

BDU v BDT  
[2013] SGHC 106

**Case Number** : Originating Summons No 236 of 2012 (Registrar's Appeal Subordinate Courts No 157 of 2012)  
**Decision Date** : 15 May 2013  
**Tribunal/Court** : High Court  
**Coram** : Judith Prakash J  
**Counsel Name(s)** : Poonam Mirchandani and Ashok Chugani (Mirchandani & Partners) for the appellant; Patrick Tan and Lynette Heng Hui-Lin (Patrick Tan LLC) for the respondent.  
**Parties** : BDU — BDT

*FAMILY LAW – Child*

*INTERNATIONAL LAW – Conventions*

15 May 2013

Judgment reserved.

**Judith Prakash J:**

1 The significance of this case is that it is the first case under the International Child Abduction Act (Cap 14C, 2011 Rev Ed) (“the Act”) to go through the courts of Singapore. Thus, there is no local authority to provide guidance on the interpretation of the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (“the Convention”) which was given the force of law in Singapore by the Act. Fortunately, however, the Convention has been adopted in many countries in Europe and the Commonwealth and cases brought in those courts are available to assist the Singapore courts albeit different jurisdictions have not always taken the same approach to the interpretation of the Convention.

2 As the English House of Lords decision of *Re H (Abduction: Acquiescence)* [1998] AC 72 explained, the Convention is an international treaty under which procedures are established for the prompt return of children who have been wrongfully removed from, or retained outside, their country of habitual residence. The Convention aims to secure the dual effects of firstly, serving the child’s best interests and secondly, ensuring that rights of custody and access under the law of a contracting state are respected in another contracting state. The Convention was adopted to provide a framework for the consistent treatment of child custody disputes which had been rendered even more difficult than in the normal case because one parent had unilaterally removed the child or children from their usual place of residence to a foreign country.

3 This case involves a Singaporean mother, a German father and a child who holds both nationalities. The case was brought by the father for the return of his son and was commenced in the District Court in accordance with the Transfer Order made by the Chief Justice on 1 March 2011 specifying that any proceedings under the Act are to be heard and determined by a District Court in the first instance. The decision of the District Court was that the child, whom I shall refer to as E, was to be returned to Germany. The mother has appealed to the High Court for that decision to be reversed.

4 The Convention provides for each contracting state to designate a "Central Authority" to discharge certain duties which are imposed by the Convention upon such authorities. Among these duties is the duty for Central Authorities to co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children.

## **Background**

5 The brief facts of the case as set out below come mainly from the judgment of the learned District Judge ("the DJ").

6 The mother is a Chinese Singaporean. She and the father got to know each other over the internet in 2007. They met in person only in 2009 when the mother travelled to Germany to meet the father. The mother became pregnant during that visit and the parties then married in Denmark on 30 October 2009. Immediately thereafter, they set up home in Germany. E was born in Germany on 16 April 2010. He is now three years old.

7 The father is a registered nurse working at a hospital in the town of "M" in Germany. He lives with his parents in a three-storey apartment in a small village "S" near "M" town. His parents live on the first floor while he lives on the second and third floors. This apartment was purchased by the mother, the father, and the father's parents in mid 2011. The mother and E were living in the same apartment prior to January 2012 when the whole family visited Singapore in order to spend Chinese New Year with the mother's family.

8 The mother did not work during the marriage and she and the child were supported by the father. Initially the couple lived by themselves but subsequently they moved in with the father's parents. The mother found life difficult in Germany partly because she could not speak the language and partly because they were living in a very small town and she felt like an outsider. There were quarrels and differences between the father and mother and between the mother and her mother-in-law. The father ascribes the quarrels and unhappiness to miscommunications and cultural differences.

9 On 1 November 2010, the mother and E (but not the father) made a visit to Singapore. The visit should have lasted five weeks but she extended it to February 2011 so that she could spend the Chinese New Year with her family. On 30 January 2011, the father came to Singapore to persuade her to return home and eventually the family went back to Germany on 7 February 2011. Before coming to Singapore, the father had made an application to a court in Germany regarding E. As a result, on 15 February 2011, the German court made an interim order that the father was to have the sole right to determine E's place of abode.

10 After the mother returned to Germany with him, the father applied to restore the mother's right to decide on the place of abode of the son. On 14 July 2011, the German court ordered that the parties should jointly exercise the right of determination of E's abode.

11 On 18 January 2012, the family travelled to Singapore to celebrate Chinese New Year with the mother's relatives. They were scheduled to go back to Germany on 17 February 2012, but in the event only the father returned. The mother and child remained behind and have not left Singapore since. The mother was then pregnant again and the parties' second child, another son ("J"), was born in Singapore on 21 August 2012.

12 On 23 February 2012, the father applied to the German court and as a result on 2 March 2012, the court made an interim order that the exercise of "paternal authority" over E was to be transferred to the father alone and that the mother was to hand the son over to the father who was entitled to

bring the son from Singapore to Germany against the will of the mother. Subsequently, the father applied to the German Central Authority for a "Request for Return" under the Convention. He also applied to the Singapore Central Authority for their assistance for the voluntary return of the son.

13 The Central Authority contacted the mother on 4 April 2012 and three days later, the father and the paternal grandfather arrived in Singapore to take the child back to Germany. The mother refused to hand over the child. On 24 April 2012, the mother commenced proceedings under the Guardianship of Infants Act (Cap 122, 1984 Rev Ed) for sole custody, care and control of E. This application was stayed pursuant to s 13 of the Act when, on 31 May 2012, the father brought an application under the Act for a return order in respect of E. This is the application that has given rise to the appeal. The application concerned E alone. It did not involve the second child, J.

### **Relevant provisions of the Act**

14 By s 3 of the Act, the provisions of the Convention as set out in the Schedule of the Act have the force of law in Singapore. The Convention contains 45 Articles but only Articles 1, 3 to 5, 7 to 10, 12 to 15, 17 to 22, 24, and 26 to 32 have been incorporated as part of the law of Singapore.

15 For the purposes of this case, the relevant section of the Act is s 8 and the relevant Articles of the Convention are Arts 1, 3, 4, 12 and 13.

16 Section 8 of the Act provides by sub-ss 1 and 4 as follows:

**8.** – (1) A person who claims that, in breach of rights of custody attributed to a person, either jointly or alone, under the law of a Contracting State, a child has been wrongfully removed to or retained in Singapore within the meaning of the Convention may apply to the Court for an order that the child be returned.

...

(4) The Court may, if it determines that the child should be returned to the Contracting State, give leave for the child to be taken out of Singapore either unconditionally or subject to such conditions or undertakings as the Court may think fit.

...

17 The father's application was made under s 8(1) on the basis that E had been wrongfully detained in Singapore by the mother and that by virtue of the German court order, he was a person who had rights of custody to the child, which rights had been breached. In order to succeed in his application, it was not sufficient for the father to show that E's continued stay in Singapore was a wrongful retention. He also had to satisfy the provisions of Art 12 of the Convention. The first two paragraphs of this Article are relevant here and they provide:

### *Article 12*

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

18 The first paragraph of Art 12 was satisfied here in that the father's application to the Singapore courts was made very much less than a year after E was wrongfully detained in Singapore. The father argued that the wrongful detention commenced on 17 February 2012 but even if the father had consented to E remaining in Singapore then (as the mother alleged), it was clear, as the DJ found, that he had withdrawn his consent thereafter and the mother's refusal to return E to him on 7 April 2012 amounted to wrongful retention. Before me, the mother did not contest that finding.

19 Notwithstanding that Art 12 provides that a wrongfully retained child shall be returned forthwith if the proceedings for his return are commenced within a year of the retention, the parent who retained the child can resist an order for the return if she or he can show that the situation comes within Art 13. This reads:

### *Article 13*

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that —

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; 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.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

...

In the present case, it is Art 13(b) that is relied on as a defence.

20 Before I go into the facts of this case and the findings and orders made by the DJ, it would be helpful to consider how courts in other jurisdictions have approached the interpretation of Art 13(b).

### **The approach to Art 13(b)**

21 Assistance in interpreting Art 13(b) can be obtained from the *travaux préparatoires* which are the records of the discussions and decisions made during the negotiation and preparation of the Convention as well as from the approaches taken by courts in other jurisdictions.

