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**Protection of Abducting Mothers in Return Proceedings:  
Intersection between Domestic Violence and Parental Child Abduction**

**By**

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# **Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction**

## **UK National Report**

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### Table of contents

1.	<u>INTRODUCTION</u>
2.	<u>CASE-LAW OVERVIEW</u>
2.1.	Methodology
2.2.	Re E and Re S
2.3.	Post-Re E and Re S
2.3.1.	England & Wales
2.3.2.	Scotland
3.	<u>CASE-LAW ANALYSIS</u>
3.1.	Article 13(1)(b) - 'grave risk of harm'
3.2.	Court's approach to grave risk of harm
3.3.	Protective measures, including undertakings
3.4.	Effectiveness of protective measures
3.4.1.	The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ('1996 Hague Convention')
3.4.2.	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels IIa Regulation')
3.4.3.	Regulation (EU) 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters ('Protection Measures Regulation')

4. PROTECTION MEASURES AVAILABLE IN THE UNITED KINGDOM

4.1. England and Wales

4.2. Scotland

5. EUROPEAN UNION INSTRUMENTS ON PROTECTION MEASURES

5.1. Regulation (EU) 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters ('Protection Measures Regulation')

5.1.1. Incoming protection measures

5.1.2. Outgoing protection measures

5.2. Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order ('European Protection Order Directive')

5.3. Analysis: utility of the Protection Measures Regulation and the European Protection Order Directive in the child abduction context

CONCLUSION

6.

## **1. INTRODUCTION**

This report was prepared under the auspices of the POAM project, which explores the ways of adequately protecting abducting mothers involved in return proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the 1980 (Hague Child Abduction) Convention') in circumstances where the child abduction had been motivated by acts of domestic violence from the left-behind father.<sup>1</sup> The report includes desk research into relevant primary and secondary sources in the UK and integrates this research with the findings of the UK local workshops that were organized by the authors of this report at an earlier stage of the project, in May 2019.<sup>2</sup> The report refers to both 'domestic violence' and 'domestic abuse'. The former term is intended to denote physical violence by the left-behind father against the abducting mother, whereas the latter term is meant to have a broader meaning that includes acts of psychological and emotional abuse. The report also refers to 'protective measures' and 'protection measures' interchangeably; these two terms are intended to have the same meaning.

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<sup>1</sup> 'Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction', funded by the European Union's Rights, Equality and Citizenship Programme (2014-2020). For more information about the project see: <https://research.abdn.ac.uk/poam/>. <sup>2</sup> See <https://research.abdn.ac.uk/poam/events/>.

This report was funded by the European Union's Rights, Equality and Citizenship Programme (2014-2020).

The report is divided into six Parts (Part 1 – Introduction and Part 6 – Conclusion). Part 2 contains a detailed overview of relevant UK case-law and is closely linked with Part 3, where this case-law is analysed. The analysis in Part 3 is centered around five main themes that were recurrent in the case-law: 1.) the ‘grave risk of harm’ exception to return, embodied in Art13(1)(b) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (‘the 1980 (Hague Child Abduction) Convention’); 2.) the court’s approach to the grave risk of harm exception to return; 3.) protective measures, including undertakings (see Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 1347/2000 (the ‘Brussels IIa Regulation’), Art 11(4)); and 4.) the effectiveness of protective measures. Part 4 provides an overview of protection measures available to victims of domestic abuse in England & Wales and in Scotland. This is followed by Part 5 which explores the topic of protection measures in the cross-border context within the European Union (‘EU’), in particular by analyzing the Regulation 606/2013 on mutual recognition of protection measures in civil matters (‘Protection Measures Regulation’) and the Directive 2011/99/EU on the European Protection Order (‘European Protection Order Directive’), and examines the potential utility of these two instruments in the child abduction context from the UK perspective.

## **2. CASE-LAW OVERVIEW**

### **2.1. Methodology**

The report covers reported decisions of the English and Scottish courts that were taken post-Supreme Court judgments in *In the Matter of E (Children)*<sup>2</sup> (‘*Re E*’) and *In the Matter of S (a Child)*<sup>4</sup> (‘*Re S*’). In these two decisions, the Supreme Court reviewed its approach to child abduction cases involving allegations of domestic violence, making these judgments the current authorities on the topic.<sup>3</sup> In *Re E* and *Re S* the Supreme Court explicitly recognized that the circumstances of the abducting mother and the child may be intertwined to the extent that domestic violence solely against the mother may lead to Article 13(1)(b) being established on the basis of a grave risk of psychological harm or an intolerable situation to the child.<sup>4</sup> Moreover, it is irrelevant whether the risk is the result of objective reality or of the abducting mother’s subjective perception of reality.<sup>7</sup>

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<sup>2</sup> [2011] UKSC 27.

<sup>4</sup> [2012] UKSC 12.

<sup>3</sup> To be contrasted with earlier case-law, e.g. *Re C. (abduction: grave risk of psychological harm)* [1999] 2 FCR 507; *Re H. (children) (abduction)* [2003] 2 FCR 151; *Re W. (Abduction: Domestic Violence)* [2004] EWHC 1247; and *Re W (A Child)* [2004] EWCA Civ 1366.

<sup>4</sup> See sections 2.2 and 3.2 below.

<sup>7</sup> *Ibid.*

*Re E* and *Re S* are set out in section 2.2. Post-*Re E / Re S* cases can be found in section 2.3, which is divided into two sub-sections, 2.3.1 containing English cases and 2.3.2 containing

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Scottish cases. The search for reported case-law was carried out using online case-law databases, namely, Westlaw, Lexis Nexis, INCADAT (International Child Abduction Database), BAILII and EUPILLAR. Altogether, 17 reported decisions of the High Court (England), 6 decisions of the Court of Appeal (England), and one decision of the Court of Session (Scotland)<sup>5</sup> involving child abductions where allegations of domestic violence had been made, were identified.<sup>6</sup> Of these, 3 cases contained explicit reference to the Protection Measures Regulation. The case-law search was not confined to cases between the UK and other EU Member States but included also cases that involved requesting States from outside the EU.<sup>7</sup> The *theoretical* [emphasis added] utility of the EU protection measures instruments was then examined on the facts of each particular case. The inclusion of cases involving non-EU Member States was considered methodologically sound on the ground that, although the latter type of cases is not governed by the Brussels IIa Regulation, the underlying approach of the UK courts to the grave risk of harm defence in both types of cases is the same – i.e. the starting point is that the requesting State is expected to provide adequate protection.<sup>11</sup>

The cases are set out following a common template. This includes: 1.) facts of the case; 2.) considerations related to Art 13(1)(b) – i.e. the violence/abuse; court’s approach to grave risk of harm/evidence;<sup>8</sup> protective measures, including undertakings; and effectiveness of protective measures, including undertakings; 3.) outcome; and 4.) a brief comment on whether an additional tool to secure cross-border recognition of protective measures would have been helpful in the given case. The heading of this section refers to ‘EU instruments on protection measures’, and this term is intended to encompass the Protection Measures Regulation and/or the European Protection Order Directive.

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<sup>5</sup> Given the very small number of relevant reported cases in Scotland, interviews were held with two Judges of the Scotland’s Supreme Courts to supplement the desk research findings and gain a better understanding of the approach of the Scottish judiciary to child abduction cases involving allegations of domestic violence. These interviews took place on 18 November 2019 and 17 December 2019. The first interview was conducted in person and the second one was a phone interview.

<sup>6</sup> The case-law search focused on cases where the abducting parent was the mother of the child and the left-behind parent, against whom allegations of domestic violence had been made, was the child’s father. However, in one case, such allegations were made by the child’s father against the left-behind mother. That decision was, nevertheless, included in the research given its relevance to the focus of the POAM project as the judgment contained explicit reference to the Protection Measures Regulation.

<sup>7</sup> Additionally, two decisions of the High Court (England) which involved non-Hague Convention contracting parties as requesting States were identified. These cases were, however, not included in the analysis as such cases are not governed by the Hague Convention principles but rather by the welfare of the child as the leading principle (see *Re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40). These cases were *D v D* [2016] EWHC 3546 (Fam) (Northern Cyprus) and *AR v AS* [2015] EWHC 3440 (Fam) (Saudi Arabia).<sup>11</sup> *TB v JB (Abduction: Grave Risk of Harm)*, [2001] 2 FLR 515.

<sup>8</sup> Occasionally, where more substantial information was available, ‘Evidence’ was set out under a separate heading.

## 2.2. *Re E and Re S*

*In the Matter of E (Children)* [2011] UKSC 27

On appeal from: [2011] EWCA Civ 361

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Date of judgment: 10 June 2011

Judge: Lord Hope, Deputy President, Lord Walker, Lady Hale, Lord Kerr and Lord Wilson  
**Facts**

In this case, the Supreme Court was concerned with two girls, Livi, aged 7 and Milly aged 4. The parties met in Spain in 2001 and moved to live together in Norway. The mother was British and the father Norwegian. The father, who had been married before, had three older children who also lived in Norway. The mother also had a child from a previous relationship, Tyler. On 19 May 2004, the parties' first child, Livi was born. The parties married on 16 December 2014. On 10 April 2007, Milly was born. The children lived all their lives in Norway and were habitually resident there prior to the removal.

In August 2010, the mother's eldest daughter, Tyler, left for England. On 7 September 2010, the mother followed, taking Livi and Milly to England without the consent of the father and with the view of staying permanently. On 17 September, the father applied to the Central Authority for the return of the children. Proceedings commenced on 6 October and the mother opposed the children's return, relying on Article 13(1)(b). The mother's main argument in resisting return was that the risk to her own mental health was such that there was a grave risk that the children would be placed in an intolerable situation unless there were real and effective protective measures in place.<sup>9</sup> The trial judge, Pauffley J ordered the return of the children.

The mother appealed against the decision to return the girls to the Court on Appeal. The appeal was dismissed by the Court of Appeal and the mother obtained leave to appeal to the UK Supreme Court.

### **Article 13(1)(b)**

#### The violence/abuse

The allegations indicated a severe level of abuse. In particular, the mother asserted ongoing serious psychological abuse and threats, and physical violence towards other people, pets and property. She asserted that the abuse (including physical violence) was also directed towards the children.

*“She (with support from Tyler) makes allegations against the father which, if true, amount to a classic case of serious psychological abuse. She says that he was never physically violent towards her (apart from one incident*

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<sup>9</sup> Para 46.

when he knuckled her head), but that she always felt that he was on the verge of extreme violence and that if he was violent, he would kill her. She recounts incidents of physical violence towards other people, and towards property, of ill-treatment of pets, killing the family's cat, spraying the family's budgies with bleach, and killing a rabbit which Tyler kept as a pet while they were away. She alleges that the father was domineering and controlling, buying the family's food, keeping her short of money, and not wanting her to work outside the home. She says that the children were frightened of his anger, that he was rough with them and smacked them too hard, and she recounts one particular incident when he lost his temper with Livi and kicked her bottom with his workman boots so hard that she flew up into the air and landed in the snow."<sup>10</sup>

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The father denied all the allegations though admitted to killing the cat, because it had become dangerous and the rabbit, because the mother had asked him to. The father counter-argued drug and alcohol use by the mother.

The mother relied on a psychiatric assessment which diagnosed her with suffering from an adjustment disorder.

#### Court's approach to grave risk of harm

The Supreme Court acknowledged that, by its very terms, the grave risk of harm exception was of restricted application.<sup>11</sup> At the same time, the Court, however, expressed the view that there was no need for the provision to be "narrowly construed", or be given further elaboration or "gloss".<sup>12</sup> The Court further emphasised that a full-blown examination of the child's future was not in accordance with the principles of the Hague Convention as suggested in *Neulinger and Shuruk v Switzerland*.<sup>17</sup>

In terms of the level of risk that is required, the Court noted that the risk to the child must be "grave".<sup>13</sup>

*"Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Therefore, a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm."*<sup>19</sup>

With regards to the type of harm under Art 13(1) b) the Court noted that although the terms "physical or psychological harm" were not qualified, they "gain colour" from the alternative "or otherwise placed in an intolerable situation".<sup>14</sup> Intolerable situation is to be given a

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<sup>10</sup> Para 40.

<sup>11</sup> Para 31.

<sup>12</sup> Ibid. In this respect the Court confirmed that it shared the view of the High Court of Australia expressed in *D.P. v. Commonwealth Central Authority* [2001] HCA 39, (2001) 206 CLR 401, namely that Article 13(1)(b) did not need to be "narrowly construed". Ibid. <sup>17</sup> Paras 22 and 26.

<sup>13</sup> As opposed to "real", which is the standard applicable in other contexts such as asylum. Para 33. <sup>19</sup> Ibid.

<sup>14</sup> Para 34.

subjective interpretation, from the perspective of the child concerned.<sup>15</sup> Whilst “[e]very child has to put up with a certain amount of rough and tumble, discomfort and distress [...] there are some things which it is not reasonable to expect a child to tolerate.”<sup>22</sup> Among these are “physical or psychological abuse or neglect of the child herself” and, importantly, can also be “exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent.”<sup>23</sup> The Court further clarified that the source of the risk was immaterial,

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meaning that it may include a situation where a mother’s subjective perception of the circumstances (as opposed to the objective reality) leads to a mental illness which could have intolerable consequences for the child.<sup>16</sup>

The Supreme Court recognized the “tension” that arises when a court is unable to resolve a factual dispute, and the “limitations involved” when evaluating the evidence. It supported the submission that where allegations of domestic abuse were made, the trial court should first ask whether, if they were true, the child would face a grave risk of harm.<sup>17</sup> If so, the court should proceed to considering the availability of protective measures. In particular, the Court stated:

*“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.”*<sup>18</sup>

The Court highlighted the importance of protective measures, noting that “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 she gets home.”<sup>19</sup> The need for effective protection may persist for some time following the return and therefore, the court is “not only concerned with the child’s immediate future”.<sup>28</sup> The Court further recognized that appropriate protective measures will differ from case to case and from jurisdiction to jurisdiction.<sup>20</sup> If such protective measures are not available, the court may “have no option but to do the best it can to resolve the disputed issues.”<sup>30</sup>

## Evidence

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<sup>15</sup> The Court reiterated a statement that had been made in *Re D*, at para 52: “‘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’”. Para 34. <sup>22</sup> Para 34. <sup>23</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Para 37.

<sup>18</sup> Para 36.

<sup>19</sup> Para 35.

<sup>28</sup> Ibid.

<sup>20</sup> Para 36. The Court highlighted the importance of judicial cooperation: “This is where arrangements for international co-operation between liaison judges are so helpful.” Ibid. <sup>30</sup> Ibid.



The Supreme Court set out the following three observations concerning the issue of the burden of proof and evidential practices:

*“First, it is clear that the burden of proof lies with the “person, institution or other body” which opposes the child’s return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the Page 14 evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination.”<sup>21</sup>*

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### Protective measures, including undertakings

The father proposed undertakings: i) He would withdraw the complaint he had made to the police about the abduction; ii) he would not use or threaten violence to, or harass or pester or molest the mother, or contact her save through lawyers; iii) he would not remove or seek to remove the children from her care pending an order of the Norwegian court or by agreement; iv) he would vacate the matrimonial home pending an order of the court in the child custody case, and would not go within 500 metres of it without the court’s permission; v) he would pay all household costs and 1,000 Norwegian krone to the mother as child support, less any benefits which she received.<sup>22</sup>

The undertakings were, amongst others, akin to a non-molestation order, occupation order and other ‘soft-landing’ measures.

It was noted that the trial judge had “considered very carefully how these risks might be avoided”,<sup>23</sup> including the mother’s mental health and the psychological harm to the children.

### Effectiveness of protective measures, including undertakings

The Supreme Court commented on the issue of the lack of enforceability, in that the undertakings could not be enforced in Norway and instead orders would need to be made in the Norwegian courts. The English trial judge had liaised with the Norwegian judge and was reassured by the details of the legal position in Norway, leading her to reach the conclusion that even if the undertakings were not enforceable, remedies would be available in Norway “if need be”.<sup>34</sup> Pauffley J “considered the evidence as to whether the protective measures available

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<sup>21</sup> Para 32.

<sup>22</sup> Para 41.

<sup>23</sup> Para 49.

<sup>34</sup> Ibid.

would be sufficient to avoid the risk...she was satisfied that psychological interventions were available and would be in place within a few days of the mother's return...secondly the father's series of undertaking satisfied her that ...the mother...would be adequately protected...".<sup>24</sup> It is of note that the majority of the undertakings were focused on the safety of the mother from which the children would also benefit.

The Court acknowledged that there was a need for a recognition and enforcement framework to be put in place in order to secure the effectiveness of protective orders and undertakings (between common law countries) made in the requested State with the view of protecting the child upon the return until the courts of the requesting States are seised with the substance of the matter. The Court noted that the Brussels IIa Regulation "clearly contemplates that adequate measures actually be in force and without some such machinery this may not always be possible"<sup>36</sup>, and urged the Hague Conference "to consider whether machinery can be put in

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<sup>24</sup> Para 46.

<sup>36</sup> Para 37.

place whereby, when the courts of the requested state identify specific protective measures as necessary if the article 13b exception is to be rejected, then those measures can become enforceable in the requesting state, for a temporary period at least, before the child is returned.”<sup>25</sup> It was also highlighted that liaison judges were a helpful element of international co-operation.<sup>26</sup>

## **Outcome**

The Supreme Court acknowledged that the risk to the mother’s mental health, “whether it be the result of objective reality or of the mother’s subjective perception of reality, or a combination of the two”, was very real.<sup>27</sup> The court also accepted that if the mother’s mental health was to deteriorate as envisaged in the psychologist’s report, there would be a grave risk of psychological harm to the children.<sup>40</sup> Nevertheless, in the view of the Supreme Court, the trial judge had considered that appropriate protective measures were in place to address these concerns, and it was not the task of an appellate court to disagree with the judge’s assessment. Accordingly, the Supreme Court dismissed the mother’s appeal and upheld the order for the return of the two girls.

## **Theoretical utility of the EU instruments on protection measures**

The instruments may have been a useful tool in this case on account of a return order having been made and given that the courts were clearly concerned about the lack of enforceability of the undertakings given by the father.

### *In the Matter of S (a Child)* [2012] UKSC 10

On appeal from: [2011] EWCA Civ 1385

Date of judgment: 14 March 2012

Judge: Lord Phillips, President, Lady Hale, Lord Mance, Lord Kerr, Lord Wilson

## **Facts**

In this case, the Supreme Court was concerned with the parties’ 2-year-old son whom the mother had removed from Australia to England. The parties were not married. The mother was British but had Australian citizenship. The father was Australian. The family lived in Sydney, Australia, and this is where the child was habitually resident immediately prior to his removal. At the start of their relationship, the father informed the mother of his past, i.e. that between 1994 and 1998 he had been a heroin addict and contracted Hepatitis C.

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<sup>25</sup> Ibid.

<sup>26</sup> Para 36.

<sup>27</sup> Para 49.

<sup>40</sup>

Ibid.

The parties started cohabiting in October 2008 and by February 2009 the mother was pregnant. The relationship was characterized by financial hardship owing to the father's debts from the

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collapse of his import business. The child was born on 13 November 2009. The father's financial problems led to "serious alcohol and drug relapses"<sup>28</sup> (cocaine) from early 2009 until the mother left for England. On 27 January 2011, the Australian police obtained on behalf of the mother an Apprehended Violence Order in a local court, without notice to the father. The mother asserted that this followed an incident where the father was found in the garage injecting himself. The relationship broke down and on 2 February 2011, the mother removed the child to England without the father's consent.

On 30 August 2011, the father applied for the summary return of the child to Australia. Charles J, presiding over the court at first instance refused to order the return of the child. The father's appeal was successful in the Court of Appeal. The mother appealed to the Supreme Court.

### **Article 13(1)(b)**

#### The violence/abuse

The allegations indicated a moderate/severe level of abuse, all of which appeared to have been directed towards the mother but impacted the child. The abuse was ongoing until shortly before the mother left for England.

The mother made allegations of serious violence towards her by the father including threat to kill her, alcohol abuse, drug abuse and threats to kill himself. Extracts from the evidence before the court included messages from the father to the mother on 13 January 2011:

*"get fucked, bitch" and "I'll ... belt ya"*<sup>29</sup>

And a message from the mother who wrote:

*"Those last few weeks in Sydney were literally hell. I was terrified and devastated as well as penniless. You left me with not even enough money to buy nappies for [W]... But you managed to get cash from your credit cards to buy drugs... Even the birth of your son was never enough to stop you drinking and using drugs... That night I found you using in the garage you could have come upstairs and done anything to us – that is why I called the police. [W] deserves to be safe and so do I."*

The father's reply was:

*"I understand all that but I still need my family and my son needs his father."*<sup>43</sup>

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<sup>28</sup> Para 9.

<sup>29</sup> Para 11.

<sup>43</sup>

Ibid.

A jointly instructed psychiatric report suggested that the mother suffered from Battered Women's Syndrome, a form of Post-Traumatic Stress Disorder, in addition to an acute stress

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reaction.<sup>30</sup> The report further stated that the likely psychiatric and psychological impact on the mother upon return would be "significant and "severe".<sup>45</sup>

### Court's approach to the grave risk of harm

The Supreme Court first considered the approach adopted by Coleridge J at first instance, observing that the judge followed the guidance set by the Supreme Court in *Re E*. That approach, of assuming the allegations to be true and proceeding to consider protective measures on that basis, was reflected in preliminary court directions leading up to the final hearing. The relevant directions stated that:

*"(a) for consideration of whether, taken at their highest, the allegations made by the mother would come within the article 13(b) exception having regard to the proposed undertakings/protective measures;*

*(b) ...*

*(c) subject to the court's conclusion as to (a)... above, [for] summary disposal or directions to enable a further hearing with such oral evidence as the court considers appropriate to take place."<sup>31</sup>*

The Supreme Court then addressed the Court of Appeal's criticism of that approach. The matter was heard by Thorpe LJ, McFarlane LJ and Longmore LJ. Thorpe LJ expressed in "arrestingly vehement terms" that the directions endorsed by Coleridge J "bedevilled" the hearing before the trial judge Charles J and that such a practice should be "immediately stifled".<sup>32</sup>

With the above observations in mind, and despite drawing a distinction between the directions made by Coleridge J in *Re S* as opposed to the guidance at para 36 of *Re E* relating to factual "disputes", the Supreme Court did not explicitly criticise the approach of *Re E* in so far as it applied to the issue of disputed facts. The Supreme Court indicated that "it would have been better for the direction not to have been given"<sup>48</sup> but the Court did not endorse Thorpe LJ's criticism of the practice, whether it related to the directions or the resolution of disputed issues.

When the matter came before Charles J for a final hearing, the learned judge in no uncertain terms further reiterated the *Re E* approach at para 36:

*"(a) he began by assuming that the mother's allegations against the father were true;*

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<sup>30</sup> Para 25.

<sup>45</sup> Ibid.

<sup>31</sup> Para 21.

<sup>32</sup> Ibid.

<sup>48</sup>

Ibid.

*(b) he concluded that, on that assumption, and in the light of the fragility of the mother's psychological health, the protective measures offered by the father would not obviate the grave risk that, if returned to Australia, W would be placed in an intolerable situation; so*

*(c) he proceeded to consider, as best he could in the light of the absence of oral evidence and the summary character of the inquiry, whether the mother's allegations were indeed true; and*

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Ibid.

This report was funded by the European Union's Rights, Equality and Citizenship Programme (2014-2020).

(d) *following a careful appraisal of the documentary evidence, including the mass of emails between the parents, he concluded that, as counsel for the father had been constrained to acknowledge, the mother had "made out a good prima facie case that she was the victim of significant abuse at the hands of the father" (italics supplied).*"<sup>33</sup>

The Supreme Court appeared to endorse the *Re E* approach to the grave risk of harm. Having said that, however, the actual exercise undertaken by Charles J at first instance appeared to diverge from the *Re E* methodology.

Significantly, Charles J had considered a range of evidence including 300 text messages and emails passed between the parents,<sup>50</sup> a letter from the mother's doctor (general practitioner),<sup>34</sup> a psychologist's report,<sup>35</sup> a jointly instructed psychiatrist who commented on the mother having suffered from Battered Women Syndrome and acute stress reaction,<sup>36</sup> and the risk of reoccurrence of her anxiety and depression.<sup>37</sup> In considering the evidence, the judge observed that the text messages and emails:

*"...revealed that a number of important allegations made by the mother against the father were admitted or at least, in the light of what he had said in the texts and emails, could not, as his counsel had conceded, realistically be denied".*<sup>38</sup>

This is suggestive of the fact that the court did evaluate the evidence before it (including commissioning additional expert evidence) and made findings regarding the mother's "genuine conviction that she has been the victim of domestic violence" and "the fragility of the mother's psychological health".<sup>39</sup>

Therefore, it is in fact apparent that the judge did undertake an extensive evaluation of the evidence before him, which arguably amounted to an effective examination of the allegations. So, the impression that Charles J "assumed" the grave risk of harm was in fact conflated with what appeared to be a thorough investigation based on the evidence before him.

#### Protective measures, including undertakings

The father had put forward a number of undertakings which he asserted would protect the mother and child. The father also indicated that he would lodge a signed copy of the

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<sup>33</sup> Para 29.

<sup>50</sup> Para 7.

<sup>34</sup> Para 16.

<sup>35</sup> Para 17.

<sup>36</sup> Para 25.

<sup>37</sup> Ibid.

<sup>38</sup> Para 7.

