referred to the messages relied on by the mother as demonstrating that the father was intending to move to England and was agreeing to the children staying here "irrespective of the marital relationship". In one of these the father said, "I'm still moving to (X) though", X being the place in England where he and the mother had discussed living.

45. In respect of the father's position, the Judge noted, at [40], that his messages demonstrated "first of all (his) strong wish to see the children and secondly his desire to achieve a reconciliation". It was in response to his suggestion, on 21 May, that one way for him to see the children was for the mother to go to the USA that the mother had replied that this was "not an option". The Judge also referred to the message from the father, on 28 May, that he did "NOT AGREE" to moving back to England but that "I HAVE TO if I want any chance of raising my children".

46. The Judge's assessment of the evidence was, at [42], that "the father was willing to relocate to the UK in order to achieve" a reconciliation; and, at [45], that the "father was always intending to come over to see the children, and press his case"; and that none "of the messages … amount to an acceptance that the children should remain in the UK absent any serious attempt to make the marriage work and reunite the family".

47. The father came to England on 28 June 2020. He gave up his rented accommodation in the USA and, at [46], obtained "a six month tenancy in a house in multiple occupation" in England. In the days before he arrived the Judge considered that, at [47], he "was obviously worried as to the viability of the reconciliation plan" but told the mother than he was "willing to wait until after I arrive … to see if anything changes".

48. On 3 July the father told the mother, at [49], "that she needed to be planning a date at which she would leave the UK". The father's application was subsequently made to ICACU on 13 July.

49. The Judge's conclusion on the issue of acquiescence was, at [52]:

> "… the contemporaneous messages show that the father's subjective intention was never that the children should remain in this country save in the context of his moving back here with a view to reconciliation and reunification. Understandably he considered coming over here was the best way to achieve that, particularly because of C's position. Although there are a few messages to suggest that he would come over anyway, or that the children would need a home regardless of what happened to the parental relationship, this is within an overall and clear context of the parties working towards reuniting the family. It was when the father really began to lose faith in this process that he questioned his residency status if the marriage did not subsist and very shortly after pressed her about returning the children to the US. I do not regard the father's conduct as evidencing an intention to acquiesce in these circumstances. He was hoping for a reconciliation. His hope was not unreasonable given the mother's clear message to him when she left and indeed for some time thereafter. The discussions about reconciliation, and indeed the counselling sessions ultimately did not seem to be going anywhere and no agreement was ever reached."

The Judge later added, at [54], that the "reason (the father) began to ask for the children's return was (as the messages show) his genuine loss of confidence in the mother's willingness to reconcile".

50. I have already referred above (paragraph 17) to the Judge's summary of the mother's case under Article 13(b), namely "serious domestic violence to her, … a highly abusive sustained course of conduct towards C … (and) that the father was abusive to A". The Judge also referred to the three elements relied on, namely the father's conduct towards the mother, C and A; the effect on the children of being separated from their primary carer; and the effect of being separated from C.

51. The judge next spent some time, from [58], considering the mother's position that she would not return "as this does deserve some further consideration". This consideration starts as follows:

> "No doubt the mother is right to consider it would be wrong and unfair to make C return to the US (even if it was possible). Nonetheless, one solution (albeit imperfect) to this particular problem would be for C to stay with family members in the … area. Nonetheless, in the mother's statements for these proceedings the possibility of C staying with her grandparents is not mentioned. It was simply stated that C would have to live with her father, which she did not want to do."

The Judge had raised this question during closing submissions, leading to further statements being produced from the "maternal family to explain why they could not care for C", at [62]. The Judge said, at [65], that she found this evidence (i.e. the reasons given for being unable to care for C) "a little difficult to understand".

52. The Judge's conclusion as to the mother's position was as follows, at [67]:

> "It is always invidious to choose between children, but one would think that C is at an age where she is able to understand what is happening and to cope with separation from her mother better than the younger children, and as long as she was able to remain in Manchester where she has established family and friends, her welfare would not be too adversely affected. She would miss her mother very much, but could speak to her frequently. One would hope that proceedings in the US would not take too many months. Against that backdrop it is difficult to understand why – at least on the grounds of C's welfare – the mother would choose to stay here rather than accompany the younger children to the US. She is plainly a loving mother and her choice does not sit easily with her assertions about the grave risks the younger children would suffer if they had to return without her."

53. The Judge next analyses the evidence relied on by the mother. She notes, at [69], that, despite "the large number of messages … in which she complains to her friends about the father's abusive treatment of her and C, there are none which relate to the father physically abusing anyone". She refers to the mother's allegations as recorded by child protection services in the USA, namely that she had been assaulted by the father; that C had "complained she had been grabbed by the father on the wrist"; and that "the father squeezed A's ribs until she cried when she misbehaved". The Judge then noted that there "is no mention of smacking". Adding that, the "CPS concluded physical abuse (using a particular definition which included substantial harm or risk of it) was ruled out".

