Neutral Citation Number: [2022] EWCA Civ 1171

Case No: CA-2022-001274

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MR G KINGSCOTE QC sitting as a DEPUTY HIGH COURT JUDGE
FD22P00140

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 August 2022

Before:

LORD JUSTICE BEAN
LORD JUSTICE MOYLAN
and
LADY JUSTICE ANDREWS

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Re:- B (Children)
(Abduction: Consent: Oral Evidence) (Article 13(b))

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- -

Christopher Hames QC and Paul Hepher (instructed by **Russell-Cooke LLP**) for the **Appellant Mother**
James Turner QC and Edward Bennett (instructed by **Dawson Cornwell Solicitors**) for the **Respondent Father**
Henry Setright QC and Anita Guha (instructed by **Goodman Ray Solicitors**) **for the Intervener**

Hearing date : 4 August 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 19th August 2022.

Lord Justice Moylan:

1. The mother appeals from a return order made under the 1980 Child Abduction Convention ("the 1980 Convention") by Mr Kingscote QC, sitting as a Deputy High Court Judge, on 9 June 2022. The order requires three children, aged 4, nearly 3 and 19 months, to be returned to Spain.

2. The judge rejected the matters relied on by the mother in opposing the making of a summary return order, consent and Article 13(b). He found that the father had not consented to the mother removing the children from Spain on 23 August 2021 and determined that the mother had not established that there was any grave risk that the return of the children to Spain would expose them to physical or psychological harm or otherwise place them in an intolerable situation.

3. The mother's case on this appeal is, in summary: (i) that the judge was wrong not to hear oral evidence from the parties for the purposes of determining whether the father had consented to the children's removal and, accordingly, that his finding that the father had not consented cannot stand; and (ii) that the judge's approach to the determination of whether the mother had established a grave risk within the scope of Article 13(b) was flawed (a) because he had failed properly to apply the approach set out in *Re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 ("*Re E*"), and (b) because he had failed properly to analyse the children's situation on their return to Spain and the efficacy of the proposed protective measures.

4. The father's case, again in summary, is that: (a) the judge was entitled to determine the issue of consent without hearing oral evidence; and (b) that although the judge might have conflated the approach set out in *Re E*, he had sufficiently analysed the evidence and reached a conclusion which was open to him.

5. On this appeal, the mother is represented by Mr Hames QC (who did not appear below) and Mr Hepher; the father is represented by Mr Turner QC (who did not appear below) and Mr Bennett. I am very grateful to Reunite International Child Abduction Centre (who I gave permission to intervene) for their submissions on the issue of consent advanced through Mr Setright QC and Ms Guha, acting pro bono.

6. For the reasons set out below, I have concluded that the appeal must be allowed in respect of both consent and Article 13(b) and the matter remitted for rehearing before a Family Division Judge.

Background

7. The mother is a British national aged 23. She lived in Spain with her family from the age of 16. She has a child by a former relationship who is now aged 6.

8. The father is a Moroccan national aged 36. He has lived in Spain since 2009.

9. The parents met in either 2014 or 2016. Shortly afterwards, they began living together with the mother's parents in their home. The three children were born in 2018, 2019 and 2021. The parents and the children all lived with the mother's parents until the latter moved to live in England in 2019. Thereafter, the family lived, it would appear, in a number of different places in Spain.

10. The three elder children were removed from the parents and placed in foster care by the Spanish authorities in September 2020. In a report dated 4 May 2022, very helpfully provided by the Spanish authorities for these proceedings in response to a request from the English court, this was said to be due to a number of factors: "unsanitary conditions, lack of hygiene in the children, inadequate clothing for the time of year, lack of basic food for the children and even for the adults"; "inadequate security of the house"; "negligence in the health care of the children". It is recorded that the "children are not registered in the Civil Registry" and that the family had lived in eight municipalities. There is reference also to the "consumption of toxic substances by the parents, conflictive relationship and lack of collaboration in the intervention".

11. The children remained in foster care until April 2021 when they were returned to the care of the parents. This followed a "favourable report for the family reunification of the children". It was said that both parents "have been actively involved and shown interest in improving their educational styles and their socio-family situation". It was recommended that "monitoring and support by the Family Intervention Team is necessary".

12. As referred to above, on 23 August 2021, the mother travelled to England with the children. They have remained living here since then. Following a referral from a specialist social worker (or advisor) at the British Embassy in Spain, a Child in Need Social Work Assessment was carried out by the relevant Local Authority in England. This is a long document and it records, at one point, the Embassy social worker saying to the author of the report that the father was "assessed as being the protective factor when the children were released from Local Authority Care" in Spain. There is no reference to this in the documents provided directly by the Spanish authorities. The latest information from the English Local Authority at the end of May 2022 was that some safeguarding concerns had been identified and there was due to be an Initial Child Protection Conference.

Proceedings

13. The father's application under the 1980 Convention was issued on 25 February 2022. The first hearing attended by the mother, in person, did not take place until 18 March 2022. This followed the making of a location order and other orders on 10 March 2022. Among other matters, the order of 18 March provided for the father's attendance at the final hearing, stating that this was "necessary for the just resolution of these proceedings". Another hearing took place on 29 April, which the mother again attended in person. The father then filed a substantive statement dated 5 May 2022.

14. The mother was represented at the next hearing which took place before the judge on 9 May 2022. By that date, the mother had still not filed any response to the father's application. She filed her statement on 16 May 2022. In this, she set out her case that the father had agreed to her and the children moving to England. It was a short account which relied entirely on conversations between her and the father and on no documentary evidence at all. In summary, she said that, initially, they had proposed moving to England as a family but the father's application for a visa had been refused. After this, the father still agreed to the mother and the children moving because the children would be in a better position in England and because he was concerned that,

if they remained in Spain, the children would be taken into care again. It was her case that he had said this "on multiple occasions" including on the day when she and the children had left when he "could see the bags had been packed for us to leave".

15. In respect of Article 13(b), the mother relied on the father's "abuse of me and the children" and on the likely "lack of basic necessities". In very brief summary, as to the former, she said that the father had been physically abusive of her and that he had been very controlling of both her and the children, including by locking them in the home and by not allowing the children to play with their toys by putting them on the balcony. As to the latter, she said that if she and the children were returned to Spain they would not be able to meet even their basic needs because the father had insufficient financial resources to maintain them and she did not believe they would be entitled to state benefits as "I did not get any benefits when I was living in Spain". She also said that she was not a registered resident in Spain.