<sup>39</sup> Para 29.

undertakings with his local family court in Australia in advance of the mother and child's return:

*“(a) to make a specified contribution towards their further rent and by way of periodical payments for W;*

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*(b) to comply with the terms of the Apprehended Violence Order, which had been expressed to continue until 27 January 2012;*

*(c) not to remove W from the mother's care save for the purpose of any agreed contact with him;*

*(d) not to approach within 250 metres of their accommodation save as might be agreed in writing for the purpose of any contact with W; and*

*(e) not to seek to contact the mother save through lawyers”.*<sup>40</sup>

### Effectiveness of protective measures, including undertakings

The problem of effectiveness of protective measures was considered in so far as the trial judge determined that they would not adequately or effectively ameliorate the grave risk of harm. This formed a part of his assessment in deciding to make a non-return order:

*“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 of 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.”*<sup>58</sup>

### **Outcome**

The Supreme Court allowed the mother's appeal and restored the order of Charles J refusing the return of the child to Australia.

### **Theoretical utility of the EU instruments on protection measures**

The instruments would not have been helpful in this case on account of the non-return order made at first instance and upheld by the Supreme Court.

## **2.3. Post-*Re E* and *Re S***

### **2.3.1. England & Wales**

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<sup>40</sup> Para 24.

<sup>58</sup> Para 35.



Date of judgment: 2 September 2013

Judge: Mr Justice Keehan

## **Facts**

This case concerned an application by the father for the summary return of three children, aged 8, 5 and 2 to the Netherlands. The parties first married in 2003 in a civil ceremony and in 2006

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underwent an Islamic marriage. By 2007, they had settled into their long-term family home address in Amsterdam. The mother was born in the Netherlands, whereas the father had moved to live there before their marriage. The mother asserted that she had been subjected to serious physical and sexual abuse at the hands of the father, that he had made threats to kill and exposed the children to violent behaviour. The parties separated in 2012. The mother submitted that post-separation the father attended the family home and following a physical assault on her the police were called. The mother also commenced divorce proceedings. On 1 September 2012, the mother left the Netherlands with the children and moved to live in England with her mother.

The mother opposed the return on the basis of Article 13, arguing that 1) the father has consented to the removal of the children pursuant to Article 13(a), 2) that the father had subsequently acquiesced in the children living in the jurisdiction of England and Wales, pursuant also to Article 13(a) and 3) that pursuant to Article 13(1)(b) the children would be at a grave risk of harm and/or be placed in an intolerable situation if the court ordered their return to the Netherlands.

## **Article 13(1)(b)**

### The violence/abuse

The allegations, if found to be true, would indicate a severe level of abuse.

The mother asserted ongoing physical and sexual abuse during the marriage, including being raped on a daily basis.

*“The mother alleges, as I have indicated, that she was the subject of serial and serious sexual abuse at the hands of the father. In her first statement, B 47, paragraph 17, she asserts that she did tell the Dutch police about her allegations of having suffered sexual abuse at the hands of the father.”<sup>41</sup>*

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<sup>41</sup> Para 40.

<sup>60</sup> Para 54.

Dealing with specific incidents of physical abuse, she asserted that during an argument in October 2011 when the father pronounced the talaq, he made threats to kill the mother and cut both his wrists in front of her and the youngest two children, causing the children to be hysterical. A further incident occurred in February 2012 when, following an argument one of the children accidentally caught her finger in a door, the father became angry, slapped and punched the mother in front of the children. Nevertheless, no allegations of physical violence by the father against the children were made.

The mother submitted that due to her fear of the father her emotional and psychological state would be such that if a return were ordered the children would be at grave risk of harm and/or be placed in an intolerable situation.<sup>60</sup>

### Court's approach to grave risk of harm / Evidence

On the face of it, the court appeared to have undertaken some investigation of the merits of the mother's allegations by considering the evidence before it. Arguably, the thoroughness with which the judge considered the allegations could be viewed as an "effective examination" in line with *X v Latvia*<sup>42</sup>. The court heard oral evidence from the mother and father but also had before it witness statements produced by each party including from maternal grandmother, maternal uncle and a friend of the mother, and informal letters of character witnesses on behalf of the father. The judge in his analysis indicated that he had taken into account all the statements in the trial bundle, various documents and exhibits and a CAFCASS report, stating that:

*"In considering this matter and the decisions I shall make; I take account of all the statements that appear in the trial bundle and the various documents set out both as exhibits to those statements and also in section D. I take full account of the oral evidence given by both the mother and the father and the submissions both written and oral made by counsel on behalf of the parties."*<sup>43</sup>

*"By direction of the court at an earlier stage the CAFCASS Officer was directed to ascertain the wishes and the feelings of H, as the eldest child. That report was prepared by Jacqueline Bartley and is set out in section C of the bundle."*<sup>44</sup>

As indicated above, the judge appeared to have undertaken an effective examination based on the evidence available within the ambit of these summary proceedings, including oral evidence. To that end, he did make findings of fact, including as to credibility:

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<sup>42</sup> Application no. 27853/09, Grand Chamber [2013].

<sup>43</sup> Para 36

<sup>44</sup> Para 37.

<sup>64</sup> Para 43.

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*“I conclude that the mother has lied to the court. She said in her statement that she had told the police about the allegations of sexual abuse. She had to change that in her oral evidence because by that time she had seen the police report and her statement and she knew that it contained not a single reference of any sexual abuse. I consider why the mother should lie, I am satisfied the only reasonable explanation is that she lied to bolster her case to prevent the children being returned to the Netherlands. I entirely reject any allegation that the mother was raped or the subject of sexual abuse at the hands of this father. The consequence of that finding is that I now consider the mother's evidence on four issues to be tainted and I am required and I do treat her further evidence on important matters with considerable caution.”<sup>64</sup>*

The judge also found that the account given by the eldest child to the CAFCASS officer could not be relied upon nor its corroboration of the allegations of physical violence. Further, he made no findings of fact in respect of the mother's allegations of physical violence.

Nevertheless, and despite the abovementioned findings (or non-findings against the mother), the judge's approach can be seen as inconclusive as he proceeded to indicate that, for the purposes of his judgment, he would continue on the basis of the mother's allegations against

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the father but without making any findings of fact on the issue.<sup>45</sup> The proclaimed intention not to make findings (despite appearing that the learned judge had indeed made findings) was reiterated in the subsequent paragraph.

#### Protective measures, including undertakings

The father proposed the following by way of undertakings: (i) not to be violent or threaten violence to the mother, (ii) not to separate or remove the children from the care of the mother before the first hearing before the Dutch courts, (iii) not to appear or be present at the airport on the arrival of the mother and the children, (iv) to notify the mother of any court hearing, (v) not to support any criminal prosecution or process being taken against the mother in relation to the abduction of the children, (vi) to pay the mother a sum of money for the next two months to cover the interim position of the mother and the children (vii) to vacate the former matrimonial home to enable the mother and the children to live there, and (viii) to take such steps as necessary to enable the mother to obtain benefits including, if needs be, temporary registering at another address.

The judge observed that:

*“I am quite satisfied from the totality of the evidence that with the undertakings given by the father and the mother's ability to call upon assistance if need be from the Dutch police and/ or her ability to make application*

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<sup>45</sup> Paras 46 and 47. <sup>66</sup>  
Para 57.

*to the Dutch courts, there is no grave risk of harm in this case, nor is there any question that a return would place the children in an intolerable position.”<sup>46</sup>*

### Effectiveness of protective measures, including undertakings

The effectiveness of the protective measures was considered only in so far as the court concluded that it was satisfied “from the totality of the evidence” that the undertakings would be effective and that, if needed, the mother would be able to seek assistance from the Dutch police and/or make application to Dutch courts.

The judge was not convinced that it would be necessary for the father to first obtain an order against him prohibiting violence to the mother from the Dutch court before a return. The judge viewed this in the light of no allegation over a period of 6 or 7 months after separation and before the mother moved to England.

### **Outcome**

The court found that with the undertakings given by the father and the mother's ability to call upon assistance if need be from the Dutch police and/ or her ability to make application to the Dutch courts, there was no grave risk of harm nor would the children be placed in an intolerable situation. Accordingly, a return order was made.

### **Theoretical utility of the EU instruments on protection measures**

The instruments may have been useful in this case as the court made findings of fact that found the mother’s accounts of serious sexual and physical abuse to be true but nonetheless made a return order. In this case however, the court rejected the mother’s assertions of sexual abuse and did not make findings on the physical abuse. Nonetheless, giving that the court was prepared to accept undertakings, including one relating to the father promising not to be violent or threaten violence towards the mother, the EU instruments may have been helpful. This conclusion is reinforced by the fact that the mother had requested the court to impose on the father an obligation to make an application prior to her return to the Dutch courts for an order against him, prohibiting him from being violent to the mother.<sup>46</sup> The court refused this request.

*Re A (Children) (Abduction: Objections: Non-Return)* [2013] EWCA Civ 1256

Date of judgment: 23 July 2013

Judges: Thorpe LJ, Kitchin LJ and Sir David Keene

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<sup>46</sup> Ibid.

## **Facts**

This case involved three children who had been removed by the mother to the UK from Norway. The parties had lived together in Norway with their two children. In 2008, there was an incident of domestic violence perpetrated by the father on the mother, which was witnessed by the children and led to the parties separating. After separation, the third child of the marriage was born, and the mother moved to the UK shortly thereafter with the children. The father made an application under the Hague Convention for the return of the children to Norway. When the proceedings commenced, the two older children in particular objected in strong terms to the return.

The father's application was refused. The matter came before the Court of Appeal on the father's appeal against the decision to refuse the return of the children. In this appeal, the father argued that 1) the judge had misdirected herself in failing to consider all the relevant authorities; 2) the judge had misdirected herself in confusing the children's antipathy to the father with their antipathy to Norway; 3) the balancing exercise that the judge conducted was flawed because she placed undue weight on the 2008 episode, especially as there has been no further evidence of a history of violence that would explain any objection to return on the part of the children.

### **Article 13(1)(b)**

#### The violence/abuse

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The judgment does not provide specific details of the violence/abuse and therefore it is difficult to identify the level of abuse save to say that the violence/abuse in question appears to relate to one incident which took place on 22 August 2008 and which affected not only the relationship between the mother and father but also between the father and the two older children. Following this incident, the parties separated.

#### Court's approach to grave risk of harm / Evidence

The Court's approach to grave risk of harm, including approach to evidence, was not expressly clear from the appellate judgment. It is of note, however, that the father's grievance did not identify the approach that had been adopted by the first instance court as an issue. Rather, the appeal concerned how the trial judge applied the law to the facts and the weight attached to the evidence as opposed to whether she first investigated the merits of the allegations before proceeding to consider whether protective measures were sufficient to ameliorate any risk identified. Nevertheless, clearly the trial judge was satisfied that the children would be exposed

to a grave risk of harm, despite there being no repetition of that type of incident, noting also that “the children’s emotional response...had clearly profoundly affected the CAFCASS officer’s view”.<sup>47</sup>

The court took into account the children’s views expressed through the CAFCASS officer’s evidence and statements from the parties.

#### Protective measures, including undertakings

The court noted that there were certainly protective measures available in Norway, however, did not comment any further on the trial judge’s approach to protective measures. On the contrary, it noted that given the severity of the event of 22 August 2008 and its consequences, it was open to the trial judge “to treat the incident as the foundation for her conclusion”.<sup>69</sup>

#### Effectiveness of protective measures, including undertakings

The problem of effectiveness of protective measures was not addressed in the Court of Appeal decision.

### **Outcome**

The Court of Appeal upheld the trial judge’s decision not to order the return of the children to Norway, finding that the trial judge’s concluding was ‘impeccable’ and that her analysis was not flawed.

### **Theoretical utility of the EU instruments on protection measures**

It is considered that neither the Regulation nor the Directive would have been of assistance in this case in light of the non-return order.

*FQ v MQ* [2013] EWHC 4149 (Fam)

Date of judgment: 20 December 2013

Judge: Mrs Justice Hogg

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<sup>47</sup> Para 13.

<sup>69</sup> Para 14.

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## **Facts**

The applicant father applied for the return of his two children, aged 7 and 8, to the United States of America (USA). The children's mother was a British national; the father was a US national. The children were born and lived in the USA until the mother removed them to the United Kingdom in August 2012. The mother acknowledged that the removal was wrongful, however, argued that her action had been triggered by the father's behavior, in particular because he had been abusive and violent towards her, and sometimes the children, over a number of years. On occasions, the children witnessed the events. The father denied the allegations. Before the mother left the USA, she had instructed a US attorney to launch injunction and custody proceedings in the local courts.

A CAFCASS report prepared in the course of the return proceedings concluded *inter alia* that, the children had genuine anxieties about the father, were settled in the UK and had a strong and genuine preference for remaining in the UK. The report also noted that a return to the USA could have an adverse effect on the mother's emotional well-being and mental health, which in turn could affect her ability to care for the children.

The mother submitted that: 1.) the children had become settled in the UK (Art 12) (the father's return application was made a year after the removal, in August 2013); 2.) the children objected to returning to the US (Art 13(2)); and 3.) there was a grave risk that a return would expose the children to physical or psychological harm, or would otherwise place them in an intolerable situation (Art 13(1)(b)).

### **Article 13(1)(b)**

#### The violence/abuse

The allegations, if found to be true, would indicate a moderate to severe level of abuse.

According to the mother, the violence was directed towards her and sometimes also towards the children. The father was also psychologically abusive of both the mother and the children

as his behaviour “scared the mother, upset the children and she felt lonely and afraid too ashamed to tell anyone.”<sup>48</sup> The violence culminated with the father threatening to kill the mother, the children and himself if the mother tried to leave.<sup>49</sup>

Regarding future risk of violence, the court felt that as, at the time of the return proceedings, the parents were separated and each was seeking divorce, there was no ongoing risk of violence.<sup>50</sup>

### Court’s approach to grave risk of harm / Evidence

Interestingly, it seems that the court applied a combination of the two approaches. On the one hand, it seems that the court conducted an ‘effective examination’ of the situation, in line with Judge Albuquerque’s concurring opinion in *X v Latvia*<sup>51</sup>, in that a thorough, limited and expeditious examination took place. This examination was based on: 1.) documentary evidence (the parents’ respective submissions, including, in particular, an e-mail which the father sent to the mother a few days after the removal, and in which he apologized to the mother), and 2.) oral evidence whereby the court heard the mother and her uncle who had acted as the ‘mediator’ between the parents in the past with the aim to facilitate reconciliation.<sup>52</sup> Four hearings took place in the course of the return proceedings. On the other hand, however, the court was at pains to emphasise that it neither investigated nor heard “detailed evidence about the mother’s allegations against the father, and it made no findings about the extent and nature of the alleged violence”, pointing to the conclusion that the *Re E* approach was applied instead, however, without any explicit reference to *Re E*. In particular, the court said:

*“Having considered the e-mail, the parents' evidence and that of the uncle I have to say that I do not accept the father's blanket denials of domestic violence, nor his denial he admitted to the uncle and family violence and abuse towards the mother. I have not investigated or heard detailed evidence in respect of the mother's allegations against the father and I am not making findings as to the exact extent and nature of the alleged violence, that matter may be for another court, but his email gives a strong indication and acknowledgement that he has a bad temper and was prone to display it. He promised “it” would never happen again. I cannot say with precision what “it” was. He begged forgiveness. To me I felt he was minimizing the truth, holding back and denying that he made admissions to the uncle and family. In this respect I prefer the evidence of the uncle and the mother. In my view the father did make admissions, apologised and begged forgiveness and to be given another chance.”<sup>53</sup>*

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<sup>48</sup> Para 6.

<sup>49</sup> Para 6.

<sup>50</sup> Para 123.

<sup>51</sup> Application no. 27853/09, Grand Chamber [2013].

<sup>52</sup> Para 12 and 16. Additionally, a CAFCASS report was prepared, and although the primary purpose of the report was to enable the court to assess the “children's degree of maturity, whether they objected to a return to America as alleged by the mother, and whether they are settled in this jurisdiction for the purposes of Article 12”, unsurprisingly, the report contained also information relevant to the allegations of domestic violence under the Art 13(1)(b) defence. Para 86. See also paras 87-88.

<sup>53</sup> Para 27.

<sup>76</sup> Para 64.



*“I have not investigated her [the mother’s] allegations of violence or abuse against herself or the children. If they are true she and the children needed to seek a place of safety away from the father. If they are true the mother would feel overwhelmed and distraught.”<sup>76</sup>*

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*“I have made no findings of violence and abuse against him.”<sup>54</sup>*

The view that the *Re E* approach was adopted is reinforced by the court’s method of approaching protective measures. In particular, the court simply considered whether, if the mother’s allegations were true, the proposed undertakings would be sufficient to protect the mother and the children. In rather general terms, the court also noted that the mother could apply for protective measures in the USA if needed. In particular, the court held:

*“If I take the mother's allegations at their highest I must ask myself are the proposed undertakings sufficient to protect the mother and children, and are there other measures which he could accept or she could take to obtain adequate protection. America has a sophisticated legal system, and it is clear that not only can protective orders be made, but that the mother is fully aware of them and able to seek them if need be.”<sup>55</sup>*

#### Protective measures, including undertakings

The father had offered various undertakings to facilitate the children’s return. They included allowing the mother to live with them in the family home, not communicating with her directly, and not threatening or intimidating either her or the children. As divorce proceedings were pending in the USA, the court felt that protective orders could be made there, if necessary.

#### Effectiveness of protective measures, including undertakings

The problem of effectiveness of undertakings was not addressed. It is reasonable to assume that this was due to the fact that the Art 13(1)(b) defence was not successful and, in any event, the return application was refused (on the basis of Art 12(2)).

### **Outcome**

There was no grave risk of the children suffering either physical or psychological harm or be placed in an intolerable situation. Nevertheless, Art 12 defence was established successfully and, accordingly, return was refused.

### **Theoretical utility of the EU instruments on protection measures**

It is not considered that either of the two instruments would have been helpful in this case as the return application was refused (on the basis of Art 12).

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<sup>54</sup> Para 121.

<sup>55</sup> Para 122.

LS v AS [2014] EWHC 1626 (Fam)

Date of judgment: 17 January 2014

Judge: The Honourable Mr. Justice Hayden

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**Facts**

This case concerned a father's application for the return of his three children to Hungary from the England. The children were aged 15 years and 9 months, 8 and 2 years old. The parties had one other child who was 18 years old and remained living in Hungary with maternal grandparents. Both parties were Hungarian Nationals and married in 1995 at a very young age, the father 17 and the mother 16, with their first child being born very shortly after the marriage. The relationship was marked with many separations and reconciliations on account of the mother's complaint of domestic violence, and the father's complaint of the mother's infidelity. The marriage was characterised as one with "a very unhappy history".<sup>56</sup>

In June 2013, the mother and children left for the UK in what was described as a carefully planned departure, and by the time proceedings commenced had only been living in the UK for five-and-a-half months. The mother defended the application for the children's return on the basis of the Art 13(1)(b) defence and on the basis of the children's objections (Art 13(2)).

**Article 13(1)(b)**

The violence/abuse

The allegations would indicate a severe level of abuse, that was ongoing and directed predominantly at the mother.

The court adopted the children's language in describing the father as "unpredictable, violent and tyrannical".<sup>57</sup> The court observed that there was an extensive history of violence throughout the marriage, both physical and verbal:

*"Her description of the violence shown to her by her husband is "he would regularly hit me, grab me by the throat and push me against the wall when he got angry".<sup>58</sup>*

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<sup>56</sup> Para 5.

<sup>57</sup> Para 31.

<sup>58</sup> Para 8.

It was agreed that “domestic violence has indeed characterised the marriage and characterised it throughout.”<sup>59</sup> It was also agreed the children witnessed domestic violence and one of the children was herself subject to violence by the father on two separate occasions.<sup>60</sup> It was also uncontroversial that at least on one occasion the police was called in relation to an incident of domestic violence against the mother.<sup>61</sup> On one occasion, the mother resorted to living in a women’s refuge and on other occasions when she fled the home she had gone to the home of her parents.<sup>62</sup>

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The court summed up the children’s experience of the violence and abuse present in the marriage, and the possibility for the father’s “rehabilitation” as follows:

*“I draw from the evidence that domestic violence both physical and verbal has been so much a part of the life experience of these children that its cessation has overwhelmed them and set both their sense of the past and of the possibilities for the future in perspective. The father expresses no understanding of the reasons for his behaviour and his violence is so entrenched (including a conviction for assaulting a nephew) that it is unlikely to be addressed effectively or at all within the timescales of these children.”*<sup>63</sup>

#### Court’s approach to grave risk of harm / Evidence

In this case, there are clear indications that the court undertook an effective examination of the evidence before it to reach the conclusion that the children would face a grave risk of harm should they be returned. Evidentially, the judge considered detailed and carefully written arguments, the parties’ statements and CAFCASS’ report. The judge did not hear oral evidence. The judge explicitly remarked that he did not need expert evidence to identify that the children were at grave risk of harm from their father in Hungary.<sup>64</sup> Instead, the judge was guided by the “factual matrix of the case” and, in considering the merits of the mother’s allegations, commented on “the unusual advantage of a clear substratum of facts from which I draw inferences predicated on evidence, case law and experience.”<sup>65</sup> In particular, the judge noted:

*“On my evaluation of the evidence I consider this is likely to have occurred frequently in consequence of the father’s volatility.”*<sup>66</sup>

*All this, it seems to me, is sufficient to identify the factual matrix of the case”.*<sup>67</sup>

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<sup>59</sup> Para 6.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Para 18.

<sup>63</sup> Para 34.

<sup>64</sup> Para 25.

<sup>65</sup> Para 30.

<sup>66</sup> Para 8.

<sup>67</sup> Para 9.

Although it is not clear whether the inferences drawn are expressly “findings of facts”, if one were to see this as simply a terminology issue, then in effect the judge evaluated the merits of the allegations first, as early on as in paragraph 8 of his judgment and made findings on the nature and frequency of the harm suffered.

#### Protective measures, including undertakings

On behalf of the father, it was argued that sufficient protective measures could be put in place - although the judgment does not shed light on what had been proposed - and contended that the mother could engage the Hungarian Court and Police and refuges as she had done in the past. The court rejected this. The court took into account that in Hungary there was a “long standing abuse from which she [the mother] had been unable to protect either herself or her children.”<sup>68</sup>

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#### Effectiveness of protective measures, including undertakings

The mother’s Art 13(1)(b) defence in this case was successful and therefore the issue of the effectiveness of any proposed protective measures was not in issue. However, it is noteworthy that the court did give some thought to past protective measures which had been in place in Hungary and had been ineffective. In particular, the court noted that “[h]istory, over many years in these children’s lives, shows that the protective measures the mother has sought to put in place in Hungary have been ineffective.”<sup>69</sup> The court further observed that “father is simply not constrained by the interventions of the State”,<sup>93</sup> and on this basis found that “preventative measures have been woefully ineffective”.<sup>70</sup>

#### **Outcome**

The court refused the father’s application for summary return, concluding that the children were at grave risk of harm should they be returned to Hungary, indicating that the harm was primarily emotional harm but also physical harm. The return application was refused also on the basis of the child’s objection’s defence, with the court highlighting the inter-relationship between the objections expressed by the children and their abusive past,<sup>71</sup> and the lack of effectiveness of protective measures in the past.<sup>96</sup>

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<sup>68</sup> Para 25.

<sup>69</sup> Para 31.

<sup>93</sup> Ibid.

<sup>70</sup> Para 35.

<sup>71</sup> Para 26.

<sup>96</sup> Para 35.

## Theoretical utility of the EU instruments on protection measures

Neither the two instruments could have been utilised in this case as the court refused to make an order for the return of the children.

Re F (A Child) [2014] EWCA Civ 275

Date of judgment: 13 March 2014

Judges: Lord Justice Sullivan Lord Justice McFarlane and Lord Justice Lewison

### Facts

This case concerned an appeal brought by the mother against an order for the return of the child, aged 3 who had been removed to England and Wales from Italy. The parties met in Italy in June 2009 and the child was born on 27 June 2010 at a time when the parties were already living together. The mother alleged that the father's behaviour was characterised by jealousy, aggression and moodiness. The mother further asserted that following the birth of the child, the father's behaviour escalated and resulted in displays of violence towards her.

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In August 2011, the relationship ended after an incident of violence and the mother obtained protective orders from the local Italian court. In October 2011, the mother applied to the juvenile court in Trento for permission to relocate to Wales and this was denied. Nevertheless, ongoing proceedings ensued to deal with the protection of the mother and future welfare arrangements for the child. In March 2013, the court appointed a psychologist, Dr Desgasperi to assess the family dynamics and the child's welfare needs. Amidst this, the mother applied again for leave to remove permanently to Wales, and this too was refused. The mother appealed. On 27<sup>th</sup> June 2013, the appeal was refused. She took the appeal to the Italian Supreme Court, with a hearing date awaited. In July 2013, the mother spent the whole of the month in Wales with the child and this was by mutual agreement with the father, however, upon return the mother reported a further incident of significant assault upon her by the father. She asserted that she sought further protective measures from the social services and the Italian court but to no avail. The mother left for Wales with the child on 9<sup>th</sup> September 2013 without the consent of the father or permission of the court. On 30<sup>th</sup> October 2013, the father applied for the return of the child which the mother resisted on the basis of the Art 13(1)(b) defence. The judge concluded that there was insufficient evidence of a grave risk to the child, and, accordingly, a return order was made with a range of protective measures agreed on by the parties.<sup>72</sup> The mother appealed, *inter alia* because the judge had refused her application for permission to obtain an expert psychiatric assessment of her mental health and well-being.<sup>73</sup>

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<sup>72</sup> Para 13.