54. The Judge sets out, at [71], that:

> "I must consider whether this evidence, if true, demonstrates that A and B would be at grave risk of physical or psychological harm in the sole care of the father, and also whether this, coupled with separation from the mother and their half sister would place them in an intolerable situation."

The Judge first refers to the evidence from the relocation application in 2018 and then observes, at [73], that:

> "This suggests to me that the issues that arose in the US were the result of the particular situation in which the family found themselves".

55. The "particular situation" or context, as described by the Judge, was that C and the mother "did not like the US"; that the mother and father "argued about money"; that matters "already tense, became much worse in the lockdown and when the father lost his job". The Judge's approach can be seen from her conclusion that:

> "It is in that context that the argument took place in which C's wrist was hurt. It is also in that context that the mother says he was abusive and violent to her".

56. The Judge's next paragraph, [74], dealt with a recording relied on by the mother:

> "I have listened to the tape produced by the mother of A crying and it is true that there are three loud noises on it which may represent the father making noises with his belt. The tape goes on for quite some time after the loud noises. At all times the father does appear to be talking quite calmly and A appears to calm down too. I note that the mother did not intervene – her evidence was that she was breastfeeding B."

57. I propose to quote at length the Judge's consideration of the situation of the children in the event of their returning to the USA without their mother and her conclusion in respect of Article 13(b):

> "[75] If the mother chooses not to return, there is no doubt that A and B will find it very hard at first to be without her, as well as their older sister. Although the father has said he would return to the same area so that they can attend the same nursery and other activities, they may well have little recollection of it. I do have to consider whether the loss of the day to day care by their mother and company of their sister, plus the father's behaviour as alleged, would either individually or taken together, establish that there is a grave risk that their return would expose them to physical or psychological harm, or otherwise place them in an intolerable situation.
>
> [76] Caring for two very young and distressed children will no doubt place stress on the father. I bear in mind that the allegations made against him are also in the context of considerable stress, but this was principally the stress of considerable conflict between the adults and an unhappy stepchild.
>
> [77] Looking at the evidence before me I do not consider that the Article 13b defence is established if the mother does not return. There is other evidence to place alongside the mother's allegations. In her handwritten letter stated how she loves to watch the father playing with and caring for A and B and that they need him in their lives. There is no complaint about the father's treatment of A and B between their respective births and the date of relocation. He looked after the children a good deal in (the USA) and he has had very frequent contact since July of this year without complaint as to his treatment of them. There is no question that he loves them and is committed to them. In turn, they know him and love him too. It will be upsetting for them to be separated from their mother and C too, but they have the benefit of an established relationship with their father.
>
> [78] The father also has the support of his family in … to help him and the children too. His parents are under an hour away, and he has other relatives as well. No doubt he will make

> use of the support they offer him and that, coupled with the children going to nursery three times a week should help him manage, especially in the early weeks whilst the children and he become used to living together and without their mother, if this is what she decides to do. Hopefully there would be video contact with her; and she may be able to visit before too long. There is no evidence as to the timescale for proceedings in the US, and I would hope that such would be measured in months rather than years."

58. The Judge, accordingly, found that no ground for refusing to order the return of the children had been established.

59. At the end of the judgment, at [79], the Judge considered the position in "the event that the mother did decide to accompany A and B" to the USA. She referred to undertakings which the father had offered dealing with matters such as accommodation and prosecution of the mother. It is relevant to note that these were relevant only if the mother in fact returned to the USA.

Submissions

60. The mother challenges the Judge's approach to and conclusions in respect of both acquiescence and Article 13(b).

61. As referred to above, the three elements relied on by the mother, separately and cumulatively, as establishing Article 13(b) are: (a) the children being separated from their primary carer; (b) the children being separated from C; and (c) the children being placed in the care of their father against whom the mother has made serious allegations of abusive behaviour. These are, of course, based on the mother (and C) not returning to the USA with A and B.

62. Mr Harrison started his oral submissions by making two preliminary observations. The first was that, while the Judge had found the mother was the children's primary carer, this understated the position because, in addition, they had never spent a night apart from her; the father had never cared for the children overnight on his own; and, for the period between January 2018 and November 2019, she had effectively been their sole carer. Further, the effect of the Judge's order was, he submitted, that they would be separated from her for an indeterminate period. The Judge had adverted to this point but, he submitted, only in passing. She had rightly acknowledged that there "was no evidence as to the timescales for proceedings in the US", but had then gone on to speculate with the "hope that such would be measured in months rather than years".