16. In his statement in reply dated 24 May 2022, the father disputed the mother's allegations. He said that he had never agreed to the mother and the children relocating to England permanently. He pointed to the fact that he had reported the mother's removal of the children to the police. He also did not rely on any documentary evidence in relation to consent. He denied that he had ever been abusive towards the mother or controlling of either the mother or the children. He said that he worked and would be able to make a contribution to the mother's and the children's living expenses. With that and state benefits, which he said were available, the children would not be in any financial difficulties.

17. The information provided by the Spanish authorities included that:

> "(the parents) have been looking for a way to earn an income in order to be able to secure housing that would allow them to start all the necessary procedures to regularise their documentation (a tenancy agreement was urgently needed) as well as to be able to establish their residence definitively in search of stability."

There was then reference to the family having been "granted … social emergency financial aid to help them pay their rent" and to the parents being assisted with processing documentation for residence permits and the registration of the children. It is clear that social services were still engaging with the family up to the date of the children's departure to England. They had continued "to provide (the parents) with information and guidance on access to resources, services and/or social benefits". The father collected "the last cheque of the social emergency aid that he had been granted by social services" in October 2021.

18. Again in response to a request from the English court, the Spanish Social Services provided a further short report clarifying certain matters. In this it was said that, if the children returned to the same part of Spain, they would be allocated the same social worker and the same team of professionals as previously assisted them. It then added:

> "The support which the family could access would depend on its administrative situation in Spain and its economic situation. Social emergency support from municipal Social Services is

> temporary, limited to a few months, based on the assessment of the family situation, as indicated above.
>
> If the family does not have accommodation with the basic conditions of habitability and equipment, social services could respond for the children/minors, if it is considered that they are in a situation of possible vulnerability, having to adopt child protection measures foster care in juvenile centres." (emphasis in original)

It can be seen that the entitlement to support would depend on the family's "administrative situation". It was also said that registering with "the municipal social services of the town hall … **is fundamental for access to any type of assistance** …" (emphasis in original). The second paragraph quoted above makes clear that, if the children's basic needs were not being met, they could be placed in "foster care in juvenile centres".

Judgment

19. At the outset of the hearing before the judge, an application was made on behalf the mother: (a) for the parties to give oral evidence on the issue of consent; and (b) for an adjournment for the purpose of obtaining evidence on the immigration status of the mother and the children in Spain and on her entitlement to benefits and financial support in Spain. The judge rejected both applications. He gave a short ex tempore judgment explaining his decision, which we do not have. However, he gave a summary of his reasons in his judgment at the conclusion of the hearing.

20. In respect of the issue of oral evidence, he referred to Mostyn J's decision of *ES v LS* [2021] EWHC 2758 (Fam), [2021] 4 WLR 134 and then summarised its effect as follows:

> "The proceedings are summary and oral evidence is very much the exception, rather than the rule. He observed that there was no obvious reason why Art 13(b) defences should not include oral evidence but defences of consent and acquiescence under Art 13(a) should be heard with oral evidence."

The judge then noted that "Peel J agreed with the views of Mostyn J in" *Re IK (A Child)* [2022] EWHC 396 (Fam) and said that, after the hearing, counsel had sent him MacDonald J's decision in *E v D* [2022] EWHC 1216 (Fam) in which an application to hear oral evidence in relation to consent had been refused.

21. The judge also referred to the Practice Guidance, *Case Management and Mediation of International Child Abduction Proceedings*, issued by the President of the Family Division on 13 March 2018 ("the Practice Guidance"). He concluded:

> "I did not consider that I needed oral evidence to determine the issue of consent justly."

22. In respect of the application for an adjournment for further evidence, he rejected the submission that this evidence was required to enable him to determine "in concrete

terms … the situation that the children would face on their return". He considered that the financial evidence was sufficient to enable him to make a reasoned decision. As to the issue of immigration status, the judge pointed to the fact that this had not been raised until Mr Hepher's position statement, Mr Hepher having been instructed "at the last minute" because previous counsel had contracted Covid.

23. The judge summarised the relevant legal principles applicable to consent and article 13(b). In respect of the latter he quoted from Baker LJ's judgment in *Re IG (a child) (child abduction: habitual residence: Article 13(b)* [2021] EWCA Civ 1123 dealing with the proper approach to article 13(b); from my judgment in *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] 2 FLR 194 on the need for caution when relying on undertakings and on the need to analyse the efficacy of any proposed protective measures having regard to the weight being placed on them; and from Henderson LJ's judgment, at [61], in *In re P (A Child) (Abduction: Consideration of Evidence)* [2018] 4 WLR 16 on the need for the court "to examine in concrete terms the situation that would actually face" the child/children on their return.

24. He then analysed the parties' respective cases on the issue of consent as set out in their statements. He considered comments the parents are reported to have made to Spanish social services and children's services in England. He concluded that the mother had not proved that the father had consented to the removal of the children.

25. In respect of Article 13(b), the judge summarised the mother's case as follows:

> "112. The mother's case is that there is a grave risk of the children being exposed to physical or emotional harm on their return for the following reasons:
>
> i) She has suffered domestic abuse and coercive control from the father including a threat to kill her made on 11 May 2022 and the children would be exposed to that abuse.
>
> ii) She and the children have uncertain immigration status and can only remain in Spain for 90 days out of 180.
>
> iii) She and the children would lack basic necessities and would have insufficient financial support. She says that was one of the reasons why the children were taken into care in August 2020. The children faced going back into care.
>
> iv) The children would face the prospect of being separated from their mother if she were arrested.
>
> v) The children might be abducted to Morocco."

The last of these was no longer relied on for the purposes of this appeal.

26. In the next paragraph, the judge summarised the approach he was required to take:

> "I consider all five reasons below. In doing so I bear firmly in mind that under the checklist in *Re IG* at para 47(4) where the

> allegations are disputed, I should first establish whether, if true, there would be a grave risk that the children would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk. In essence, I have to take these allegations at their highest on the evidence before me."