22 The *Explanatory Report of the Hague Convention on the Civil Aspects of International Child Abduction*, by Elisa Pérez-Vera (Actes et Documents of the XIVth Session, Volume III, 1982 ("the Explanatory Report")) (at [16]) sheds light on the key objective of the Convention:

... since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive actions of any political or juridical consequences. The Convention, in order to bring this about, places at the head of its objective the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'. ...

23 The Hague Convention deals with choice of forum issues, *and not with the underlying merits* (with regard to custody, howsoever called municipally). This much is clear from the Explanatory Report (at [11] , [14] and [15]):

11 With regard to the definition of the Convention's subject-matter, we need only remind ourselves very briefly that the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child. ...

14 It frequently happens that the person retaining the child tries to obtain a juridical or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about. However, if he is uncertain about the way in which the decision will go, he is just as likely to opt for inaction, leaving it up to the dispossessed party to take the initiative. Now, even if the latter acts quickly, that is to say manages to avoid the consolidation through lapse of time of the situation brought about by the removal of the child, the abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his claims.

15 To conclude, it can be firmly stated that the problem with which the Convention deals — together with all the drama implicit in the fact that it is concerned with the protection of children in international relations — derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less expedient. In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favourable to him. ...

24 In other words, the Court is not concerned with facts that merely have a bearing as to whether a particular parent is deserving of custody (and access). In order for the exception to be invoked, it must be demonstrated that the child should not be sent back because of the grave risk of him being placed in *an intolerable situation* (or physical or psychological harm akin to an intolerable situation). This is an extremely high standard, and rightfully so: a lower standard will de-emphasise the divide between choice of jurisdiction and custody, and perhaps lead to a conflation of both.

25 A key paragraph in the Explanatory Report ([34]) reads:

... it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. *This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter.* In fact, the Convention as a whole rests on the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. [emphasis added]

26 Courts in various jurisdictions have recognised that if the Art 13(b) exception were to be interpreted liberally, this would undermine the *raison d'être* of the Hague Convention. A prime example is the leading decision in England, *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 ("In

re E”), a decision of the Supreme Court. Baroness Hale and Lord Wilson who delivered the judgment of the court set out the context of the Convention and its aims at [6] – [8] as follows:

6 All parties recognise that the context in which these cases arise has changed in many ways from the context in which the Hague Convention was originally drafted. There is every indication that the paradigm case which the original begetters of the Convention had in mind was a dissatisfied parent who did not have the primary care of the child snatching the child away from her primary carer ... Nowadays, however, the most common case is a primary carer whose relationship with the other parent has broken down and who leaves with the children, usually to go back to her own family. ...

7 It is also common for such abducting parents to claim that the parental relationship has broken down because of domestic abuse and ill-treatment by the other parent. That is why – she says – she had to get away and that is why – she says – she had to do so secretly. She was too afraid to do otherwise and she is too afraid to go back. Critics of the Convention have claimed that the courts are too ready to ignore these claims, too reluctant to acknowledge the harm done to children by witnessing violence between their parents, and too willing to accept that the victim, if she is a victim, will be adequately protected in the courts of the requesting country: ...

8 Yet the parties also understand that there is no easy solution to such problems. The first object of the Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their own home country, so that any dispute can be determined there. The left-behind parent should not be put to the trouble and expense of coming to the requested state in order for factual disputes to be resolved there. The abducting parent should not gain an unfair advantage by having that dispute determined in the place to which she had come. And there almost always is a factual dispute, if not about the primary care of the children, then certainly about where they should live, and in cases where domestic abuse is alleged, about whether those allegations are well-founded. Factual disputes of this nature are likely to be better able to be resolved in the country where the family had its home. Hence it is one thing to say that the factual context has changed and another thing entirely to say that the change should result in any change to the interpretation and application of the Hague Convention.

27 Having set the context, the court went on to lay down several propositions as to how applications under the Convention were to be dealt with. These are:

(a) The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child; an expansive application of Art 13(b) would defeat the object of the Hague Convention (at [30], citing *In re D* [2007] 1 AC 619 at [51]).

(b) There is no need for Art 13 to be “narrowly construed” because by its very terms, it is of restricted application. The words are plain and need no further elaboration or “gloss” (at [31], citing *DP v Commonwealth Central Authority* (2001) 206 CLR 401, an Australian case I discuss at [30] below).

(c) The burden of proof (on the ordinary balance of probabilities) lies with the “person, institution or body” opposing the child’s return. However, the summary nature of the Hague Convention process means that it will rarely be appropriate to hear oral evidence of the allegations made and as such those allegations are usually not tested in cross-examination (at [34]).

(d) The risk to the child must be “grave”. It is not enough that the risk be “real”. Although “grave” characterises the risk rather than the harm, there is in ordinary language a link between the two: a low risk of death or really serious injury might be properly qualified as “grave” while a higher level of risk might be required for other less serious forms of harm (at [33]).

(e) The words “physical or psychological harm” gain colour from the alternative “or *otherwise*” placed “in an intolerable situation” [emphasis in original] (at [34]):

‘Intolerable’ is a strong word, but when applied to a child must mean ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. **Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e g, where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.**

[emphasis added in bold and italics]

(f) Art 13(b) is prospective, and looks to the situation as it would be if the child were to be returned forthwith to his home country. This is not necessarily the same as being returned to the person, institution or other body who has asked for his return. The situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when he gets home (at [35]).

(g) Where 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 be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country (at [36]).

28 There is a noticeable tension between propositions (e) and (f) above, and how they relate to each other. On the one hand, a subjective perception of events could lead to a mental illness which in turn leads to an intolerable situation (*ie* a lowering of the bar). On the other hand, whether an intolerable situation exists depends on the protective measures which can be put in place in the requesting country (*ie* a more stringent standard).

29 This has led to some confusion in subsequent litigation. The English Court of Appeal in *In re S* [2011] EWCA Civ 1385 allowed an appeal, on the basis, *inter alia*, that the trial judge had not adequately explained why (in the absence of expert evidence) the proposed protective measures were insufficient. However, the Supreme Court in *In re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257 (“*In re S*”) overruled the Court of Appeal and restored the decision of the trial judge. The exact *ratio decidendi* is unclear. On one interpretation, the case was decided merely on the principles of appellate intervention: the trial judge was entitled to come to the finding that the child would be placed in an intolerable situation, and an appellate court was not entitled to intervene unless it had not been open to the trial judge to make such finding (at [35]). It could, however, also

be argued that the Supreme Court was downplaying the consideration of the availability of adequate protective measures in the returning country as a factor. At [34] of the Supreme Court's judgment, Lord Wilson said:

In the light of these passages we must make clear the effect of what this court said in *In re E* [2012] 1 AC 144. The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned.

30 So, whilst *In re E* tried to clarify the position in the United Kingdom, *In re S* has made the position somewhat less clear-cut. The Australian position, however, seems to be quite certain. The interpretation of Article 13(b) has been authoritatively settled by the majority judgment of the High Court in the case of *DP v Commonwealth Authority; JLM v Director-General NSW Department of Community Services* [2001] HCA 39. Several propositions were laid down:

(a) It is not self-evident what is meant by saying that Art 13(b) is to be narrowly construed; on its face Art 13(b) presents no difficulty of construction (at [41] and [44]).

(b) The burden of proof is imposed on the person who opposes return. What must be established is clearly identified: a grave risk of certain types of harm or otherwise placing the child in an "intolerable situation" (at [41]).

(c) A court cannot avoid making some prediction, based on the evidence, of what may happen if the child is returned. A court cannot avoid this by saying it is not for the courts of the country to which the child has been abducted to inquire into this (at [41]). While there is seldom any certainty, only grave risk is required — not just of harm that will actually occur, but of a risk that the return would expose the child to harm (at [42]).

(d) With regard to the requirement of grave risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence. A bare assertion may well not be sufficient (at [43]).

(e) Art 13(b) will not find frequent application (at [45]):

It is well-nigh inevitable that a child, taken from one country to another without the agreement of one parent, will suffer disruption, uncertainty and anxiety. That disruption, uncertainty and anxiety will recur, and may well be magnified, by having to return to the country of habitual residence. Regulation 16(3)(b) and Art 13(b) of the Convention intend to refer to more than this kind of result when they speak of a grave risk to the child of exposure to physical or psychological harm on return.