63. The second was that, prior to the move to the USA, the mother and father had never contemplated C living separately from the mother or the rest of the family. Their position during the relocation proceedings had been that, if permission was refused, they would remain with C in England. Yet, Mr Harrison submitted, C's importance as a member of the family had been marginalised during the course of the abduction proceedings. He suggested that, in the circumstances of this case, if C had been a full sibling, it was "almost inconceivable that a court would nevertheless split the sibling unit and force (the mother) to choose between the children".

64. In respect of Article 13(b), Mr Harrison submitted that the Judge's approach, and consequent conclusion, were flawed for a number of reasons. Although the Judge had properly characterised the mother's allegations as being that "the father was guilty not only of serious domestic violence to her, but also of a highly abusive sustained course of conduct towards C", as well as having been physically abusive to A, the Judge did not carry this characterisation into her later analysis. Instead, she wrongly minimised the mother's allegations contrary to the guidance set out in *Re E* and by reference to matters which, in any event, did not diminish the nature of those allegations.

65. The Judge, he submitted, had departed from "the essential guidance in *Re E*" and had failed to exercise the degree of caution required, when evaluating the allegations relied on by the mother, as set out in *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045. The Judge had taken into account matters which did not provide any justification, at a summary hearing, for casting doubt on the truth of the mother's allegations or for minimising their nature. Such an approach undermined the guidance from *Re E* which had been designed to safeguard children in these cases.

66. Mr Harrison relied, in particular, on the following in support of the above submission. The Judge's reference to, and reliance on, the fact that none of the mother's messages to friends had referred to the father physically abusing "anyone"; that there had been "no mention of smacking"; and that the father was "talking quite calmly" while there were "three loud noises … which may represent the father making noises with his belt". He submitted that these did not, in any event at a summary hearing, justify diminishing the effect, or doubting the credibility, of the mother's allegations. Further, the Judge did not balance them with other evidence such as the complaints made to the Police and child protection services and C's statement as well as aspects of the father's own evidence. The conclusion reached by child protection services was, he submitted, limited in its nature and the report contained at least some corroboration of the mother's case.

67. Mr Harrison also relied on how, he submitted, the Judge had wrongly "minimised the risks posed by an alleged perpetrator of serious abuse" by saying that his conduct had been "in the context of considerable stress". The Judge's "characterisation of the mother's allegations as 'situational violence/abuse'" was wrong and was "inconsistent with (the approach) commended in *Re E*". Mr Harrison submitted that if "a person is capable of inflicting physical abuse on a young child … that is a matter which gives rise to very serious concern; it cannot be dismissed as 'situational'". Likewise, the violence against her which the mother alleged and the incident in which C was injured cannot be dismissed as 'situational'.

68. Mr Harrison also questioned the Judge's approach to the mother's decision that she would not return to the USA. The Judge spent a significant part of the judgment questioning the mother's decision and C's situation in England and said that the mother's "choice does not sit easily with her assertions about the grave risks the younger children would suffer if they had to return without her". Although the father had suggested that the mother was seeking to manipulate the court, the Judge made no finding that she was. Further, Mr Harrison submitted that the Judge was wrong to use the mother's decision to discount the risks to the children when the mother's decision could be "readily understood" including because of "C having been exposed to significant abuse"; there being no alternative care arrangements for C in

England; and the mother's "precarious position in the USA". The mother was not acting unreasonably but would be "placed in the impossible situation of having to choose between the children" because, as the Judge had found, it would be "wrong and unfair to make C return to the US (even if it was possible)". Further C had said she would be "very distressed" if she was separated from the mother, evidence which, Mr Harrison submitted, had to be "understood in the context of other evidence of the emotional harm alleged by M to have been caused by" the father. Although the Judge said that she would "take the mother at her word", the Judge's scepticism about the mother's decision and C's situation might, Mr Harrison suggested, provide some explanation for the Judge's flawed consideration of the children's position if they were returned to the USA without her.

69. Mr Harrison submitted that the Judge only "superficially" considered the situation to which the children would be exposed if ordered to return to the USA without the mother. This, he submitted, again reflected her minimisation of the seriousness of the allegations relied on by the mother and her scepticism about the mother's position. The Judge, he submitted, had failed to recognise the effect on the children of being removed from their primary carer and the importance of the integrity of the sibling unit. The sudden rupture in the children's relationship with the mother would, he submitted, be more than "very hard" for the children. This would be compounded by the likely absence of face to face contact.

70. If the father had been abusive both to the mother and the children as alleged how, he asked, could the children be protected from the risks that would be created if they were placed in his care. There were, he submitted, no protective measures which would mitigate these risks nor the risks deriving from the children's separation from the mother and C.