The judge then *separately* analysed each of the matters relied on by the mother under (i), (ii), (iii) and (iv) (as set out above) in turn. He did not consider or analyse their potential collective effect. Rather, at the end of each he said words to the effect that the mother's allegations did not reach the Article 13(b) threshold.

27. The first matter was "Physical and emotional abuse". The judge set out the mother's case:

> "The mother's case is that:
>
> i) The father was controlling throughout the relationship.
>
> ii) He was verbally abusive and would threaten her and try to hit her.
>
> iii) He would lock her in the house.
>
> iv) He was controlling with the children too and would lock them in.
>
> v) He became physically abusive when the children were taken into care and would 'hit her' and 'chuck' her around when she was pregnant with B after he had been drinking.
>
> vi) When the children were returned to them by social services, the father would be controlling and abusive and continued to hit her. He would lock the mother and the children in the house.
>
> vii) He has continued to send abusive messages, but she does not have any record of these because she got a new phone as he was so abusive.
>
> viii) The father threatened to kill the mother on 11 May 2022 during a video call, if he lost the case."

28. After a few observations about the evidence, the judge then concluded:

> "121. I have to consider in concrete terms the situation that would face the children on return. In taking the allegations at their highest I do not consider that they reach the high test of grave risk that is required for Art 13(b). In reaching that conclusion I bear in mind the following."

The matters which followed comprised a number of factors which included that the parents would not be living together, that the father had given undertakings (not to threaten the mother or subject her to any violence and not to go to her place of residence) and that there is a bespoke Domestic Violence Court in Spain. In addition, he said that the mother "has not made allegations that the father has been physically violent or abusive to the children"; that the mother had "invited the father to move close to her in England and have regular contact with the children"; that the father "was identified as the protective factor in the family and concerns were not expressed about domestic violence by Spain in the lengthy period of time that they (Spanish Social Services) worked with the family".

29. The judge then concluded: "I therefore do not find that the allegations of domestic violence reach the threshold required for" Article 13(b). It is not entirely clear whether this was because those allegations did not potentially create a grave risk within Article 13(b) or because of the efficacy of protective measures. However, I consider the latter more probable because the judge had considered matters which would come within the scope of protective measures before stating his final conclusion.

30. The judge next considered the issue of the mother's immigration/residence status. He pointed to the mother having had "no difficulties (when) living in Spain with the children after Brexit" and to Spanish Social Services having helped the family "on the issue of residence permits". He also said: "I have to assume that the Spanish judicial system is also capable of dealing with immigration issues, as is the court in England and Wales". He then concluded that the children would not be exposed to a grave risk under Article 13(b) as a result of *their* immigration status because "I consider that the judicial system will be in a position to deal with that issue in any proceedings (and) I further consider that Spanish social services have, and will continue, to assist the parents on this issue".

31. Under the heading, "Basic necessities and financial provision", the judge summarised the mother's case as being that "the family will not have sufficient to meet their basic needs. They will move to an unstable environment that may result in them going back into care". The father's case was that he was earning between €2,300 to €2,800 per month and would be able to pay the mother €600 per month. In addition, he asserted that the mother could rely on state benefits and assistance from the local authority. The mother's response was that she was not entitled to benefits. She said that "when they were living in Spain she received no financial support from the father as he was not working. The family's sole income, on her case, appears to have been assistance from her parents and from a family friend".

32. The judge decided that the mother "will be in receipt of some support from the father". He pointed to the Municipal Social Services having previously "granted them social emergency financial aid to help them pay their rent" and to the availability of "food aid". He concluded that the "mother's concerns about lacking financial necessities (do not) reach the threshold required by Article 13(b) that the children be placed in an intolerable situation". He dismissed the mother's "concern that the children would be likely to be placed back in care (because they) would not be returned to foster care (they) would be returned with their mother".

33. The judge only addressed the issue of the potential consequences for the children if they were separated from the mother in relation to the father's "denuncia", or criminal complaint about the mother's removal. He considered that from "the children's perspective a removal from the mother would, potentially, put them in a very difficult situation". He balanced that against two factors. The first was that the children had already been in foster care in Spain for seven months. The second was that, although denied by the mother who did "not understand the reference", the British Embassy social worker had said that Spanish social services considered the father to be "the protective factor in the family".

34. The judge concluded: "I am not satisfied that a removal from their mother would potentially expose the children to a grave risk under" Article 13(b). He then added: "But in any event, I consider that the risk can be sufficiently ameliorated by the father's proposal that it be a condition of the summary order to return that he provide evidence that he has withdrawn his consent to a prosecution of the mother".

35. In his response to requests for clarification of his judgment, the judge said that he had refused to hear oral evidence because he considered that he had "sufficient documentary evidence to determine summarily the issues before me fairly".

Submissions

36. I set out below a summary of the parties' respective written and oral submissions.

37. Mr Hames submitted that the judge should have heard oral evidence on the issue of consent and had been wrong to apply or follow the decisions of *ES v LS* and *Re IK* because they misstate the correct approach to that issue. It has, he submitted, long been recognised that the determination of whether a parent has consented to the removal of a child/children is one which may well require oral evidence.

38. Mr Hames summarised the position as being that the parties presented "directly contradictory evidence" of what had been said about the mother and the children coming to England "without contemporaneous texts/WhatsApps or other (written) evidence of communications between them". In those circumstances, Mr Hames submitted that it was necessary for the judge to hear oral evidence to be able properly and fairly to determine the issue of consent. It would not have affected the one day listing so would not have led to any delay.

39. In respect of Article 13(b), Mr Hames accepted that the judge had set out the right approach, namely:

> "where the allegations are disputed, I should first establish whether, if true, there would be a grave risk that the children would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk. In essence, I have to take these allegations at their highest on the evidence before me."

He submitted, however, that the judge did not undertake an analysis which was consistent with that approach and, as a result, had failed properly to evaluate the risks

to the children on a return to Spain. He submitted, adopting what I had said in *In re A (Children) (Abduction: Article 13(b))* [2021] 4 WLR 99 ("*Re A*"), that the judge had fallen "between two stools" in that he had not considered the nature of the risks if the mother's allegations were true nor had he been in a position confidently to discount the possibility that the allegations gave risk to an Article 13(b) risk. As a result, the judge had also been "distracted" from considering what effective protective measures were available if the allegations were true.