31 New Zealand, on the other hand, has given rise to conflicting authority. The leading case is *A v Central Authority for New Zealand* [1996] 2 NZLR 517 ("*A v Central Authority*"), a decision of the Full Bench of the Court of Appeal. In this case, the resisting mother sought to rely on allegations of sexual abuse by the father. The court held that (at 533):

**In most instances where the best interests of the child are paramount in the country of**



**habitual residence the Courts of that country will be able to deal with any possible risk to a child, thus overcoming the possible defence of the abducting parent.** That does not gainsay the fact that in some instances there will be situations where the Courts of the country to which the child has been abducted will not be so satisfied. This will not necessarily be limited to cases where there is turmoil or unrest in the country of habitual residence. There may well be cases, for example, where the laws of the home country may emphasise the best interests of the child are paramount but there are no mechanisms by which that might be achieved, or it may be established that the Courts of that country construe such provisions in a limiting way, or even that the laws of that country do not reflect the principle that the best interests of the child are paramount. ...

**However, leave was reserved to the parties to apply in respect of any matters which might arise in relation to her return. S's safe return to Denmark was adequately protected by this step.** In the first instance it is for the Central Authorities, both of New Zealand and of Denmark, in terms of art 7b and h of the convention, to take steps to ensure that this occurs, and accordingly it was not necessary for Fraser J to further address that issue at the time of judgment.

[emphasis added]

32 Thus, the issue of whether the child will be put in an intolerable situation will not even arise if the legal system of the country of habitual residence is capable of protecting (the best interests of) the child.

33 The mother in the present case placed some emphasis on a conflicting New Zealand authority, *El Sayed v Secretary for Justice* [2003] 1 NZLR 349 ("*El Sayed*"). This is a decision of the High Court which came seven years after *A v Central Authority*. In the later case, the resisting mother successfully relied on violence and threats on the father's part. The court did not analyze whether Australia, the place of habitual residence, had sufficient legal safeguards in place to ensure the protection of the children's best interests. The court held that the Art 13(b) exception required (at [61]): (a) the identification of specific harm to the child; (b) of a requisite character; (c) that harm must be demonstrated to be of a grave character; (d) by clear and compelling evidence; and (e) if harm of that kind was established, the trial Court had a wide discretion as to how the return dilemma is to be addressed.

34 In its judgment, the High Court referred to *A v Central Authority* (an authority which technically was binding on it) as holding that it is the function of the relevant Central Authority, not of the court to ensure appropriate arrangements for children ordered to be returned. It considered that decision to be uncontroversial because it was a case in which the mother had made allegations of neglect and incest by a Danish father, which a Danish court had found to be unsubstantiated, yet the mother had continued to persist in her concerns. Further, the father there was only seeking access and not custody. Thus, it was able to distinguish *A v Central Authority*. Implied in its disregard of *A v Central Authority* is the finding that there was no grave risk to the child in that case.

35 I think the principles from (a) to (d) laid down in *El Sayed* provide a useful guide to the type of analysis that a court faced with an Art 13(b) defence should undertake. As for the last principle, the High Court was emphasising that even if grave risk is established, the trial court has a discretion as to what it should do. The High Court was not dictating either an immediate rejection of the application or an automatic return. The trial court would have to exercise its discretion in the light of all the circumstances before it. In that case, it did not find it necessary to consider the legal safeguards available in Australia. I think this was because of the particular factors in that case which persuaded

it that a return of the child would not be correct.

36 Having considered the various authorities, generally, the approach is clear. Article 13(b) is to be interpreted in the way that it is written and there is no need for any additional gloss, whether to narrow it or broaden it. Secondly, it is the person who is opposing the return of the child who has to prove that an Art 13(b) situation exists. To establish this, it must be shown that there is a grave risk of the child being harmed or placed in an intolerable situation, and this is over and above the anxiety, disruption and distress that the child may experience due to the implementation of the return order. There is some disagreement over whether the question of protective measures which can be taken by the court of the returning country should be considered as part of the exercise of establishing the grave risk of harm or whether they should be considered after the court has come to the conclusion that there is such a grave risk and then has to consider what to do. It should be noted that all the jurisdictions I have mentioned require there to be clear and credible evidence (albeit with the usual civil standard of balance of probabilities still applying) that the requisite risk exists. This is because they are conscious that in order to support the usefulness of the Convention they must not allow abducting parents to easily escape its reach. I find the method of analysis described by the New Zealand High Court in *El Sayed* to be helpful. I also take guidance from *In re E* which in large part does not differ from *El Sayed*.

## **The decision below**

### ***Orders and undertakings***

37 The DJ heard the parties over several days in July and August 2012. The last hearing was on 2 August 2012 and the DJ's decision was delivered on 21 August 2012 which, coincidentally, was the date of the second child's birth. The orders made by the DJ were as follows:

- (a) The son is to be returned to Germany.
- (b) For the purposes of the return:
  - (i) The [mother] shall hand over the son to the [father] by 28 August 2012 at 6 pm at the office of the [father's] counsel.
  - (ii) The [mother] shall hand over the son's passport and other relevant travel documents to the [father] at the same time as the handing over of the son.
  - (iii) The [father] is to undertake as per his list of undertakings set out in his counsel's letter to the Family Court dated 15 August 2012 (see [41] below).
  - (iv) In addition the [father] is to undertake to:
    - (A) Fetch [*sic*] the [mother] and/or the 2<sup>nd</sup> child from [the airport].
    - (B) Pay for the [mother's] rental accommodation described in para 3(b) of his list of undertakings dated 15 August 2012 pending any German government grant for accommodation for the wife and/or the 2<sup>nd</sup> child.
    - (C) Pay to the [mother] an amount of not less than Euro 300 and not more than Euro 400 a month inclusive of energy bill if there is any shortfall between the German government grant for accommodation and the actual rental payable for accommodation.

(D) Pay to the [mother] a sum of Euro 250 a month for her maintenance pending approval of any German government grant for her maintenance.

38 By the father's solicitors' letter to the court dated 15 August 2012, the father gave various undertakings to the court. I paraphrase the more important ones as follows:

- (a) The father would pay for the mother's and the second child's airfares to Germany.
- (b) The father would provide the mother and the second child with rented accommodation within 35km or 30 minutes of the father's home and with basic furniture.
- (c) The father would help the mother in applying for monthly payments from the Government of Germany for her rental.
- (d) As the father had been granted paternal authority over E by an interim order from the German court, the father would allow the mother liberal access to E twice a week for four hours each time and with Skype access on Sundays.
- (e) At the same time the mother was to allow access to the second child and the mother and father and the two children would meet at a neutral location in a public place.
- (f) Pending the outcome of custody and maintenance proceedings in Germany, the father would give the mother interim maintenance of Euro 241 per month for the second child and the father would apply for German citizenship for the second child.
- (g) The father would not take out child abduction proceedings or pursue similar criminal or civil prosecution proceedings against the mother in Germany.

### ***Issues before the District Court***

39 In coming to her decision, the DJ considered the following issues:

- (a) Whether there was wrongful retention of E in Singapore after 17 February 2012.
- (b) Whether E's state of habitual residence changed from Germany to Singapore after 17 February 2012.
- (c) Whether there was a grave risk that the return of E to Germany would expose him to physical or psychological harm or place him in an intolerable situation.

40 In relation to the first issue, the DJ found that the father had rights of custody of E due to the interim order of the German court made on 2 March 2012 which gave him sole rights to custody and that the mother did not dispute the fact of that order. After considering the authorities and the evidence, she found that the father had not consented to or acquiesced in the retention as the mother had alleged. She therefore held that the retention of E was wrongful. On appeal, the mother did not dispute this holding.

41 In relation to the second issue, the mother submitted that after 17 February 2012, E's habitual residence had changed from Germany to Singapore. The DJ noted in her judgment (at [53]) that the term "habitual residence" is not defined in the Convention and there is no uniform international approach taken by courts in the contracting states in determining habitual residence of a child. She

identified and went through three approaches ([54] to [59]):

- (a) The combined child-centric approach and the parent's present shared intentions approach;
- (b) The child-centric approach; and
- (c) The parental intention approach.

42 The DJ favoured the combined child-centric approach and the parents' present shared intentions approach. Under this approach, there is generally equal emphasis on the parents' shared intentions as well as the child past experience but the courts place a great weight on parental intention where the child is young. She held that looking at the facts here, the parties came to Singapore only to celebrate Chinese New Year and never had any shared intention to reside in Singapore. E remained in Singapore after 17 February 2012 only because the mother remained here but he continued to have contact with his father in Germany. There was no degree of settled purpose in relation to the residence in Singapore. The fact that E had no difficulty with food, accommodation and the people around him was not sufficient to justify a change in his habitual residence from Germany to Singapore. Accordingly, Germany remained E's habitual residence. On appeal, the mother did not challenge this holding either.