71. In respect of the issue of acquiescence, Mr Harrison submitted that the father's messages "clearly demonstrate his agreement to the children remaining in England on the basis that he too would return and live here". In his oral submissions, Mr Harrison took us to some of the father's messages and highlighted the following passage in the judgment as showing the flaw in the Judge's approach:

> "[52] In my judgment the contemporaneous messages show that the father's subjective intention was never that the children should remain in this country save in the context of his moving back here with a view to reconciliation and reunification …"

This showed, he submitted, that the Judge had wrongly taken the father's motivation for acquiescing, namely "with a view to reconciliation and reunification", as meaning that he had not acquiesced.

72. Mr Harrison submitted that acquiescence motivated by a wish to reconcile is still acquiescence. The father had made clear that he was agreeing to move to England and had not made this agreement conditional upon reconciliation or upon even attempting reconciliation. He was moving for the children. Mr Harrison also relied on that fact that: "Acquiescence is not a continuing state of affairs and, once given, cannot be withdrawn": Butler-Sloss LJ, as she then was, in *Re S (Abduction: Acquiescence)* [1998] 2 FLR 115, at p.122; applying what Stuart-Smith LJ had said in *In re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106, at p.123.

73. I can summarise the father's submissions more shortly because, in essence, it is submitted that the Judge's decision was right for the reasons she gave and that her approach was not flawed as submitted on behalf of the mother. In other words, that, in respect of both acquiescence and Article 13(b), the Judge reached a decision which was open to her and which is supported by her analysis in her judgment.

74. Mr Hames pointed to the conventional advantage that a trial judge has over this court including, in this case, that the Judge heard oral evidence on the issue of acquiescence. He submitted that in "a carefully considered and detailed judgment … the trial judge meticulously analyses the evidence before her".

75. The abduction in this case was, he submitted, "clandestine and deceitful". The mother had pretended that she was taking the children to a party when she had, in fact, secretly purchased flights to England. She did this, he submitted, because the mother knew "full well" that the father would have objected if he had been aware of her plans.

76. Mr Hames referred to the evidence filed by the mother in support of the relocation application and submitted that it demonstrated "clearly a long-considered and well-thought through plan for the family, including for C, to move permanently" to the USA. The mother's statement, he submitted, portrayed the father "as a loving and caring parent". Further, he submitted that the father has a "close, loving and supportive extended" family in the USA demonstrated in part by the fact that C spent "some time staying with the step-paternal aunt".

77. In his written submissions, Mr Hames said that the mother was intent on projecting a picture of a father "unable or incapable properly and safely to care for the children where he presented a risk of harm to the children on account of his volatile and at times violent behaviour". He submitted that the Judge was "entitled … to reject the mother's criticism of the father". He also submitted that the Judge was entitled to conclude that "the issues that arose in the US were the result of the particular situation in which the family found themselves" and that this was "the context" in which the argument with C took place in which her wrist was hurt and in which "the mother says he was abusive and violent to her".

78. Mr Hames also submitted that the Judge was right to be sceptical about the mother's motivation for refusing to return to the USA and that there was clearly a "self-serving element in her taking that stance in order to defeat the father's application". He relied on what Butler-Sloss LJ, as she then was, had said in *C v C (Minor: Abduction: Rights of Custody)* [1989] 1 WLR 654, at p.661 D/E, about the potential for the 1980 Convention to be undermined if a parent could establish Article 13(b) by refusing to return "for her own reasons".

79. In response to the submission that the Judge did not correctly apply the approach set out in *Re E*, Mr Hames submitted that the Judge did pose the question, in paragraphs 71 and 75 of her judgment, of whether the evidence taken at its highest established the required grave risk. He submitted that the Judge was entitled to find that, with the undertakings offered by the father, the Article 13(b) risk was not established even if the mother remained in England. She had also, he submitted, examined the situation that A and B would face on their return to the USA in 'concrete terms" in

accordance with *Re P (A Child) (Abduction: Consideration of the Evidence)* [2018] 4 WLR 16.

80. On the issue of acquiescence, Mr Hames submitted that the Judge applied the correct legal approach and reached a sound decision as to whether the father had in fact acquiesced. There was, he submitted, no basis on which this court could properly interfere with that decision.

Law

81. It hardly needs repeating but, nevertheless, I start by referring to the objective of the 1980 Convention as set out in the preamble:

> "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,"

As explained by Baroness Hale and Lord Wilson in *Re E*:

> "[14] … This objective 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. It does so by making certain rebuttable assumptions about what will best achieve this: see the Explanatory Report of Professor Pérez-Vera, at para 25."