40. Mr Hames also criticised the manner in which the judge considered the matters relied on by the mother separately rather than cumulatively. He submitted that the judge was wrong to "compartmentalise each aspect of the mother's case … and dismiss each in turn". As a result, the judge had not considered their "overall effect and the totality of the overall risk". The judge had, therefore, failed properly to apply the *Re E* approach.

41. Additionally, Mr Hames pointed to matters the judge had taken into account when considering the issue of "Physical and emotional abuse" which, he submitted, were either inaccurate or were matters on which the judge should not have relied. As to the former, the judge said that the mother had not asserted that the father had been abusive to the children, when she had. As to the latter, the judge was not entitled to find that the mother had "invited the father to move close to her in England" simply on the father's assertion. He had also been wrong to rely on the father having been "identified as the protective factor" by the Spanish authorities. Mr Hames pointed out that there was no reference to this in any of the reports which have been provided directly by the Spanish authorities. The only reference to this was in the English Social Work Assessment which records a conversation with a social worker "for the British Embassy" in which this was said. The original source is unknown. He submitted that the judge should not have taken this into account when addressing the mother's case under Article 13(b) or in respect of the risk of the children being separated from her.

42. Mr Hames also submitted that the judge had failed sufficiently to consider "in concrete terms" the situation which the children would face on a return to Spain, in particular in relation to the mother's immigration status and her lack of financial resources. The judge had been wrong "to take the father at his word", that he would provide financial provision for the mother and the children, and had not been entitled to conclude on the evidence that the mother would be entitled to benefits in Spain to enable her to meet her and the children's "basic necessities". As a result, the judge did not properly consider the risk that the children would be removed from the mother, a risk which had been clearly identified by the Spanish authorities if the mother were unable financially to meet their needs, nor the consequences for the children if that were to happen. Mr Hames also pointed to the fact that this was what had occurred in 2020 even though the parents were then living together and, on his case, the father was working.

43. As to the mother's immigration/residence status, Mr Hames submitted that, again, the judge's analysis was flawed. The fact that the mother and the children had had no apparent difficulties living in Spain after Brexit did not demonstrate that they had any entitlement to reside there now. The judge was also wrong "to assume that the Spanish judicial system is also capable of dealing with immigration issues, as is the

court in England and Wales". This assumption was not based on any reasoned analysis.

44. Mr Turner submitted that the judge's judgment is very full and very careful. The judge accurately set out the law on the issues of both consent and Article 13(b) and addressed "each and every relevant issue". There was, he submitted, no error which would entitle this court to intervene.

45. He relied on the general principle that oral evidence is only rarely permitted in abduction cases and submitted that the judge had been entitled to refuse to hear oral evidence in this case because he "did not consider that I needed oral evidence to determine the issue of consent justly". This was, Mr Turner submitted, the appropriate test to apply, namely was "oral evidence necessary to do justice" in the individual case. In those circumstances, the judge's discretionary decision could not be said to have been wrong. Mr Turner additionally submitted that the judge's, unexpressed but probable, reason for his decision not to hear oral evidence had been that he had concluded that the mother's case was "so improbable" that it was not necessary for him to hear oral evidence.

46. Mr Turner did not seek to support what the judge said, based on *ES v LS* and *Re IK*, about there being "no obvious reason why Art 13(b) defences should not include oral evidence but defences of consent and acquiescence under Art 13(a) should be heard with oral evidence". He pointed out that there is a substantive difference between Article 13(b) and other issues, including the issue of consent, because the "pragmatic solution" adopted by the Supreme Court in *Re E*, so as to avoid the need for oral evidence, is not available in respect of those other issues.

47. In respect of Article 13(b), Mr Turner submitted that the judge properly and fairly analysed and considered the mother's case. The judge had accurately summarised the matters relied on by the mother and then considered them carefully. He accepted that the judge had conflated the approach set out in *Re E* but submitted that this was a "non point" as all that is required is that a judge analyses the two elements or components of that approach which he/she is entitled to undertake either separately or compendiously.

48. As to the mother's criticism that the judge looked at matters sequentially, Mr Turner did not accept that the judge "did not have an overview of the matter", but he submitted that, in any event, the judge had been entitled to look at the matters relied on by the mother individually. He made the point that "zero plus zero cannot produce something positive, provided each of the individual matters is itself properly negated".

49. Mr Turner submitted that the judge had correctly directed himself as to the need "to consider in concrete terms the situation that would face the children on return" and had done so. The judge had been entitled to rely on the protective measures which he had identified. Mr Turner also referred to the general approach that, unless the contrary is proved, courts are entitled to assume that the relevant authorities in the requesting State are "equally adept in protecting children".

50. In respect of the issue of the mother's (and the children's) immigration status, Mr Turner submitted that, because they were born in Spain, the children's immigration

status "is not in doubt". As for the mother, she would be entitled to enter Spain for 90 days and would be able to apply to the Spanish courts to relocate with the children. He submitted that no further evidence had been required on this issue.

51. As to the mother's case on "basic necessities", Mr Turner submitted this had been dealt with in detail by the judge in a carefully reasoned analysis. There was a "stop gap solution", as referred to in the report from Spanish Social Services, and there were sources of finance available to her.

52. Mr Setright submitted that, in recent years, there has been a growing "expansion" in the manner in which Hague abduction cases have been litigated which has affected the time they take to determine. He, rightly, emphasised the critical importance of expedition and for the need for the process to be "relatively simple, accessible, swift and summary".

53. Even though they had only a limited amount of time to undertake them, I am very grateful to Mr Setright and Ms Guha for the results of their researches into the approach taken in other jurisdictions to hearing oral evidence, in particular in respect of consent. They included a table setting out an overview of the approach to oral evidence taken in each of the Contracting States, derived from the "Country Profiles" contained in the section of HCCH website dealing with the 1980 Convention. This showed, what can probably be described as, a mixed approach with some States appearing to be more restrictive and some less restrictive. He also referred to a small number of decisions from other States which I deal with further below. The preponderant effect of the authorities was that oral evidence was rarely permitted generally but with courts being more inclined to hear oral evidence on the issue of consent.