43 The main focus of the appeal was in relation to the DJ's finding on the third issue. The DJ held that the mother was not entitled to invoke Art 13(b) to avoid an order for the return of E. As this is the central issue of the appeal, I will go into the evidence (both before the DJ and before me on appeal) and the DJ's approach in some detail.

#### ***Arguments and evidence relating to Art 13(b) before the District Court***

44 In the court below, the mother claimed that returning to Germany would expose her to further physical and psychological harm and E to psychological harm and place him in an intolerable position. She alleged that she was psychologically abused by the father's parents, especially her mother-in-law, and physically abused by the father. The DJ considered these allegations and the supporting evidence in detail. Whilst accepting that there had been problems between the mother and the mother-in-law, the DJ held (at [76]) that they were not grave harm under Art 13(b) and did not have an impact on E. Therefore, they were not a basis for a defence under Art 13(b).

45 Next, the DJ went on to consider the mother's allegations of domestic violence by the father. The father had denied these allegations and given his own versions of what had happened. The DJ analysed the mother's evidence and found that it showed that the mother did not regard the alleged violence to be so serious as to affect the marriage or her ability to care for the son. She had testified that she had no intention of not returning to Germany until 7 April 2012 when she allegedly begged the father to be allowed to return with the son to Germany but he refused. Although she had sought help from a women's centre in Germany and had regular counselling sessions in 2011, in six out of seven sessions, the discussion revolved around her conflicts with her mother-in-law. The mother had only mentioned once that the father had hit her and, at that stage, the counsellors had discussed the possibility of going to the police and a women's shelter. The mother had not taken either action. In Singapore, when the mother provided information to a Dr Lim Yun Chin ("Dr Lim") for the purpose of his putting up a report on the son, she had not mentioned any violence on the part of the father. Her final position with regard to returning to Germany was that she would not return under any circumstances but that if the father wanted to be part of his children's lives, he should consider moving to Singapore.

46 The DJ noted that there was no allegation of any child abuse or mistreatment with regard to E himself. The Skype/Camfrog conversations between the parties showed that the father often expressed his love for E and that he missed E. The DJ concluded that the alleged harm from domestic violence could not be so grave or intolerable to the mother as to enable her to use it as a basis for a defence under Art 13(b). In any case, the violence took place between the father and the mother and was not inflicted on the son.

47 Dr Lim, who is a consultant in psychological medicine, put up a report on E on 13 July 2012. In the report he set out the child's "Personal and Family Background" which was based on what the mother had told him. Dr Lim observed E and the mother on three occasions. He noted that E had achieved normal growth milestones for his age except that his speech was delayed. E's actions when his mother moved away from him showed that her physical presence was integral to his feeling of security and well-being. It was evident that his feelings of security were contingent on the mother being physically present. Dr Lim also stated that E was at an age where his cognitive development was rudimentary and this meant that for his mental stability he needed the physical presence of the adult and the latter's sensitivity to his needs. Dr Lim opined that the mother could not return to Germany and to do so would be to court disaster because of the absence of the support of the father and her in-laws' hostility towards her. It would not be in E's psychological and social interests to separate him from his mother who had been the primary caregiver over the past 26 months and wished to continue fulfilling that role. Disrupting the mother-child bond would destroy E emotionally. He concluded that it would be unwise to separate the mother and child at this stage of E's development and that the mother's mental state was fragile and precarious.

48 The DJ agreed with the submission of the father's counsel that she should attach little weight to Dr Lim's record as it was based solely on information provided by the mother and three sessions of observation of interaction only between the mother and the son. The DJ observed it was not surprising that E would stay close to his mother if she was the only person he knew during the sessions with Dr Lim. The photographs exhibited by the father showed that the son was also close to him. The DJ found there was no compelling evidence that E would be placed in an intolerable situation if he were to be returned to Germany or that the court and authorities in Germany would not be able to protect him. The return order was for the purpose of allowing the custody issues to be determined in E's habitual residence and would not necessarily mean that he would be separated permanently from the mother. The mother had engaged a lawyer in Germany to represent her and before the DJ her counsel had submitted that the German court was likely to award custody of E to the mother. After stating the above, the DJ concluded at [84]:

84. It is pertinent to note in *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 WLR 654 Lord Justice Butler-Sloss stated that "*If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four horses through the Convention, at least in respect of applications relating to young children*". In this case the [mother] decided that she will not return. She should not be allowed to use her own conduct as creating a bar for return. [emphasis in original]

## **The appeal**

### ***The course of the appeal***

49 The DJ made her orders on 21 August 2012. The mother filed her appeal on 31 August 2012. Unfortunately, however, the appeal took a rather long time to come on for hearing. This was partly because the mother's lawyers discharged themselves as the mother was unable to afford private

representation and the mother then had to apply to the Legal Aid Bureau for legal assistance. An emergency legal aid certificate was issued to the mother on 2 November 2012 but then some further time was taken to obtain an opinion from the solicitors on the legal position of the mother in relation to the appeal.

50 After legal aid was confirmed, on 9 January 2013, the mother applied to the High Court for leave to file a further affidavit and to append thereto a further report from Dr Lim. This application was granted and the mother filed these documents on 6 February 2013. In the meantime, on 1 February 2013, the mother had commenced divorce proceedings in the Family Court on the basis of the father's alleged unreasonable behaviour. This appeal came on for hearing on 25 March 2013, more than six months after the hearing of the application. In normal circumstances, such a period of time would not be a matter of comment but in a case like this, especially where very young children are involved, six months can mean significant change. I therefore hope that in future appeals such as this can be put on a fast track and dealt with expeditiously by all concerned.

### ***The mother's case on appeal***

51 In her submissions on appeal, the mother dropped all except one of her objections to the father's application. She concentrated on trying to establish that Art 13(b) applies to the situation. Her case is that under the present circumstances she cannot return to Germany and that to order E to return without her and his brother would expose E to grave risk of psychological harm or put him in an intolerable situation. She further contends that the undertakings (see [37] and [38] above) and/or protective measures which can be put in place to address her current situation are so manifestly inadequate and unsatisfactory that no return order ought to be made.

52 The mother says that she cannot return to Germany due to her fragile state of mind and the real risk that exists that she might either end her life or become psychologically impaired or further depressed. In this regard, the mother relies on the evidence of the violence that she was subjected to during the marriage, the father's recounting of various threats made by the mother to end her life if E is taken away from her, and her psychiatric condition as contained in Dr Lim's report of 13 July 2012 and his further report of 1 February 2013 ("Dr Lim's second report"). Her submissions are an extension of the case presented to the DJ and rely a great deal on Dr Lim's second report as evidence of the deterioration in her mental health since that hearing.

### ***Facts relied on by the mother***

53 At this juncture, I think I should go into more detail about the mother's allegations relating to her married life, and her relationship with the father and his parents. It should be remembered that these allegations have not been tested and are disputed by the father. I will then recount what Dr Lim said in his second report.

54 The following account is based on the first affidavit made by the mother. This affidavit was filed on 24 April 2012 and was filed in support of her application in the Singapore court for custody of the child and maintenance. In subsequent affidavits in these proceedings, the mother went on to develop some of her allegations and give more details of them but I think it important to know what her case was at the very beginning.

55 At the start of her affidavit, the mother said that throughout her marriage she had been abused physically, orally, emotionally and psychologically. She said that while she had previously every intention of returning to Germany with E, she could no longer return because there was a grave risk that her return would expose her to further physical and psychological harm and would expose E to

psychological harm and would place him in an intolerable situation. To paraphrase, the mother asserted:

- (a) She lived in mortal fear for the safety of herself and E.
- (b) E had witnessed his father beat up his mother on several occasions.
- (c) E was then only 24 months old and could not be separated from her. She had been his main caregiver since birth and he went into panic crying whenever she was not in sight.
- (d) She had no home to live in in Germany and living with the father was no longer an option. She had no financial means to support herself or obtain proper legal advice and had no family or friends or support structure in Germany.