<sup>73</sup> Para 9.

## Article 13(1)(b)

### The violence/abuse

The allegations would indicate a moderate level of abuse, one that was ongoing until separation and even after the parties separated, as evidenced by an assault which took place in July 2013, nearly 2 years after the separation. The Court of Appeal's description of the abuse is brief but does set out the mother's submission that the father's behaviour was characterized by jealousy, aggression and moodiness, wherein an "incident of violence" took place in 2011 and a "significant assault" took place in 2013.

The mother's wellbeing was also a factor within the proceedings, adducing evidence to support the claim that she was suffering from "extreme anxiety" and "depression caused by the abuse".<sup>74</sup>

### Court's approach to the grave risk of harm / Evidence

The Court of Appeal criticized the trial judge on several grounds: first, for failing to test the evidence sufficiently; second, for failing to apply the appropriate burden of proof; and third, for failing to follow the *Re E* approach to the grave risk of harm.

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First, the trial judge's approach to the grave risk of harm may be identified as one that did not sufficiently examine the merits of the allegations. In fact, it was so asserted by the mother and justified the court's decision to grant permission to appeal. In respect of "the substantial history of domestic violence relied upon by the mother",<sup>75</sup> the trial judge was noted as saying:

*"The court should not base its decision on the basis of untested allegations"*.<sup>76</sup>

The Court of Appeal pointed out that similar expressions were recorded in the note of judgment given at the end of the hearing prior to making the final order,<sup>77</sup> and clarified that "the deployment of these various phrases" established sufficient concern to justify granting permission to appeal".<sup>78</sup>

Second, the Court of Appeal was critical also of the trial judge's approach to the burden of proof, on the basis that it contradicted the guidance given on this issue by the Supreme Court in *Re E*. The Court of Appeal reiterated the Supreme Court's view that the burden of proof

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<sup>74</sup> Para 24.

<sup>75</sup> Para 14.

<sup>76</sup> Para 14.

<sup>77</sup> Para 15.

<sup>78</sup> Para 16.

under Art 13(1)(b) was the ordinary balance of probabilities, as opposed to being a “heavy one” or requiring “clear and compelling evidence” (as erroneously indicated by the trial judge).<sup>79</sup>

Finally, the Court of Appeal explicitly reproached the trial judge for failing to follow the *Re E* approach to grave risk of harm by saying that “where there are untested allegations, for example of domestic violence, the structure described in paragraph 36 of the judgment in *Re E* should be followed”.<sup>80</sup> This implies that the Court of Appeal was content to endorse the *Re E* approach to the grave risk of harm defence whereby the court should assume that the allegations are true and then proceed to considering protective measures.

Despite the criticism of the trial judge’s methodology, the Court of Appeal determined that the judge had not erred having arrived appropriately at the stage of considering protective measures as per *Re E*.

*“Finally, the judge’s description of the approach to be taken to contested and untested allegations was not relevant to this stage of the process. Her decision to refuse to allow the instruction of an expert was taken on the basis of the mother’s account of her mental health, irrespective of the veracity or otherwise of allegations of domestic violence. Thereafter, the Court’s approach to domestic violence allegations was exactly on all fours with that described in *Re E*, namely that a number of protective measures were discussed between the parties and agreed and ultimately approved by the court. It is not therefore possible to hold that the judge was in error in the process that was adopted, despite the words that she used in her judgment.”*<sup>106</sup>

Given the above observations, in relation to the refusal to grant permission to instruct an expert, the Court of Appeal found that it had not been established that such evidence was

“necessary”,<sup>81</sup> and therefore “the judge’s case management decision as to the instruction of an expert is not vulnerable to challenge on appeal”.<sup>82</sup> In relation to the trial judge’s description of the approach to be taken in respect of Art 13, the Court of Appeal reverted to *Re S* as a benchmark:

*“...we invited him [counsel for the mother] to assume that Article 13(b) would be applied to the available evidence in the manner described by the Supreme Court in *Re E* and *Re S*.”*<sup>83</sup>

### Protective measures, including undertakings

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<sup>79</sup> Para 18.

<sup>80</sup> Para 18. <sup>106</sup>

Para 40.

<sup>81</sup> The evidence relevant to the mother’s mental health came from her witness statement; letters and e-mails from medical professionals the mother had consulted in Italy and Wales; and instructions given to counsel and relayed to the judge. Para 21.

<sup>82</sup> Para 41.

<sup>83</sup> Para 43.

The Court of Appeal noted a range of protective measures, discussed and agreed between the parties and endorsed by the trial judge. The judgment, however, does not enlighten us on the specifics of those measures.

### Effectiveness of protective measures, including undertakings

The effectiveness of the proposed measures was not addressed.

### **Outcome**

The mother's appeal against a decision ordering the return of the child to Italy was dismissed. The court found that the "material relating to her mental health that the mother was able to put before the English court was insufficient to establish that her mental health was, or might be, such as to trigger the circumstances described in paragraph 34 of *Re S.*"<sup>84</sup> Accordingly, the material before the court failed to establish that such instruction was necessary.<sup>111</sup>

### **Theoretical utility of the EU instruments on protection measures**

It is likely that the instruments would have been helpful in this case. This is especially in view of the mother's arguments that whilst in Italy attempts to obtain further protective measures came to nothing, indicating concerns over effective access to justice.<sup>85</sup>

### *IB v MM* [2015] EWHC 1502 (Fam)

Date of judgment: 22 May 2015

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Judge: Her Honour Judge Jakens (sitting as a Deputy High Court Judge)

### **Facts**

This case concerned a father's application for the summary return of his daughter, aged 9, to Germany. A half-sibling (DA) aged 10 was not party to the proceedings. The mother was a German national, as were the children. The father was a Guinean national but had resided in Germany for 15 years. The parties began their relationship in 2005 and never married.

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<sup>84</sup> Para 37. <sup>111</sup>

Para 41.

<sup>85</sup> Nevertheless, the mother did obtain some protection orders after the separation in 2011. The claim that she was unable to obtain further protective measures is worrying as it may indicate that should there be a need for enforcement of protective measures originating from the requested State, the enforcement procedure in the requesting State may also lack in efficiency, rendering thus the EU instruments useless.



Prior to the mother's relationship with the father, the mother was the victim of a "horrific attack" of attempted murder by her then partner (father of DA), who stabbed her 9 times in DA's presence. He was sentenced to 4.5 years in prison.

The parties' relationship lasted between 2005 and 2008 during which time they lived in Stade. After separation the mother moved to Cuxhaven with the children and contact was maintained. In 2010, the mother moved to Essen, asserting that she had to move due to the fear and threat to her safety and the children ensuing from DA's father's continued presence in her vicinity after release from prison. The father issued proceedings arguing that the move was without his consent. The mother alleged domestic violence and drug use by the father. Contact was ordered, and by 2011 further proceedings resulted in additional contact arrangements. However, by November 2012, the father complained that the mother was obstructive to contact. In the same year, the mother met Mr LR who was living in Germany at the time. He moved to the UK in August 2012. The mother asserted that in March 2014, she discussed her plans to move with the children to the UK and that the father was in agreement.

The mother left for the UK with the children in July 2014 and in April 2015 married Mr LR. The father remained living in Germany with his girlfriend. In January 2015, the father brought an application for the return of the child, asserting that the mother wrongfully retained the child in England and Wales. In the alternative, the father sought contact.

The mother opposed the return of the child, relying on four of the Art 13 defences, namely consent, acquiescence, the child's objections and the grave risk of psychological harm which was related to the deep connection between the children's fears and the trauma of their mother.

### **Article 13(1)(b)**

#### The violence/abuse

The allegations would indicate a mild level of abuse that was not ongoing, although there were certain safeguarding concerns post-separation which included allegations of drug use and the fact that the father would fall asleep on the sofa during contact visits.

The mother alleged domestic violence, drug use and the father's aggression. In relation to the children, the judge did find that the fears of the children were deeply connected to the trauma of their mother which stemmed from the violent attack perpetrated on the mother by her previous partner, DA's father.<sup>86</sup>

#### Court's approach to grave risk of harm / Evidence

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<sup>86</sup> Para 117.

In this case, the court took the approach of assessing the veracity of the evidence before it, akin to investigating the merits of the allegations. In this regard, the court's assessment led to the conclusion that this was a case of "two wholly competing versions of events and credibility of the parties and the reliability of the views of the CAFCASS reporter Mrs Odze are fundamental to any finding".<sup>87</sup> Of note is that the judge's approach to the case required the making of findings of fact in respect of the events.

The judge took into account the issue of the reliability of the evidence, stating that:

*"Neither parent in my judgment has been entirely honest, and I have therefore directed myself in the light of the case of R v Lucas (1981) 1 QB 720 at 724, 73 Cr App R 159 at 1 to contextualize any dishonesty in assessing evidence. My approach should be to ask myself if the lie was deliberate and related to a material issue, whether there was any innocent motive for the lie, and that I must remember that people sometimes lie, for example, to bolster up a just cause, or out of shame, or a wish to conceal disgraceful behaviour."*<sup>88</sup>

### Protective measures, including undertakings

In reaching a decision to make a non-return order, the judge found that protective measures would not adequately ameliorate the grave risk of harm, with the judge observing that:

*"there were no readily available solutions to address this family dynamic which is the primary source of risk in the case. Other protective measures such as injunctions in Germany would not be required as Mr MB has not acted against the mother since the attack years ago, and there is no evidence that MR IB would cause harm to AM".*<sup>89</sup>

The court concluded that there were no protective measures which could address the shared trauma in a concrete and definable way.<sup>90</sup>

### Effectiveness of protective measures, including undertakings

The effectiveness of protective measures was not largely explored in this case, especially in view of the non-return order.<sup>91</sup>

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## **Outcome**

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<sup>87</sup> Para 10.

<sup>88</sup> Para 11.

<sup>89</sup> Paras 118 and 119.

<sup>90</sup> Para 120.

<sup>91</sup> Para 117.

The court dismissed the father’s application, finding that to return the child would be to place her in an intolerable situation in terms of the abiding trauma on the mother that she shared, and in terms of separation from her brother DA and mother, if she were to return without them. The mother’s state of mind was considered by the court as a “key ingredient” and an “element” that the court felt “compelled to add to the mix” when evaluating the question of whether there was a grave risk of harm if the child was to be returned to Germany.<sup>92</sup> Importantly, the court’s finding concerning the grave risk of harm defence was bolstered by the child’s objections defence as a non-return order would relieve the child of her nightmares,<sup>93</sup> which she had talked about to the CAFCASS officer.

### **Theoretical utility of the EU instruments on protection measures**

The instruments would not have been helpful in this case, on account of the observations already made about the effectiveness of protective measures.

*AO v ZP* [2015] EWHC 3345 (Fam)

Date of judgment: 21 September 2015

Judge: Mr. Justice Baker

### **Facts**

The applicant father applied for the return of his son, aged 5, to Ukraine. The family had originally lived in Ukraine. It was the mother’s case that the father had had problems with alcohol and drugs and was, on occasions, aggressive and abusive towards her; and that the father and his family were controlling of her. She also submitted that the child had witnessed some acts of abuse perpetrated on her by the father. In 2013, the mother left and went to live with her parents in Belarus, leaving the child in the father’s care. The parents then reached a shared care agreement according to which the child spent periods at home in the care of his father in Ukraine and some other periods in Belarus with the mother. His registered place of permanent residence was the father's accommodation in Ukraine and he also attended a nursery school there. In 2014, the mother commenced a relationship with another man and together they decided to come to live in England. In November 2014, the mother took the child to Belarus with the father's consent for a period of approximately 12 weeks. In January 2015, she brought the child to England without the father’s knowledge. In May 2015, the mother gave birth to her second child, and following the birth, she suffered from significant postnatal depression.

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<sup>92</sup> Para 95.

<sup>93</sup> Para 114.

The mother opposed the father's return application on the grounds of acquiescence (Art 13(1)(a)) and the grave risk of harm (Art 13(1)(b)). She also noted that if the court were to order the child's return to Ukraine, she would not accompany him because she was suffering from postnatal depression. The mother did not attend the court hearing with an explanation (passed on through her counsel) that she was unwell and unable to travel.

## **Article 13(1)(b)**

### The violence/abuse

The violence was directed only to the mother. The child only occasionally witnessed the incidents.

Based on available information, the level of violence/abuse as alleged by the mother would amount to "mild" violence:

*"[...] the allegations of domestic violence and abuse to which I have already alluded in the course of my summary of the background stretching over, on the mother's case, the whole period of their relationship; the history of drink and substance abuse [...]; and what she describes as the controlling attitude of the father and his family. The mother says that I has witnessed some acts of abuse perpetrated on her by the father."*

The judge, however, doubted the strength of the mother's submission given the fact that she was content to leave the child in the father's care when she left Ukraine for Belarus, and later agreed to a shared care arrangement whereby the child spent substantial periods of time in the father's care in Ukraine.

### Court's approach to grave risk of harm / Evidence

The Court's approach to grave risk of harm was not explicit from the judgment. Nevertheless, it was clear that, in relation to the Article 13(1)(b) defence, the court relied on documentary evidence filed by each of the parties.<sup>94</sup>

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<sup>94</sup> Para 9. Additionally, in relation to Article 13(1)(a) – acquiescence, the court sought to obtain oral evidence through a fact-finding hearing. The court directed that both parties attend the hearing – the mother in the UK and the father from Ukraine. It was further directed that the father should attend to give oral evidence should the judge decide so. The court also noted that public funding had been extended to cover the mother's representation at the hearing. Ibid. Despite the mother not being able to attend the hearing, the hearing was not adjourned. The judge defended this decision by the urgent nature of return proceedings, a previous delay in the proceedings, the limited scope of a hearing under the 1980 Convention and the fact that no further hearing could be arranged in the near future. Nevertheless, the judge proposed that efforts be made to allow the mother to take part in the hearing via the telephone. Para 10.

## Protective measures, including undertakings

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The father was willing to offer undertakings to facilitate the mother's return with the child. These included: "not to use violence or threats towards the mother, nor to instruct anybody else to do so, not to pester or harass her and to pay for tickets for I to return and for tickets for the mother to return were she to come as well."<sup>95</sup> In addition, her gave an undertaking "not to prosecute her in the Ukraine courts or anywhere else in respect of the abduction [...]."<sup>123</sup>

The court, however, acknowledged that the undertakings may be of little significance as the mother seemed determined not to return with the child were a return order to be made.  
Effectiveness of protective measures, including undertakings

The problem of effectiveness of undertakings was not addressed. This was presumably because Article 13(1)(b) was not made out successfully.

### **Outcome**

The high standard required for Article 13(1)(b) to be satisfied was not met in this case, and neither the acquiescence defence applied. Accordingly, the return of the child to Ukraine was ordered.

### **Theoretical utility of the EU instruments on protection measures**

It is not considered that the instruments would have been helpful in this case given first, the "mild" nature of the violence, and second, the fact that the mother was unable to return with the child due to postnatal depression she suffered following the birth of her second child.

### AT v SS [2015] EWHC 2703 (Fam)

Date of judgment: 29 September 2015

Judge: The Honourable Mr Justice MacDonald

### **Facts**

The case involved an application for the return of a 5-year-old child to the Netherlands made by the child's father. The mother and the father, both of dual Afghani and Dutch nationality, had lived in the Netherlands where their son was born in 2010. The parents separated in late 2011 or early 2012. There were concerns that the child had been a witness to domestic violence on

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<sup>95</sup> Para 25. <sup>123</sup>

Ibid.

This report was funded by the European Union's Rights, Equality and Citizenship Programme (2014-2020).

the basis of allegations made by the mother, which the father denied. Dutch child protection services became involved in 2011 due to concerns about the mother's parenting abilities and her reluctance to co-operate with professionals. In 2012, a supervised contact order in favour of the father was made by a local court. In 2013, following a decline in the mother's mental health, the child was temporarily placed in a foster care. Thereafter, the child was returned to

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the mother's care. In 2014, it was recorded that the child was doing well in the mother's care, however, the mother repeatedly failed to cooperate with the contact order. She stated that this was due to her lack of trust in the father as a result of domestic violence and the father's lack of parenting skills. In November 2014, the mother and child moved to the UK without the father's consent. At the time of the return proceedings the mother was living with her second husband and was heavily pregnant.

The mother opposed the return application, seeking to rely on the grave risk of harm defence (Art 13(1)(b)). In her initial written evidence, the mother sought to ground a grave risk of physical or psychological harm in the history of alleged domestic abuse by the father. Later, however, it was made clear in submissions made on behalf of the mother that the mother's reliance on Art 13(1)(b) was based on the fact that she would not be returning with the child were a return order to be made and that this would result in the child being separated from his primary carer and placed in a foster care in the Netherlands.<sup>96</sup>

## **Article 13(1)(b)**

### The violence/abuse

The violence was directed primarily towards the mother, nevertheless, the mother alleged that the father had been physically violent also to the child by grabbing him from her arms. The child also witnessed domestic violence.

Based on available information, the level of violence in this case was assessed as "severe", however, the risk of further violence did not appear to be ongoing. Indeed, it was accepted by the mother that there had been no incidents of verbal or physical violence since the parents separated in October 2011.<sup>97</sup> In terms of psychological abuse, the mother alleged at one point in her statement that there was an event in 2014 when the father intimidated and frightened her, however, she confirmed that she had not spoken to the father directly since their separation in 2011.<sup>126</sup>

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<sup>96</sup> Para 50.

<sup>97</sup> Para 9. <sup>126</sup>

Ibid.

*“The CCPB [the Child Care and Protection Board] also recorded that S had been witness to domestic violence. Within this context the father conceded that he could get very angry but asserted his anger was directed towards inanimate objects. In her statement in these proceedings the mother alleges that the father has in the past raped her. Whilst the father was arrested following that allegation the mother later withdrew the complaint. The mother also alleges in her statement that the father would get drunk and angry and verbally abuse her and that he was a controlling individual. She alleges that on one occasion he dragged her out of the house by her hair and, on another occasion, threatened to attack her with a hammer. The mother further alleges the father has issues with both drugs and alcohol and associates with dangerous people. In addition, she alleges that the father has been physically violent to S by grabbing him from her arms.”<sup>98</sup>*

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### Court’s approach to grave risk of harm / Evidence

Although not explicitly stated in the judgment, it appeared that the court adopted the *Re E* approach in this case. This conclusion has been made based on the following indicators. First, the court did not seek to establish the merits of the allegations of domestic violence made by the mother against the father. Instead, it simply concluded that “taken at their highest”, the allegations could not be regarded as leading to a conclusion that the child would be exposed to a grave risk of harm in terms of Art 13(1)(b).<sup>99</sup> This was because the last incident had occurred nearly five years prior to the return proceedings (i.e. before the parties separated in 2011), and the mother was able to live in the same country as the father for almost 3 years after the last allegation without incident. The court therefore concluded that: “[...] the mother's allegations concerning domestic violence do not, even if taken as the truth, come close to satisfying the terms of Art 13(b).”<sup>129</sup> Second, the court went straight to the protective measures, noting that it must assume (the contrary not having been proved) that the requesting State has adequate administrative, judicial and social services and procedures for protecting the child upon the return.<sup>130</sup>

The court based its decision on the following evidence: 1.) Written evidence submitted by the parties; 2.) Information from the Dutch Authorities (requested by the court during the return proceedings and submitted via the Dutch Central Authority) seeking details of the involvement of the Dutch authorities with the family in the past, and confirmation of the practical measures that would be adopted by the Dutch authorities in case the child is returned – either with the mother or without her<sup>100</sup>; and 3.) Submissions from the parties’ respective representatives in a hearing which took place on 11 September 2015.<sup>132</sup>

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<sup>98</sup> Para 8.

<sup>99</sup> Para 51. <sup>129</sup> Para 51. <sup>130</sup> Para 62. “[...] I must assume that Holland has adequate procedures for protecting S in foster care, which procedures extend to ensuring that any psychological distress consequent upon his temporary separation from his primary carer is appropriately addressed.” Ibid.

<sup>100</sup> Para 29.

<sup>132</sup> Para 28.

### Protective measures, including undertakings

Even though the court concluded that the domestic abuse allegations of did not satisfy the terms of Art 13(1)(b), it gave consideration to undertakings offered by the father should the mother return with child to the Netherlands. These included:

- “i) Not to prosecute nor pursue any civil or criminal claim against the mother in relation to the wrongful removal of S from the Netherlands;
- ii) Not to seek to separate S from the mother save for any agreed or court ordered contact pending the determination of the that issue by the Dutch courts;
- iii) To pay for the single air fare for the mother and S to Holland;
- iv) Not to attend the airport, or any other address which the mother may be present at during her stay in the Netherlands to facilitate S's return;
- v) Any other undertakings which the court considers appropriate in order to safeguard the position of S in Holland pending the first hearing before a Dutch court.”<sup>101</sup>

### Effectiveness of protective measures, including undertakings

The problem of effectiveness of undertakings was not addressed.

### **Outcome**

The Article 13(1)(b) defence was not made out successfully. The question whether the child will be exposed to a grave risk of harm must be answered in the context of the protective measures which can be put in place on the child’s return.<sup>134</sup> It is, however, to be noted that the potential harm in the present case did not stem from the allegations of domestic violence but from the child’s possible temporary separation from his primary carer and his placement in a foster care.<sup>102</sup>

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<sup>101</sup> Para 52.

<sup>134</sup> Para 47.

<sup>102</sup> Para 61. The court applied the Supreme Court reasoning in *Re E* that the focus of the inquiry should be on the question of risk of harm to the child rather than on the conduct of the abducting parent that may be a wholly or contributory causative effect of that harm. Specifically, the court said: “To take the present case as an example, were the court to conclude that a return to Holland would expose S to a grave risk of physical or psychological harm or would otherwise place S in an intolerable situation by reason of his being separated from his mother and placed in care in Holland, from S's perspective whether that separation, and all that flows from it, is due to the mother's contumelious attempt to frustrate the Convention process or an involuntary inability to travel or something between those two extremes is neither here nor there for S. The risk of harm is grave or the situation intolerable for S either way.” Para 42.



## **Theoretical utility of the EU instruments on protection measures**

It is not considered that the instruments would have been helpful in this case given in particular the fact that the mother was not intending to return with the child.

*In the Matter of M (Children)* [2016] EWCA Civ 942

Date of judgment: 9 August 2016

Judges: Lord Justice Beatson, Lady Justice Macur and Lord Justice Sales

### **Facts**

This case was an appeal against a first-instance refusal to order a return of two children, aged 5 and 4 years respectively, to the country of their habitual residence (USA, New Jersey).<sup>103</sup> The parties met and married in Germany where the father, a US national, was stationed whilst

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<sup>103</sup> The first-instance decision was reported at *DM v KM* [2016] EWHC (Fam) 1282.

serving in the US army. The mother was a German national. In January 2016, the children travelled with their mother to the UK for a holiday. They were expected to return the following month, however, did not return as planned but remained living in the UK. The mother and the children were located in March 2016. The mother resisted the father's application on the basis of a grave risk of harm (Art 13(1)(b)), relying on domestic violence by the father against both her and the children.

## **Article 13(1)(b)**

### The violence/abuse

The mother made allegations of domestic abuse by the father - physical, sexual and emotional, towards her and, whether directly or indirectly, the children, who often witnessed “their parents' negative interaction.”<sup>104</sup> The mother’s allegations were indicative of “severe” violence, although based on the information provided in the judgment it is difficult to assess to what extent a risk of the violence continuing was present at the time of the return proceedings.

The father disputed the severity of the mother's allegations. Nevertheless, he acknowledged that the marriage had been unhappy and volatile and that the children would sometimes have witnessed the incidents. He also accepted that the police had to be called several times and that once he had been escorted to a hospital for a psychiatric assessment, although was discharged the same night. The mother said that this was the last time the family resided together.<sup>105</sup>

### Court’s approach to grave risk of harm / Evidence

The Court of Appeal was of the view that the first instance judge (Russell J) had rightly referred to *Re E* and on this basis correctly set out the approach to the grave risk of harm. In particular, Russell J noted that return proceedings were summary in nature and therefore “militate against resolution of factual disputes going to the risk and extent of harm”.<sup>106</sup> It follows that the court should assess risk on the assumption that the allegations are true and consider whether suitable protective measures may be put in place. Only if the available protection would be insufficient, would it be necessary for the court to “do the best it can to resolve the disputed issues”.<sup>140</sup>

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<sup>104</sup> *In the Matter of M (Children)* [2016] EWCA Civ 942, para 4. The first-instance decision provides a more detailed insight into the nature of the mother’s allegations: “The respondent alleges that the domestic abuse had started in 2010 but became worse after the birth of their second child in 2011 and persisted thereafter. She says that DM has assaulted both the children, giving as examples J when he was 1 year old being hit on his legs and D when he was a baby of two months being hit on his mouth. She said in her statement that she was regularly assaulted; she was slapped, had her hair pulled and twisted and that she was choked. She says that during these incidents the children were present. KM says that in 2014 the violence escalated, and she was sexually assaulted by DM who attempted to rape her. [...]” *DM v KM* [2016] EWHC (Fam) 1282, paras 10-11.

<sup>105</sup> Para 5.

<sup>106</sup> Para 7.

<sup>140</sup>

Ibid.