54. In so far as our domestic jurisprudence is concerned, Mr Setright, who has very considerable experience in these cases, submitted that:

> "the courts have relatively often permitted oral evidence where the defences of consent or acquiescence are advanced (and occasionally, more in the past than in contemporary practice where habitual residence is disputed). Where that course is permitted, normally there is an assiduous approach to the limiting of oral evidence to the issue, and to the areas of evidence for which it is essentially needed."

Like Mr Turner, he pointed to the difference between Article 13(b) and consent. The latter *is* a fact-finding exercise while the former is not. The former is not, because to embark on such an exercise when determining a case under Article 13 (b) would encroach "on both the summary aspect of the jurisdiction, and on the welfare jurisdiction of the requesting state, and which can be a difficult exercise on balanced written evidence if the parties are not heard orally". The latter is a fact-finding exercise and one in respect of an issue which, Mr Setright submitted, goes to the "heart of the case" when consent is relied upon.

Legal Framework

Consent

55. In *ES v LS* Mostyn J said:

> "9. The court is fully accustomed to determining a risk of harm defence under article 13(b) summarily and without oral evidence. When raised, that defence is almost invariably hotly contested. Notwithstanding the existence of disputes of fact, and the presence of much controversy about the availability of safeguards, the court always determines the availability of that defence, and, where it arises, how the consequential discretion should be exercised, summarily and without oral evidence. In my judgment that process should, in principle, apply to all available defences. I do not understand why the factual and discretionary issues which arise on a settlement defence routinely warrant the confrontation of witnesses in cross-examination, whereas the factual and discretionary issues which arise on a risk of harm defence do not. It is not as if the factual and discretionary issues arising under a settlement defence have some kind of special quality which is absent from a risk of harm defence. Nor do I think that because some of the evidence about settlement, or about the existence and quality of the children's objections, comes from an FCA an entitlement to cross-examine her inevitably arises.
>
> 10. It might be said, because aspects of these defences fall within the professional remit of an FCA, that the court will place greater weight on such evidence than on evidence given by a party to the proceedings, and therefore there arises a right to confront the FCA in cross-examination. I categorically reject that argument. I repeat, these are summary, procedural, interim proceedings. I can see that procedural fairness will generally insist that in substantive proceedings concerning the welfare of children, a party should be entitled to confront in cross-examination an FCA who has given evidence adverse to that party. But no such right arises on interim procedural applications.
>
> 11. In my judgment, whenever it is suggested that oral evidence should be given in an outward return case under the 1980 Hague Convention, whether by a party or by an FCA, the court should strictly apply paragraph 3.8 of the Practice Guidance. The court will have in mind that to permit oral evidence is highly exceptional. It will need to be satisfied that oral evidence is "necessary" to resolve the proceedings justly. In my judgment the criterion of necessity should be interpreted and applied in accordance with *In re H-L (A Child) (Care Proceedings: Expert Evidence)* [2013] EWCA Civ 655, [2014] 1 WLR 1160, para 3, where Sir James Munby P held that the meaning of "necessary" in FPR r 25.4(3) (and, by extension, in section 13(6) of the Children and Families Act 2014), had the

> connotation of the imperative, of what is demanded rather than what is merely optional or reasonable or desirable.
>
> 12. In my judgment, that definition should apply to cases governed by paragraph 3.8 of the Practice Guidance. The court should allow oral evidence only where it is *demanded* to resolve the case justly. It should not allow oral evidence where it is merely reasonable or desirable to have it."

56. In *Re IK* Peel J said:

> "8. Counsel flagged up in their Opening Notes that I might be expected to receive oral evidence from no fewer than 4 witnesses; in the end I heard from 3 (M, F and F's wife), somewhat against my better judgment. In *ES v LS* [2021] EWHC 2758 (Fam) Mostyn J deplored the tendency to adduce oral evidence in almost every 1980 Hague Convention case, and outlined why ordinarily there should be no oral evidence given. I understand that the decision has attracted some controversy, but I agree with Mostyn J. Conventionally, no oral evidence is received in cases where Article 13(b) is pleaded. As Mostyn J said, there is no obvious reason why that defence generally proceeds without oral evidence, but other defences, including consent, proceed with oral evidence. Nowadays, there is usually placed before the court a plethora of emails, text messages, WhatsApps and the like which enable the judge to see real-time documentation, in chronological form. When the court is required to exercise its summary jurisdiction within the set criteria of the Hague Convention, it seems to me that usually such material (and any other written evidence supplied) will enable the court to do so. Contemporaneous documentation of this nature is likely to be the most valuable evidence for the court. I am confident that in this case, had I not received oral evidence but confined myself to the written narrative evidence, documentation, and oral submissions, I would have reached the same decision."

Neither of these authorities referred to earlier decisions addressing the issue of oral evidence in 1980 Convention cases.

57. First, it has long been established that there is no *right* to adduce oral evidence but that the court has a discretion to permit such evidence: *Re E (A Minor) (Abduction)* [1989] 1 FLR 135). Secondly, reflecting the concerns identified by Mostyn J and Peel J, it has also long been established that the threshold to the court giving permission for oral evidence is a high one. As Butler-Sloss LJ (as she then was) said in *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548, at p.553:

> "There is a real danger that if oral evidence is generally admitted in Convention cases, it would become impossible for them to be dealt with expeditiously and the purpose of the

> Convention might be frustrated … the admission of oral evidence in Convention cases should be allowed sparingly."

However, contrary to the approach proposed in both *ES v LS* and *Re IK*, it has also long been established that, in respect of the issue of consent, that threshold will more often be crossed.

58. I deal with some of the authorities below, but I would first comment that there are sound reasons for there being a distinction, in respect of oral evidence, between the issue of consent and whether Article 13(b) has been established. As counsel in this case rightly noted in their submissions, there is a clear difference between consent and Article 13(b). They are not, as suggested by Mostyn J and Peel J, equivalent. Consent is an issue of *fact* in respect of which the court has to make a finding. It is a binary issue of fact. Secondly, as Mr Setright pointed out, it is a finding which is closely connected with a central aspect of the structure of the 1980 Convention, namely whether the removal or retention has been wrongful. I appreciate, of course, that the issue of consent is addressed through Article 13(a), and not Article 3, but this does not alter the important role that consent plays in the application of the 1980 Convention. Further, as counsel pointed out, the *Re E* approach, which takes the allegations relied on to establish an Article 13(b) grave risk "at their highest", is not available in consent cases.

