14 March 2012

PRESS SUMMARY

In the Matter of S (a Child) [2012] UKSC 10
On appeal from [2012] EWCA Civ 1385

JUSTICES: Lord Phillips (President); Lady Hale; Lord Mance; Lord Kerr; Lord Wilson

BACKGROUND TO THE APPEALS

A mother appeals against an order of the English Court of Appeal that she should immediately return her son, WS (hereafter "W"), who is aged two, to Australia. The order was made pursuant to Article 12 of the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 ('the Convention') and to section 1(2) of the Child Abduction and Custody Act 1985, which incorporates the Convention into domestic law [**1**].

The mother is British, with Australian citizenship; the father is Australian [**4**]. The parents, who were not married, lived with W in Sydney [**4**]. In 2005 the mother had moved to Australia with her British husband; her marriage failed and she was divorced in 2008 [**8**]. In October 2008 W's parents began to cohabit [**8**].

Between 1994 and 1998 the father had been a heroin addict and unfortunately, the beginning of their relationship and of the mother's pregnancy in February 2009, was a period of impending financial disaster for him, which ended in the collapse of his business with massive debts [**9**]. The father later took work as an estate agent, but contributed little to the household expenditure, which was largely met by the mother who was employed as a specialist clinical nurse [**9**]. The grave financial problems led to serious alcohol and drug relapses on the father's part between 2009 and 2011 [**10**].

The mother suffered mental health problems, including anxiety and depression relating to separation from her husband in 2007, for which she took medication until she became pregnant in 2009 [**17**]. From June 2010 the mother had had extensive psychotherapy in Australia, which continued after her return to the UK [**17**], for a chronic anxiety condition [**18**].

In January 2011 the relationship between the parents began to break down. On 19 January 2011 the mother contends that she found the father injecting himself in the car in the garage and so she called the police and told him not to enter the flat again; the father admits only to drinking that day [**11**], although subsequently in reply to emails from the mother he did not deny the drug-taking [**11**]. In light of the many text and emails that were to pass between the parents from January and June 2011, the mother's serious allegations against the father were admitted or could not be realistically be denied [**7**]. On 27 January 2011 the Australian police obtained on the mother's behalf, without notice, an Apprehended Violence Order (similar to a non-molestation order) [**12**].

On 2 February 2011 the mother removed W to England, without the father's consent or the permission of an Australian court. The removal was therefore in breach of the father's rights of custody under Australian law and so it was wrongful for the purpose of Article 3 of the Convention. The only defence raised by the mother to the father's application for an order for the summary return of W to Australia under the Convention was under Article 13(b) that "*there is a grave risk that his … return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation*" [**5**].

The evidence of the mother's psychologist was that, in the event of a return of W, with the mother, to Australia, her fear of the father's mental state and of his impulsive actions towards her together with the stress of isolation in Australia from her family would be likely to cause clinical depression, which in turn could diminish her secure attachment to W [**18**]. Further evidence from the jointly instructed psychiatrist was that the mother had suffered from Battered Women's Syndrome, a form of Post-Traumatic Stress Disorder, followed by an acute stress reaction [**25**]. The psychiatrist appeared to consider that the necessary protective measures mainly comprised treatment for the father, but his evidence could, however, have been clearer on whether the protective measures suggested by the father would, in the event of return, protect W against the risk of physical or psychological harm [**26**].

At first instance, Charles J had declined to order W's return to Australia. The Court of Appeal ordered W's immediate return. The issue in this appeal was whether that Court should have proceeded on the basis that that there were nothing more than disputed allegations to support the mother's defence. A question also arose about the correct approach to the subjective perceptions of risk held by a parent.

JUDGMENT

The Supreme Court unanimously allows the mother's appeal; Lord Wilson gives the judgment of the Court.

REASONS FOR THE JUDGMENT

In *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 the Supreme Court held that the terms of Article 13(b) of the Convention were plain, that they needed neither elaboration nor gloss; and that, by themselves, they demonstrated the restricted availability of the defence [**6**]. In that case, the Court held that where disputed 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 placed in an intolerable situation; and if so, the court must then ask how the child can be protected against the risk [**20**]. If the child cannot be protected, the court should seek to determine the truth of the disputed allegations.

Following a careful appraisal of the documentary evidence, Charles J had held that a number of serious allegations made by the mother against the father were admitted or could not sensibly be denied and that, in respect of her other allegations, she had made out a good prima facie case that she *was* the victim of significant abuse at the hands of the father [**29**]. In light of this conclusion, it was unnecessary for Charles J to continue to address the mother's subjective perceptions, as her anxieties had been based on objective reality [**29**]. The Court of Appeal referred briefly to the nature of the parents' relationship but did not refer to the many facts that provided the foundation of the mother's defence [**30-31**]. The Court of Appeal failed to appreciate that the mother's fears about the father's likely conduct rested on more than disputed allegations and to have regard to the importance of the medical evidence [**35**].

The Court of Appeal had specified the crucial question as being whether the mother's anxieties were realistically and reasonably held. In *In re E*, however, the court held that a defence under Article 13(b) could be founded upon the anxieties of a parent about a return with the child to the state of habitual residence, which were not based upon objective risk to her, but were nevertheless of such intensity as to be likely to destabilise the parenting of that child to the point at which the child's situation would become intolerable [**27**]. No doubt a court will look very critically at an assertion of intense anxieties not based upon objective risk and will also ask whether they can be dispelled [**27**]. The critical question is what will happen if the parent and child are returned [**34**]. If, upon return, the parent will suffer such anxieties that their effect on the parent's mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the parent's anxieties will be reasonable or unreasonable. The extent to which there will be good cause for those anxieties will nevertheless be relevant to the court's assessment of the parent's mental state if the child is returned [**34**].

The judgment as to the level of risk had been one for the judge at first instance, and should not have been overturned unless, whether by reference to the law or to the evidence, it had not been open to the judge to make it [**35**]. Charles J had been entitled to hold that the interim protective measures offered by the father in the event of a return to Australia did not obviate the grave risk to W and it was not open to the Court of Appeal to substitute its contrary view [**35**].

In the recent case of *X v Latvia (Application No. 27853/09)* the ECtHR (Third Section) had reiterated its apparent suggestion in *Neulinger and Shuruk v Switzerland* [2011] 1 FLR 122 that in a Hague Convention case an in-depth examination of the issues was mandated by the parties' Article 8 ECHR rights to respect for family and private life. The Supreme Court considers that neither the Convention nor, surely, the ECHR requires such an in-depth examination.

References in square brackets are to paragraphs in the judgment