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In the proceedings before Russell J, the father offered a number of undertakings (see below “Protective measures, including undertakings”), the enforceability of which was, however, challenged by the mother. In particular, the mother raised doubts over the availability of accommodation promised by the father. A position statement was filed promptly on behalf of the father, to which a letter from a US attorney at law and a tenancy agreement were attached. Later that day, a position statement in response was submitted on behalf of the mother, which challenged the validity of the tenancy agreement. Russell J, however, “heard no further oral submissions and raised no further query”,<sup>107</sup> and delivered her judgment later that day, noting that, “she had approached the case on the basis of the wife's allegations put at their highest”, as required by *Re E*.<sup>142</sup> She then proceeded to assessing the protective measures proposed by the father and found them “vague and ephemeral assurances ... not at all sufficient to meet the needs and circumstances of the children in this case”, and subsequently refused to order the children's return to the United States.<sup>143</sup>

Russell J's approach to the grave risk of harm assessment was the subject of the father's appeal. The appeal was brought on two alternative grounds: 1.) the judge's approach to, and eventual dismissal of the protective measures proposed by the father, and 2.) the judge's failure to conduct the next step of the analysis – i.e. to attempt to resolve the disputed issues<sup>108</sup> following the finding that the protective measures were not adequate.<sup>109</sup>

On the first point, the Court of Appeal reproached Russell J for taking parts of the CAFCASS report out of context and, without seeking further expert advice or hearing evidence from either of the parties on the disputed findings of fact, interpreting the report incorrectly.<sup>110</sup> On the second point, the court accepted that there was “a firm basis for [the] submissions that the judge merged the first and third step of the exercise upon which she should have embarked.”<sup>111</sup>

In conclusion, the court found that Russell J's approach to protective measures was wrong.<sup>148</sup>

### Protective measures, including undertakings

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<sup>107</sup> Para 9. <sup>142</sup> Para 10. The Court of Appeal commented with approval that Russell J was surely “confirmed in her view by the fact that the father admitted domestic abuse had occurred and that the children had been present on occasions, and that the police had been called to the home.” Ibid. <sup>143</sup> Para 11.

<sup>108</sup> See *Re E*, para 35.

<sup>109</sup> Para 12.

<sup>110</sup> Para 17.

<sup>111</sup> Ibid.

<sup>148</sup>

Ibid.

During the first instance proceedings before Russell J the father volunteered the following undertakings: a.) not seek the mother's prosecution for child abduction; b.) not attend the airport of arrival; c.) to submit to a non-molestation order; d.) not remove the children from the mother's care; e.) to provide a three-bedroom property for the exclusive use of mother and children and pay the rent and outgoings; b.) to make other reasonable maintenance provision;

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and c.) to pay for the children's return flights.<sup>112</sup> Additionally, the father undertook to initiate proceedings in a competent USA court in respect of the children.

### Effectiveness of protective measures, including undertakings

The Court of Appeal commented that Russell J was correct to question the effectiveness of the protective measures, including the “proposals made as to the protection and financial support and enforcement of protection orders.”<sup>113</sup>

Whilst the Court of Appeal acknowledged that there were unresolved issues regarding the accommodation that the father was able to arrange for the mother, and a certain level of uncertainty regarding the protective orders that the mother may have been able to obtain on return,<sup>114</sup> it reproached Russell J for the failure “to make an order conditional for return upon the father obtaining the landlord's written consent so as to securely accommodate the mother and children and the obtaining of advance injunctive orders.”<sup>115</sup>

The court criticised Russell J’s dismissal of the information provided in the letter from a US attorney (see above “Court’s approach to grave risk of harm”) as “confused and inaccurate”.<sup>116</sup> In this letter, the attorney set out available procedure to acquire an enforceable non-molestation, occupation and interim maintenance order in New Jersey. The Court of Appeal commented that this procedure was akin to the one available in the UK: “an order made with the parties’ consent in New Jersey, USA can contain the same protective language as set forth in the undertakings to the UK court, the undertakings can be specifically referenced in the New Jersey consent order, and otherwise a copy of the UK court's order can be attached and incorporated into the USA consent order.”<sup>117</sup> Moreover, the letter indicated that the consent order could be signed in advance of the return and could be accomplished “in as little as one week should there be an agreement in writing between the parties”.<sup>118</sup> Accordingly, the Court of Appeal

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<sup>112</sup> Para 8.

<sup>113</sup> Para 19.

<sup>114</sup> Para 20.

<sup>115</sup> Para 21.

<sup>116</sup> Para 22.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

Ibid.

commented that there was no basis upon which Russell J “could legitimately doubt the efficacy of the USA courts or police force in enforcing protective measures.”<sup>156</sup>

## **Outcome**

The court allowed the appeal and concluded that there was protection available to the mother in the USA. Accordingly, the children’s return to the USA was ordered, on condition that “the father provides evidence [...] that a consent order has been entered into the Superior Court of

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<sup>156</sup>

Ibid.

New Jersey [(see above “Effectiveness of protective measures, including undertakings”)] and secondly that the landlord of his present accommodation consents to the subletting or assignment of the tenancy to the mother, or otherwise her exclusive occupation of the same.”<sup>119</sup>

### **Theoretical utility of the EU instruments on protection measures**

As the requesting State was a common law jurisdiction with a variety of seemingly available avenues to secure effectiveness of protective measures (see above “Effectiveness of protective measures, including undertakings”) it is not considered that the instruments would have been helpful in this case.

*MR v HS* [2015] EWHC 234 (Fam)

Date of judgment: 5 February 2015

Judge: Mrs Justice Theis

#### **Facts**

The case involved a father’s application for the return of his two children, aged 9 and 2, to Ireland. The parties married in Bangladesh in 2001 and moved to Ireland in 2002. They became Irish citizens in 2007. The children were born and lived in Ireland until July 2014 when their mother removed them to England to escape father’s violent behaviour. The last incident of violence took place in June 2014 when the father attacked the mother with a knife. The mother fled with the children and called the police who arrested the father. The mother then went with the children to a women’s refuge in Ireland. but the father found out her location and began following and harassing her. In early July 2014, the mother obtained a barring order, but this did not stop the father’s intimidating behaviour. On 21 July 2014, the mother left for the UK and at the time of the return proceedings was living in a refuge with the children. When the mother was in the UK, the father was attempting to find her. She applied for a prohibited steps and child arrangements orders, along with a non-molestation order. The proceedings were then stayed in the light of the return proceedings. The mother provided evidence from the refuge where she was staying following the removal of the children to England of the continued harassment of her and the children by the father and the impact of this behaviour on the older child. She opposed the father’s application for return on the basis of Art 13(2) and Art 13(1)(b).

#### **Article 13(1)(b)**

##### The violence/abuse

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<sup>119</sup> Para 24.

Violence of severe intensity was directed towards both the mother and the children by the father. Importantly, at the time of the return proceedings, the risk to the mother and the children

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was ongoing. The mother alleged that throughout their relationship the father has been regularly violent to her and also to the children, often causing the mother injuries. On one occasion the father strangled the mother and threaten to kill her. The violence took also the form of sexual violence, including rape. The father's violence was directed also at the children, in particular the older child whom the father kicked and slapped, frightened with a knife and even threatened to kill. The police attended the incidents of domestic violence several times, however, the mother felt that she could not press charges. The mother also alleged that she had been subjected to psychological abuse as the father was very controlling. The father was denying of the allegations.

*“He would slap, punch, kick, head butt, push and shove the mother with such force that she would end up with injuries, including bruising. She alleges the father was very controlling, eventually stopping her having any contact with her family. She describes occasions when the father locked her out of the family home. The police were called on a number of occasions but the mother did not feel she could press charges. In 2012, she describes an occasion when the father tried to strangle her and threatened to kill her. She also alleges he was also sexually violent to her and raped her.”<sup>120</sup>*

*“The mother alleges there were incidents of the father being violent to D, he would kick and slap him hard across his head. He has also threatened to kill D and has intimidated him with a knife. As a result the mother alleges D is extremely frightened of the father. She also describes occasions when the father has been violent to A by pushing and shoving him to the extent that he too is also scared of the father.”<sup>121</sup>*

### Court's approach to grave risk of harm / Evidence

The court held that Art 13(2) had been made out successfully and having reached that conclusion found it unnecessary to consider the Art 13(1)(b) defence. Nevertheless, it seems that the court believed that the *Re E* approach provided the appropriate method of dealing with child abduction cases. In particular, the court noted that it could not make any findings concerning the disputed allegations as “those matters will have to be considered in the context of a contested hearing where oral evidence is given by the parties.”<sup>122</sup>

The court reached its decision in relation to Art 13(2) on the basis of the following evidence. First, both parties have filed statements, with supporting material attached. Second, a CAFCASS report addressing the child's objections to return was requested by the court in the course of the proceedings. The CAFCASS officer gave oral evidence. No oral evidence was

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<sup>120</sup> Para 12.

<sup>121</sup> Para 13.

<sup>122</sup> Para 42.

<sup>161</sup> Para 41.

presented by the parties as the court highlighted that return proceedings were essentially “a summary procedure” whereby the court “is not in a position to make findings but, has to assess the evidence in the context of the principles the court is bound by.”<sup>161</sup>

### Protective measures, including undertakings

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The father proposed undertakings that he would not pursue criminal proceedings for child abduction and would not seek contact unless approved by social services in Ireland.<sup>123</sup> The court also considered protection measures available to victims of domestic violence in Ireland more generally, including the utility of such measures in the present case (see below “Effectiveness of protective measures, including undertakings”).

### Effectiveness of protective measures, including undertakings

The court commented on the likely effectiveness of protection measures available in Ireland and concluded that, on the facts of this case, such measures were not likely to be effective. Prior to the abduction the mother obtained a barring order in Ireland (an equivalent of a nonmolestation injunction); however, this order was ineffective in protecting the mother and the children. Consequently, the mother and the children “had direct experience of orders being made to protect them not being effective in Ireland.”<sup>163</sup>

### **Outcome**

The court held that the Art 13(2) defence had been made out successfully in this case. The child’s objections to being returned were based on a genuine fear of his father which was exacerbated by direct experience of ineffectiveness of protective measures in Ireland.

### **Theoretical utility of the EU instruments on protection measures**

Given the outcome of the case (i.e. refusal to return), neither the Regulation nor the Directive would be of any assistance in this case. Nevertheless, had the return been ordered, it is questionable whether the instruments could have been of any assistance, given the history of ineffectiveness of domestic protection measures in this case.

### *RB v DB* [2015] EWHC 1817 (Fam)

Date of judgment: 4 June 2015

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<sup>123</sup> Para 32.

<sup>163</sup> Para 46.



Judge: Mr. Justice Mostyn

## **Facts**

The court was concerned with the removal of two children from Austria to England. This was the mother's application for the summary return of the children, aged 6 and 10 years old. The father objected to the return, mounting an Article 13(1) b) grave risk of harm defence as well as relying on the child's objections defence.

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The parents married on 14 September 2004 and the children were born in the UK, D in 2005 and B in 2009. During the marriage, the mother had a history of mental illness which caused difficulties. Documentary evidence showed a long history to include a diagnosis of severe depression and in September 2012, an emotionally unstable personality disorder. This resulted in the father obtaining a raft of orders including residence, prohibited steps, non-molestation and occupation orders from the local court in 2013.

By January 2014, the parties had reconciled, and the orders were discharged. The family relocated to Vienna, Austria in August 2014 to start afresh. The children became habitually resident there. The difficulties in the marriage, however, endured and the father alleged that the mother had verbally and physically abused him and the children, and in March 2015, he removed the children to the UK. The mother applied for their return to Austria.

## **Article 13(1)(b)**

### The violence/abuse

The level of violence asserted in this case may be categorized as moderate. The father asserted that the verbal and physical abuse was directed at both him and the children.<sup>124</sup> The allegations were not detailed in the judgment but were described as "very serious".<sup>125</sup>

The mother largely denied the allegations, however, available evidence, in particular e-mail correspondence between the parties indicated that the father's case was correct.<sup>126</sup> (See below "Court's approach to grave risk / Evidence").

### Court's approach to grave risk of harm / Evidence

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<sup>124</sup> Para 19.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

An account of the Court’s approach to grave risk of harm is limited in this case. Nonetheless, the judgment provides some insight, in that the approach did involve consideration of some evidence that corroborated the father’s case. In the words of the judge, this evidence was “derived from the contents of the mother’s emails to him which do make alarming reading.”<sup>127</sup> Mostyn J, however, emphasised that the purpose of this exercise was not to make “any firm findings of fact” or “reach any definite conclusions”; instead the objective was to assess and reach provisional conclusions on whether protection orders were necessary.<sup>128</sup>

### Protective measures, including undertakings

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The court ordered a number of specific protective measures,<sup>129</sup> stating that these measures would “dissolve”<sup>130</sup> the defences raised by the father. The list was extensive and included measures ranging from the reimbursement of travel costs for the father and the children to the mother vacating the matrimonial home (akin to an occupation or ouster order). Some of these measures could perhaps be seen as those necessary for “soft landing” to take place. In relation to one measure, which was particularly relevant to the issue of domestic violence, the judge stated that:

*“I make an order that the father, either by himself or by instructing or encouraging any other person, shall not use or threaten violence, intimidate or harass the mother. I make an equivalent order in respect of the mother against the father.”*<sup>131</sup>

Mostyn J determined that the list of measures “more than amply meets the criterion on Article 11.4” of Brussels IIa making the defence under Article 13(1) b “no longer available” to the father.<sup>132</sup>

### Effectiveness of protective measures, including undertakings

On the backdrop of the detailed raft of measures set out in the judgment, Mostyn J commented on the operation of Brussels IIa, that “when Article 11.4 was drafted over 10 years ago measures which the framers would have been contemplating were probably voluntary arrangements between the parents on the basis of undertakings.”<sup>133</sup> The learned judge then noted that there have been “further

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<sup>127</sup> Ibid.

<sup>128</sup> Para 29.

<sup>129</sup> See para 26.

<sup>130</sup> Ibid.

<sup>131</sup> Paras 9 and 10.

<sup>132</sup> Para 27.

<sup>133</sup> Para 9.

legal developments”,<sup>134</sup> including the the 1996 Hague Protection Convention,<sup>135</sup> and remarked that “[i]f orders are made under Article 11 [of the 1996 Convention] then by virtue of Article 23 they shall be recognised by operation of law in all other contracting states”.<sup>176</sup> Accordingly, Mostyn J issued orders under Art 11 of the 1996 Convention as urgent measures of protection, with the anticipation that these orders “will be reciprocally recognised and enforced by operation of law in Austria.”<sup>136</sup> Mostyn J further stated that, additionally, these orders fell within the scope of the Protection Measures Regulation and as such were enforceable also under that Regulation.<sup>137</sup> He then concluded that “[...] in as much as the list of measures I have ordered have extended to protection measures within the terms of Regulation 606/2013 then they will be doubly enforceable in Austria.”<sup>179</sup>

## **Outcome**

The court granted the mother’s application for the return of the two children to Austria, with protective measures in place.

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## **Theoretical utility of the EU instruments on protection measures**

Mostyn J in his judgment determined that the Protection Measures Regulation was applicable by virtue of Recital 6 and considered that this would ensure enforceability of the measures that he had imposed in this case. His Lordship referred to Recital 6 which refers to “reciprocal enforcement throughout the Union of protection measures ordered for the protection of a person where there exist serious grounds for considering that a person’s life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk”.<sup>138</sup> As mentioned above, the learned judge concluded that the protection measures were “doubly enforceable”, under the 1996 Hague Convention and under the Protection Measures Regulation.

*Re K (1980 Hague Convention) (Lithuania) [2015] EWCA Civ 720*

Date of judgment: 14 July 2015

Judge: Lady Justice Arden, Lady Justice Black and Lord Lewison

## **Facts**

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<sup>134</sup> Ibid.

<sup>135</sup> Para 10.

<sup>176</sup> Ibid.

<sup>136</sup> Para 29.

<sup>137</sup> Para 30.

<sup>179</sup> Para 31.

<sup>138</sup> Para 30.

<sup>181</sup> Para 9.

This was an appeal brought by the respondent mother in respect of an order of Hogg J for the return of the parties' daughter, aged 11, to Lithuania pursuant to Art 12.

Whereas the mother accepted that she had wrongfully retained the child, she relied on the exceptions under Art 13, asserting child's objection and a grave risk of harm. The parties, including the child, were Lithuanian nationals and until 2012 all resided in Lithuania. The mother had three children, the older two were not the children of the father and not subject to the proceedings. The parties never married but had a long relationship. During that time, there were allegations, firstly in 2002 that the father had tried to set fire to the maternal grandmother's flat and in a separate incident doused the mother in petrol and held a light to her.<sup>181</sup> In 2005, the mother asserted that the father tried to strangle her son (half-sibling) when he tried to intervene in an altercation between the parties. In 2008, the father was sent to prison for fraud and released in 2011. Upon his release, and for reasons that are disputed, the child ended up in the father's care, precipitating the mother's application in March 2012 to the Lithuanian authorities that the father had taken the child without her consent and prevented the child from seeing the maternal family. An agreement was reached after some enquiries by the Child's Rights Protection Services for regular contact between the mother and child who voiced that she liked living with the father. In October 2012, the mother moved to England and by the summer of 2014 contact was agreed to take place between her and the child in England over the summer holidays, which did take place. On 24 August 2014, an unpleasant incident occurred where the father attended the mother's flat with the intention of taking the child back to Lithuania with him. The incident resulted in the police attending the property and the father

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being arrested, although no criminal proceedings were brought. The incident was described as follows:

*"A fracas between the father and the mother's partner. In the course of it someone used CS gas. Both men were injured, as was the mother. E was also seen to have a red mark on the back of her head after the incident. The mother said that she saw the father holding E by her neck and dragging her out of the flat with her partner trying to stop him. The father's account to the police was that E was trying to get to him but was being held back by her hair, legs and clothing, and, wanting to protect her, he told her to run away. When the police arrived on the scene, having been summoned by various people, they heard shouting and encountered the father coming down the stair".<sup>139</sup>*

The father applied for the return of the child and at first instance, Hogg J granted the application, finding that the Article 13(1)b) exception was not made out and that the child's objections were as a result of "deep influence over a lengthy period by the mother and her team".<sup>140</sup>

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<sup>139</sup> Para 15.

<sup>140</sup> Para 34.

<sup>184</sup> Para 9

## **Article 13(1)(b)**

### The violence/abuse

Based on available information, the level of violence in this case may be assessed as severe.

The violence was directed at the mother and the child, including other children of the family. There are considerable gaps between the alleged incidents in 2002 (arson and threats to the mother who was doused in petrol and a lighter held to her),<sup>184</sup> 2005 (attempted strangulation of one of the children),<sup>141</sup> 2011 (threats with a knife)<sup>142</sup> and 2014 (the mother, father and her partner were injured when CS gas was used during an altercation in her flat, the child sustained a mark to the back of her head).<sup>143</sup>

### Court's approach to grave risk of harm / Evidence

The Court's approach to grave risk of harm explicitly acknowledged that an evaluation of the evidence was necessary. Lady Justice Black (as she then was) observed at paragraph 52 the need for the mother to substantiate the Article 13(1) (b) exception and for the court to evaluate the evidence within the confines of the summary process.<sup>144</sup> In doing so Black LJ rejected the view that the court was bound to follow the *Re E* assumption approach if "the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk" (as was the situation in this case).<sup>189</sup> The trial judge found that the mother had not

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corroborated her evidence, and that her evidence was inconsistent, therefore her Article 13 (1) b argument had not "got off the ground".<sup>145</sup>

### Protective measures, including undertakings

The Court of Appeal rejected the argument that the trial judge had not adequately considered protective measures. This was on the basis that it was not necessary for Hogg J to look further at the question of protective measures when the learned judge had already concluded that based on the evidence, the allegations did not give rise to an Art 13 (1)b grave risk.<sup>191</sup> It was also held that the mother's case was weakened further because the mother had subsequently agreed to return with the child.

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<sup>141</sup> Para 9

<sup>142</sup> Para 11

<sup>143</sup> Para 15

<sup>144</sup> Para 52-53.

<sup>189</sup> Para 53.

<sup>145</sup> Para 53.

<sup>191</sup> Para 53.

## Effectiveness of protective measures, including undertakings

On the basis that the mother's defence under Art 13(1) (b) was not successfully made out, the issue of effectiveness of undertakings or other protective measures was not addressed.

### **Outcome**

The Court of Appeal dismissed the mother's appeal and upheld the trial judge's decision to return the child to Lithuania.

### **Theoretical utility of the EU instruments on protection measures**

Neither the Regulation nor Directive would have been useful in this case as the return order was made on the backdrop of the court having found that the Art 13(1) b) exception had not been made out, and therefore the need for protective measures did not arise.

### *JZ v TG* [2017] EWHC 514 (Fam)

Date of judgment: 15 February 2017

Judge: Mr. Justice Francis

### **Facts**

The case involved a two and half-year-old girl born in Ireland to a father of a Pakistani and a mother of a Jamaican origin. The parents had met in Ireland and started cohabitating in 2011. In 2014, their daughter was born. They separated in 2016 following a serious altercation between the two of them. The mother submitted that the father had been abusive to her throughout their relationship. She secured a non-molestation order against him in Ireland and took their daughter to England without his consent. The father subsequently sent abusive text

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messages to the mother's sister, including one in which he threatened to kill the mother. The father commenced return proceedings. Initially, the mother sought to defend the application on the basis that the father was not actually exercising rights of custody at the time of the removal (Art 13(1)(a)); on the ground of settlement (Art 12(2)) and on the basis of grave risk of harm (Art 13(1)(b)). Eventually, however, only the defence of Art 13(1)(b) was pursued.

### **Article 13(1)(b)**

#### The violence/abuse

The mother alleged that she was subjected to abuse at the hands of the father, who had a serious alcohol problem, during the course of their relationship. Occasionally, the violence was directed also towards the child as the father squeezed their daughter hard and kicked furniture, including her cot, in a fit of rage.<sup>146</sup> In July 2016, the mother obtained a non-molestation order, pursuant to the Irish Domestic Violence Act 1996 whereby the Irish Court ordered the father “not to use or threaten to use violence against the applicant, molest or put the applicant in fear.”<sup>147</sup> The non-molestation order was still in force at the time of the return proceedings when the father sent a series of abusive messages to the mother’s sister. The court acknowledged that the messages were sent to the mother’s sister as opposed to the mother herself, however, having applied the English understanding of a breach concluded that “this was a molestation of the mother in the extreme”.<sup>194</sup> This led the court to conclude that the father was most likely in a breach of the non-molestation order.<sup>148</sup>

Against this background, it can be concluded that there was an ongoing risk of psychological abuse (and potentially also physical violence). The information provided in the judgment was not detailed enough to allow for a straightforward assessment of the intensity of the violence the mother was subjected to whilst living with the father in Ireland. Nevertheless, it appears reasonable to suggest that the intensity of violence was at a minimum “moderate” (if not “severe”). The mother submitted that if the court ordered the child's return, she would suffer such anxieties as a result of the father's conduct so as to affect her mental health and create an intolerable situation for the child within the meaning of Art 13(1)(b).<sup>149</sup>

#### Court’s approach to grave risk of harm

The court appeared to adopt the *Re E* approach as it explicitly stated that no fact-finding to hear oral evidence and determine disputed facts should occur in return proceedings. Specifically, the court noted:

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“It is very clear that I am not a fact finding tribunal and I do not and cannot make findings on the disputed facts, particularly in circumstances where I have heard no oral evidence. It is not my function at this hearing to do that.”<sup>150</sup>

#### Protective measures, including undertakings

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<sup>146</sup> Para 15.

<sup>147</sup> Para 28. The court commented on the fact that it was a ‘without notice’ hearing and therefore, by definition, not attended by the father. This meant that “no findings could possibly have been made against him.” Ibid. Nevertheless, the court was satisfied that “the mother must have filed with the Irish Court evidence that, at least on a prima facie basis, satisfied the court that they should make that order.” Ibid. <sup>194</sup> Para 32.

<sup>148</sup> Paras 32 and 39.

<sup>149</sup> *Re S*, para. 34, per Lord Wilson.

<sup>150</sup> Para 17.

The father proposed undertakings to cover the cost of the airfares for the mother and the child; to pay such maintenance as determined by Irish authorities. These undertakings can be classified as ‘soft-landing’ measures as opposed to protective measures *per se*. Additionally, the father offered non-molestation undertakings (although, as pointed out by the court, the Irish non-molestation order remained in force, so the father was, in any event, obliged to refrain from molesting the mother).<sup>151</sup>

### Effectiveness of protective measures, including undertakings

The court appeared to be critical of the effectiveness of protective measures generally when it said that “no court order can act to prevent a perpetrator from acting in a particular way.”<sup>199</sup> This comment was, however, made against the background of the present case where there was evidence of a flagrant breach of the Irish non-molestation order by the father, although the court was at pains to stress that this was by no means a criticism of the Irish court process.<sup>152</sup>

### **Outcome**

The return application was refused based on Art 13(1)(b). Given the father’s history of domestic violence and previous breach of a non-molestation order against the child’s mother, there was a grave risk that returning the child would cause the mother to suffer such anxieties so as to affect her mental health and create an intolerable situation for the child within the meaning of Art 13(1)(b). In reaching this conclusion, the court cited with approval the decisions of the Supreme Court in the cases of *Re E* and *Re S*.<sup>201</sup> The court also concluded that, on the facts of the case (i.e. in the circumstances where the mother felt that the Irish non-molestation order did not provide her with adequate protection), it was not possible to make adequate arrangements to secure the protection of the child after her return.<sup>202</sup>

### **Theoretical utility of the EU instruments on protection measures**

Given the outcome of the case (i.e. refusal to return), the instruments would not have been of assistance in this case. Similarly, had return been ordered, it is questionable whether the

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instruments could be of any assistance, given the history of ineffectiveness of domestic protection measures in this case.

