

Re E (Children) sub nom (1) KE (2) TB (Appellants) v SE (Respondent) & (1) Reunite (2) Aire Centre (Interveners) (2011)

[2011] EWCA Civ 361

01/04/2011

Barristers

Henry Setright KC
Private: David Williams QC

Court

The Court of Justice of the European Union

Practice Areas

International Children Law

Summary

The decision of the European Court of Human Rights in *Neulinger v Switzerland* (41615/07) (2011) 1 FLR 122 did not have the effect of lowering the threshold for the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.13(b). The judge evaluating grave risk of harm in the context of an art.13(b) defence had to weigh the immediate, not the ultimate, best interests of the child.

Facts

The appellants, the mother (M) and the half-sister of the two children concerned, appealed against the grant of an application by the respondent father for a return order under the Hague Convention on the Civil Aspects of International Child Abduction 1980. M argued that the judge had been wrong to reject her defence under art.13(b) of the Convention and had failed to apply the decision of the European Court of Human Rights in *Neulinger v Switzerland* (41615/07) (2011) 1 FLR 122 ECHR (Grand Chamber), which held that a defendant to a return order application was entitled to a full welfare review in the determination of an art.13(b) defence.

Held

Neulinger had caused a considerable stir amongst international family law practitioners and was commonly understood to undermine the foundations of the Convention. Article 13(b) had to be interpreted and applied stringently, restrictively or exceptionally, *Van den Berg and Sarri v Netherlands* considered. There was little support for the view that *Neulinger* required trial judges to adopt a different approach in the application of the Convention defences and art.13(b) in particular. The time at which the assessment of the violation was made was important. In *Neulinger* the key issue before the Grand Chamber was not whether the return order had violated the applicant's rights but whether their rights would be violated if it were then to be executed, as there had been a significant change of circumstance in the three-year

delay. Such a situation need not recur as the court could apply its expedited procedure. The court's failure to apply the expedited procedure in Neulinger contributed to the outcome. States were under a duty to investigate the circumstances that would arise were an order for extradition or return executed. In deciding whether the risk was sufficiently serious to fall within art.13(b), an investigation into the family situation and other relevant circumstances was required. However, that investigation was limited to the deciding court satisfying itself that the return to the jurisdiction would be compatible with the Convention. It did not require the same in-depth investigation as was required when disputed living arrangements for a child were being decided by a court in the jurisdiction properly seised of such matters. The investigation under art.13(b) was undertaken in the context of an application for summary return and would be more circumscribed than the level of investigation undertaken by a court deciding substantive issues. The task of the court was limited to the immediate decision, return or no. Any proper conclusion about the child's best interest in the medium and long term was inevitably precluded. On return, full investigation of custody and other issues could then be made by the court of habitual residence best placed to undertake a full investigation. The art.13(b) threshold had not been lowered and the decisions of the ECtHR in *Maumousseau v France* (39388/05) (2010) 51 EHRR 35 ECHR, *Neulinger and Raban v Romania* (25437/08) (2011) Fam Law 121 ECHR, properly understood, did not have the effect of lowering the threshold, *Neulinger*, *Maumousseau* and *Raban* explained. The judge evaluating grave risk of harm in the context of an art.13(b) defence had to weigh the immediate, not the ultimate, best interests of the child. The function of the ECtHR was only to consider whether national courts had violated any rights guaranteed by the Convention, not to interpret the Convention (see paras 5, 42, 48, 50-59, 68, 70 of judgment).

Appeal dismissed

Permission

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