82. As I said in my judgment in *Re B (A Child) (Abduction: Habitual Residence)* [2020] 4 WLR 149, at [63]:

> "One of the purposes of a prompt return is to remedy what might otherwise be the consequences for the child of one parent's unilateral wrongful act, namely their separation from their other parent and from their existing family life with the progressive establishment of a new life in the new state, the longer it takes to procure their return. This appears, for example, from the *Explanatory Report*, at [40], when it states that the "Convention is designed as a means for bringing about speedy solutions so as to prevent the consolidation in law of initially unlawful factual situations, brought about by the removal or retention of a child."

83. Article 12 of the 1980 Convention provides:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or

> retention, the authority concerned shall order the return of the child forthwith."

Article 13 provides:

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

84. It also hardly needs restating that, as set out in *Re E* at [52] and repeated *In re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257 at [6], the terms of Article 13(b) are "by their very nature restricted in their scope". It has a high threshold demonstrated by the use of the words "grave" and "intolerable".

85. The focus of Article 13(b) is, of course, on the child. The issue is the *risk* to the *child* in the event of his or her return. In *Re S* Lord Wilson emphasised, at [34], that "it matters not whether the mother's anxieties will be reasonable or unreasonable". In the context of that case, which was addressing the consequences on the mother's mental health of returning, the "critical question is what will happen if, with the mother, the child is returned". He then said:

> "If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned."

86. The focus on the child's position was also emphasised by Baroness Hale in *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, at [52]:

> "On this case, it is argued that the delay has been such that the return of this child to Romania would place him in an intolerable situation. "Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus the English courts have sought to

> avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so. In Hague Convention cases within the European Union, article 11.4 of the Brussels II Revised Regulation (Council Regulation (EC) No 2201/2003) expressly provides that a court cannot refuse to return a child on the basis of article 13(b) "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return". Thus it has to be shown that those arrangements will be effective to secure the protection of the child. With the best will in the world, this will not always be the case. No one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm."

87. It is well-established that both physical and emotional abuse can establish the existence of a grave risk within Article 13(b). This applies both when the abusive behaviour has been directed against the child and when it has been directed against the taking parent. As was said in *Re E*, at [34]:

> "As was said in *In re D* [2007] 1 AC 619, para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent."

88. It is also clear that the effect of the separation of a child from the taking parent can establish the required grave risk. This situation is one of those listed as potentially falling within the scope of this provision, at [36], in the *Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part VI Article 13(1)(b)* published in 2020 by the Permanent Bureau of the Hague Conference on Private International Law ("the *Guide to Good Practice*"). This was the basis on which a return order was set aside by the Court of Appeal in *Re W and another (Children)* [2019] Fam 125. In the course of my judgment, I said, at [57]:

> "Putting it simply but, in my view, starkly, if the children were to be returned to the USA without the mother, the court would be enforcing their separation from their primary carer for an

> indeterminate period of time. It would be indeterminate because the court has no information as to when or how the mother and the children would be together again. These children, aged five and three, would be leaving their lifelong main carer without anyone being able to tell them when they will see her again. In my view it is not difficult to describe that situation, in the circumstances of this case, as one which they should not be expected to tolerate. I acknowledge that the current situation has been caused by the mother's actions, and that she was herself responsible for severing the children from their father but, as referred to above, the court's focus must be on the children's situation and not the source of the risk."

89. It is also relevant to note the long-standing appreciation of the risk that the effective operation of the 1980 Convention would be undermined if the taking parent was able to establish Article 13(b) by the simple expedient of deciding not to return with the child. In England and Wales, this was referred to by Butler-Sloss LJ in *C v C*, at p.661 D/E, when she raised the concern that refusing to make a return order "because of the refusal of the mother to return for her own reasons, not for the sake of the child … would drive a coach and four through the Convention". This is also referred to in the *Guide to Good Practice*, under the heading "*Unequivocal Refusal to Return*":

> "In some situations, the taking parent unequivocally asserts that they will not go back to the State of the habitual residence, and that the child's separation from the taking parent, if returned, is inevitable. In such cases, even though the taking parent's return with the child would in most cases protect the child from the grave risk, any efforts to introduce measures of protection or arrangements to facilitate the return of the parent may prove to be ineffectual since the court cannot, in general, force the parent to go back. 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."

90. However, as was pointed out by Sir Mark Potter P in *S v B (Abduction: Human Rights)* [2005] 2 FLR 878, at [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."

91. The summary nature of the process inevitably impacts on the manner in which the court assesses the evidence. As Baroness Hale and Lord Wilson explained in *Re E*, at [32]:

> "… in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination."

This led the Supreme Court to endorse the following approach:

> "[36] There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues."