59. As for the authorities, I propose to refer only to three. First, *Re K (Abduction: Case Management)* [2011] 1 FLR 1268. In that case, Thorpe LJ said

> "[13] Now there are a number of cardinal case management rules that seem to me to have been disregarded on 23 September. First of all oral evidence in Hague cases is very seldom ordered. We have been told by Mr Scott-Manderson that there is an increasing tendency for applications for oral evidence to be advanced at the case management stage. There should be no departure from the well-recognised proposition that Hague applications are for peremptory orders to be decided on written evidence amplified by oral submissions.
>
> [14] There are, of course, rare cases which demand the opportunity for the judge to hear from the parties on a narrow issue that is in contention. *Classically oral evidence will be limited to those cases where the issue for the court is whether or not an agreement was reached between the parents sufficient to establish the defence of consent.* I would accept Mr Scott-Manderson's submission that there is not the same requirement for oral evidence in a case in which the defence asserted is not consent but acquiescence. Although those two defences have much in common, in the sense that they are divided by the time line of the removal, as Mr Scott-Manderson correctly submits, the concept of acquiescence is altogether more nebulous and there will seldom be one distinct conflict of evidence for the determination of which the judge would be dependent upon hearing from the parties orally.

> [15] Not only should orders for oral evidence be extremely rare but, in my judgment, they should never be made in advance of the filing of written statements on the point in issue. Here His Honour Judge Jenkins found himself obliged to reach a decision whether or not to order oral evidence without having seen how the parties put their cases in written statements.
>
> [16] Finally, if there were to be the exceptional provision for oral evidence, it should have been more strongly expressed to ensure that the parties understood that this was not an opportunity to express their cases on the generality. It was strictly limited in its ambit and should have been equally limited in its duration, so that the preparation for the trial from the point of the last case management order and the trial itself should have been disciplined by the clearest restrictions in the order of 23 September." (emphasis added)

The words I have emphasised make clear that Thorpe LJ, whose very considerable experience in this area does not need repeating, clearly recognised that the court is more likely to permit oral evidence for the purposes of fairly determining whether the left-behind parent consented to the removal/retention.

60. Secondly, in *WA (A Child) (Abduction) (Consent; Acquiescence; Grave Risk Of Harm or Intolerability)* [2015] EWHC 3410 (Fam), Pauffley J noted, at [27]:

> "[27] The written messages on social media, in emails and texts allow a straightforward analysis of parental attitudes at various stages. Although it is customary to permit oral evidence at summary return hearings where consent and acquiescence are in issue, the reality is that the extant written material permits a far more reliable assessment than the oral accounts particularly where, as here, the parties have such a strong investment in winning the arguments as to what the past comprised."

This passage, as well as referring to oral evidence as being "customary", also made the sound observation that contemporaneous written materials provide a "more reliable" foundation for determining whether the left-behind parent consented.

61. Thirdly, picking up on the last point, I would also note that in *E v D*, MacDonald J declined to hear oral evidence *because* he considered that he had sufficient documentary evidence to determine the issue of consent fairly:

> "[3] At the outset of the hearing, the father applied through Ms Kandal for the court to hear oral evidence on the issue of consent. The court has before it extensive written evidence. At a time when he was a litigant in person, the father filed and served a statement running to some three hundred pages including exhibits. That statement sets out in intricate detail the basis on which the father contends that the mother consented to the retention of V in the jurisdiction of England and Wales on or around 4 January 2022. In her statement in reply, the mother

> provides a point by point rebuttal of the father's case. Within this context, and having regard to the rarity with which the court will accede to applications to permit oral evidence in summary proceedings under the 1980 Convention, I declined to permit oral evidence, satisfied as I was that the court had sufficient documentary evidence to determine summarily the issues before it fairly."

62. As referred to above, Mr Setright very helpfully referred us to a small number of decisions from other States (most of which are available on the Hague Conference's case law search website, Incadat) including: the Ontario Court of Appeal, *Katsigiannis v. Kottick-Katsigianni* (2001) 55 O.R. (3d) 456 (C.A.), at [59]; the Supreme Court of Appeal of South Africa, *Central Authority v. H* 2008 (1) SA 49 (SCA), at [21]; the High Court of Australia, *M.W. v. Director-General, Department of Community Services* [2008] HCA 12, at [200]-[201]; and the Irish Court of Appeal in *J.V. v Q.I* [2020] IECA 302, including at [61]:

> "The normal procedure is that proceedings pursuant to the Hague Convention are heard on affidavit. This accords with the spirit and intendment of the Convention and the Revised Regulation. Order 133, rule 5 of the Rules of the Superior Courts accords with that approach. However it is clear that where there are irreconcilable differences emerging between the parties on the affidavit evidence pertaining to matters of crucial importance which are not otherwise capable of resolution without the hearing of oral evidence then if the court considers it necessary to do so and remains otherwise unable to resolve the issue the trial judge is entitled in her discretion, contrary to the normal convention, to hear oral evidence to determine a specific narrow issue such as whether or not the child in question was moved abroad by reason of and in reliance upon a true and informed consent of the left behind parent to a permanent removal of the child which consent was unequivocal and positive and continued to be operative as of the date of the removal such that the removing parent was entitled to and did actively and directly place reliance upon it for the purpose of effectuating the said removal …"

Ms Justice Maire Whelan went on to say, at [62], that "it is incumbent on the court to keep oral hearings to a minimum".

63. I should also set out what is said in the Practice Guidance about oral evidence:

> "(d) Oral Evidence
>
> 3.8. The court will rarely make a direction for oral evidence to be given. Any party seeking such direction for oral evidence will need to demonstrate to the satisfaction of the court that oral evidence is necessary to assist the court to resolve the proceedings justly. Any party seeking to rely on oral evidence

> should raise the issue at the earliest available opportunity and no later than the pre-hearing review."

The Practice Guidance is in the process of being reviewed and updated.

