

# S (A Child – Hague Convention 1980 – Return To Third State) (2019)

**[2019] EWCA Civ 352**

07/03/2019

## **Barristers**

Henry Setright KC

## **Court**

Court of Appeal

## **Practice Areas**

International Children Law

Successful appeal to the Court of Appeal against an order that the child be returned to Hungary, the Court of Appeal considering that there had not been proper consideration of the efficacy of the safety measures purportedly put in place following undertakings given by the father and despite Hungary not being the state of the child's habitual residence.

The parents are Hungarian nationals who had been living together in Germany with their child, "A" before the mother moved to England with A and informed the father when he visited them there that she wished to end their relationship. The father then attempted to take his own life and was hospitalised as a result. When visited by the mother, the father attacked her causing her to drop A for which he was subsequently given a six month suspended sentence and restraining order on 17th April 2018.

The father later returned to Germany and moved back to Hungary before issuing an application under the Hague Convention 1980 for A's return to Germany ("the 1980 Convention"), however, when the application was ultimately heard he confirmed that he would prefer A to live with him in Hungary.

The mother opposed the father's application arguing that, in accordance with Article 13(b), the court was not bound to order the return of A due to there being a grave risk that his return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

On 20th December, Cobb J, delivered a judgment but gave the father additional time to consider 12 proposed undertakings deemed by the court to "reflect relevant protective measures" and to file a schedule of the undertakings he was prepared to offer. On 15th January 2019, Cobb J added a postscript to his earlier judgment and ordered that A should be "summarily returned" to Hungary, after having accepted 14 undertakings from the father, "but for which [he] would have decided that the mother had established the grave risk exception under Article 13(b) of the 1980 Convention". Having accepted the father's undertakings that were annexed to the order, it was recited that:

"the undertakings had been given and accepted by the court pursuant to Article 11 of the 1996

Convention;...were “binding and enforceable obligations in this jurisdiction”...were intended to “constitute binding and enforceable obligations in Hungary”; and... were “measures” within the 1996 Convention as well as under Regulation (EU) No 606/2013.”

As part of his judgment, Cobb J considered the mother’s submission that to order A’s return to Hungary was tantamount to ordering his return to a “third state” and accepted only that:

“...it will be an unusual case where the court will order a return to a third state, but it is in principle unobjectionable, and each case will be fact-sensitive.”

#### The Appeal

The mother sought to appeal Cobb J’s decision on the following grounds:

- a) The judge had failed to give any “adequate consideration to the implications and/or appropriateness of” such an order and was wrong to have made this order in this case; and
- b) The “robustness” of the specific protective measures relied on by the judge, namely the father’s undertakings, had not been properly analysed did not ameliorate the grave risk as established by the mother.

The day before the hearing, the mother’s representatives also filed a supplementary skeleton raising the following three new grounds:

- (a) that there is no jurisdiction under the 1980 Convention to order that a child be returned to a third state;
- (b) that the undertakings provided by the father were not within the scope of Article 11 of the Hague Child Protection Convention 1996 (“the 1996 Convention”) and,
- (c) that the 1996 Convention did not in any event apply in this case because of Article 61 of BIIa (Council Regulation (EC) No 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility).

However, these were not, ultimately, considered due to the appeal being granted on the basis of the original grounds.

#### The Decision

Lord Justice Moylan (“the Judge”), gave permission to appeal on 28th January 2019 on the basis that the appeal had a real prospect of success both in respect of the challenge to the judge’s decision to order that the child be “returned” to Hungary and of the challenge to the “robustness” of the protective measures.

The Judge went on to deliver the leading judgment in respect of the appeal itself on 7th March 2019 at [49-66] as a part of which he made three “general observations”.