56 The mother said that originally she did not want to live in Germany but gave in to the father's requests to stay there as he wanted to look after his own mother and was afraid he would not be able to find a job in Singapore. From the onset, the mother felt that she was being treated as "an oriental maid" by the father and his family. She detailed various abusive remarks the father had allegedly made. She asserted that both the father and her mother-in-law scolded her in relation to domestic matters; that the father did not give her any money; that she had to obey the mother-in-law and follow her everywhere and that the father did not respect her or her wishes or take the trouble explain to her when they had to take a loan to buy property. The mother gave various details of quarrels and abusive remarks which continued after the family returned to Germany in February 2011 after its first visit to Singapore.

57 On her return to Germany, the mother was horrified to find out that the father had obtained an order for temporary custody order of E from a local county court. The father forced her to stay with his parents and told her that if she did not, she would not be able to see her son again. On one occasion, the father took E away while the mother was in the shower and refused to tell her where the child was. She then called the police and the Frauenhaus (women's association) for assistance. The father lied to the police that he had only taken the child out to buy breakfast. Later, the mother became hysterical and screamed for help and the father then slapped her face several times, covered her mouth and pushed her onto the floor. The mother-in-law told her that they would make sure that she would never see E again and would send her to a mental institution. The father and the mother-in-law called for an ambulance and the medical team recommended that she go to a women's shelter to obtain protection from the father and his family. The mother refused to go because she wanted her son back.

58 Subsequently, the parties underwent marriage counselling and the father then agreed to cancel the court order. In October 2011, the parties had a big fight and the father abused her physically. He then raped her, she said not for the first time. The mother called the women's shelter that she had been consulting and they advised her to go to the police station. The mother did not dare do so as the father told her that if she went to the police, she would never see E again.

59 A few days later, the father agreed that the whole family could visit Singapore. By then the mother was four months pregnant with the second child. In Singapore, there was unhappiness which the mother blamed on her in-laws sending multiple emails. This led to fights between her and the father. On 6 February 2012, they had a fight which arose when the mother suggested they should move out of the parents' house and live on their own. The father then kicked her and she fell onto the floor and suffered cramps in her abdomen. The next day, the mother consulted an obstetrician because of her cramping but did not tell the doctor of the father's assault for fear that the father

would get into trouble in Singapore.

60 On 14 February 2012, they had another argument in the mother's Singapore home. The father threw a pillow at the mother and she fell onto the floor. Both parties were shouting. E woke up and started crying. Subsequently the police were called. The father lied to the police claiming that the mother had hit his head numerous times when actually the mother had been trying to defend herself. The police asked whether they wanted to pursue the incident. The father said he did not but the mother reserved her position.

61 On 17 February 2012, the father left Singapore. The mother said he agreed that she and E should stay behind. The father disputed this but as nothing turns on this dispute any longer I need not deal with it. Subsequently, the parties had a quarrel over the phone on 8 March 2012 and according to the mother, the father told her that he did not want the second child. On 4 April 2012, the mother learnt from the Central Authority that the father had been granted E's sole custody.

62 On 7 April 2012, the father and the father-in-law arrived at the mother's apartment in Singapore. They wanted to take E back to Germany with them. The father-in-law attempted to forcefully take E away from the mother and grabbed her, shook her hard several times and pushed her against the wall. E started crying and hitting his grandfather. When the mother was freed, she picked E up and ran out of the flat. She was followed by her own father and he told the father and father-in-law to leave her alone. The mother only returned to her flat several hours later. It should be noted that in one of his reply affidavits, the father asserted that on this occasion, the mother had threatened to commit suicide with the son by throwing herself out of the apartment block. The mother responded to say that she had not made any such threat and that what had happened was that she, E and her father had simply run out of the flat and remained away for several hours.

63 I move now to Dr Lim's second report. This report is divided into several parts. Part A contains the mother's personal history, her account of her pregnancy and the birth of E, her life in "S" village, their life with his parents and the family's first visits to Singapore. It also contains an account by the mother of the father's alleged extra-marital affair which allegedly started sometime in June 2011. There is also a long account of alleged attempts to separate E from the mother and various forms of abuse and violence towards the mother including regular sexual abuse in the form of excessive demands for marital relations. Dr Lim expressed the view that it was clear that the mother was routinely abused orally and emotionally and was also assaulted physically. Part A is extremely detailed and 11 pages long.

64 Part B of the report starts thus: "Having established the presence of Clinical Depression I felt it appropriate to ascertain the severity of her experience". He then arranged for a psychological test, the Beck's Depression Inventory, to be administered to the mother. The test was administered twice, first in November 2012 and then again at the end of January 2013. According to Dr Lim, in the first test the mother's total score of 45 put her in the severe range of Major Depressive Disorder and in the second test her score went up to 59. He stated that, given his observation and assessment of the mother since July 2012, he was of the opinion that she suffered from Clinical Depression of marked severity and that the thought of losing E would push her towards a situation of risk in which she could endanger her own safety and that of the younger child J. The mother had cried throughout several of the counselling sessions and at one session E had asked his mother to stop crying and had given her a cuddle. The mother's own mother was also interviewed by Dr Lim and she stated that the mother had been feeling markedly depressed and often spoke about how she would not be able to survive in Germany especially if she was to be physically separated from E. Dr Lim highlighted certain symptoms manifested by the mother including guilty feelings, punishment feelings, self-dislike, suicidal thoughts, crying, and feelings of worthlessness. He stated that with such impairment, returning to Germany



would render her vulnerable to the extent that she might not be able even to look after herself, not to mention taking care of J. Dr Lim considered that the mother should be on medication for her depression. She had however refused that option because she was breastfeeding J and medication would be contraindicated. The mother was willing to go on medication once she stopped nursing J.

65 Dr Lim opined that the mother is in a rather fragile mental state. The hurdles which she may have to face if she is forced to return to Germany would overwhelm her. It was doubtful if she would be able to cope with life there. In fact she may be so overwhelmed that the notion of ending her life (which often entered her head) may be acted upon by her. Further, there was a real risk of suicide for the mother if either child was removed from her as they are her only two reasons for continued living.

66 As for E himself, Dr Lim opined that to separate him at the age of 3 from his mother and brother would be to precipitate a major separation anxiety for the child for the short term as well as cause a major issue for the long term. He was at a critical stage of his psychological development and had developed a strong bond with his mother. In the short term, E would experience intense emotional upheaval at being separated from his mother. As he spoke only Mandarin, the inability of his German family to communicate with him would magnify his state of anxiety and distress. The long term harm would be an impairment of his capacity to relate normally to others as well as being a victim of anger, rage and depression.

#### *The mother's submissions*

67 The mother submitted that her fragile state of mind is due to the violence subjected to her during the marriage. There was a real risk of her ending her life or becoming psychologically impaired or further depressed. She noted that the father had, in his affidavits, repeatedly voiced grave concerns over the mother's mental state and her attachment to E and had set out various threats made by the mother to end her life if E was taken from her. The mother further submitted that the court should not and cannot ignore the threat to the mother's life. These were real fears expressed by the father and Dr Lim.

68 The mother relied on evidence showing her inability to cope with separation from E. The German court had given the father sole paternal authority over E and had ordered the mother to hand him over to the father. The father had taken an uncompromising stance and had insisted that when E returned to Germany he would have sole right over E, that the child would stay with him and his parents at their matrimonial residence and that the mother would stay in separate rented accommodation with J. Therefore, should the return order be made, E would be removed from the mother who had been his primary caregiver and would thenceforth live with the father and his parents. E would see the mother and J only twice a week for four hours each time.

69 The mother said she was unable to cope with the challenges, hardship and difficulties she would be faced with in Germany. She was suffering from depression and her depression came from her fear of being separated from E and the possibility of losing J as well. She feared the father's violent behaviour upon her return to Germany. Also, she would have no support network and no prospect of employment because of language difficulties. Her fears of loneliness and isolation in Germany had aggravated her depressed state. It was also submitted that the mother would have a dismal life if she returned to Germany not only because of the factors already mentioned but also because S is a small village with hardly any Asians or English-speaking people and she would be an outsider. The mother also had financial insecurities because the father had not been maintaining her and the father had a limited salary. He himself had said he had heavy financial commitments and had said that he would pay as much as he could for the mother's rental until she finds a job and obtains state help. Upon

divorce, the mother's rights in Germany would be diluted.

70 The mother was unable to afford any (meaningful) long-term legal representation in Germany. She feared that the German courts would not award E's care and control to her and that she would be taken to task as an abducting parent. I note here that this submission was made notwithstanding the father's undertaking that he would not pursue such action.