### *R v P* [2017] EWHC 1804 (Fam)

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<sup>151</sup> Para 46.

<sup>199</sup> Para 47.

<sup>152</sup> Ibid. To reaffirm this the court noted that the Irish court process was “to all intents and purposes, [...] the same as ours in this regard.” Ibid. <sup>201</sup> Paras 35-36 and 43-44. <sup>202</sup> Para 48.



Date of judgment: 3 March 2017

Judge: Mrs. Justice Theis

## **Facts**

The case concerned a 5-year-old girl who was born to Lithuanian parents in Lithuania in 2010. The mother alleged that the father became abusive and aggressive and was violent to her while she was pregnant and when the child was a baby. She reported him to the police in 2012 but no action was taken. On one occasion, the father was violent also to the child. Following the separation, he continuously harassed the mother. In October 2015, the mother moved to the UK with her new partner and the child and gave birth to her second child two months later. In November 2016, the father commenced return proceedings. The mother accepted that she had brought the child to the UK wrongfully, but said that she had done so because she was afraid that the father would “destroy” their lives.<sup>153</sup> She was also afraid that he would find them in the UK and harass them as he had done in Lithuania. She said that if the child was returned to Lithuania, she would not go back with her.

The mother opposed the return application on the basis of settlement (Art 12(2)) and the grave risk of harm (Art 13(1)(b)).

## **Article 13(1)(b)**

### The violence/abuse

The mother alleged that the father was aggressive, violent and psychologically abusive to throughout their relationship. On one occasion, the father was violent also to the child, “flicking” her hard on her forehead.<sup>154</sup> As a result of this incident, the mother separated from the father. Thereafter, the father became angry, abusive and unpredictable. He harassed the mother by following her to work and her parents' home and threatened to kidnap the child. The mother contacted the police and was granted an injunction preventing the father from going to the child's nursery or her home or work. Medical reports showed that the child was afraid to leave her mother and showed signs of stress. In May 2014, the Lithuanian court ordered the father to see a psychologist and to have supervised access to the child. Around that time, the father breached the injunction preventing him from going to the nursery and refused to give

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<sup>153</sup> Para 79.

<sup>154</sup> Para 14.

the child back to the mother, causing a struggle. This incident resulted in the supervised access not taking place. He was convicted by a criminal court of breaching the protection order, entered a plea of guilty and was fined.<sup>155</sup>

Based on this information it appears that there was an ongoing risk of harassment in the present case. The intensity of the violence / abuse the mother suffered whilst in Lithuania could be classified as “moderate”.

#### Court’s approach to grave risk of harm / Evidence

The court appeared to adopt an approach which combined certain elements of the *Re E* approach (in particular, the court commented that the presence of a grave risk of harm can be assessed only against the background of available protective measures) with examining the merits of the allegations.

#### Protective measures, including undertakings

The court did not explore available protective measures, presumably because the mother said that she would not return with the child (firstly, as this would mean separation from her young baby since her partner would not consent to the baby going to Lithuania and, secondly, because of the history of the case). Nevertheless, the court commented on the breaches of the orders that had been made in Lithuania by the father in the past. (See below ‘Effectiveness of protective measures, including undertakings’).

#### Effectiveness of protective measures, including undertakings

The court acknowledged that protective measures have been put in place previously by the Lithuanian courts and that these provided some protection for the mother, including when the father breached those orders and was punished by the Lithuanian courts for his actions. Nevertheless, the court noted that the mother did not feel she would be adequately protected from the father's behavior if returned. While orders could be obtained to protect her, the history of breaches could not be ignored. In his oral evidence, the father displayed no recognition or understanding of the impact of his behaviour on the child, which supported the mother's fears that he cannot be trusted to comply with potential undertakings or orders made by the courts in Lithuania.<sup>156</sup>

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<sup>155</sup> Para 33.

<sup>156</sup> The court also addressed the issue of separation of the child from the mother and the need for effective measures to protect the child from a grave risk of harm that was very likely to stem from such return. The court reiterated that the primary focus of the court was on the question of the grave risk of harm or intolerability to the child rather than the conduct of the abducting parent. See *AT v SS* [2015] EWHC 2703 (Fam) above. The court concluded that

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## Outcome

The court did not order the return of the child as it was satisfied that the child was settled in the UK and that her return to Lithuania would put her at grave risk of physical and/or psychological harm or place her in an intolerable situation. Accordingly, both Art 12(2) and Art 13(1)(b) were made out successfully. The court followed the Supreme Court decisions in *Re E* and *Re S*.<sup>157</sup>

## Theoretical utility of the EU instruments on protection measures

Given the outcome of the case (i.e. refusal to return), the instruments would have been of no assistance in this case. Nevertheless, had return been ordered, it is questionable whether the instruments could have been of any assistance given the history of ineffectiveness of protection measures issued in Lithuania in this case. (see *JZ v TG* [2017] EWHC 514 (Fam), section ‘Theoretical utility of the EU instruments on protection measures’ above).

*H v K (Abduction: Undertakings)* [2017] EWHC 1141 (Fam)

Date of judgment: 11 May 2017

Judge: MacDonald J

## Facts

The case concerned two children, aged 9 and 10. The mother had been granted permission by a US court to travel to London with the children to attend a memorial service for their maternal grandmother, however, wrongfully retained them instead of returning them to the US as required by the court order. The father then commenced proceedings for the return of the children to the United States (the jurisdiction of Hawaii). The courts of Hawaii were seised of ongoing proceedings concerning the children's welfare and had already ordered the children's return and made a sole custody order in the father's favour. The mother resisted the return of the children on two grounds: child's objections (Art 13(2)) and the grave risk of harm (Art 13(1)(b)). In support of the latter defence, the mother relied on allegations of physical and sexual abuse against the father and the psychological impact of such abuse.

## Article 13(1)(b)

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in the circumstances of the present case “it was difficult to imagine any protective measures that could be put in place to assist the child with managing separation from her mother.” Para 134.

<sup>157</sup> Para 55. On the issue of the separation of the child from the abducting parent, at para 62 the court cited with approval the above decision of MacDonald J in *AT v SS* [2015] EWHC 2703 (Fam).<sup>208</sup> Paras 9 and 10.

This report was funded by the European Union's Rights, Equality and Citizenship Programme (2014-2020).

## The violence/abuse

The mother made allegations of physical abuse by the father against both herself and the children, and sexual abuse by the father against one of the children.<sup>158</sup> She also submitted that the father had been verbally abusive and threatening to her, and that the father had been viewing

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child pornography.<sup>158</sup> In May 2015, the mother sought a restraining order against the father from a Hawaiian court, alleging domestic abuse. During the course of that hearing the Hawaiian court sought to establish whether domestic abuse had occurred on two specific occasions. The court determined that the father was the more credible witness and dismissed the mother's petition for insufficient evidence.<sup>159</sup> In November 2015, the mother applied for further restraining order against the father and this order was granted *ex parte*. Shortly thereafter, that order was discharged by agreement when the parties agreed to submit to a mutual restraining order. In April 2016, the mutual restraining order was dissolved by agreement.<sup>160</sup>

The focus of the mother's submissions was more on the psychological impact of returning the children to Hawaii than on her allegations of physical abuse.<sup>161</sup> Based on the available information, the intensity of violence present in this case would be classified as "mild" with no significant risk of it being ongoing.

## Court's approach to grave risk of harm / Evidence

The Court explicitly applied the approach advocated by the Supreme Court in *Re E*.<sup>162</sup> In adopting this approach, the court refused to "engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b)."<sup>163</sup> Instead, the court assumed "the risk of harm at its highest" and then, following a determination whether it meets the test in Art 13(b), considered whether protective measures sufficient to mitigate harm could be identified.<sup>164</sup>

The court examined documentary evidence, including documents from the proceedings which were ongoing in Hawaii. The documentary evidence also included four statements from the father, two statements from the mother, a report and an addendum report from the Children's

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<sup>158</sup> Para 19.

<sup>159</sup> Paras 9 and 10.

<sup>160</sup> Para 13.

<sup>161</sup> Para 54.

<sup>162</sup> Paras 42 and 43.

<sup>163</sup> Para 43.

<sup>164</sup> *Ibid*.

Guardian and a report and an addendum report from a jointly instructed expert in the law of Hawaii.<sup>165</sup>

### Protective measures, including undertakings

The father gave various undertakings in relation to the children's return. These included several measures to protect the mother: a.) not to use or threaten violence against the mother, nor to instruct or encourage any other person to do so; b.) not to contact the mother save through a nominated US Attorney; c.) not to attend any property occupied by the mother; and d.) not to support criminal proceedings against the mother with respect to the abduction; one undertaking to protect both the mother and the children – i.e. not to separate the children from their mother

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save for the purpose of agreed or court ordered contact; and two “soft-landing” measures: a.) to book and pay for return flights for the mother and the children; and b.) to provide temporary housing for the mother and the children.<sup>166</sup>

### Effectiveness of protective measures, including undertakings

The court was satisfied that the father as a “child focused parent who has each of his children’s best interests at the centre of his considerations”<sup>218</sup> would honour his undertakings. Therefore, the court refused a submission made by the mother’s counsel that it was necessary for the court to ensure the efficacy of the undertakings by obtaining a stipulated order from the Hawaii court as a condition for the return of the children.<sup>167</sup> The court justified its decision to rely on the undertakings offered by the father as follows:

“(a) there is no evidence before the court that gives the court reason to doubt the father’s bona fides, (b) the clear and cogent evidence before the court of father’s sensitivity to children’s welfare allows the court to have confidence that he will honour promises designed to ensure the children are protected from any risk of harm, (c) in circumstances where the father is a retired District Attorney the court can be confident that he well understands the significance and gravity of a promise made to the court, (d) despite the mother’s quite remarkable assertion that she has “always complied with Court orders” and that it is the father who “has a record of failing to comply with Court Orders”, there is no cogent evidence before the court of the father breaching orders of the court, (e) as I have already observed, the undertakings given by the father will be required to regulate the position for only a little over twenty four hours before the court in Hawaii considers the matter at an inter partes hearing and (f) the jointly instructed expert has made clear that undertakings given before a court in this jurisdiction could be relied upon in Hawaii.”<sup>168</sup>

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<sup>165</sup> Para 5.

<sup>166</sup> Para 39.

<sup>218</sup> Para 59.

<sup>167</sup> Para 61. See also para 40 which sets out an extract from a report prepared by an expert in the law of Hawaii, Mr Steven Kim, Attorney at Law, for the purposes of the return proceedings. In the report, Mr Kim explains that “a stipulated order is a promise or agreement between the parties reduced to an agreed order” and that it would take one to two weeks to obtain such orders.

<sup>168</sup> Para 61.

<sup>221</sup> Para 42.

<sup>222</sup> Para 54.

## **Outcome**

Neither of the two exceptions to return the mother sought to rely on succeeded. In reaching its decision, the court cited approvingly the Supreme Court decision in *Re E*.<sup>221</sup> Even though the court found that there was no grave risk of harm, it made sure that protective measures in the form of undertakings had been agreed with the father and incorporated into the return order.<sup>222</sup>

Accordingly, the return of the children to Hawaii was ordered.

## **Theoretical utility of the EU instruments on protection measures**

Given the low intensity of the violence and no significant risk of it being ongoing, it is believed that neither the Regulation nor the Directive would have been of any assistance in this case.

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### *M v G* [2017] EWHC 1712 (Fam)

Date of judgment: 22 June 2017

Judge: Her Honour Judge Nancy Hillier (sitting as a s9 High Court Judge)

## **Facts**

In this case, the court was concerned with an application for the return of two children, A and S. A was 11 years old and S was 8 years old. The children and parents were Romanian nationals. The parents met in Romania in 1997, married in 2002, and divorced in 2012. The father continued to have contact with the children until 2014 when the mother moved with the children to live with maternal grandmother in Miroslava. The mother then went to England to work for several months.

In 2014, the father also moved from Romania to Norway for work and continued to remain there. The mother's case was that the father had agreed for her to take the children to live in England in February 2015 and thereafter she sought his permission to enroll the children in school in England. The father disputed this, saying they had not reached an agreement. Proceedings in Romania relating to contact ensued and expert reports were commissioned.

In the meantime, in August 2016 the mother and father signed a document, officiated by a Notary Public in Romania enabling her to bring the children to England between 12 October and 26 October 2016. The mother did not return the children after this date and instead issued an application for permission for the children to remain in England and Wales. That application was refused but it is of note that her appeal was later upheld, and permission granted until 31

August 2017. Nevertheless, on 15 December 2016, the father applied under the Hague Convention for the summary return of the children.

## **Article 13(1)(b)**

### The violence/abuse

The level of abuse alleged in this case was found to be ‘significant’<sup>169</sup> and this was both in respect of the mother and the older child, A. It is of note however that there was no allegation of post-separation violence.

The mother alleged that “when they lived together the father slapped her, was controlling and regularly checked up on what she spent. The mother also alleged that the father had beaten A in the bathroom until he wet himself and had held him out of a third-floor window at their home and shaken him.”<sup>224</sup> The mother also alleged that in an incident in 2010, the father put his hand

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around her throat, hit her, and caused bruising to her face. The child witnessed this and retold the story of what the father had done to the mother.

A psychological report diagnosed the mother as suffering from “mixed anxious and depressive disorder with anxiety episodes”.<sup>170</sup> The older child, A, was described as showing signs of “fury and aggression”<sup>171</sup> towards his father, acting out on one occasion “stabbing his father during a biology dissection lesson”.<sup>172</sup> A was also diagnosed with “reactive anxious-depressive disorder and oppositional defiant disorder”, and the younger child, S, was diagnosed with “childhood emotional disorders”.<sup>173</sup>

### Court’s approach to the grave risk of harm / Evidence

The court’s approach to the grave risk of harm accorded with the Supreme Court’s methodology set out in *Re E*. Accordingly, the judge assumed the allegations to be true:

*“I have carefully considered the entirety of the mother’s evidence and the allegations she has made over time. In addition, I have considered what A has himself said. I assess however that even if all the allegations are true and taken at their highest the risk of physical harm does not reach the threshold of categorisation as “grave” required by the Convention. The level of this harm involves over-chastisement and assault rather than more significant injury. I do not underestimate it but on the authorities, I have considered I cannot categorise it as grave”<sup>174</sup>*

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<sup>169</sup> Para 53.

<sup>224</sup> Para 51.

<sup>170</sup> Para 56

<sup>171</sup> Para 57.

<sup>172</sup> Para 58.

<sup>173</sup> Para 5.

<sup>174</sup> Para 54.

<sup>230</sup> Para 35.

At the same time, however, the court considered a wealth of evidence which included written and oral evidence, Cafcass report and expert psychological and psychiatric report. Nevertheless, it should be noted that the latter two were adduced into the return proceedings having been commissioned and undertaken within the Romanian legal proceedings relating to contact.

### Protective measures, including undertakings

The father offered undertakings which he argued were protective measures that would “amply cover” the concerns raised by the mother:<sup>230</sup>

- *Not to use or threaten violence against the mother or the children*
- *Not to support any civil or criminal prosecution of the mother in Romania*
- *Not to attend at the airport of arrival when the mother and children return*
- *Not to seek to separate the mother and children save as agreed for the purposes of contact and until such time as the Romanian courts can make decisions for the long-term welfare of the children.*
- *To continue to pay the child maintenance of LEU 1000 per month.*

### Effectiveness of protective measures, including undertakings

The court found that the father’s undertakings “provide realistic, enforceable protection from violence and emotional harm”<sup>175</sup> and was willing to accept the father’s undertakings. The judge further commented that “[u]nder Art 11.4 of the Brussels II revised convention I am satisfied that there are sufficient safeguards in place on the return.”<sup>176</sup> However, despite the judge’s reference to *X v Latvia*,<sup>177</sup> it is not clear from the judgment what persuaded the judge that the court was satisfied that those undertakings were enforceable in the event of a breach.

## **Outcome**

The court was satisfied that the children had been wrongfully retained and granted the father’s application for a return. The mother’s defences including consent and Article 13(1) b) grave risk was dismissed and the judge ordered the children’s return.

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<sup>175</sup> Para 80.

<sup>176</sup> Para 82.

<sup>177</sup> Application no. 27853/09, Grand Chamber [2013], para 33.



## **Theoretical utility of the EU instruments on protection measures**

The instruments may have been useful in this case on account of a return order having been made, and the effectiveness of undertakings not having been adequately discussed.

TAAS v FMS [2017] EWHC 3797 (Fam)

Date of judgment: 1 September 2017

Judge: The Honourable Mrs. Justice Parker

### **Facts**

The case concerned a two-year-old girl who was born in Turkey to parents of Libyan origin. The mother's family lived in England and the mother was a dual British-Libyan citizen. In November 2016 when the child was 18 months old, the mother removed the girl from Turkey, where she was habitually resident, and brought her to England. The mother alleged that she had been subjected to severe domestic abuse, involving threats to her life and the child's, and violence to both. The father denied that. After her arrival to England, the mother went to the police to make allegations of domestic abuse by the father.<sup>178</sup> A few weeks later, she was stopped trying to leave the country to go to Turkey via Germany. The police obtained a Police

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Protection Order in respect of the child. The local authority applied for an interim care order based on the alleged risk from the mother deliberately exposing the child to risk of harm from the father by taking her to Turkey. That application was refused, but the judge made the child a ward of court, found that she was not habitually resident in the UK, and ordered that she should not be removed from England and Wales until further order.

The mother opposed the father's application for the child's return on the basis of Art 13(1)(b).

### **Article 13(1)(b)**

#### The violence/abuse

The allegations of domestic violence made by the mother and described above can be classified as "severe". Based on the available information it was difficult to assess whether the risk of violence was ongoing.

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<sup>178</sup> A few weeks later, the mother was stopped trying to leave the country to go to Turkey via Germany. The police obtained a Police Protection Order in respect of the child. The local authority applied for an interim care order based on the alleged risk from the mother deliberately exposing the child to risk of harm from the father by taking her to Turkey. That application was refused, but the judge made the child a ward of court, found that she was not habitually resident in the UK, and ordered that she should not be removed from England and Wales until further order. Paras 4-8.

## Court's approach to grave risk of harm

The court made it clear that it was following *Re E*. Accordingly, the court had to: “(a) take the allegations at their highest; and (b) to decide whether on that basis there is a grave risk that if the child returns to her country of habitual residence she will be exposed to physical and psychological harm or otherwise placed in an intolerable situation; and (c) if so, to ask how the child can be protected against the risk.”<sup>179</sup> Accordingly, the court assumed that the mother’s allegations were true (a) and concluded that the mother and child were at risk of domestic violence if they lived with the father upon the return (b).<sup>180</sup> The court then proceeded to assessing the availability of protective measures (c).

Consistent with the *Re E* approach, the court expressed the view that determining the truth of the mother’s allegations was a matter for the Turkish court. Indeed, in the absence of supporting evidence,<sup>181</sup> it would not have been possible for the present court to decide the disputed facts,

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in particular whether the mother's allegations were true.<sup>238</sup> Only if the court is not satisfied that effective measures exist, might there be scope for oral evidence to determine how far the risk exists in reality.<sup>182</sup>

## Evidence

The court instructed two experts to advise on the availability and effectiveness of protective measures in Turkey.<sup>183</sup> Documentary evidence, including documents produced as part of the English care proceedings, were also assessed.<sup>184</sup> The parties were ordered to attend the final

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<sup>179</sup> Para 30.

<sup>180</sup> The court noted that (unlike in the present situation), “[t]here also may be cases in which the court can safely take the view that an Article 13(b) defence is not made out; for instance, where what is said by the abducting parent just simply does not establish the first base for gravity risk or intolerability.” Para 36.

<sup>181</sup> The mother was unable to produce any supporting evidence in relation to the serious assault, including sexual assault. She explained this by the fact that she was controlled by her husband and therefore unable to make complaint or seek medical help. She produced photocopied photographs of alleged injuries to herself and the child. These appeared to show discoloration to her limbs which resembled bruising, but it was impossible for the judge to form any conclusion. Para 31. Similarly, the mother did not present any evidence that she was at risk from harassment or harm. Indeed, there was no evidence that the father had tried to find her in the UK or had threatened her. Moreover, he maintained her financially following the separation. The fact that the mother was prepared to return to Turkey (albeit to resolve the divorce from the father) meant that it could not seriously be suggested that a return there would in itself be so psychologically harmful to her as to meet the high standard of Art 13(1)(b). In contrast, the father produced many affectionate and passionate text messages between himself and the mother. The mother’s explanation was that “this correspondence was impelled by fear and a wish to placate” Para 32. The court commented that this “may be true and is potentially credible” and concluded that this was “primarily a matter

<sup>182</sup> Para 30.

<sup>183</sup> Para 16.

<sup>184</sup> *Ibid.*

hearing to give oral evidence, the father by video link if necessary.<sup>185</sup> Eventually, however, the court decided not to hear oral evidence but instead decided that she was “entitled to form at least some conclusion (relevant to any potential defence that the mother’s psychological reaction to return to Turkey would be so intense and so adverse to create the relevant degree of risk or intolerability on return) from the fact that she was prepared to travel back there with the child shortly after her original departure.”<sup>186</sup>

### Protective measures, including undertakings

The mother submitted that protective measures for victims of gender-based violence in Turkey were insufficient.<sup>244</sup> However, based on a report from an expert in Turkish law, the court was satisfied that such protective measures existed in Turkey and were efficient.<sup>187</sup>

In addition, the father offered the following undertakings: 1.) to protect the mother: a.) “not to instigate or support any criminal proceedings in Turkey against the mother in respect of the abduction”, b.) “not to use or threaten violence against the mother or instruct anyone else to do so”, c.) “not to be present at the airport when the mother returns”; 2.) to protect both the mother and the child: “not to separate the mother and the child except for the purposes of contact; and 3.) ‘soft-landing’ measures: a.) to pay for the child’s and the mother’s return tickets; b.) to pay for the mother’s accommodation and to provide maintenance.”<sup>246</sup>

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for the Turkish court” as there “may be much circumstantial evidence in Turkey to confirm or to disprove what each says.” Ibid. <sup>238</sup> Para 31.

Additionally, the court made the both father and the mother subject to several undertakings. These included, in respect of the father: 1.) to protect the mother: any accommodation that the mother will occupy to be kept confidential and only made known to the father if specifically directed by the Turkish court; 2.) ‘soft-landing’ measures: a.) to “provide a sum of money to the mother so that she can instigate proceedings in Turkey and progress them for at least a time”; and b.) “moneys for accommodation, or at least a down payment for accommodation

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<sup>185</sup> Ibid.

<sup>186</sup> Para 39. <sup>244</sup> The mother relied on a report of the UK Home Office from February 2016 titled “Country Information and

Guidance Turkey: Women Fearing Gender-based Violence”, and on the European Court of Human Rights (‘ECtHR’) decision in the case *M.G. v Turkey* ECHR 101 (2016). In this case the ECtHR criticised the lack of protection measures and Turkish authorities’ failure to progress allegations of domestic violence made between 2006 and 2014, by which time, however, new legislation to tackle domestic violence had been adopted Turkey. Para 28.

<sup>187</sup> See Professor Giray’s expert report set out at paras 49-53.

<sup>246</sup> Para 47.

and for maintenance, should be available before she [the mother] leaves for Turkey.”<sup>188</sup> In respect of the mother, the court imposed the following two undertakings on her (both for her protection): 1.) to be made “the subject of an order here preventing her from living with the father, bringing him into contact with L [the child] or permitting unsupervised contact without permission of the Turkish court; and 2.) “the Turkish proceedings should be commenced while she is in this country and interim protection be put in place before she departs.”<sup>248</sup> With regard to the ‘interim protection’ point, however, the court, drawing on a previous experience, was concerned that it may take some time for the order to be recognised or registered in the requesting State, which may in turn lead to the return order being set aside on the basis that the delay resulted in a change of circumstances.<sup>189</sup>

### Effectiveness of protective measures, including undertakings

Based on the expert report the court concluded that the undertakings would be “binding in Turkey”<sup>250</sup> as they would be “directly recognised and enforced” under the 1996 Hague Convention. In the same paragraph the court mentioned the Criminal Code or “the specific laws which protect individuals” in Turkey as alternative avenues for securing the enforceability of undertakings.<sup>190</sup> Specifically, the court said:

*“Under Hague 96 undertakings given by the parents in this jurisdiction will be directly recognised and enforced in Turkey. All the undertakings offered by the father are enforceable either pursuant to Article 23(1) Hague 1996 or the Criminal Code, or the specific laws which protect individuals. Specifically the Turkish law which prevents violence against women provides a full repertoire of orders very familiar here (although using slightly different terminology), in the form of an order against molestation including not to approach friends, relatives and children of the protected person, not to damage belongings and goods, not to communicate in a way such as to cause distress, to hand over weapons to the Law Enforcement officials, not to use alcohol, drugs or stimulants in places where the protected people are present, and to apply to the Health Centre for examination or treatment and to ensure treatment. The Turkish court can make a mirror order which reflects an undertaking. The mother will not be prosecuted for an offence of child abduction, unless the father himself brings a complaint, which he has undertaken not to do.”<sup>252</sup>*

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No details regarding the recognition and enforcement procedures under the Criminal Code and “the specific laws” were provided by the court, indicating that the court did not truly engage with the question of the effectiveness of the protective measures. The level of superficiality in

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<sup>188</sup> Ibid.