64. In conclusion, the observations in *ES v LS* and *Re IK* to the effect that, for the purposes of determining whether to hear oral evidence, there is no distinction between the issue of consent and Article 13(b) are not sound and they should not be followed. I would not describe the admission of oral evidence on the issue of consent as customary but, for the reasons set out above, the threshold for hearing oral evidence from the parties for the purposes of determining the issue of consent is more likely to be crossed in consent cases. Whether it is, of course, is a matter for the court's discretion which will, among other factors, take into account the nature of the available evidence including, in particular, the extent of any relevant documentary material. As summarised by Andrews LJ during the hearing, the judge must decide whether it is necessary to hear oral evidence in order to be able fairly to determine this central issue of fact in the context of what is a summary process and in the context of the available documentary/written evidence.

65. I do not propose to deal with other issues such as settlement and child's objections largely because the Practice Guidance is in the process of being reviewed and is likely to address the issue of oral evidence in more detail than currently. However, as with the issue of consent, I can see good reasons why the court might accede to an application to hear oral evidence on issues in addition to that of consent, other than Article 13(b).

66. Finally, two matters. First, as referred to by Thorpe LJ, the ambit of any oral evidence needs to be "strictly limited". I would also endorse Mr Setright's submission that the discretion to permit oral evidence does not alter the burden upon the parties fully to set out their cases on consent in their written statements. As he said, the purpose of oral evidence is not to assist the parties to cure any deficiencies in their written evidence but, when necessary, to put the court in a better position to decide the issue fairly.

67. Secondly, I do not endorse Mostyn J's substitution of the word "necessary", as it appears in the Practice Guidance, with the word "demanded". I appreciate that this derived from Sir James Munby P's observations on the meaning of "necessary" in, the then version of, FPR rule 25.1, in the context of permitting expert evidence in care proceedings. We are dealing with the word in the Practice Guidance and, while I do not suggest that there is likely to be any substantive divergence, in my view it is simpler just to apply the word used.

Article 13(b)

68. Article 13(b) provides:

> "… 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 … 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."

Given the extensive analysis of this provision in many authorities including, in particular *Re E*, I propose to deal with this briefly.

69. First, the approach as set out in *Re E*, at [36] is as follows:

> "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 was repeated by Baker LJ in *Re IG* when he said, at (47):

> "(4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish 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 establish how the child can be protected from the risk …
>
> (7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk."

70. The authorities make clear that the court is evaluating whether there is a grave risk based on the allegations relied on by the taking parent as a whole, not individually. There may, of course, be distinct strands which have to be analysed separately but the court must not overlook the need to consider the cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk(s) that might potentially be established as well as the protective measures available to address such risk(s).

71. Secondly, I agree with Mr Turner that it is not *necessary* for a judge to undertake the *Re E* approach as a two-stage process because, as set out in my judgment in *In re W and another (Children)* [2019] Fam 125, at [48]:

> "The question of whether article 13(b) has been established requires a consideration of all the relevant matters, including protective measures …"

However, as that case also demonstrated, quoting from Black LJ, as she then was, in *Re K* [2015] EWCA Civ 720 at [53], absent the court being able "confidently to discount the possibility that the allegations give rise to an article 13(b) risk", conflating the process set out in *Re E* creates the risk that the judge will fail properly to evaluate the nature and level of the risk(s) if the allegations are true and/or will fail properly to evaluate the sufficiency and efficacy of any protective measures.

72. This is what happened in *Re A* and the judge, as I described it at [97], fell "between two stools". She did not properly evaluate the risk of harm that would potentially be established if the allegations were true and, at [98], equally had not properly analysed "the nature and extent of the protective measures required to address or sufficiently ameliorate the risk(s) which the allegations potentially create" so that the child would not be exposed to a grave risk within the scope of Article 13(b). That is why, at [97], I referred to what Lord Wilson had said in *In re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257, at [22], about the *Re E* approach forming "part of the court's general *process of reasoning* in its appraisal of a defence under the article" (emphasis added). I also repeated what Lady Hale and Lord Wilson had said in *Re E*, at [52]: "The clearer the need for protection, the more effective the measures will have to be".

Determination

73. I first deal with the issue of consent.

74. In my view, the judge was wrong not to hear oral evidence on the issue of consent. It seems clear that he was, understandably, significantly influenced by the decisions of *ES v LS* and *Re IK* but these, as referred to above, do not accurately state the correct approach to the determination of this issue.

75. Looking at the issue afresh, it is clear to me that this was a case in which oral evidence was necessary for the fair and proper determination of whether the father had consented to the children's removal from Spain. The judge considered that he had "sufficient documentary evidence to determine" the issue fairly but there was, in fact, no documentary evidence which dealt directly with the issue of consent. The mother relied on alleged conversations between her and the father, which the father disputed. Neither party relied on any documentary communications between them and the only documentary evidence was what they were each said to have said to Spanish and English social workers after the event. This was, no doubt, relevant evidence but, in my view, it was clearly not sufficient evidence by itself to enable a fair and proper determination of whether the father had consented to the children's removal. The judge should have allowed short, focused, evidence on this issue.

76. I also do not accept Mr Turner's submission that, in effect, the judge would have been entitled to refuse to hear oral evidence because the mother's case seemed so improbable. As was suggested by Andrews LJ during the hearing this would mean that the judge had, effectively, decided the issue prior to, and for the purposes of, determining what evidence was required in order properly to determine that very issue. As she said, this would be putting the cart before the horse.

77. As to Article 13(b), in my view, broadly for the reasons advanced by Mr Hames, the judge's approach was flawed such that his decision cannot stand. As the matter will have to be reheard, I say the minimum required to explain my conclusion.

78. First, I agree with Mr Hames that, at least at some point, the effect of the allegations relied on by the taking parent should be considered together when determining whether there is a grave risk. There may, of course, be cases when this is not realistic because the allegations are not connected. However, I would suggest that, when a judge takes this course, he/she should make this clear. This is because, if they are considered only individually, there is a clear prospect of the court failing to consider their overall effect and the totality of the overall risk.

79. In the present case, I do not agree with Mr Turner's submission that the judge had "an overview of the matter". In my view, it is clear that the judge only looked at the allegations by category and individually and did not consider their overall effect. However, I would not have allowed the appeal on the basis of this alone. This is because I do not consider that, if the judge's analysis had been otherwise sound, I would have concluded that his decision that Article 13(b) had not been established was wrong.