92. This does not mean, as I said in *Re C*, at [39], that it was being "suggested that no evaluative assessment of the allegations could or should be undertaken by the court". In support of this conclusion, I quoted what Black LJ (as she then was) had said in *Re K (1980 Hague Convention) (Lithuania)* [2015] EWCA Civ 720, at [53], about the *Re E* approach:

> "I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk."

I would emphasise that Black LJ was referring to discounting the *possibility* that the allegations would *give rise* to an Article 13(b) *risk*. She was not otherwise diverging from the approach set out in *Re E*. It is also plain that she was referring to the end of the spectrum, namely when the court was able *confidently* to discount the possibility that the allegations gave rise to an Article 13(b) risk. This is not to dance on pins but is a distinction of substance derived from the court not being in a position

to determine the truth of the allegations relied on as establishing the Article 13(b) risk.

93. It was for this reason that, in *Re C* at [39], I commented that "a judge has to be careful when conducting a paper evaluation" of the evidence. The court has to be careful for the reason given by the Supreme Court, at [36], namely "the inability of the court to resolve factual disputes". This creates the "tension" there identified between this inability and "the risks that the child will face if the allegations are in fact true". This led the Supreme Court to adopt the "pragmatic and sensible solution" set out above. In its concluding paragraphs in *Re E*, the Supreme Court repeated, at [52]:

> "Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be."

94. In the *Guide to Good Practice*, at [40], it is suggested that the court should first "consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk" before then determining, if they could, whether the grave risk exception is established by reference to all circumstances of the case. In analysing whether the allegations are of sufficient detail and substance, the judge will have to consider whether, to adopt what Black LJ said in *Re K*, "the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13(b) risk". In making this determination, and to explain what I meant in *Re C*, I would endorse what MacDonald J said in *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159, at [7], namely that "the assumptions made by the court with respect to the *maximum level of risk* must be reasoned and reasonable assumptions" (my emphasis). If they are not "reasoned and reasonable", I would suggest that the court can confidently discount the possibility that they give rise to an Article 13(b) risk.

95. But, I repeat, a judge must be careful when undertaking this exercise because of the limitations created by it being invariably based only on an assessment of the written material. A judge should not, for example, discount allegations of physical or emotional abuse merely because he or she has doubts as to their validity or cogency. As explained below, in my view this would lead the court to depart from the *Re E* process of reasoning while, equally, not being in the position set out in *Re K*

96. If the judge concludes that the allegations would potentially establish the existence of a grave risk within the scope of Article 13(b), then, as set out in *Re E*, at [36], the court must "ask how the child can be protected against the risk". This is a broad analysis because, for example, the situation faced by the child on returning to their home state might be different because the parents will be living apart. But, the court must carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to a grave risk within the scope of Article 13(b). And, to repeat what was said in *Re E*, at [52]: "The clearer the need for protection, the more effective the measures will have to be".

97. In my view, putting it colloquially, if the court does not follow the approach referred to above, it would create the inevitable prospect of the court's evaluation falling

between two stools. The court's "process of reasoning", to adopt the expression used by Lord Wilson in *In re S*, at [22], would not include either (a) considering the risks to the child or children if the allegations were true; nor (b) confidently discounting the possibility that the allegations gave risk to an Article 13(b) risk. The court would, rather, by adopting something of a middle course, be likely to be distracted from considering the second element of the *Re E* approach, namely "how the child can be protected against the risk" which the allegations, if true, would potentially establish.

98. The likely consequence of adopting this middle course is, in my view, that the court will be treating the allegations less seriously than they deserve, if true. Equally, there is the danger that, for the purposes of determining whether Article 13(b) is established, the court will not properly consider the nature and extent of the protective measures required to address or sufficiently ameliorate the risk(s) which the allegations potentially create. In my view, as explained below, this is what happened in the present case.

99. This does not, of course, mean there is no evaluation of the nature and degree of the risk(s) which the allegations potentially establish. This is the essence of the approach endorsed in *Re E* because the court is required to determine *whether* the allegations, if true, would establish the required grave risk.

Determination

100. I propose, first, to deal with the challenge to the Judge's determination that the father had not acquiesced in the children remaining in England.

101. I accept Mr Harrison's submission that acquiescence does not depend on the parent's motivation for acquiescing. If a parent has, in fact, acquiesced (as explained in *Re H*) then acquiescence is established. The question in the present case is whether the Judge fell into error or whether she correctly determined the factual issue of whether the father had acquiesced.

102. In support of his case, Mr Harrison can point to what the Judge said, at [52]:

> "In my judgment the contemporaneous messages show that the father's subjective intention was never that the children should remain in this country save in the context of his moving back here with a view to reconciliation and reunification."

Viewed in isolation this would suggest that the Judge had wrongly determined that the father had not acquiesced because his acquiescence was "with a view to reconciliation and reunification".