71 The mother had many criticisms of the undertakings given by the father. In relation to accommodation, he had been vague about the details – the number of rooms, the condition of the home, the neighbourhood and whether such accommodation would be within reach of amenities. He had undertaken to provide only four pieces of basic furniture. He had not addressed the issue of the mother's and J's transportation within Germany. He had undertaken to assist the mother to apply for government grants but this was a limited undertaking. His undertaking to pay maintenance for J was only from the grant he received for the child and this would be if J was registered as a German citizen. The mother did not want J to become a German citizen as she feared that he would then be removed from her care. Whilst the father had said that children and spouses are covered by "family insurance in Germany", the mother would be excluded once the marriage ended.

72 The mother also submitted that on the effects of separation of E from his mother and his little brother. E was only three and had only known his mother as his primary caregiver. He had a right to be with and to be brought up by his mother. E was clearly both physically and emotionally dependent on his mother. The undertakings given by the father and his actions thus far showed every promise of an indefinite, if not a permanent, separation of mother and child. The father's proposed access of four hours twice weekly was cruel and pointed to his inability to have E's interests at heart. E would find himself in an intolerable situation if upon his return to Germany, he was deprived for an appreciable period of the day-to-day care hitherto provided by his mother.

### ***The father's version***

73 At this stage, I should recount, briefly, the father's side of the story as it was presented to the DJ. Explaining that he did not want to delay the hearing of the appeal, the father did not respond to the mother's latest affidavit. He had, however, filed detailed responses to the allegations that the mother had made in the court below. Not surprisingly, the father's account of the marriage and the parties' behaviour was quite different from the mother's account. I am not going to go into a lot of detail since this is not the forum to investigate the facts of the marriage. I will set out only those matters which are relevant to the issue before me.

74 The father accepted that the mother had had problems adjusting to life in Germany and particularly in relation to his parents. He noted that while they were in Singapore in early 2012, he and the mother had had several discussions on solving their marital problems and the option of moving away from his parents to live on their own had been discussed. They had been unable to come to a solution. He stated that he and the mother had different expectations with respect to their roles and responsibilities as husband and wife and these differences had led to many quarrels.

75 The father denied having abused the mother and asserted that he had never abused E or the unborn child in any way. In fact it was the mother who had verbally, physically, emotionally and psychologically abused him during quarrels and had exposed E to such abuse (the father asserted that E had witnessed the mother abusing him). On many occasions he had had to defend himself from the mother's physical and verbal abuse.

76 The father admitted that there had been some physical scuffling between him and the mother.

His version was that on these occasions the mother had started it and he had had to restrain her physically from continuing to abuse him. The father denied having at any time forced the mother to have sexual intercourse with him. He said that the couple had discussed their sex life during their marriage counselling and the mother had not complained to the counsellor that the father had ever sexually assaulted her.

77 The father stated that apart from the marriage counselling, the parties had consulted a lawyer in relation to the purchase of their house. Both the counsellor and lawyer had advised her that she had legal rights in Germany as the mother of a German citizen.

78 In November 2010, the mother told the father that she wanted to stay on in Singapore to celebrate Chinese New Year in 2011. The father was upset and the parties quarrelled badly. Subsequently, he said he would travel to Singapore to bring her and E back to Germany. The mother then threatened him that if he came to Singapore she would commit suicide and take E with her. These threats were made twice in an online conversation. In January 2011, the father came to Singapore with his brother with the intention of taking the mother and E back to Germany. During this visit, there were several quarrels.

79 The father also referred to the incident in 2011 in Germany when an ambulance had been called for. His account was that the mother had become hysterical believing that he and his family were going to take E away from her. She had started hitting the father and, because she refused to stop, he had pushed her onto the floor and held her arms down to stop her from hitting him. He and the mother-in-law became fearful of the mother's hysterical and violent behaviour and that is why the ambulance was called. After the ambulance arrived, the paramedics talked to the mother and she told them that she did not want to go to a women's shelter because she did not feel that she was in any danger from the father and the mother-in-law.

80 As for the quarrels in Singapore in February 2012, the father's version was that again it was the mother who had started assaulting him and that he had responded by trying to restrain her. On one occasion E was sleeping in the bedroom and he woke up during the quarrel and witnessed the mother hitting the father. There was also a very traumatic incident in April 2012 when he and his father had come to Singapore to take E back. When they arrived at the mother's house, E had smiled at the father but the mother grabbed him and her behaviour then had been partly crying and partly aggressive. At this stage, the father told her that he was not prepared to live with her under the same roof because of all their quarrels but she was welcome to return to Germany with them and they would find a solution for her and the unborn baby. Subsequently, the mother picked up E and ran out of the flat and attempted to jump off the building with E but was prevented from doing so by her father. I must state that the mother denies having tried to commit suicide or give the impression that she had tried to do so. Her version was that she had simply run out of the house in order to get away from the father and the father-in-law.

81 Finally, it was the father's position that he had a good relationship with E. He said that he had often looked after E while E was in Germany and even when he was with E in Singapore. While the father was in Germany and E was in Singapore, he had attempted to talk to his son via Skype but the mother had often cut short the communications or prevented them entirely. He also said that E did understand German and a little English and that his parents were attached to E as well. The father denied having an extra-marital relationship.

#### *The father's submissions*

82 The father submitted that the judgment of the DJ must be upheld and that her findings on all

issues were correct. He submitted that the length of time that elapsed between the date of filing of the notice of appeal and the date of the hearing was due to delays on the part of the mother. This meant that if the court were to order that E could remain in Singapore because he had become settled in Singapore during the period of delay in the appeal proceedings, the mother would in effect benefit from her wrongdoing. This would not be a just and fair outcome for the father or, more importantly, fair and just for E.

83 In relation to the defence under Art 13(b), the father submitted that the findings of the DJ (see [45] to [48] above) were correct and had to be upheld. The DJ also made efforts to facilitate the provision of undertakings from the father and incorporated them in the order of court of 21 August 2012. In doing so, the DJ had ensured that the difficulties which the mother had raised in relation to the return to Germany would be mitigated.

84 In relation to Dr Lim's second report, the submission was that his assessment and findings were self-serving and incongruous. His assessment of the mother's medical condition was based entirely on the mother's version of events. He had not been apprised of the father's version. Had he been given this version, he may have arrived at a different conclusion as to the mother's risk of suicide if she was to return to Germany.

85 Secondly, Dr Lim's diagnosis of the mother was that she had major depressive disorder. Her symptoms as described by him showed that the mother had negative thoughts about the past, present and future. The father said that these symptoms indicated that the mother was unable to look after the children and be an effective mother. Further, the statements made by Dr Lim as to the sources of the mother's depression showed that these sources had nothing to do with the children being with her or not.

86 Thirdly, the father argued that the mother had a propensity to make threats of suicide. At an earlier stage in the proceedings, the mother had stated that her threats of suicide were "flippant", made "off-the-cuff", made in "desperation" and "exasperation" and therefore "were not serious". The father called into question the credibility of the mother's threats of suicide. If she had previously made such threats but was not serious about them, then there was no reason for her present threats to be taken seriously. Fourthly, the father contended that there was nothing in Dr Lim's report to indicate that the mother's major depressive disorder would improve if she continued to live in Singapore with the children.

87 The father insisted that he had been a very hands-on father to E and shared equal responsibility for looking after him while E was in Germany. At that time, he had been a constant figure in E's life as much as the mother had, and if she had not wrongfully retained E in Singapore, he would have continued to play a large role in looking after E. He asserted that he believed that children need both their parents and that was why he had given undertakings to allow the mother and her parents access to E. He said that the mother's fears regarding the separation of E and J were unfounded because he had undertaken to allow the children to have access to each other and to both parents as well.

88 In relation to the undertakings, the father pointed out that he was in Singapore during the proceedings before the Family Court and he had given the undertakings to meet concerns expressed during the hearing. He had also made repeated requests, through his solicitors, to ask for the mother's suggestions regarding the undertakings. The mother had not made any suggestions so the first draft of undertakings which was submitted on 31 July 2012 did not contain any input from her. On 2 August 2012, the mother had written a long complaint about the undertakings and therefore a further request for her input was made. None was forthcoming and the father had revised his undertakings and

submitted them without the benefit of the mother's suggestions. These revisions were made to address the mother's concerns as expressed in her letter of 2 August 2012. The mother had been given every opportunity to address the undertakings. She had not put forward any specific suggestions and in these circumstances, it was not correct for her to assert that there were shortcomings in the father's undertakings.

