

C (Children) (Abduction Article 13 (B)) (2018)

[2018] EWCA Civ 2834

20/12/2018

Barristers

Mark Jarman KC

Court

Court of Appeal

Practice Areas

International Children Law

Successful appeal of the dismissal of a father's application under the Hague Child Abduction Convention 1980

This case concerned two children who had been wrongfully retained in England by their mother. Their father applied under the Hague Child Abduction Convention 1980 ("the Convention") for the return of the two children to South Africa. In response to the father's application, the mother relied on Article 13(b) of the Convention, namely that there was a grave risk that her return would expose the children to physical or psychological harm or otherwise place the children in an intolerable situation. This risk was based on the mother's allegations of domestic violence against the father and her contention that she would suffer psychologically if she had to return to South Africa.

The Judge at first instance heard the matter on submissions and held that the seriousness of the allegations made by the mother were such that, if true, would give rise to the grave risk stipulated in Article 13(b). Further, he held that the mother's anxieties were "real, intense and (if she were to return to South Africa with the children) potentially psychologically disabling" [24] and that this would harm the children by extension. As such, he dismissed the father's application.

The father appealed on the basis that: (i) that the evidence provided did not support the first instance Judge's conclusions, on which he based his determination that Article 13(b) was established; and (ii) that the first instance Judge failed adequately to analyse the circumstances for the children following a return to South Africa having regard, in particular, to the specific protective measures proposed by the father.

The Court allowed the appeal, finding that first instance Judge's determination that the mother had established her defence under Article 13(b) could not be maintained. In respect of her allegations of domestic violence, the Court held that the first instance Judge did not analyse the nature and degree of any risk based on the situation as it would be for the children should they be returned to South Africa, i.e. the future risk, and therefore did not address why the measures proposed by the father would not ameliorate this risk. In respect of the psychological risk to the mother, the Court held that the evidence

did not support the first instance Judge's conclusion that a return would be "potentially psychologically disabling." In light of the above, the Court of Appeal held that the order to dismiss the father's application must be set aside and would need to be reheard.

Whilst the legal framework itself was not in dispute, the Court of Appeal offered a number of observations in respect of proceedings under the Convention [34-45]. These may be summarised as follows:

- (i) proceedings under the 1980 Convention need to be determined expeditiously;
- (ii) the need for expedition and the summary nature of the process militate against the court hearing oral evidence and – typically – against findings being made;
- (iii) however, this does not mean that an evaluative assessment of the allegations cannot/should not be undertaken by the court;
- (iv) an appraisal of a defence under Article 13(b) must take into account all relevant matters, including measures available in the home state which might ameliorate or obviate the matters relied on in support of the defence;
- (v) in deciding what weight should be given to protective measures, the court has to take into account the extent to which they are likely to be effective; and
- (vi) information about the efficacy/enforceability of any protective measures should be obtained from the relevant authority and raised before the final hearing.

Permission

 Family Law Week