<sup>248</sup> Ibid.

<sup>189</sup> Para 48. The court’s past experience referred here concerned the US State Florida where the registration of a protection order “led, for various reasons, to six months’ delay which then led, in its turn, to an application to set aside the Hague Return Order.” Ibid. <sup>250</sup> Para 69.

<sup>190</sup> Para 51.

<sup>252</sup> Ibid.

the court's assessment is alarming in particular because the court eventually decided not to make any orders under the 1996 Hague Convention but to leave the effectiveness of undertakings to the good will of the father and the rather vaguely described Turkish domestic laws. The court's rationale behind the decision not to engage the 1996 Convention was not very persuasive:

*"The measures which I make pursuant to Article 11(1) of Hague 1996 will lapse under Article 11(2) as soon as the Turkish authorities have taken the measures required by the situation and it would be wrong for me to second guess what their actions may be. The farthest I should go is to place the mother under embargoes just as I place the father."*<sup>191</sup>

It was the mother's case that the protection of victims of domestic violence in Turkey was insufficient; this raising the question of where the burden of proof lies in relation to sufficiency and effectiveness of protective measures. In other words, is there a burden of proof on either party to establish either that the protective measures are sufficient or that they are insufficient?<sup>192</sup> The court declined to answer this question with the following explanation:

*"These are not investigatory proceedings. They are arm's length proceedings between parties in the civil sphere and therefore not equivalent to the approach that a court might take when assessing welfare at the end of care proceedings."*<sup>193</sup> *"I have approached the case on the basis that the mother must establish a defence. She has not done so. I am entirely satisfied that the protective measures available in Turkey are sufficient. So, I prefer to leave the question of burden of proof and whether there is a duty on the mother to show that they are insufficient or on the father to prove that they are insufficient, to another day and another case."*<sup>256</sup>

## **Outcome**

The Art 13(1)(b) defence had not been made out. Accordingly, the return of the child was ordered.

## **Theoretical utility of the EU instruments on protection measures**

In the circumstances of the present case where the level of violence was assessed as 'severe' with possibly ongoing risk to the mother the Regulation/Directive would have been helpful. Had the Regulation been applicable, it would have alleviated the court's concerns over possible delays in the recognition/registration of an English protection order in Turkey (see section 'Effectiveness of protective measures, including undertakings' above). More significantly, however, the Regulation would have provided the mother with some reassurance in a situation where she was returning with the child to a country with a weak record of human, including

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<sup>191</sup> Para 65.

<sup>192</sup> Para 67.

<sup>193</sup> Para 67.

<sup>256</sup> Para 68.

women's rights protection, having to rely solely on the good will of the father to comply with the undertakings. Even if a protection order was granted in the UK prior to the mother's departure (as envisaged by the child abduction court), there was no guarantee that such order would be recognized and, if needed, enforced in Turkey within a reasonable period of time, if at all.

B v P [2017] EWHC 3577 (Fam)

Date of judgment: 21 December 2017

Judge: The Honourable Mr Justice MacDonald

## **Facts**

The case concerned two children, aged 12 and 11, who had lived in Hungary until they were brought to the UK by their mother in November 2016. Both children had been diagnosed with autism and there was evidence that at least one of the them suffered also from chronic PTSD. The mother alleged serious physical and sexual violence and psychological abuse against her by the father. The violence was often witnessed by the children, who, in the return proceedings, showed a very high level of anxiety and distress when recalling the family life in Hungary.

The mother conceded that the children had been habitually resident in Hungary but resisted the children's return on two grounds: 1.) a grave risk of harm (Art 13(1)(b)); and 2.) child's objections (Art 13(2)).

## **Article 13(1)(b)**

### The violence / abuse

The mother alleged that the relationship between the parents was characterised by physical, sexual and psychological abuse, including coercive and controlling behaviour. She also alleged that the father would shout at the children and interrogate the older child daily to check on the mother's activities. The abuse culminated with a traumatic incident which took place on 13 September 2013 and was witnessed by the children. In this incident the father seriously assaulted the mother and the children believed that the father had intended to kill her during that incident. The father's behaviour was described as follows:

*"In her second statement, the mother alleges that the father became controlling from a point following her becoming pregnant with F in February 2006, which behaviour the mother alleges continued for the remainder of the parent's relationship. The mother alleges that following the parents' marriage in June 2008 the father's behaviour towards her deteriorated further, with him becoming verbally abusive and physically and sexually violent towards her and forcing her to perform sexual acts that were degrading and with which she was uncomfortable. The mother further alleges the father would shout at the children, which they found very frightening. The mother alleges that in the Summer of 2010 the father responded to the mother questioning him*

This report was funded by the European Union's Rights, Equality and Citizenship Programme (2014-2020).

*about where he had been by grabbing her around the throat, pinning her against the wall and shouting "shut the fuck up, it's none of your business where I have been and what I've been doing", continuing to scream abuse for a further half an hour before leaving the property. The mother alleges that following this incident, the father would on occasions return home drunk and verbally abuse her, leading the children to fear that he was going to kill her. The mother alleges that the father would damage household items in temper and continued his controlling behaviour in respect of her, including financial control.*"<sup>194</sup>

The abuse experienced by the mother can confidently be assessed as severe, with ongoing risk being present.

The court accepted that the evidence had demonstrated "a good prima facie case that the mother was the victim of significant domestic abuse at the hands of the father, that there was a deeply troubling and traumatic incident on 13 September 2015 in which the mother was assaulted by the father and that the children have been witness to these incidents of domestic abuse, including the incident on 13 September 2015."<sup>195</sup>

#### Court's approach to grave risk of harm

The court acknowledged *Re E* as the authority on Art 13(1)(b)<sup>196</sup> and, accordingly, said that no fact-finding exercise to determine the authenticity of the matters alleged under that Art 13(1)(b) should be carried out.<sup>197</sup> Instead, the judge should "assume the risk of harm at its highest and then, if it meets the test in Art 13(b), consider whether protective measures sufficient to mitigate harm are identified."<sup>198</sup> The court also acknowledged that Art 11(4) of Brussels IIa was applicable in the present case, and noted that violence as such would not be enough to found the grave risk of harm defence. Rather, "the vital consideration is whether the child and the abducting parent will have sufficient protection if they return to the State of the children's habitual residence."<sup>199</sup>

The court referred also to *Re S* and spent some time on the issue of anxieties not based on objective risk.<sup>200</sup> This issue was addressed in *Re S* by Wilson LJ whereby he concluded that the anxieties of the abducting parent about a return which are not based upon objective risk but are nevertheless of such intensity as to be likely, in case of a return, to destabilise her parenting to a point where the child's situation would become intolerable, were capable of grounding a grave risk of harm defence under Art 13(1)(b).<sup>201</sup> In the present case, the judge sought to analogically apply this analysis to the anxieties of the child (as opposed to the abducting parent). In

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<sup>194</sup> Para 18.

<sup>195</sup> Para 69.

<sup>196</sup> Para 62.

<sup>197</sup> Para 64.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Para 65.

<sup>201</sup> *Re S*, per Lord Wilson, paras 27 and 34. <sup>265</sup>

Para 66.

particular, the court found no reason why the Wilson LJ's reasoning could not apply in the circumstances where the child holds "a fixed and immutable subjective fear" of the leftbehind parent "independent of the truth or otherwise of the allegations".<sup>265</sup> Quite the contrary, as Art 13(1)(b) explicitly refers to the question of harm to the child, "a fixed and immutable

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subjective fear on the part of a child independent of the truth or otherwise of the allegations" should be "all the more capable" of establishing the grave risk of harm defence.<sup>202</sup>

In *Re S*, Lord Wilson observed that where there is evidence sufficient for the court to draw conclusions on the basis of the objective reality, there will be no need to examine the subjective position. In the present case, however, the court was of the view that it was impossible to separate the objective reality from the children's subjective perceptions. This was due to the children's medical condition (autism) which caused their objective experience of family life to be "overlain" by a substantial subjective element."<sup>203</sup> Specifically, regardless of the children's objective experience of family life, the traumatic event on 13 September 2015 (see section 'The violence/abuse' above) left them with "fixed and immutable subjective fear" that the father was trying to and was going to kill their mother, and that this would happen if they were ordered to return to Hungary.<sup>268</sup> Therefore, whilst objectively, it may not have been the father's intention to kill the mother on 13 September 2015, the children's belief stemming from that event was that he was going to kill her and that he would do so should he have the opportunity.<sup>204</sup>

### Evidence

The court commissioned a CAFCASS officer to prepare a report on the children's wishes and feelings in relation to a return to Hungary.<sup>205</sup> At the request of the children and on the reference on the CAFCASS officer, the judge also met the children,<sup>271</sup> although, interestingly, by virtue of the Guidelines for Judges Meeting Children who are subject to Family Proceedings, the judge may not rely on that information as evidence in the proceedings.<sup>206</sup>

Additionally, given the children's diagnosis of autism, the court commissioned an expert report from a child psychologist in order to assist the court in resolving the questions of whether there

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<sup>202</sup> Ibid.

<sup>203</sup> Para 71.

<sup>268</sup> Ibid.

<sup>204</sup> Para 72.

<sup>205</sup> Para 3.

<sup>271</sup> Ibid.

<sup>206</sup> Para 45. The judge pointed out the practical difficulty of simply "banishing" the meeting from his mind. He explained that the children's "emotional presentation when articulating their objections gave [him] some impression of the potential impact of such a return on their emotional wellbeing", leading him to conclude that "the injunction against using a meeting with the child as a means of gathering evidence contained in the Guidelines for Judges Meeting Children who are subject to Family Proceedings is far easier to articulate in theory than it is to apply in practice." Paras 44-45. <sup>273</sup> Para 5.



was a grave risk of harm and whether the children had attained a degree of maturity where it was appropriate to take account of their respective views.<sup>273</sup> The court, however, pointed out that this should not be a common practice in return proceedings as “[i]t will only be in rare cases that expert evidence will be necessary to assist the court when evaluating defences raised under Art 13 of the 1980 Hague Convention.”<sup>207</sup> In addition to the CAFCASS officer report and the child psychologist report, the court reviewed also other documentary evidence, in particular statements from the parties.<sup>208</sup>

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#### Protective measures, including undertakings

The father offered the following undertakings: 1.) for the protection of the mother: a.) to communicate with the mother through her solicitors should provision be made for contact between the father and the children on their return to Hungary; and b.) not to pursue criminal charges against the mother upon her return to Hungary in respect of the abduction; 2.) for the protection of both the mother and the children: a.) not to come within 100 metres of any property at which the mother and the children reside in Hungary; b.) not to remove the children from the care of the mother save for agreed contact with the children; c.) not to use or threaten violence or intimidate in any other way the children or the mother; and a “soft-landing” measure: to pay for the return flights to Hungary for the mother and the children.<sup>209</sup>

Additionally, the Hungarian social service provided information about the protective measures that would be available to the mother in Hungary. These included the possibility to seek assistance from the police “to keep the father away”; to seek maintenance from the father; and to request a placement in a “temporary family home” or a “protected house”.<sup>210</sup>

#### Effectiveness of protective measures, including undertakings

The court did not address the effectiveness of the protective measures. The mother contended that, as demonstrated by past events, the social services and the police in Hungary were unable to protect her and the children from violence from the father.<sup>211</sup> In support of this assertion the mother relied on the letter from the social services (see section ‘Protective measures, including undertakings’ above) which explained the practical limitations on the effectiveness of the available protective measures.<sup>212</sup>

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<sup>207</sup> Para 6.

<sup>208</sup> Para 11.

<sup>209</sup> Para 34.

<sup>210</sup> Para 35.

<sup>211</sup> Para 36.

<sup>212</sup> Ibid.

## Outcome

The court declined to order the return of the children to Hungary, on the basis of Art 13(2) and Art 13(1)(b). There was clear and cogent evidence of the severe impact on the children of the incidents to which they had been exposed in the family home. Their expressed fears and anxieties were based both on an objective, verifiable experience of them witnessing incidents of domestic abuse in the family home, and on the overlying subjective fears they had drawn from that objective experience in light of their particular condition.<sup>213</sup> Returning to Hungary would involve a grave risk of exposure to psychological harm and would place them in an intolerable situation.

## Theoretical utility of the EU instruments on protection measures

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There would have been no benefit from engaging either of the instruments as the return application was refused.

*In the matter of C (Children) (Abduction Article 13(b))* [2018] EWCA Civ 2834

On appeal from: High Court of Justice Family Division, HHJ Bellamy (unreported)

Date of judgment: 20 December 2018

Judges: Lewison LJ, Richards LJ and Moylan LJ

## Facts

This case involved two children, aged 6 and 4. The family lived in South Africa, the father and children having been born there. The mother was born in England but moved to South Africa at the age of 9. The parties worked for the same company.

On 4 May 2018, the family travelled to England. The father contended that it was for a holiday whereas the mother's case was that it was to consider whether they would move to live in England permanently as "a last opportunity for us to try and save our marriage".<sup>214</sup>

On 7 May 2018, the parties had an argument which resulted in the police being called. The father left and returned to South Africa alone.

On 6 August 2018, the father commenced proceedings for the summary return of the two children to South Africa. The mother opposed the application, relying on Article 13(1) b) on the basis of domestic abuse and also the children's objections to a return.

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<sup>213</sup> Para 80.

<sup>214</sup> Para 7.

The trial judge gave a substantive judgment, finding that there was a grave risk of harm that could not be ameliorated by protective measures. Accordingly, the father's application was refused, and the matter came before the Court of Appeal.

## **Article 13(1)(b)**

### The violence/abuse

The domestic abuse asserted indicates a severe level of abuse, including physical, sexual and psychological abuse. The mother submitted that she was 'psychologically fragile' and that condition was exacerbated by "the father's violent and sexually aggressive behaviour".<sup>215</sup>

*"The mother stated that she had been the victim of significant domestic violence and abuse, beginning in 2012. She relied on a number of specific incidents which she said had taken place between then and May 2018. She also alleged that it was "not uncommon" for the father to drink excessively and that, "quite often, he was extremely drunk". The mother explained that she was particularly vulnerable. She did not believe that the father "would be*

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*able to control himself" and she would be "at further risk of physical or sexual assault should I return to South Africa". She also said that, in respect of her mental health, a return "would have a very detrimental effect on me". She also believed that the children had been affected by what they had witnessed in South Africa and were afraid to return there.*"<sup>216</sup>

The mother argued that she was suffering from extreme stress and had developed Telogen Effluvium.

### Court's approach to the grave risk of harm / Evidence

The first instance court adopted an approach that involved a level of examination of the merits of the mother's allegations, on the basis of available evidence. The judge considered the parties' respective statements, in addition to a report from CAF/CASS, a letter from the mother's doctor (general practitioner), documents and logs disclosed by the police. The judge did not hear oral evidence but found that there was "clear evidence of the significant impact the abuse has had on the mother."<sup>217</sup> Nevertheless, the court made it clear that it was not "possible at this stage to undertake finding of fact hearing."<sup>218</sup> Further, the trial judge stated that "if her [the mother's] complaints about the father's behaviour are true then it is a grave risk".<sup>219</sup> This language suggests that there had not been a conclusive finding about the allegations after all. So, although the judge undertook some evaluation of the merits of the allegations, the Court of Appeal found that in fact it has drawn an "inference" which was not sufficient because:

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<sup>215</sup> Para 21.

<sup>216</sup> Para 10.

<sup>217</sup> Para 49.

<sup>218</sup> Para 50.

<sup>219</sup> Para 24.

*“The failure by the judge to address the nature of the risk of domestic violence occurring in the future and to answer why this would not be sufficiently ameliorated by the measures proposed by the father are, in my view, fundamental gaps in the reasoning”*.<sup>220</sup>

The Court of Appeal, however, was reflective of the methodology set out by the Supreme Court in *Re E* whereby the court assumes the allegations to be true and proceeds to considering protective measures on that basis. In this regard, Moylan LJ made a crucial point in stating that:

*“[I]t was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course, a judge has to be careful when conducting a paper evaluation, but this does not mean that there should be no assessment at all about the credibility or substance of the allegations.”*<sup>288</sup>

Lewison LJ then went even further ultimately rejecting the *Re E* approach. In particular, His Lordship stated:

*“The assumption that the allegations about past conduct are true (“if they are true”) which, according to Re E, underpins the exercise, seems to me to be quite different from the evaluative exercise that the court undertakes in*

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*other areas of the law. In addition, I find it hard to reconcile that approach to the evidence with the statement in Re E that the legal burden of proof is the ordinary civil standard. It might have been said that, as an international convention, the standard of proof under the Hague Convention differed from the ordinary domestic standard; or it might have been said that the relevant test was the same as that in other summary procedures, but that was not what the court said.”*<sup>221</sup>

His Lordship concluded that the *Re E* approach “may be pragmatic but, with great respect, unless I have misunderstood it, it seems to me to be unprincipled.”<sup>222</sup>

### Protective measures, including undertakings

The father offered protective measures which included vacating the family home and a nonmolestation undertaking,<sup>223</sup> and proposed that he would lodge these undertakings with the court in South Africa.<sup>292</sup>

### Effectiveness of protective measures, including undertakings

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<sup>220</sup> Para 50.

<sup>288</sup> Para 39.

<sup>221</sup> Para 68.

<sup>222</sup> Para 70.

<sup>223</sup> Para 12.

<sup>292</sup> Para 8.

The Court of Appeal reproached the trial judge for not sufficiently considering the effectiveness of the proposed protective measures (or “addressing the situation as it would be”<sup>224</sup>):

*“The judge asks whether the proposed protective measures would “ameliorate that risk” but does not provide an answer, other than inferentially.”*<sup>294</sup>

The Court of Appeal acknowledged the problem with the efficacy of undertakings as a form of protective measure, both in terms of compliance and consequences upon a breach.<sup>225</sup> The Court of Appeal expressed the view that the issue of “effectiveness” was not confined to enforceability, noting that the problem raised at the trial hearing related to the timing of the lodging of the undertakings with the court in South Africa and to the enforceability of the undertakings.<sup>226</sup> The Court of Appeal referred to the practice guidance on *Case Management and Mediation of International Child Abduction Proceedings*, 13 March 2018 and recommended the engagement of the International Judicial Liaison to surmount this difficulty.<sup>297</sup>

## **Outcome**

The Court of Appeal found that the trial judge’s determination that the mother had established her Article 13(1) b) defence was wrong and the order was set aside. The decision was overturned, and the appeal allowed.

## **Theoretical utility of the EU instruments on protection measures**

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The instruments may have been useful in this case had proper consideration been given to the enforceability of protective measures by the trial judge before making a non-return order, and indeed in circumstances where the Court of Appeal overturned the non-return order.

*In the Matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures) [2019] EWHC 649 (Fam)*

Date of judgment: 14 February 2019

Judge: Mr Justice Williams

### **Facts**

This case concerned a little girl aged 4 years and 2 months. The mother, father and child were all Latvians, and it was not disputed that the child was habitually resident in Latvia. In the

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<sup>224</sup> Para 49.

<sup>294</sup> Ibid.

<sup>225</sup> Para 43.

<sup>226</sup> Para 44.

<sup>297</sup> Para 45.

summer of 2018, the mother removed the child to the UK and on 22 November 2018, the father commenced summary return proceedings under the 1980 Hague Convention.

When the matter first came before the court on 26 November 2018, an order was made for the tipstaff to locate the child's whereabouts. On 14 December, the matter returned to court, with the mother attending in person. She accepted that she had removed the child from the jurisdiction of Latvia without the father's consent but opposed the return, relying on Article 13(1) b) and alleging domestic abuse.

Further directions were made, and the matter came before Williams J for a final hearing on 14 February 2019.

## **Article 13(1)(b)**

### The violence/abuse

The mother alleged physical violence, threats and controlling behaviour, indicating a severe level of abuse towards her:<sup>227</sup>

*“The mother's statement contains an account of various forms of abuse which she alleges the father perpetrated on her. She describes being forced into a cold shower, she describes shouting, abuse, spitting, twisting of her arm, pushing, choking, all clearly forms of physical abuse. She alleges that he threatened to kill her family, that he threatened to take her daughter away, and that he would commit suicide and harm himself, all of which clearly would fall into the category of emotional abuse, at least”.*<sup>228</sup>

*“She also alleges various forms of coercive or controlling behaviour; following her to work, tracing phone calls, surreptitiously taking intimate videos of sexual activity between them. She refers in particular to one incident*

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*where in 2017 she says he hit her head with a door and as a result of which she received four stitches to her head”.*<sup>229</sup>

### Court's approach to the grave risk of harm / Evidence

The Court considered the witness statements of the parties as well as additional documentation put forward by the mother from her family to corroborate her evidence, photographs and a medical report “whilst being mindful of the limits on its ability to assess evidence within a summary hearing of this sort”,<sup>230</sup> and concluded that it was unable to determine the truth of the

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<sup>227</sup> Para 9.

<sup>228</sup> Para 27.

<sup>229</sup> Para 28.

<sup>230</sup> Para 19.

allegations.<sup>231</sup> At the same time, the court appeared to follow the Re E approach as it commented:

*“Thus, taking the mother's allegations at their highest, as I have to do, given that I cannot make a finding as to their accuracy, the Article 13(b) threshold certainly is met, but do the protective measures which are offered by the father address the risk which is identified. Clearly the majority of the allegations of abuse take place within the context of an ongoing relationship and the parties sharing a property together. Thus, if they are living separately and are longer in a relationship, the opportunity for incidents will be reduced. In terms of other forms of abuse, whether it is attempting to snatch A from the mother on the street or sending abusive messages or making threats, they would all be addressed by measures which would prevent the father from communicating with the mother, or measures which would prevent him from removing A from her care without an order of the Latvian courts.”<sup>303</sup>*

### Protective measures, including undertakings

The father offered protection measures, in the sum of undertakings as follows:

*“a. A promise to this court that he would not instigate or support any civil or criminal proceedings against the mother arising from the wrongful removal of A from Latvia.*

*b. He undertook to pay for A's airfare for her to return to Latvia, and he has added that he will pay for the mother's airfare, assuming that she would return with A.*

*c. He offered not to attend at the airport upon their return, he undertook not to remove A from the mother's care pending a hearing in the Latvian courts.*

*He has in addition today offered an undertaking that he will initiate proceedings in the Latvian courts so that if A and the mother return, there will be a hearing before a judge who will be able to discern what the arrangements should be for A, and he has in addition undertaken to register any order this court makes insofar as it is necessary and covers protective measures with the courts in Latvia, the effect of which would be to give the mother equivalent protection in Latvia to that which she would get in England.*

*d. He has offered in terms of ensuring the mother and A are protected from domestic abuse that he - I think there must be a typing error in the undertaking because it does not include an undertaking not to assault her - I am assuming it should read the standard form of undertaking that he will not assault the mother, harass, threaten, interfere or molest the mother, whether by himself or any third party. As is usually the case in relation to such undertakings, he makes that promise without accepting that he has ever behaved that way in the past.*

*e. He also undertakes to vacate the property where he and the mother and A at the time lived, and he says he will vacate it and allow the mother and A to reside there until there is a hearing in the Latvian courts, and he says he*

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*will not go back to that address save for the purpose of any contact which he and mother agree in relation to A. He has clarified that he will pay the rent on that property so the mother and A will have a secure home available to them until such time as the Latvian court is able to consider the situation with both the mother and father present in court.”<sup>232</sup>*

### Effectiveness of protective measures, including undertakings

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<sup>231</sup> Para 33.

<sup>303</sup> Para 36.

<sup>232</sup> Para 13.

The problem of effectiveness of protective measures was considered and the court made reference to Art 11 of the 1996 Hague Child Protection Convention and determined that, pursuant to Art 26, the undertakings, if accepted by this court, would be enforceable. The court made a return order on the basis that the undertakings would become part of the return order and would be registered with the Latvian court on an application by the father before the actual return.<sup>233</sup>

The court then turned to the Protection Measures Regulation and again determined that it was applicable in order to deal with the problem of effectiveness.<sup>234</sup> The court concluded that “the availability of forms of registration in Latvia” would enable the protection measures offered by the father to be adequate and enforceable.<sup>235</sup>

The court did indicate that it was necessary for the relevant application to be made to the Latvian court to register the undertakings so that they become enforceable before the return order comes into force.

## **Outcome**

The court found that the Art 13(1)(b) threshold was met, however, the risk was addressed by the undertakings offered by the father, which were enforceable in Latvia. Accordingly, the court granted the father’s application and ordered the return of the child with protection measures.

## **Theoretical utility of the EU instruments on protection measures**

The Protection Measures Regulation would have been helpful in this case on account of the return order being made. The court made the following observations on the applicability of the Regulation.

*“European Regulation 606/2013 on the Mutual Recognition of Protection Measures in Civil Matters sets up a mechanism allowing for direct recognition of protection orders issued as a civil law measure between member states, thus a civil law protection order such as a non-molestation order or undertaking issued in one member state, can be invoked directly in another member state without the need for a declaration of enforceability but*

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*simply by producing a copy of the protection measure, an Article 5 certificate and where necessary a transliteration or translation.*

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<sup>233</sup> Paras 39-42.