### ***Analysis***

89 As I have said above (at [36]), the analysis undertaken in *El Sayed* is a helpful way of approaching issues of the kind that I am faced with. To reiterate, in order to establish that an Art 13(b) situation exists, the mother who is resisting the return bears the onus of:

- (a) Identifying specific harm to E;
- (b) Showing that it is of the requisite character;
- (c) Demonstrating that that harm is of a grave character; and
- (d) Showing that the evidence supporting (a), (b) and (c) is clear and compelling.

90 Applying that approach to this case makes one thing plain and that is that the mother here has concentrated on trying to establish her state of mind and her situation on the basis that if she can show that there is a risk of a mental breakdown or suicide on her part, that will establish the ingredients needed to show grave risk of harm to E. She has not really identified any grave risk of harm to E that arises *simpliciter* out of his return to Germany. It is accepted that a return to Germany would not be an easy experience but as the courts have pointed out over and over again, children have to put up with a certain amount of discomfort and distress and situations that are painful to a certain degree (see [30(e)] and [48] above). In any return, there will be problems of readjustment to the environment and in some cases to the parent who was left behind.

91 Looking at E, it is clear that from birth up to February 2012, a period of some 22 months, he was generally in the company of both parents, although there was a break of a few weeks when the mother brought him back to Singapore in November 2010. The mother's evidence is that she was his primary caregiver even then but I cannot disregard the father's evidence that he also played a part in looking after E. There is also some evidence of communication with E over Skype when he and the father were parted. Of course in view of E's tender years, this communication could not have been substantial. However, it is reasonable to infer that until February 2012, E enjoyed a bond with both parents.

92 Since then, the situation has changed to some extent. E has been continually with his mother and her family and his bond with her is very strong. In the event that he is returned to Germany and if the mother does not go with him, he is likely to suffer considerable distress. As against that, however, he would be looked after by his father and paternal grandparents who he is not unfamiliar with. It is also significant in this case that unlike in *El Sayed* the father has not demonstrably been abusive of E. There are no accusations of harm directly inflicted on E by the father. Secondly, although the mother's contention is that E became distressed when the father abused her, the father's position is that such distress was caused by E witnessing the mother abusing the father and the father trying to restrain her.

93 At this juncture, I must say something about the mother's allegations of abuse by the father. The DJ found that on the evidence before her the alleged violence did not affect the marriage or the

mother's ability to care for E. From her analysis, it can be discerned that the DJ did not consider there to have been serious violence within the marriage. This was partly because of conflicting evidence and partly because the mother herself had not taken any action which indicated that violence was a big problem in her marriage. In Germany, the mother mentioned violence only once to her counsellors and when she was given the opportunity of going to a women's shelter (at the suggestion of paramedics who could have assisted her), she had not taken it but had remained with the father and his family. To me it is significant that on that occasion the outside assistance was called for by the father and mother-in-law and the mother does not deny this.

94 In Singapore, the mother's behaviour was equally equivocal. She complained that the father had hit her in the stomach in February 2012 but although she went to see the obstetrician soon thereafter, she did not complain to him about the father's abuse. Even when the police were called in during a quarrel, the mother did not take the opportunity to lodge a report against the father. Thirdly, the mother had not mentioned any violence on the part of the father to Dr Lim when she gave him information for the purposes of his first report. She only went into a great deal of detail about the alleged abuse when she saw him for the second report. These later visits took place after she had been unsuccessful in the District Court.

95 It is not possible to make a final finding of fact in a case like this when allegations are disputed and there is no cross-examination of any deponent. However, I consider that the DJ was entitled to find on the evidence before her that violence was not a serious issue in the marriage. There may have been some violence in the marriage but the circumstances in which such violence occurred have not been established and therefore it is impossible to decide whether the aggressor was the mother or the father. The mother was not consistent in her reactions to the abuse. It may be that while she was in Germany, she felt isolated and was not familiar with the system (although her own evidence shows that she was able to get some support outside the family) and therefore was reluctant to involve the police or other authorities. This inhibition did not apply in Singapore, however, and if the father had been as abusive as the mother alleged in court, she could have gone to the police or have consulted doctors (including her obstetrician) and undergone a complete medical examination so as to obtain some objective evidence to support her accusations. The DJ's finding as to the mother's attitude to the violence in her marriage is not against the weight of the evidence and cannot be overturned. Thus, the presence of violence in this marriage would not, objectively at least, provide a reason for the mother not to return to Germany.

96 The risk of harm to E that the mother has contended to exist is psychological harm that will be caused from (a) a separation from her and the trauma of adjusting to new carers, and (b) the impact on him if the mother harms herself. There is also a suggestion that he would be placed in an intolerable situation if he is separated from his mother and brother and forced to live with his father and the father's family. The mother's case is supported by Dr Lim's opinion that separation from her will harm E. However, Dr Lim's opinion was rendered only on the basis of what the mother had told him. He had no opportunity to observe E's interaction with the father. Of course, separation from his mother would cause E distress but if he has a reasonable relationship with a loving father, such distress could be somewhat ameliorated. It would also be ameliorated if the mother returns to Germany with E and has frequent contact with E. As the DJ observed, an order to return E to Germany does not *ipso facto* mean that the mother will not be able to get either custody of E or access to him from the German court. The German court has not yet adjudicated on the contested custody matter and whilst the mother now fears that she would be disadvantaged in such a contest because she kept E in Singapore, she has not produced any evidence to show that this action would definitely put her out of the running to gain custody of or substantial access to E in Germany. The DJ noted that the mother had affirmed on affidavit that she had engaged a lawyer in Germany to represent her. Further, the mother's counsel had submitted during the hearing of the application

before the DJ that the German court was likely to award custody of E to the mother. These statements in the judgment of the DJ were not contested on appeal and it is therefore clear that before the District Court, the mother did not have reason to believe that the custody dispute would not be thoroughly adjudicated in Germany with all factors taken into account, including the paramount interest of the child. She has now changed her position.

97 It appears on the facts of this case that the risk of separation of E from his mother arises mainly from the possibility that the mother will not return to Germany with him. The mother has given many reasons why she will not return. Indeed she maintains that it is not that she will not return but that she cannot return. There is no doubt that if the mother returns to Germany, the practical situation she will face will not be an easy one. Whilst she will no longer be living with the father and, to that extent, discord with him and his family will be reduced, she will have to cope with living in a fairly strange environment, without a job, with at least one young child to attend to and with a new language to learn. However, there is evidence that there are support facilities supplied by the German state that may be available to the mother as the mother of a German citizen, and whilst the mother is uncertain as to the extent to which she can obtain the benefit of these facilities, she has access to legal advice and has also had the experience of having the support of organisations in Germany which help families or women in distress. Further, the undertakings given by the father were intended to alleviate her difficulties. The mother finds them inadequate but has not made any suggestions as to what undertakings would satisfy her. The mother seems to be adamant in her refusal to return. The issue is to what extent that position taken by her should influence the court's decision.

98 In *El Sayed* which was an appeal against an order for return, the appeal court accepted that there was a very real possibility that the mother in that case would not return to Australia if the children (aged two and five) were ordered to be returned. The court was in no doubt on the evidence that the father was a violent, vindictive and abusive man who had inflicted severe physical abuse on the mother. The court nevertheless observed that the mother was not entitled to "create" a situation (ie by refusing to return with the child) in which the court would be faced with the very difficult situation of its order resulting in the separation of a mother and a very young child. It accepted that there would be huge trauma inflicted on a two-year-old who was removed to another jurisdiction and did not see her mother for a significant period of time. It was also concerned with the impact of returning the child to a father whom she did not know, who had been abusive to her when *in utero* and who did not necessarily commit himself to having custody of her. As regards the older child, it noted that the trial judge had found some support for the proposition that he had both been physically abused and emotionally traumatised and that the father was prepared to use him as a weapon of revenge against the mother. In the result, the trial judge had found that there was a grave risk of harm to both children if they were returned to the situation from which the mother had removed them. The ultimate conclusion of the appeal court was that once it was accepted that there was a grave risk of a requisite character – which it considered to be the case with both children in *El Sayed* – then the court had a discretion to decide whether to return the children or not and, in this case, the exercise of the discretion strongly favoured refusing the order for return. It would be observed that the appeal court in exercising its discretion in that manner, took into account not only the likelihood that the mother would not return but also the following factors relating to the father:

- (a) His equivocal stand as to precisely what it was he sought;
- (b) The father's own life circumstances were, in physical terms, fluid and the mother's position on a return would be parlous thus putting the children in an intolerable situation;
- (c) The passage of time militated strongly against a return of the children for the limited purpose of access for which their return was sought.

