

## Re E (Children) [2011]

[2011] UKSC 27

10/06/2011

### Barristers

Baroness Scotland KC  
Henry Setright KC  
Teertha Gupta KC  
Private: David Williams QC  
Deirdre Fottrell KC

### Court

The Supreme Court

### Practice Areas

International Children Law

### Summary

The Supreme Court has given judgment in the child abduction case of Re E (Children) [2011] UKSC 27. The court considered the proper interpretation of Article 13(b) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction 1980. The appeal of the mother has been dismissed.

### Facts

This case concerns two little girls whom the court refers to as Livi and Milly. Livi is seven and Milly is four. They were born in Norway to a British mother and a Norwegian father, who married shortly after Livi's birth. They had lived all of their lives in Norway until September last year when their mother brought them to England with a view to staying here permanently. The father was not asked and did not consent to their removal from Norway. The mother has an older daughter, Tyler, who is nearly 17 and also lived with the family in Norway, but left Norway for England shortly before her mother. After the removal of Livi and Milly, the father applied to the Norwegian central authority under the Hague Convention on the Civil Aspects of Child Abduction 1980 ("the Hague Convention") for the children to be returned to Norway. Article 12 of the Hague Convention requires a requested state to return a child forthwith to her country of habitual residence if she has been wrongfully removed in breach of rights of custody. Article 13 provides three exceptions, of which this case is concerned with the second:

"... the requested state is not bound to return the child if the person, institution or other body which opposes its return establishes that - (a) ... ; 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 ...." (emphasis supplied)

The mother, with Tyler's support, has argued that this exception applies. She has made allegations

against the father which the court says, if true, amount to a classic case of serious psychological abuse. She has recounted incidents of physical violence towards other people, property and the ill-treatment of the family pets. She has also alleged that the father was domineering and controlling and that she and the children were frightened of him. There is also psychiatric evidence that the mother is suffering from a mental disorder which will deteriorate if she has to return with the children to Norway unless certain protective measures are in place. She is and always has been the children's primary carer.

She has argued that there is a grave risk that the children would be placed in an intolerable situation if returned to Norway. She has also argued that article 13(b) should be interpreted in the light of article 3.1 of the United Nations Convention on the Rights of the Child, which requires that in all actions concerning children the best interests of the child shall be a primary consideration.

The father denies the mother's allegations, although he accepts that he can get angry and that he did kill a family cat and Tyler's rabbit. He has made arrangements and given undertakings to reassure the mother pending any order in the Norwegian courts: in particular he would vacate the family home and not go within 500 metres of it; he would pay household costs and money for child support; and he would not remove the children from the mother's care.

The trial judge in England decided that it was overwhelmingly in the children's best interests for them to return to Norway for their futures to be decided there. The Court of Appeal rejected the mother's appeal. Both the Court of Appeal and the Supreme Court agreed to hear the case principally because of concerns about the impact of the decision of the Grand Chamber of the European Court of Human Rights in *Neulinger and Shuruk v Switzerland* [2011] 1 FLR 122.

## **Held**

### Decision

The Supreme Court has unanimously dismissed the mother's appeal.

### Judgment

The judgment of the court was delivered by Baroness Hale and Lord Wilson. It was said that the best interests of the child are at the forefront of the whole process under the Hague Convention. The aim is to serve the interests of children generally, by deterring wrongful abduction and restoring abducted children to their home country, but also to serve the interests of the individual child by making certain assumptions about what will be best for her [14]. These assumptions can be rebutted in a limited range of circumstances, all inspired by the best interests of that child [16].

The case law of the European Court of Human Rights indicates that the right to respect for family life in article 8 of the European Convention must be interpreted in the light of the Hague Convention and the UN Convention on the Rights of the Child. The best interests of children have two aspects: to be reunited with their parents as soon as possible so that one parent does not gain an unfair advantage over the other through the passage of time; and to be brought up in a "sound environment" in which they are not at risk of harm [52]. In *Neulinger and Shuruk v Switzerland*, the Grand Chamber held that the return of a child from Switzerland to Israel would breach article 8 of the European Convention on Human Rights. In doing so, the Grand Chamber gave the appearance of turning the swift, summary decision-making procedure which is envisaged by the Hague Convention into a fullblown examination of the child's future in the requested state, the avoidance of which was the very object of the Hague Convention [22]. However, the President of the Strasbourg court has recently acknowledged extra-judicially that "the logic of the Hague Convention is that a child who has been abducted should be returned to the jurisdiction best-placed to protect his interests and welfare, and it is only there that his situation should be reviewed in full"[25]. Hence *Neulinger* does not require a departure from the normal process, provided that the

decision is not arbitrary or mechanical.

The exceptions to the obligation to return are by their nature restricted in scope and should be applied without extra interpretation or gloss. Violence and abuse between parents may constitute a grave risk to the children. But 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 [52]. In this case, the trial judge was satisfied that medical treatment would be available for the mother and that there were legal remedies to protect the children should they be needed. It is not the task of an appellate court to disagree with the trial judge's assessment [49].

The Supreme Court urges the Hague Conference to consider whether machinery can be put in place whereby, when the courts of the requested state identify specific protective measures as necessary if the Article 13(b) exception is to be rejected, those measures can become enforceable in the requesting state [37].

## **Permission**

Family Law Week 