<sup>234</sup> Para 26

<sup>235</sup> Para 39



*A protection measure within that is defined as any decision, whatever it is called, ordered by an issuing authority of the member state of origin. It includes an obligation imposed to protect another person from physical or psychological harm. Our domestic law provides this court can accept an undertaking where the court has the power to make a non-molestation order. Thus, it seems that a non-molestation undertaking given to this court could qualify as a protection measure within the European Regulation on protection measures.”<sup>236</sup>*

*S (A Child) (Hague Convention 1980: Return to Third State) [2019] EWCA Civ 352*

On appeal from: High Court of Justice Family Division, Mr Justice Cobb, reported as *S (Father) v D (Mother)* [2019] EWHC 56 (Fam)

Date of judgment: 7 March 2019

Judges: Lord Justice Longmore, Lord Justice Moylan and Lord Justice Baker

## **Facts**

This case concerned a child aged 4. The family were Hungarian nationals and in January 2017 moved to Germany. The child became habitually resident in Germany. In April 2018, the family travelled to Hungary for a short holiday and from Hungary, the mother brought the child to the UK. The father travelled to the UK shortly after. The mother ended the relationship and the father overdosed on Xanax. The father had a history of bipolar disorder and the paramedics were informed of this. During his admission in hospital, the mother visited him with the child, and it was reported that the father attempted to strangle the mother whilst she held the child. The child fell to the floor but was not harmed. Whilst in hospital, the father made two further attempts to take his life.

On 17 April 2018, the father pleaded guilty to assault and a restraining order was made against him, along with a 6-month suspended sentence. The father then returned to Hungary.

In August 2018, the father issued an application for the return of the child to Germany however during the proceedings, the father’s position as to which country he sought a return of the child to changed. At the final hearing, the father confirmed that he sought a return to Hungary, a “third State”.

On 20 December 2018, the Court at first instance ordered the return of the child, subject to “detailed and concrete undertakings”<sup>309</sup> from the father. On 15 January 2019, returning before Cobb J, the Court concluded that the protective measures were sufficient. The mother appealed.

On 19 February 2019, the Court of Appeal heard the mother’s appeal against the return order to Hungary.

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<sup>236</sup> Paras 25 and 26.

<sup>309</sup> Para 32.

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## Article 13(1)(b)

### The violence/abuse

The allegations would indicate a moderate/severe level of abuse with at least one major incident impacting directly on the child. On the forefront of the mother's case was the assault that took place in the hospital. In addition, the mother alleged physical and emotional abuse during the relationship. She also asserted that the father suffered mental health issues contributing to his erratic and aggressive behaviour.<sup>237</sup>

In relation to the assault in the hospital it was stated:

*"[T]he father seriously assaulted the mother on the ward; he attempted to strangle her. The mother had been holding A at the time of the assault and dropped him to the floor. Both the mother and A were medically checked and were found not to have sustained any serious or long-lasting injuries, but both were plainly shaken and understandably distressed by the events. The mother deposes to the fact that "A was very upset by the incident in the hospital". While in hospital after this incident, the father again made attempts on his own life ...".<sup>238</sup>*

### Court's approach to the grave risk of harm / Evidence

The trial judge undertook an evaluation of the evidence before him. This included evidence from the mother's doctor in Germany, evidence from the father's doctor in Hungary and written statement of evidence from both parents. The judge found that the evidence overall to support the mother's grave risk of harm assertion was "inconsistent",<sup>239</sup> though acknowledging that the serious act of violence perpetrated on her at the hospital after removal or retention was "incontrovertible evidence".<sup>313</sup> Therefore in investigating the merits of the mother's allegations, the court found that although there was "no independent contemporary verification"<sup>240</sup> of the mother's allegations of a history of domestic violence, the serious assault that took place at the hospital corroborated her account.<sup>241</sup> As to credibility, the court found that it was not persuaded by the father's case that the allegations were "false".<sup>242</sup>

### Protective measures, including undertakings

The undertakings proposed by the father at the adjourned final hearing on 15 January 2019 included:

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<sup>237</sup> Para 22.

<sup>238</sup> Para 15.

<sup>239</sup> Para 45.

<sup>313</sup> Ibid.

<sup>240</sup> Para 46.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

“(a) not, in summary, to molest the mother or A;

(b) not to remove A from the mother's care and control and that, pending a decision of the Hungarian court, A would remain in the mother's care;

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(c) to submit to supervised contact with A until welfare issues could be considered by the Hungarian court;

(d) to provide and pay for an identified property for the mother and A's sole occupation until 1st March 2019 and an equivalent property thereafter pending the decision of the Hungarian court;

(e) to pay the mother maintenance for herself and A at a stipulated rate until the Hungarian court could be seised of the issue of financial support;

(f) not to come within a specified distance of the property occupied by the mother and A;

(g) to submit to the jurisdiction of the Hungarian court and to "co-operate to bring this matter before the Hungarian court for the purposes of determining" care, contact and welfare issues.”<sup>243</sup>

### Effectiveness of protective measures, including undertakings

The trial judge concluded that “the father offers suitably detailed and concrete undertakings to reflect relevant protective measures.”<sup>244</sup> This was following a short adjournment to enable the further to put forward proposals for protective measures. The trial judge was content, it would seem, with undertakings being effective just by virtue of the father agreeing to and signing:

*“I will be so satisfied if the father voluntarily gives the following undertakings (or undertakings of a similar nature) in writing and signed by him, which would be in force pending determination of the issues by a court in Hungary ...”*<sup>319</sup>

The trial judge’s explanation for the finding that the father's undertakings were “effective”, however, was neither persuasive nor satisfactory.<sup>245</sup> Accordingly, the Court of Appeal remarked that “[t]he judge's reasoning as to the efficacy of the protective undertakings provided in this case was insufficient to support his conclusion that they were ‘effective’.”<sup>246</sup> The Court of Appeal, in overturning the decision, concluded that the trial judge had not sufficiently scrutinized the robustness of the proposed undertakings,<sup>247</sup> in particular in light of the return of the child to a third state.<sup>248</sup>

### **Outcome**

The Court of Appeal granted the mother’s appeal and overturned the order of Cobb J for return. The Court of Appeal found that there was no analysis as to why it was appropriate to make an

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<sup>243</sup> Para 27.

<sup>244</sup> Para 32.

<sup>319</sup> Ibid.

<sup>245</sup> Para 61.

<sup>246</sup> Para 64.

<sup>247</sup> Para 48.

<sup>248</sup> Para 38.

<sup>324</sup> Para 57.

order for return to a third state. The order was in effect a relocation decision albeit made with no proper welfare determination having been undertaken.<sup>324</sup>

## **Theoretical utility of the EU instruments on protection measures**

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The Protection Measures Regulation may have been useful in this case at the trial court level especially given that a major appeal point related to the effectiveness of the protection measures (i.e. undertakings proposed by the father).

*Uhd v McKay* [2019] EWHC 1239 (Fam)

Date of judgment: 15 May 2019

Judge: The Honourable Mr. Justice MacDonald

### **Facts**

This case concerned the father's application for the return of Ruby, a little girl aged 3 to Australia. There was another child who was Ruby's half sibling, T, aged 10. The father was an Australian national and the mother a British national who had lived in Australia for about 22 years. The parties commenced a relationship in August 2012 and began cohabiting in November 2012. They married in April 2013.

The mother asserted that the father's behaviour changed after marriage and between 2013 and 2015, when the parties' separated. This separation was prior to the birth of Ruby in July 2015. The mother stated that the father would regularly become abusive and violent towards her and T, including serious physical, verbal and emotional violence. Proceedings ensued in Australia, with the mother seeking interim protective measures ('intervention order') and subsequent proceedings following alleged breaches of that order. A final intervention order was made by consent. In May 2017, the mother applied for an extension and at a contested hearing, the court declined to accept most of the mother's allegations. Nevertheless, the mother obtained a further intervention order on 10 July 2018. On 22 September 2018 the mother removed Ruby from the jurisdiction of Australia without the father's consent and whilst proceedings were ongoing in Australia.

The father issued an application under the 1980 Hague Convention for the return of the child and the mother alleged physical, verbal and emotional violence, coercive and economic control, including abuse of the children.

## Article 13(1)(b)

### The violence/abuse

The violence was directed towards the mother though allegations were also made in respect of physical and verbal abuse of the children.

Based on the information, the level of violence may be assessed as ‘severe’. The mother also relied on the effect on her mental health of an order for return as part of her defence in seeking to satisfy the Art 13(1) (b) exception. In particular, the mother alleged the following:

*“i) Between 2013 and 2015 the father's behaviour included physical, verbal and emotional violence and coercive and economic control. The mother relies on a statement from Dominic McKay to corroborate allegations of domestic abuse, albeit the accounts provided by Dominic McKay derive exclusively from what the mother has told him; ii) With respect to physical violence, the mother alleges that the father would "drag me round the house, pin me down and scream in my face" and, in respect of emotional abuse, alleges that the father "would play mind games, punish me if he felt I did something wrong, give me silent treatment, spread malicious gossip about me amongst our friends, hurt our family dog and isolate me. iii) With respect to economic abuse, the mother asserts that the father was "mostly unemployed" and would force the mother to pay all of the bills from her state benefits. iv) With respect to physical and verbal abuse towards children, the mother alleges that the father beat T, left him by the roadside, locked him in a car on a hot day and shouted at him. The mother alleges that the father also put his fingers inside T's mouth causing him to choke and threatened him on a regular basis. The mother relies on a statement from Dominic McKay which asserts that T reported that the father had hit him in the stomach, placed his fingers down T's throat, displayed anger towards the mother, squeezed him until T could not breathe, broke T's wooden sword. v) The mother also alleges that the father attempted to kill T, asserting that he attempted to "smother T to death on several occasions". At no point does Dominic McKay suggest that the father attempted to "smother T to death". vi) The mother further alleges that the father subjected T to sexual abuse, the mother stating that she caught the father doing so. vii) The mother alleges that when she was pregnant with Ruby the father "would not allow me to receive any medical care and would not allow me to eat and drink”<sup>249</sup>*

There was, however, no mention of domestic violence in mother’s medical records from Australia, leading the judge to take the view that a “significant degree of caution is required in respect of the allegations raised by the mother having regard of the totality of the evidence that is before the court.”<sup>250</sup>

### Court’s approach to grave risk of harm / Evidence

The Court’s approach to grave risk of harm clearly involved the judge undertaking an evaluation of the allegations with reference to the evidence that the mother relied upon. Crucially, the court considered the approach to the assessment of the grave risk of harm and revisited the Supreme Court case of *Re E*, distinguishing the assumption approach in *Re E* and

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<sup>249</sup> Para 14.

<sup>250</sup> Para 15.

<sup>327</sup> Para 69.

indicating an acceptance of the need to evaluate the merits of the allegations. In particular, MacDonald J stated that:

*“However, as I have had cause to note in a number of cases recently, the methodology endorsed by the Supreme Court in Re E by which the court assumes the risk relied upon to establish the exception under Art 13(b) at its highest is not an exercise that is undertaken in the abstract. The requirement, made clear in Re E, for the court to evaluate the evidence against the civil standard of proof whilst taking account of the summary nature of the proceedings, must also mean that the analytical methodology endorsed by the Supreme Court in Re E by which the court assumes the risk relied upon at its highest is not an exercise that excludes consideration of relevant evidence before the court.”<sup>327</sup>*

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Therefore, contrary to the Supreme Court’s guidance in *Re E*, MacDonald J clearly expressed the view that “the court is not prevented from examining the evidence before it that informs the question of objective risk and evaluating that evidence in a manner consistent with the summary nature of these proceedings”.<sup>251</sup> Vitally, the court took into account evidence relating to the merits of the mother’s allegations, and demonstrably this also informed the decision on protective measures.

The evidence included a full trial bundle with statements from the mother and from the father exhibiting an extensive array of documents “including psychological reports on each of the parents filed and served in the proceedings in Australia and a series of domestic abuse risk assessments authored by domestic abuse organisations in that jurisdiction from which the mother sought assistance.”<sup>329</sup> The court also heard oral evidence from a forensic consultant psychiatrist jointly instructed in the return proceedings to prepare a report on the mother, and written and oral submissions from the parties’ advocates.<sup>330</sup>

#### Protective measures, including undertakings

The father offered undertakings to facilitate the mother’s return with the child, and those relevant to the issue of domestic violence were as follows:

*“[...] Without making any admissions, not to harass, molest, pester, use or threaten violence against the mother, and not to instruct or encourage any other person to do so, pending the first inter partes hearing in a family court in Australia*

...

*Not to attend at the mother’s address (or such other address at which she may be residing) unless agreed in writing by both parties pending the first inter partes hearing in a family court in Australia.*

...

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<sup>251</sup> Para 81

<sup>329</sup> Para 11.

<sup>330</sup> Ibid.

*Prior to Ruby’s return to Australia, to apply to, or attend before, Ms Justice Johns (if available, and if not available before another judge of the Family Court of Australia) and request the discharge of any warrant for the arrest of the mother and to provide undertakings to the Australian court in the terms set out in 1 to 9 above.”<sup>252</sup>*

### Effectiveness of protective measures, including undertakings

MacDonald J stated that he was “satisfied that such risks as are contended for by the mother are amply met by the protective measures that are available in this case. Whilst, having regard to the conclusions set out above it is not strictly necessary for the father to offer them, he nonetheless continues to offer undertakings and has expanded those undertakings since the conclusion of submissions, as set out above.”<sup>332</sup>

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In addition, the court addressed the issue of the efficacy of undertakings in Australia given to an English court.<sup>253</sup> In doing so, it noted that there was evidence to show that the undertakings that the father provided would not be directly enforceable in the Australian court yet the learned judge on balance was satisfied that the measures can be effective if the father attended the Australian court and gave mirror undertakings. On this basis, the learned judge concluded that he was “satisfied that the undertakings offered by the father to this court can be effective as protective measures”.<sup>334</sup>

### **Outcome**

The father’s application was granted, and the court ordered a return with undertakings.

### **Theoretical utility of the EU instruments on protection measures**

The instruments may not have made a huge difference in light of the judge’s observations that the undertakings offered by the father were not actually necessary and that he did not need to offer them.

### C v B [2019] EWHC 2593 (Fam)

Date of judgment: 4 October 2019

Judge: Mr Robert Peel QC (sitting as a Deputy High Court Judge)

### **Facts**

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<sup>252</sup> Para 55.

<sup>332</sup> Para 98.

<sup>253</sup> Para 100.

<sup>334</sup> Ibid.

The case concerned an application for the return to Germany of three children, aged 13, 11 and 8, made by their father following a removal of the children to the UK by their mother. The parents were German, and the children had lived in Germany their entire lives. The parents divorced in about 2012. In 2014 the mother remarried. Following the divorce, the parents had joint custody, with the mother as primary carer and the father having regular contact, including staying contact. After the mother's remarriage, disputes over contact developed, which led to active involvement of courts and social services in the affairs of the family. The mother alleged that the children had been shown pornographic films while in the father's care and that the father was unreliable and neglectful. Thereafter, contact between the father and the children became irregular. This resulted in the father seising a court with a contact application in 2016, and the court granting supervised contact in January 2017. A psychologist's report prepared for the German courts found that the father was able to parent the children and there was no evidence to justify mother's concerns.

Upon arriving in the UK, the mother kept their whereabouts secret from the father, and it was not until December 2018 that the father learned that the children were living in the UK and applied for their return. There was a further delay which resulted in the matter coming before the judge for final determination only in September 2019, i.e. 9 months after the

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commencement of the return proceedings and 18 months after their removal from their habitual residence. Initially, the mother sought to oppose the return application on three bases: 1.) that the removal had not been in breach of the father's custody rights; 2.) that she had suffered physical and psychological abuse at the father's hands, meaning that the return would expose the children to a grave risk of harm, and she would refuse to return to Germany with the children if return was ordered (Art 13(1)(b)); and 3.) that the children objected to a return (Art 13(2)). At the later stages of the proceedings, however, the mother was no longer pursuing the first defence.<sup>254</sup>

## **Article 13(1)(b)**

### The violence/abuse

It was the mother's case that she left Germany because she wished to separate from her husband and was in fear of her life from him.<sup>255</sup> She had suffered serious physical and psychological abuse at his hands, which was witnessed by the children. On one occasion, the violence was directed also towards one of the children as her step-father hit her with a slipper.

*"[...] (iv) That she suffered physical and psychological abuse at the hands of Mr A, witnessed by the children (and an allegation that Mr A hit one daughter with a slipper). She lists a number of incidents including two alleged*

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<sup>254</sup> Para 7.

<sup>255</sup> Para 28.



*attempts to kill her (an attempted strangulation and striking her with glass bottles), regularly beating her, threatening her and sexually abusing her.*<sup>256</sup>

The mother also alleged that she had suffered physical and psychological abuse at the hands of the father. Her allegations were summarised by the judge as follows:

*“(i) That she suffered physical abuse at the hands of F. The allegations are made in general form although she makes reference to one specific occasion when he hit her during pregnancy, and another occasion when he smashed a glass pane in front of children.*

*(ii) That she suffered psychological abuse at the hands of F, feeling restricted, controlled and isolated by him. He described her negatively to family members and called her a "whore" She describes one humiliating episode (the date is unclear) when he attempted to persuade her to have sex with a family friend, which she refused. (iii) That F exposed the children to pornographic material and neglected them during contact.*<sup>257</sup>

The mother had previously been diagnosed with an anxiety disorder and suffered from mental health problems. She believed that given the severity of violence she had been exposed to during her second marriage, she could not be protected from her second husband. Her fear was so great that she would not accompany the children should the court order their return.<sup>339</sup>

### Court’s approach to grave risk of harm

The court cited *Re E* as the relevant authority, stating that “the court should assume the risk of harm at its highest and then go on to consider whether protective measures are sufficient to mitigate the identified harm.”<sup>258</sup> At the same time, however, the court cited with approval *Uhd v McKay*<sup>259</sup> and *Re C (Children) (Abduction: Article 13(b))*<sup>260</sup> stating that “the evidence cannot be viewed entirely in the abstract” and that “[t]he court is entitled to weigh all the evidence and make an assessment about the credibility and substance of the allegations.”<sup>343</sup>

### Evidence

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<sup>256</sup> Para 69.

<sup>257</sup> Para 69.

<sup>339</sup> Para 69.

<sup>258</sup> Para 58.

<sup>259</sup> [2019] EWHC 1239 (Fam).

<sup>260</sup> [2018] EWCA Civ 2834.

<sup>343</sup> Para 58.

The court read documentary evidence,<sup>261</sup> heard oral evidence from the CAFCASS Officer and from the mother,<sup>262</sup> and met the children in the presence of the CAFCASS Officer and a note taker.<sup>263</sup> Throughout the proceedings, the father was present before the judge.<sup>264</sup> Whilst acknowledging that it did hear limited evidence from the mother, the court noted that “it is rare for oral evidence to be taken from the parties to determine the veracity or otherwise of the allegations relied upon.”<sup>265</sup> A full fact-finding exercise would defeat the purpose of the summary nature of return proceedings.<sup>349</sup> Accordingly, when the mother applied for an adjournment to allow a psychologist report to be prepared to analyse her mental state and the impact upon her of any return to Germany,<sup>266</sup> the court refused her application, explaining that to do otherwise would be “contrary to the purpose and intent of the summary nature of Hague Convention proceedings.”<sup>267</sup>

### Protective measures, including undertakings

Referring to Art 11(4) Brussels IIa the court noted that when considering the grave risk of harm defence, it was obliged to “consider what protective measures can be put in place.”<sup>352</sup> The following undertakings were ordered: 1.) for the protection of the mother: a.) the father should

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give a non-molestation undertaking; b.) the father should undertake not to inform the mother’s second husband of her whereabouts; c.) not to support or pursue criminal or civil proceedings in Germany arising out of the abduction; 2.) for the protection of the children: the children’s passports “to be held independently pending further order of the German court”<sup>268</sup>; 3.) for the protection of both the mother and the children: a.) until a decision of the German court to the contrary, the children should live with the mother; and b.) until a decision of the German court to the contrary, there should be “no contact between the children and the father unless agreed otherwise”.<sup>269</sup>

### Effectiveness of protective measures, including undertakings

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<sup>261</sup> Consisting of the parties’ respective submissions; a statement from the father in reply; a German Family Psychologist report from December 2017; the CAFCASS Officer’s report. Para 10.

<sup>262</sup> Para 11. The oral evidence from the mother was requested at a later stage of the proceedings after the mother unexpectedly informed the court that in the event of an order for return of the children to Germany, she would not accompany them. Oral evidence was confined to this specific point. Para 9.

<sup>263</sup> Para 12.

<sup>264</sup> Para 13.

<sup>265</sup> Para 58.

<sup>349</sup> Ibid.

<sup>266</sup> Para 39.

<sup>267</sup> Para 40.

<sup>352</sup> Para 59.

<sup>268</sup> Para 70.

<sup>269</sup> Ibid.

The court referred with approval to *Re A (A Child) (Hague Abduction: Art 13(b) Protective Measures*<sup>270</sup> where Williams J summarised the use of protective measures under Art 11(4) Brussels IIa, whilst including in the list also “more traditional measures such as nonmolestation injunctions” and making reference to the Protection Measures Regulation.<sup>271</sup>

## Outcome

The court concluded that the mother had not established the Art 13(1)(b) defence, for the following reasons.<sup>357</sup> The mother left Germany because of domestic violence from her second husband, not the father. Accordingly, she would not likely be exposed to the high level of risk required by the Convention as a consequence of the father's conduct. The allegations against the father related to the period of their relationship. The mother had been able to manage for six years after the end of the relationship with no detrimental effect on her ability to care for the children. The children had been able to maintain a relationship and regular contact with the father at that time; that would be improbable if they felt in danger from him. No findings had been made against the father by the German courts and there was no independent corroboration of the allegations. Part of the mother's motivation for leaving had been a desire to prevent the children having contact with the father. There was no evidence that her husband had tried to locate her. The German authorities would have tools to ensure the protection of the mother and the children. Further, the mother would herself take steps for their protection if returned. Her concern that the children did not want contact with the father or to be placed in his care was one for the German courts to decide. Protective measures could be put in place to mitigate the impact of the return. The mother's refusal to return with the children was not a consequence of an Art13(1)(b) defence which was fully made out but was intended to be causative as part of her attempt to establish the defence. There was “an element of tactical game-playing” on her

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part.<sup>272</sup> The court was confident that she would not in fact refuse to accompany the children, although that could not be completely ruled out.

The court noted that even if the Art 13(1)(b) defence had been made out successfully, return would have been ordered as the family had no prior connection with the UK and therefore the German courts were far better placed to deal with welfare issues concerning the children.<sup>273</sup> The child's objections defence was also rejected and, accordingly, the return of the children was ordered.

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<sup>270</sup> [2019] EWHC 649.

<sup>271</sup> Para 60. See also analysis of *Re A (A Child) (Hague Abduction: Art 13(b) Protective Measures* [2019] EWHC 649 (Fam) above. <sup>357</sup> Paras 70-73.

<sup>272</sup> Para 71.

<sup>273</sup> Para 74.

<sup>360</sup> Para 1.

## **Theoretical utility of the EU instruments on protection measures**

It appeared that the court focused on the allegations of domestic violence made by the mother against the children's father, and to some extent neglected the risk of further violence to the mother from her second husband. This approach is not satisfactory as, given the severity of the violence the mother had received from her second husband, the court's approach exposes the mother to potentially serious risks should she return with the children. It is therefore suggested that the instruments could have been helpful in this case to facilitate the recognition of protective measures in relation to both the father and the mother's second husband.

### 2.3.2 Scotland

#### GCMR Petitioner [2017] CSOH 66

Date of judgment: 21 April 2017

Judge: Opinion of Lady Wise

#### **Facts**

The case concerned a child aged 10 who was born in 2006 in Portugal to Portuguese parents. The child had lived in Portugal until December 2011 when she was wrongfully removed by her mother. Prior to the abduction, shared care arrangements were in place by virtue of an order of a local court made in September 2009. On discovering that the mother had abducted the child, the father endeavoured to locate them, however, was unable to do so for several years, until May 2016, when he discovered that they were resident in England. The English Central Authority received the father's return application in October 2016 and promptly transmitted it to the Scottish Central Authority.<sup>360</sup> The mother opposed the application on the grounds of settlement (Art 12(2)), child's objections (Art 13(2)) and grave risk of harm (Art 13(1)(b)).