99 In *In re S*, the trial judge had made an order that a two-year old child should not be returned to Australia. The mother had made many serious allegations against the father (including a threat to kill her) and there was incontrovertible evidence before the trial judge about the father's substantial descent into abuse and his inability to make a proper financial contribution to the family. The mother was on antidepressant medication whilst in Australia and she had had extensive psychotherapy in Australia to address her chronic anxiety symptoms. A report on the mother's psychological condition was given by the Australian psychologist. The trial judge also asked for a report by an English psychiatrist to be instructed by both parties. The psychiatrist so appointed subsequently opined that the likely psychiatric and psychological impact on the mother of a return to Australia would be significant and severe. The trial judge made a careful appraisal of the documentary evidence and concluded that the mother had "made out a good *prima facie* case that she was the victim of significant abuse at the hands of the father". The trial judge refused to order the return. This decision was overturned by the Court of Appeal. On further appeal to the Supreme Court, the trial judge's decision was restored. The Supreme Court said:

35. As we have explained, the Court of Appeal failed to appreciate that the mother's fear about the father's likely conduct rested on much more than disputed allegations. Equally it paid scant regard to the unusually powerful nature of the medical evidence about the mother, in particular of her receipt of regular psychotherapy while in Australia. This conferred an especial authority on Ms MacKenzie's report, of which the court scarcely made mention. Overarchingly, however, it failed to recognise that the judgement about the level of risk which was required to be made by article 13(b) was one which fell to be made by Charles J and that it should not overturn his judgement unless, whether by reference to the law or to the evidence, it had not been open to him to make it. Charles J was right to give central consideration to the interim protective measures offered by the father. But his judgement was that, in the light of the established history between the parents and the mother's acute psychological frailty for which three professionals vouched, they did not obviate the grave risk to W. It must have been a difficult decision to reach but, in the view of this court, it was open to him to make that judgement; and so it was not open to the Court of Appeal to substitute its contrary view. The fact that Charles J had not received oral evidence did not deprive his judgment of its primacy in that sense.

100 It would be noted from the above extract, that the Supreme Court in *In re S* considered that an appellate court cannot overturn the findings of the trial judge unless those findings were against the weight of the evidence. In this case, the finding of the DJ that there was no grave risk of harm to E if he were to be returned to Germany was fully open to her on the basis of the evidence that had been presented in the District Court. If no further evidence had come to light in the appeal, I would have dismissed the appeal without hesitation. It is only because of Dr Lim's second report that I felt that the matter required more consideration.

101 Having done so I note that the abuse inflicted on the mothers in both *El Sayed* and *In re S* was very much more serious than that inflicted on the mother here, even if all her allegations are accepted as the truth and the father's counter allegations are not given credence. There was also trauma inflicted on the children in the cases cited because of the father's behaviour. In those situations, there was much more reason than there is here for the court to believe that protective measures available in the courts of the returning country might not be sufficient to protect the mother. It is a sad truth in all jurisdictions that court orders are often breached and their ability to influence behaviour depends on the rationality of the persons at whom they are aimed. Often, persons in the grip of high emotion behave in ways that are completely contrary to what the court ordered and do so in the full knowledge that there may be a price to pay later for such behaviour. The fact that the behaviour is punished subsequently is, unfortunately, insufficient to undo the harm inflicted by the breach of the order. The mother here has not established, however, that the situation she will



face on return is such that protective measures available in Germany might not be sufficient protection for her.

102 In *In re E*, the English mother had two children in Norway with the Norwegian father and subsequently returned to England bringing the two children with her without the father's consent. The father applied under the Convention for the return of the children. The mother resisted the application on the grounds that the father had subjected her to psychological abuse and that to order the immediate return of the children would put them at a grave risk of being exposed to harm. The mother's mental state having deteriorated due to strain of the legal proceedings, the judge gave permission for a psychiatrist to evaluate the mother's mental state. The psychiatrist considered that there was a high risk of the mother's condition deteriorating if she were forced to return to Norway with the children unless protective measures were put in place. The father, although denying the mother's allegations, was willing for appropriate protective measures to be put in place and gave undertakings to the court himself. The judge accepted the undertakings and ordered the return of the children to Norway. The Court of Appeal upheld that decision and the mother then appealed to the Supreme Court who also dismissed the appeal. I have set out at [27] the principles established by the Supreme Court in *In re E*. In upholding the decision of the trial judge, the Court of Appeal noted that she had accepted that the risk of deterioration in the mother's mental health if she were forced to return to Norway might also constitute a grave risk to the children and had examined with care how the protective measures recommended by the psychiatrist might be put in place. Since the judge had considered very carefully how this risk might be avoided and had no reason not to trust the father to abide by the promises which he was asked to make regarding care of the children, it was not for the appellate court to disagree with the judge's assessment.

103 In the present case, the DJ carefully considered the situation of the mother and of J should they return to Germany with E. She was careful to craft undertakings from the father which would assist the mother in living in Germany. She did not accept the undertakings as first proffered but took into account the mother's criticisms and required the father to enhance the undertakings until they met what the DJ considered to be a reasonable standard. The mother's criticisms of the undertakings at this stage would be more palatable if she had given concrete suggestions as to what would satisfy her and enable her to live in Germany with the younger son. She forbore to do so, perhaps thinking that such a course might undermine her position of being unable to return. Whilst the financial assistance that the father is offering the mother may seem to a third party to be rather low, he is of limited means and it is not clear how much more the mother can reasonably expect in the way of support from him. She has not indicated alternative figures which the court could consider.

104 I am also concerned with the way that the case has developed. From the beginning, the mother declared that she would not return to Germany, although she acknowledged that this had not always been her position and that initially she had been prepared to return if the father could set the family up in a home away from his parents. The mother's position changed once it became clear this was unlikely to happen. Further, the story that she told about her marriage initially did not portray a situation which would pose a grave risk of harm to E if he was ordered to return. For one thing, in the initial affidavits when the father alleged that the mother had threatened suicide on several occasions, the mother brushed these threats off as having being made flippantly and not seriously. When the father asserted that in April 2012 the mother had threatened to throw herself out of the apartment block with E, the mother denied having done such a thing. On the appeal, however, it was submitted on behalf of the mother that even the father had recognised that she was suicidal. It was surprising that the mother would so make use of the father's evidence which she had refuted and urged the court not to take seriously.

105 Secondly, there is the way that the mother's interaction with the psychologist developed.

There is no indication from his first report that when the mother first consulted Dr Lim, she informed him about her suicide threats or any feeling of wishing to commit suicide nor did she say anything about the father's violence towards her. After the order below was made, however, and in the sessions that led up to the second report, the mother gave Dr Lim many details of how she had allegedly been sexually and physically abused by the father, told him about the father's alleged girlfriend and how the father had allegedly tried to separate E from her on several occasions. Whilst the court cannot judge the truth of these stories, it may be significant that they were not affirmed on affidavit in such detail when the mother was resisting the return application.

106 It remains a concern that the mother has expressed suicidal thoughts. Dr Lim noted that at first she had not done so but that as she observed and tried to understand the proceedings of the court over the preceding two months, her depressive symptoms had been accentuated. It is not surprising that the mother would have had an adverse reaction to the outcome of the proceedings below. The notion of wanting to end it all became, apparently, more entrenched in her psyche. However, Dr Lim did opine that the mother's mental state could be improved if she went on a course of antidepressant medication. So far the mother has refused this treatment because she is breastfeeding. The younger child was about six months old at the time of Dr Lim's second report and whilst the mother might have wanted to continue to breastfeed him, other suitable methods of feeding him would have been available had she gone on medication. The mother has not helped herself very much.

107 I have concluded that the mother has not discharged her burden under Art 13(b) and that the appeal must be dismissed. However, I note the mother's point that even if she returns to Germany it would be highly stressful for E to see her only twice a week for four hours each time. I therefore require a further undertaking from the father that as long as the mother is in Germany and as long as E is in his custody, until the custody and access issues are finally worked out by the German court, he will ensure that the mother has daily access to E.

108 I will see the parties to work out the orders for return and the wording of the further undertaking(s) required consequent upon the dismissal of the appeal.

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