80. In my view, however, by conflating the process as set out in *Re E*, the judge failed properly to evaluate the nature and level of the risk if the mother's allegations were true and also failed properly to evaluate the sufficiency and efficacy of the protective measures. This can be seen most clearly from the manner in which the judge expressed his conclusions:

(a) "I therefore do not find that the allegations of domestic violence reach the threshold for Art 13(b)":

(b) "I do not consider that the children will be exposed to a grave risk under Art 13 (b) of being placed in an intolerable situation on return as a result of their immigration status. I consider that the judicial system will be in a position to deal with that issue in any proceedings. I further consider that Spanish social services have, and will continue, to assist the parents on this issue";

(c) "I do not consider that the mother's concerns about lacking financial necessities reach the threshold required by Art 13 (b) that the children would be placed in an intolerable situation"; and "The mother expressed concern that the children would likely be placed back in care. The children would not be returned to foster care. They would be returned with their mother"; and

(d) "I am not satisfied that a removal from their mother would potentially expose the children to a grave risk under Art 13 (b)"

81. At first sight, it would appear from each of these that the judge did not consider that the mother's allegations, if true, would potentially establish the existence of an Article 13(b) risk. I have set out above (paragraph 29) that, in respect of the judge's conclusion at (a), this was probably based on his assessment as to the efficacy of protective measures. However, the same does not apply in respect of the other conclusions.

82. In my view, the judge could not confidently discount the possibility that the allegations gave rise to an Article 13(b) risk and needed to apply the *Re E* approach. He needed, therefore, both to analyse the nature of the potential risk(s) *and* then carefully consider whether and how such risk(s) could be addressed or sufficiently ameliorated so that the children would not be exposed to the risk(s). The judge did not do this, or at least did not do so sufficiently, because he conflated the process.

83. In addition, as submitted by Mr Hames, the judge's analysis was also flawed because he wrongly relied on certain matters, as summarised below, with the result that he failed sufficiently to consider "in concrete terms" the situation which the children would face on a return to Spain.

84. In respect of physical and emotional abuse, the judge was wrong to include the following as relevant factors. He wrongly stated that the mother had not alleged that the father had been abusive to the children, when she had; the judge was not entitled to conclude, simply on the father's assertion, that the mother had invited the father to move close to her in England; and the judge was wrong to place reliance on the father being a "protective factor" given the source of this information and its absence from the information supplied directly by the Spanish authorities.

85. On the issue of immigration, the mother's case was that she and the children were not entitled to live in Spain. Again, in my view, the judge relied on factors which did not properly address this case. I pass over the judge's reference, as quoted in (b) above, to *their* immigration status because I would accept that he had the mother's immigration status in mind as well. However, I do not consider that the fact that the mother had lived "without difficulty, post Brexit, in Spain" was of much assistance in determining the mother's and the children's future rights. More importantly, I do not agree with the judge that he was entitled to assume that "the (Spanish) judicial system will be in a position to deal with that issue in any proceedings". If the mother has no right to reside in Spain, it is not clear to me what proceedings these would be nor, indeed, what the mother's position would be pending the resolution of any such proceedings.

86. Immigration status was not an issue which featured significantly in intra-Europe abduction cases prior to the UK's leaving the European Union. It is, however, a factor which is now much more likely to be relevant and, I would add, to require expert evidence. The latter is demonstrated by a recent unreported decision in which the judge adjourned the final hearing in order to get expert evidence on the mother's immigration status, as it happens, in Spain. This led to some delay but the evidence enabled the issue to be definitively determined, namely that the mother had rights of residence in Spain. It also emphasises the importance of this issue being raised at the outset of the proceedings so that the need for evidence can be addressed at that stage.

87. I acknowledge that this issue was raised very late. However, there was an issue as to the mother's residence rights which was also relevant to her entitlement to state benefits, as was made clear by the information provided by the Spanish authorities for these proceedings. In cases where the taking parent is a national of the requesting State or has residence rights, I accept that the court would generally be entitled, absent evidence to the contrary, to assume that they will be able to access state benefits. However, this was not such a case.

88. I should make clear that I do not accept Mr Turner's submission that this issue was sufficiently addressed on the basis that the mother would be entitled to enter Spain for 90 days and could make a relocation application. The former appears to have been accepted but, even if it is right (and it may not be because the general entitlement applies to visitors and not to someone in the mother's position) there is no information about how long relocation proceedings might take, so the court would still have to deal with the mother's and the children's situation on a return to Spain.

89. In my view, in the circumstances of this case, the court needs to know what rights the mother and the children would have in Spain in order to address what risks might arise in the event of their returning there. Might this lead to the mother being unable to meet their basic needs? Might it lead to the separation of the mother and the children? It would seem to me that a court might well conclude that the enforced separation of the children from their primary carer in this manner would establish an Article 13(b) risk. As referred to above, without further information, I do not consider that, as submitted by Mr Turner, the latter risk would necessarily be ameliorated by the mother being able to make a relocation application to the Spanish court.

90. The same applies in respect of the financial situation that the children would face. On the mother's case, she would have insufficient financial resources to meet, even, her and the children's basic needs. Putting to one side the judge's reliance on the father as a source of financial support, the judge had no substantive evidence that the mother would be entitled to state benefits which would enable her to meet the needs of herself and the children for any significant period of time. Again, the evidence from the Spanish authorities suggested that there was, at least, considerable fragility in the mother's position which might lead to the children being taken into care. The judge's dismissal of the mother's concern about this because they would be returned with the mother, and not returned to foster care, does not, with all due respect, address the mother's concern.

91. I also do not consider that the judge dealt sufficiently with the risk that the children might be separated from the mother. He was right to describe this as "a very difficult situation". But this situation was not addressed by the two factors on which he relied, namely that the children had already been in care in Spain and secondly because the father had been said to be a "protective factor". The latter was too tenuous a piece of evidence for it to bear any significant weight. This issue needed more careful analysis.

Conclusion

92. In conclusion, therefore, for the reasons set out above, in my view the appeal must be allowed on both grounds, as summarised above, and the matter remitted for hearing before a Family Division Judge and not a deputy, with a case management hearing to be listed as soon as possible.

Lady Justice Andrews:

93. I agree.

Lord Justice Bean:

94. I also agree.