103. However, when the judgment is considered more broadly, I do not consider that the Judge reached a flawed determination. The Judge, at [15], referred to Lord Browne-Wilkinson's observation that "judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child". The Judge carefully analysed the evidence, including the parties' respective messages. The Judge was entitled to conclude that the father was, in essence, for the short period between the beginning

of May and early July 2020, exploring the prospects of a reconciliation, which would involve him moving to England, but was not agreeing with or going along with the children remaining here. This was the context of the discussions and did not mean that the father had in fact acquiesced.

104. Accordingly, I consider that the Judge approached the case in the manner identified by Lord Browne-Wilkinson in *Re H*, at p.88 D:

> "In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions."

The Judge was entitled to conclude, at [52]: "I do not regard the father's conduct as evidencing an intention to acquiesce … He was hoping for a reconciliation". I would, therefore, reject this challenge to the Judge's decision.

105. I now turn to Article 13(b). I propose, first, to consider the approach taken by the Judge.

106. As referred to above, Mr Hames submitted that the Judge did consider whether the evidence "taken at its highest proved the mother's case that the children would be at risk". However, he also submitted that the Judge was entitled to reject the mother's criticisms of the father. The latter is clearly not taking the allegations at their highest.

107. Mr Harrison submitted that the Judge did not analyse the effect of the mother's allegations, if true, but improperly discounted them by reference to factors which did not justify their being discounted. He also submitted that the Judge only superficially analysed the effect on the children of their separation from the mother and from C.

108. It is clear to me that the Judge did not undertake the approach endorsed by the Supreme Court in *Re E*. Mr Hames is right to point to the Judge asking, at [71] (and similarly at [75]), I repeat:

> "I must consider whether this evidence, if true, demonstrates that A and B would be at grave risk of physical or psychological harm in the sole care of the father, and also whether this, coupled with separation from the mother and their half sister would place them in an intolerable situation."

However, the Judge does not then answer that question because she does not determine the effect of the mother's allegations *if true*. As Mr Harrison submitted the Judge discounted the allegations about the father's abusive behaviour by reference, for example, to there being "no mention of smacking" and by reference to "the context of considerable stress". Further, the Judge did not consider how the children would be protected from the risk which would be created if the children were living with the father, if the allegations were true. The Judge's brief analysis

in paragraphs [76] to [78] does not address this issue because she is there continuing to discount the mother's allegations.

109. I also do not consider that the Judge decided that she could confidently discount the possibility that the allegations gave rise to an Article 13(b) risk, again adopting Black LJ's words. In this respect, I reject Mr Hames' submission that the Judge was entitled to reject the mother's allegations, or criticisms of the father. They were allegations of a nature and of sufficient detail and substance to warrant a careful analysis, applying the *Re E* approach.

110. Rather, in my view, the Judge fell between two stools, as described above, and embarked on a flawed exercise in her analysis of the wife's case.

111. Although, at the outset of her consideration of Article 13(b), the Judge fairly characterised the mother's allegations as being that "the father was guilty not only of serious domestic violence to her, but also of a highly abusive sustained course of conduct towards C", as well as having been physically abusive to A, I agree with Mr Harrison that the Judge did not carry this characterisation into her later analysis.

112. Instead, in my view as submitted by Mr Harrison, the Judge wrongly discounted the mother's allegations. I agree with Mr Harrison's submission that the Judge's reliance on the absence of any reference in her messages to friends of the father physically abusing anyone; and her reliance on there being no mention of smacking; and her assessment of the recording were inapposite in this case having regard to the summary nature of the process and to the other evidence on which the mother relied, including the complaints made to the Police and child protection services.

113. I also agree that, significantly in this case, the Judge wrongly discounted the mother's allegations, at [73], on the basis that they were "issues that arose in the US (which were) the result of the particular situation in which the family found themselves" and, at [76], on the basis that "the allegations made against (the father were) in the context of considerable stress".

114. With all due respect to the Judge, whilst I do not exclude context as potentially being relevant to a balanced assessment of allegations of abuse, the fact that the family circumstances in the USA might have been stressful, does not provide, as submitted by Mr Harrison, any balancing context for the alleged incident with C, nor for the allegations that the father was "abusive and violent to" the mother, nor, I would add, for the allegations in respect of A. I acknowledge, of course, that these allegations have not been established to be true but the Judge's approach inappropriately departed from that set out in *Re E* and, as a result, did not give them the weight they required but rather diminished their significance by reference to factors which, at a summary hearing, did not justify their being discounted in this way. As Mr Harrison submitted the allegations could not be explained and were not diminished by reference to the "particular situation" in the USA. This neither explained nor diminished the gravity of the father's allegedly violent behaviour towards the mother. Nor could it explain or diminish the father's other alleged abusive behaviour towards C and A.