The first related to the court’s approach to protective measures by way of undertakings from the father, noting that [51]:

“The Practice Guidance on Case Management and Mediation and International Child Abduction Proceedings dated 13th March 2018 refers in paragraphs 2.9(b), 2.11(e) and 3.6 to “protective measures (including orders that may be subject to a declaration of enforceability or registration under Art 11 of the

1996 Convention or, where appropriate, undertakings) the applicant is prepared...to offer". In addition, paragraph 2.11(e) also states that, where the respondent raises a defence under Article 13(b), the applicant must address the issue of "the protective measures that are available, or could be put in place, to meet the alleged identified risks". This latter provision makes clear the broad potential scope of the exercise. I also do not consider that the use of the words, "prepared...to offer", in the other provisions in the Guidance should be taken as restricting their scope to protective measures which the applicant can provide."

His Lordship's second observation concerned the ambit of the 1996 Convention, in respect of which said [53]:

"...even when the 1996 Convention applies, the jurisdictional scope of Article 11 is not unlimited. For example, there are some matters which are expressly excluded from the scope of the Convention ... The exclusion of such obligations would seem to exclude certain of the father's undertakings from the scope of Article 11 (i.e. those relating to maintenance). The recitals to the 15th January 2019 order could not bring them within the 1996 Convention simply by asserting that they were "measures" for the purposes of Article 23" of that Convention."

In his third observation, the Judge at [54] stated that he repeated what he said at [43] in the case of *Re C* (Article 13(b)) [2018] EWCA Civ 2834 regarding "the need for caution when relying on undertakings". He also cited Lady Hale (then) JSC's concerns in *re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144, at [7] about the "too ready" acceptance by the courts of common law countries of undertakings which are not enforceable in the courts of the requesting state and her reminder of the importance of the "efficacy of protective measures" given that [36], "the appropriate protective measures and their efficacy will obviously vary from case to case and from country to country".

The Judge went on to state that when considering whether protective measures designed or relied on to protect a child from an identified grave risk are sufficient to ameliorate that risk "the efficacy of the measures will need to be addressed with care. Clearly, the more weight placed by the court on the protective nature of the measures when determining the application, the greater the scrutiny required in respect of their efficacy" [56].

The Judge agreed with the assertion on behalf of the mother that Cobb J's order was, in effect, a relocation order, and "self-evidently a summary return order to the state of A's habitual residence at the date of the wrongful removal or retention, namely Germany". It was, he concluded, an order which "required the mother to move to a state with which she and A clearly had connections but in which they had not been living and to which there was no existing agreement or arrangement that they would move" [57].

He also agreed with the mother's submission that Cobb J's order was tantamount to "a welfare determination but one made without the judge having undertaken a welfare assessment" as "The judge's determination was clearly not a welfare determination, even a summary one, as can be seen from paragraph [51] of his judgment. His approach was confined to the structure of the 1980 Convention" [59].

The Judge also questioned, "...whether [his] conclusion that the undertakings are "effective" is supported by his reasoning." [60-61], noting that Cobb J did not explain his conclusion that the undertakings were "effective"...to neutralise" the grave risk" or clarify whether he deemed them effective because he had concluded that the father could be relied upon to comply with the undertakings and/or because of his apparent understanding that they would be enforceable in Hungary, despite it being apparent to the

Judge that was unlikely to be the case in respect of at least some of the recitals given.

Similarly, the Judge notes that Cobb J's reassurance based upon the understanding that the father has initiated child welfare proceedings in Hungary was ill founded upon examination of the now translated letter from a Hungarian solicitor which in fact stated that they would have "no competence with regard to the child's unlawful expulsion abroad" [63].

For these reasons, the Judge concludes that [64]: "the judge's order that A be returned to Hungary cannot stand. In summary, it was a welfare determination but without any welfare assessment having been undertaken. I also consider that the judge's reasoning as to the efficacy of the protective undertakings provided in this case was insufficient to support his conclusion that they were "effective" (for the reasons set out above)."

Having done so, as there is no other order which it would now be appropriate to make under the 1980 Convention, he went on to dismiss the father's application under that convention accordingly.

**Permission**

 **Family Law Week**