115. The result is that the Judge nowhere analysed whether the allegations, if true, would potentially create a grave risk within the scope of Article 13(b) nor how any such

risk might be addressed. The stark consequence of the Judge's order would be that very young children would be placed in the care of a parent against whom serious allegations of abuse have been made. The Judge did not address this outcome nor how the children might be protected.

116. Having concluded that the Judge's approach was flawed, I consider that this court is in a position to determine the proper outcome of the father's application, without the need for a rehearing. The oral evidence was rightly confined to acquiescence so we have all the relevant evidence available to us to determine whether Article 13(b) has been established. In reaching my decision on this question I have, of course, taken into account all the parties' respective submissions.

117. I have no doubt that, if the mother's allegations are true, they would potentially establish a grave risk within the scope of Article 13(b) in the event of the children being returned to the USA without their mother and, as a result, being placed in the care of the father. This would arise because, as summarised by the Judge, of the father having been seriously violent towards the mother; having carried out a highly abusive sustained course of conduct towards C; and having been physically abusive to A. Those allegations, I repeat *if* true, would meet the high threshold of Article 13(b) and, in my view, the Judge's analysis did not properly recognise the effect of the children being placed in the care of the father against whom serious allegations of abuse had been made, not only in respect of the mother but also in respect of C *and* A. Having regard to the extent and nature of the mother's allegations, it would create a grave risk of physical or psychological harm or place them in an otherwise intolerable situation, by being abruptly placed in the full-time care of the father.

118. This arises, obviously, in the context of the children returning to the USA without the mother. The position might well be different if she was returning. However, although, as submitted by Mr Harrison, the Judge was plainly sceptical about whether the mother would in fact decide not to return with the children and questioned the mother's decision, she did not conclude that the mother was being manipulative or "self-serving" nor that, as alleged by the father, she would in fact return with the children. This is, therefore, not a case which falls within the category referred to by Butler-Sloss LJ in *C v C*.

119. Aware, as I am, of the potential for a taking parent to seek to undermine the effective operation of the 1980 Convention by refusing to return with the child or children, I would emphasise the following elements of this case. The mother plainly has a valid reason for remaining in England. No-one has suggested that C should return to the USA. If the mother's allegations, supported by C, are correct, this situation has arisen significantly because of what they say was the father's conduct towards C. I appreciate, of course, that it was the mother who wrongfully removed the children from the USA but it seems to be agreed between the parents that C's situation in the USA had become untenable. This is not, therefore, a case of a mother capriciously or opportunistically seeking to take advantage of her own wrongful abduction.

120. How could the children be protected from the risk arising from the mother's allegations? In my view, the answer is, again, clear. Because the children would be living with the father, no protective measures would mitigate or address the grave risk arising from that very situation. As referred to above, I do not consider that the Judge addressed this question but, in any event, none of the matters referred to by

her (at [77] and [78]) would have this effect. The "other evidence" and the other matters referred to by the Judge do not address the question of the children's situation if the allegations are true.

121. I have, so far, focused only on the mother's allegations relating to the father's behaviour. If these were not present, there would be the difficult question of whether the children's separation from their primary carer and their sibling would establish a grave risk within Article 13(b). I can see the force in Mr Harrison's submission that the Judge did not sufficiently analyse the likely effect on the children given the background in this case. In addition, as Baker LJ observed during the hearing, the effect in this case of making a return order would be similar to that in *Re W*, as quoted above.

122. It is, however, not necessary to decide this issue. All I would say is that the separation of the children from their primary carer, again I emphasise, in the circumstances of this case, would further reinforce the creation of a grave risk within Article 13(b). This separation would also, clearly, be relevant to the exercise by the court of its discretion to order the children's return.

123. Finally, there is the issue of the court's discretion under Article 13. As Baroness Hale observed, in *In re D (A Child) (abduction: Rights of Custody)* [2007] 1 AC 619, at [55]:

> "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate."

There is nothing in the circumstances of this case which could conceivably justify the court exercising its discretion other than by declining to order the children's return.

Conclusion

124. For the reasons set out above, I have concluded that this appeal must be allowed. In my view, returning the children to the USA in the absence of their mother would create a grave risk of their being exposed to physical or psychological harm or of them otherwise being placed in an intolerable situation. I appreciate, of course, the circumstances in which the mother removed the children from the USA and that the father disputes much of the mother's case. However, I am persuaded that, taking the allegations advanced by the mother as to the father's conduct, removing the children from the mother and placing them in the care of the father would create a grave risk within Article 13(b) and that the application for a return order must be dismissed.

Lord Justice Baker:

125. I agree.

Lord Justice Arnold:

126. I also agree.