#### **Article 13(1)(b)**

##### The violence/abuse

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The mother alleged that the father was a "violent and aggressive man who abuses alcohol and illicit substances" and was violent to her both during their relationship and after it ended. The mother claimed that domestic abuse against women was not taken seriously in Portugal and upon her arrival in the UK reported the abuse to organisations such as the Citizens Advice Bureau and the Ethnic Minorities Law Centre.<sup>274</sup> The mother also submitted that the

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<sup>274</sup> Para 15.

father had inflicted corporal punishment on the child. The mother described several incidents of violence she or the child suffered at the hands of the father, which were summarised by the court as follows:

*“When in Portugal and during her pregnancy with IAR, the respondent had been hospitalised due to a concerning loss of amniotic fluid. Her position now is that she did not tell the hospital staff how she came by the injury that caused the said loss but that it was an assault by the petitioner. [...] Further, it appeared from the translated version of a report of a hospital attendance by IAR on 5 September 2011 that the petitioner had admitted smacking her. She had presented at hospital with bruising to her right buttock. There was further evidence of corporal punishment being inflicted on the child by the petitioner. In the psychological assessment carried out on 6 December 2011 (report No 6/11 of process) the child is reported as stating that she “...prefers to live with her mother because she can sleep with her, because her mother plays with her more and doesn’t smack, she only shouts.” In the same report, the author narrates that the petitioner had carried out an act of physical punishment on the child, namely a smack on the legs. More recently, IAR told Dr Edward that her paternal grandmother had beaten her and that her father cut her hair off. She is frightened that he will do so again.”<sup>275</sup>*

The child’s psychologist appointed during the return proceedings (see below ‘Evidence’) in her report concluded that there was a real risk of both physical and psychological harm to the child on her return to Portugal. In particular, she stated:

*“Dr Edward’s report expresses the view (at page 19) that IAR would likely experience significant anxiety and distress at the prospect of such a return and might even endanger herself through efforts to return to her mother. This supported a contention that the child would also suffer psychological harm if she is returned.”<sup>363</sup>*

As for the mother, the information provided in the judgment is not sufficiently detailed to allow for an assessment of the severity of the violence and the risk of further violence should the mother return to Portugal. Nevertheless, based on the incident concerning the loss of amniotic fluid by the mother, it is likely that the overall level of violence the mother experienced at the hands of the father could be classified as ‘severe’.

#### Court’s approach to grave risk of harm

The court noted that the “[r]ecent guidance on a defence under Article 13b of the convention” could be found in the Supreme Court decision in *Re E* and summarised the *Re E* guidance as follows:

*“While the case of In Re E might have impacted on what things might create a grave risk for a child, the strength of the test that must be satisfied to succeed under Article 13b remains as exacting as ever. Clear and compelling evidence of a grave risk of substantial harm is required, something much more than the risk inherent in any unwelcome return to the country of habitual residence. It has also long been established that in the absence of compelling evidence to establish that the courts in the requesting country do not have the power to protect the*

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*child, the courts of the requested county should assume that they will be able to do so – C v C [1989] 1 WLR 654.”<sup>276</sup>*

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<sup>275</sup> Para 16.

<sup>363</sup> Ibid.

<sup>276</sup> Para 14.

It appeared that the court followed the *Re E* approach in that it did not conduct an independent investigation into the merits of the allegations of domestic violence. Although the court commissioned a report by a child’s psychologist, it was expressly stated that the remit of the psychologist’s assessment was confined to the issues of settlement and child’s objections. In addressing the allegations of domestic violence, the court relied on available written evidence and, noting contradictory accounts of what happened between the parties, concluded that it was “unable to reach any firm conclusion on the disputed issues they raise.”<sup>277</sup> In particular, the court stated:

*“There are directly contradictory accounts in the various Affidavits lodged of what occurred between the parties, in particular in relation to the respondent’s allegation that the petitioner was violent to her and physically chastised the child. In D v D 2002 SC 33 the Inner House made clear (at para 8) that no conclusions can be drawn on the veracity of allegations in contradictory accounts in Affidavits. While there is some extraneous evidence, such as the documentation available to the court in Portugal and a record of a hospital admission, I find that those reports are insufficient to support a conclusion that the petitioner acted in the manner alleged by the respondent.”*<sup>278</sup>

### Evidence

The court appointed a child’s psychologist to prepare a report that would address the issues of settlement and objection to return.<sup>279</sup> The court also examined affidavit evidence from the father, the mother and several witnesses, together with a “large volume of documentary material”.<sup>280</sup>

### Protective measures, including undertakings

The court felt that there was no need to consider whether appropriate protective measures could be put in place as the mother had failed to establish that, if returned, the child would be at grave risk of physical or psychological harm.<sup>281</sup>

### Effectiveness of protective measures, including undertakings

See above (‘Protective measures, including undertakings’).

### **Outcome**

The return application was refused based on settlement (Art 12(2)) and child’s objections (Art 13(2)).

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<sup>277</sup> Para 32.

<sup>278</sup> Para 32.

<sup>279</sup> Para 4.

<sup>280</sup> Para 4.

<sup>281</sup> Para 33.

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## Theoretical utility of the EU instruments on protection measures

As the father's return application was refused, there was no need to engage either of these instruments. Nevertheless, had a return order been made, in the circumstances of the present case where the violence had likely been 'severe' and a level of risk of the violence continuing was present, it may be suggested that the engagement of the Regulation would have been a helpful precaution. It is, however, not certain whether given the passage of time since the last incident of domestic violence in Portugal the Scottish court would have been willing to grant a protective measure to the mother.

### **3. CASE-LAW ANALYSIS**

This Part analyses the case-law that has been set out in Part 2. As explained in Part 1, the analysis centers around several key themes that frequently occur in the case-law. These include the interpretation of the grave risk of harm defence as pertinent to child abductions involving allegations of domestic violence; the court's approach to proving such allegations; and forms, availability and effectiveness of protective measures, including the role of the Protection Measures Regulation thereof.

#### **3.1. Article 13(1)(b) - 'grave risk of harm'**

##### *Narrow application of Article 13(1)(b)*

Article 13(1)(b) is by its very terms of restricted application and, accordingly, there is no need for the provision to be "narrowly construed".<sup>282</sup> In other words, the terms of Article 13(1)(b) are unambiguous and, by themselves, demonstrate the restricted availability of the defence.<sup>371</sup> As such, they need no further elaboration or gloss.<sup>372</sup>

##### *Risk vs harm*

The risk to the child must have reached such a level of gravity that it can be classified as "grave". It is not enough for the risk to be "real". Although "grave" denotes the risk rather than the harm, there is a connection between the two.<sup>283</sup> This means that "a relatively low risk of

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<sup>282</sup> *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, para 31 ('*Re E*').

<sup>371</sup> *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, para 6 ('*Re S*').

<sup>372</sup> *Re E*, para 31.

<sup>283</sup> *Re E*, para 33.

<sup>374</sup> *Ibid.*

death or really serious injury might properly be qualified as ‘grave’ while a higher level of risk might be required for other less serious forms of harm.”<sup>374</sup>

### *‘Physical or psychological harm’*

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The words “physical or psychological harm” are not qualified; however, they “gain colour” from the third limb of the defence (i.e. “or otherwise [...] placed in an intolerable situation”).<sup>284</sup>

### *‘Intolerable situation’*

“Intolerable” is a strong word but when applied in the context of Art 13(1)(b) refers to “a situation which this particular child in these particular circumstances should not be expected to tolerate.”<sup>285</sup> Although “every child has to put up with a certain amount of rough and tumble, discomfort and distress”, there are certain situations which it is unreasonable to expect a child to tolerate.<sup>286</sup>

### *Article 13(1)(b) and domestic violence*

Courts in the UK have recognised that “situations which it is unreasonable to expect a child to tolerate” include not only physical or psychological abuse or neglect of the child himself, but also exposure to the harmful effects of witnessing by the child of physical or psychological abuse of his own parent.<sup>287</sup>

The case-law analysis<sup>288</sup> revealed that in cases involving allegations of domestic violence the grave risk of harm defence is often invoked and in some cases also successfully made out in conjunction with the child’s objections defence (Art 13(2) of the 1980 Convention).<sup>289</sup>

### *Anxieties not based on objective risk*

It is irrelevant whether the risk is the result of objective reality or of the abducting mother’s subjective perception of reality.<sup>290</sup> Accordingly, anxieties of an abducting mother about a return

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<sup>284</sup> *Re E*, para 34.

<sup>285</sup> *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, para 52; and *Re S*, para 27.

<sup>286</sup> *Re E*, para 34.

<sup>287</sup> *Re E*, paras 34 and 52.

<sup>288</sup> See Part 2 above.

<sup>289</sup> See e.g. *LS v AS* [2014] EWHC 1626 (Fam) where it was noted: “[...] clarity and force of the children’s wishes should not be artificially separated from the fact of what, I conclude, has been their seriously abusive past home life.” Para 26.

<sup>290</sup> *Re E*, para 34; and *Re S*, para 31.



with the child which are not based on objective risk to her but are nevertheless of such intensity as to be likely, if returned, to affect her mental health so as to destabilise her parenting of the child to a point where the child's situation would become intolerable, can found the grave risk of harm defence under Art 13(1)(b).<sup>291</sup> It is not important whether the mother's anxieties are reasonable or unreasonable.<sup>383</sup> This means that if the court concludes that there is a grave risk of harm to the child, the source of the risk is irrelevant. This means that the grave risk of harm

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defence may successfully be established, for example, “where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.”<sup>292</sup> The court shall, however, examine an assertion of intense anxieties not based upon objective risk very critically, and shall consider whether it can be dispelled through protective measures.<sup>293</sup> (See section 3.2. below). However, if there is enough evidence for the court to make a conclusion as to what was the objective reality for the child, the court does not need to proceed to examining the mother’s subjective perceptions.<sup>294</sup>

The above reasoning can analogically be applied to a situation when it is the child (rather than the abducting mother) who holds intense anxieties about a return not based on the objective reality, which would amount to the child’s situation on return being intolerable.<sup>295</sup> It has been suggested in support of this argument that, given the focus of Art 13(1)(b) on the situation of the child, “[...] a fixed and immutable subjective fear on the part of a child independent of the truth or otherwise of the allegations is all the more capable of grounding a defence under Art 13(1)(b).”<sup>296</sup>

### *The burden of proof*

The burden of proof that Article 13(1)(b) (or any other exception to return) applies, rests with the person opposing the child’s return.<sup>297</sup> It is therefore for the abducting mother to produce evidence to corroborate the defence raised. The burden of proof that protective measures exist seems to be on the left-behind parent as the Practice Guidance on Case Management and Mediation in International Child Abduction Proceedings (‘the Practice Guidance’) states:

“Where the respondent's answer raises a defence under Art 13(b) the applicant should give immediate consideration to, and take steps, in the most expeditious way available, to ensure

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<sup>291</sup> *Re E*, para 34; and *Re S*, para 34.

<sup>383</sup> *Re S*, para 34.

<sup>292</sup> *Re E*, para 34.

<sup>293</sup> *Re S*, para 27.

<sup>294</sup> *Re S*, para 29. See also *B v P* [2017] EWHC 3577 (Fam), para 67.

<sup>295</sup> *B v P* [2017] EWHC 3577 (Fam), para 66.

<sup>296</sup> *Ibid.*

<sup>297</sup> *Re E*, para 32.

that information is obtained, whether from the Central Authority of the Requesting State or otherwise, as to the protective measures that are available, or could be put in place to meet the alleged identified risks.”<sup>298</sup>

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The court is required to evaluate the evidence against the civil standard of proof, i.e. the ordinary balance of probabilities.<sup>299</sup>

### *Evidence*

When evaluating the evidence, the court should “be mindful of the limitations involved in the summary nature of the Convention process.”<sup>300</sup> Indeed, a full fact-finding exercise would defeat the purpose of the summary nature of return proceedings. Accordingly, it will seldom be appropriate to hear oral evidence related to the allegations made under Article 13(1)(b), and, therefore neither those allegations nor their denial are typically verified in cross-examination.<sup>301</sup> Nevertheless, as set out in the Practice Guidance on Case Management and Mediation in International Child Abduction Proceedings,<sup>302</sup> oral evidence is not entirely barred, and a party who seeks direction for oral evidence has to show that such evidence is needed to help the court to resolve the case justly.<sup>303</sup> If a party seeks to rely on oral evidence, the issue should be raised at the earliest available opportunity.<sup>304</sup>

## **3.2. Court’s approach to grave risk of harm**

The case-law overview in Part 2 above has revealed that UK courts have conceptualized two distinct approaches to cases where factual allegations of domestic violence have been made under the grave risk of harm defence. Additionally, isolated incidences of alternative

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<sup>298</sup> J Munby (President of the Family Division), ‘Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings’, March 2018, England & Wales, para 2.11 (e), available at <https://www.judiciary.uk/publications/practice-guidance-case-management-and-mediation-of-internationalchild-abduction-proceedings/> (‘Practice Guidance’). Even at an earlier stage, i.e. when the return application is being made, the left-behind parent in an intra-EU child abduction case must provide in the return application details of all measures of which he/she is aware that have been taken by courts or authorities to secure the protection of the child after his/her return to the requesting State. Practice Direction 12F – International Child Abduction (England & Wales), para 12.11 (h), available at [https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_12f](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12f).

<sup>299</sup> *Re E*, para 32.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*

<sup>302</sup> ‘Practice Guidance’ (n 390).

<sup>303</sup> *Ibid.*, para 3.8. See also *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 57.

<sup>304</sup> ‘Practice Guidance’ (n 390).<sup>397</sup>

See section 2.2 above.

approaches have been recorded, although these remain largely non-theorized and conceptually undeveloped.

### *The ‘protective measures approach’*

As outlined above,<sup>397</sup> in *Re E*<sup>305</sup> the Supreme Court set out an approach which emphasises the role of protective measures and can therefore be termed as the ‘protective measures approach’ (or ‘the *Re-E* approach’). A court adopting this approach will refuse to carry out a fact-finding exercise to determine the truth of the allegations of domestic violence. Instead, the court will take the allegations at their highest and decide, whether on that basis, there is a grave risk that if the child returns to his/her country of habitual residence he/she will be exposed to physical and psychological harm or otherwise placed in an intolerable situation.<sup>399</sup> Afterwards, the court will consider whether protective measures sufficient to mitigate the harm are available in the

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requesting State.<sup>306</sup> Only if the protective measures cannot ameliorate the risk, the court may have to try to resolve the disputed issues of fact.<sup>307</sup>

This approach relies on the availability of adequate and effective protective measures as a substitute for determining facts. It is based on the premise that determining the truth of the allegations is a matter for the court of the requesting State.<sup>308</sup> This approach is illustrated by Table 1 below.

*Table 1*

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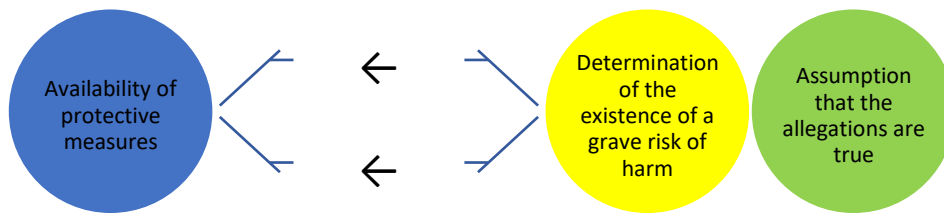
<sup>305</sup> *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27. <sup>399</sup>

*Re E*, para 36.

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.* In the context of the *Re E* approach, it has been suggested that only in such circumstances there might be scope for oral evidence. *TAAS v FMS* [2017] EWHC 3797 (Fam), para 30.

<sup>308</sup> See e.g. *TAAS v FMS* [2017] EWHC 3797 (Fam), para 31.



The *Re E* approach has been referred to with approval and/or explicitly followed in a number of cases that involved allegations of domestic violence, both in England & Wales (High Court and Court of Appeal) and Scotland (Court of Session). These cases included: England & Wales, High Court - *In the Matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)*<sup>309</sup>, *H v K (Abduction: Undertakings)*<sup>310</sup>, *TAAS v FMS*<sup>311</sup> and *B v P*<sup>312</sup>; England &

Wales, Court of Appeal - *Re F (A Child)*<sup>313</sup> and *In the Matter of M (Children)*<sup>314</sup>; and Scotland, Court of Session - *GCMR Petitioner*<sup>315</sup>.

#### *The ‘evaluative assessment approach’*

An alternative approach, which has found some support in the English Court of Appeal, can be termed as the ‘evaluative assessment approach’. Under this approach, the court will first seek to determine, to the extent possible, the merits of the disputed allegations of domestic violence. In this exercise the court will understandably be confined by the summary nature of the return proceedings, and therefore, may not be able to make findings related to the disputed allegations.<sup>316</sup> Once the evaluative assessment has been carried out, the court determines whether a grave risk of harm exists. Only afterwards, as part of the exercise of discretion, the court proceeds to assessing available protective measures.<sup>317</sup> This approach is based on the premise that it is necessary to assess the disputed allegations in order to evaluate the risk and is illustrated by Table 2 below.

<sup>309</sup> [2019] EWHC 649 (Fam).

<sup>310</sup> [2017] EWHC 1141 (Fam).

<sup>311</sup> [2017] EWHC 3797 (Fam).

<sup>312</sup> [2017] EWHC 3577 (Fam).

<sup>313</sup> [2014] EWCA Civ 275.

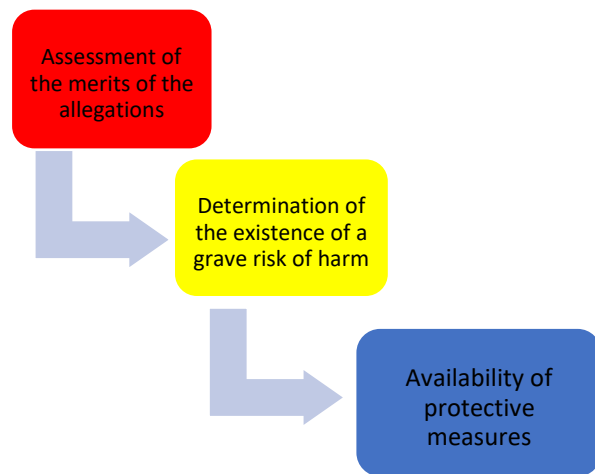
<sup>314</sup> [2016] EWCA Civ 942.

<sup>315</sup> [2017] CSOH 66.

<sup>316</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, paras 35-38.

<sup>317</sup> The leading UK authority on the exercise of discretion is the Supreme Court decision in the case of *Re M (Children) (Abduction)* [2007] UKHL 55.

Table 2



In England, the evaluative assessment approach has been sanctioned by the Court of Appeal, at the expense of the protective measures approach, in the cases of *Re K (1980 Hague*

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*Convention) (Lithuania)*<sup>412</sup> and *Re C (Children) (Abduction Article 13(B))*<sup>413</sup>. The evaluative assessment approach has been endorsed also by the High Court in the case of *Uhd v McKay*<sup>414</sup>.

In *Re K (1980 Hague Convention) (Lithuania)*<sup>415</sup> Black LJ (as she then was) rejected an argument that the court was “bound” to follow the approach set out in *Re E*.<sup>416</sup> She suggested that, as it was the role of the abducting parent to demonstrate the Art 13(1)(b) exception, it was the role of the court to evaluate the evidence, pointing out that the evaluation should be carried out “within the confines of the summary process.”<sup>318</sup> Notably, however, Black LJ’s reasoning was limited to a specific scenario, in particular a situation when the evidence before the court allows the judge to “confidently discount” the likelihood that the allegations give rise to an Article 13(1)(b) risk.<sup>319</sup> Black LJ described such circumstances as those where the Art 13(1)(b) defence does not even “[get] off the ground”.<sup>419</sup> In cases of this type it is redundant for the judge to look further at the issue of protective measures.<sup>320</sup>

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<sup>318</sup> Ibid.

<sup>319</sup> Ibid.

<sup>419</sup> Ibid.

<sup>320</sup> Ibid. The conclusion that there was no need to explore protective measures as the allegations did not give rise to an Art 13(1)(b) grave risk was reached also in other cases, e.g. *Re K (1980 Hague Convention) (Lithuania)* [2015] EWCA Civ 720; *GCMR Petitioner* [2017] CSOH 66 and *Uhd v McKay* [2019] EWHC 1239 (Fam)

The reasoning of Black LJ in *Re K* was referred to with approval by Moylan LJ in *Re C (Children) (Abduction Article 13(B))*<sup>321</sup>. At the same time, His Lordship sought to re-interpret the approach set out by the Supreme Court in *Re E* by saying that in setting out that approach the Supreme Court was not suggesting that no evaluation of the allegations could or should be undertaken.<sup>422</sup> Although a judge needs to be cautious when conducting a “paper evaluation”, this “does not mean that there should be no assessment at all about the credibility or substance of the allegations.”<sup>322</sup> Moylan LJ’s reasoning was supported by Lewison LJ who expressed the view that the basis of the *Re E* approach – i.e. the assumption that the allegations are true, differed significantly from the evaluative exercise undertaken by the court in other areas of law.<sup>323</sup> His Lordship then highlighted a serious shortcoming of the *Re E* approach in respect of the burden of proof in the particular context of intra-EU cases. He pointed out that Art 11(4)

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<sup>412</sup> [2015] EWCA Civ 720.

<sup>413</sup> [2018] EWCA Civ 2834.

<sup>414</sup> [2019] EWHC 1239 (Fam).

<sup>415</sup> [2015] EWCA Civ 720.

<sup>416</sup> *Re K (1980 Hague Convention) (Lithuania)* [2015] EWCA Civ 720, para 53.

of Brussels IIa placed on the left-behind parent the burden of demonstrating that adequate arrangements had been made to protect the child upon the return.<sup>324</sup> However, when applying the *Re E* approach, the burden of proof required by Art 13(1)(b) seems to be reversed as *Re E* requires the allegations to be presumed to be true but the effectiveness of the protective measures to be investigated.<sup>325</sup> This led Lewis LJ to conclude that the *Re E* approach was “unprincipled”<sup>326</sup> and to express a hope that judges dealing with child abduction cases “do not apply *Re E* in its full rigour; but recognize that some evaluative exercise is necessary.”<sup>327</sup>

The protective measures approach was revisited also by MacDonald J in the High Court case of *Uhd v McKay*<sup>328</sup>. Contrary to his approach in prior cases,<sup>329</sup> the learned judge indicated an

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(although in this case the court nonetheless accepted undertakings that had been offered by the father, see para 98). In other cases, however, extensive undertakings were ordered even though Art 13(1)(b) had not been established, e.g. *TAAS v FMS* [2017] EWHC 3797 (Fam) and *C v B* [2019] EWHC 2593 (Fam).

<sup>321</sup> [2018] EWCA Civ 2834). *Re C* was followed in a non-domestic violence case of *JP v TP* [2019] EWHC 1077 (Fam). The judge (Mr Darren Howe QC) was of the view that, given the quantity of available evidence it was not appropriate to simply assume that the allegations were true and then look at protective measures. Rather, “[o]n the facts of this case” it was necessary to undertake an evaluation of the allegations, which was in line with the judgment of Moylan LJ in *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834 (para 64). <sup>422</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 39.

<sup>322</sup> *Ibid.*

<sup>323</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 68.

<sup>324</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 69.

<sup>325</sup> *Ibid.*

<sup>326</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 70.

<sup>327</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 69.

<sup>328</sup> [2019] EWHC 1239 (Fam).

<sup>329</sup> See e.g. *H v K (Abduction: Undertakings)* [2017] EWHC 1141 (Fam) and *B v P* [2017] EWHC 3577 (Fam).

acceptance of the need to evaluate the allegations and noted a number of recent cases where the *Re E* approach had not been “an exercise that is undertaken in the abstract”.<sup>330</sup> This methodology found support in the *Re E* requirement to evaluate evidence on the balance of probabilities (whilst taking into consideration the summary nature of the return proceedings), which implied that the *Re E* approach did not discount evaluation of appropriate evidence before the court.<sup>432</sup> Accordingly, MacDonald J came to a conclusion that “the court is not prevented from examining the evidence before it that informs the question of objective risk and evaluating that evidence in a manner consistent with the summary nature of these proceedings”.<sup>331</sup> In this case, the learned judge saw the importance of considering the seriousness and level of the grave risk of harm asserted and in evaluating the evidence considered the merit of the mother’s allegation which would then go on to inform his decision on the need for and effectiveness of protective measures.

The decisions in *Re C* and *Uhd v McKay* were referred to and followed in the recent High Court case of *C v B*<sup>332</sup>.

Although each of the above two approaches has its pros and cons, it is suggested here that the evaluative assessment approach is more appropriate and should therefore be endorsed. Indeed, without determining whether domestic violence is present, it is difficult to see how ‘grave risk’ could reliably be assessed and effective protective measures determined. The protective measures approach seems to be illogical – as if “putting the cart before the horse” – as it

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“involves the consideration of protective measures to mitigate risk before that risk has been established and assessed.”<sup>333</sup>

Admittedly, the evaluative assessment approach may raise concerns over the length of the proceedings, however, speed should not take priority over the proper assessment of risk and consideration of the safety of the child and the abducting parent. Indeed, the emphasis on speed may encourage courts to minimise or ignore allegations of domestic violence rather than

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<sup>330</sup> *Uhd v McKay*, para 69.

<sup>432</sup> *Ibid.*

<sup>331</sup> *Uhd v McKay*, para 81.

<sup>332</sup> *C v B* [2019] EWHC 2593 (Fam).

<sup>333</sup> A Barnett, ‘Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention on International Child Abduction – a perspective from England and Wales’, p. 18, in *Eight Letters Submitted to the United States Department of State and the Permanent Bureau of the Hague Conference on Private International Law about a Draft Guide for Article 13(1)(b) and Related Draft Documents that were circulated for comment prior to the October 2017 meeting of the Seventh Special Commission on the 1980 Hague Child Abduction Convention at The Hague*, available at <https://law.ucdavis.edu/faculty/bruch/files/Letters-re-Hague-Convention.pdf>.

determining them, leaving thus an unassessed risk of harm. Besides, the Court of Appeal and the High Court have both emphasized that the assessment of the allegations should be carried out within the boundaries of the return proceedings which are by its nature summary. Importantly, the evaluative assessment approach seems to be supported by the jurisprudence of the ECtHR, specifically the case of *X v Latvia*<sup>334</sup> where the Grand Chamber introduced the concept of ‘effective examination’. As Judge Albuquerque explained in his concurring opinion, ‘effective examination’ means a ‘thorough, limited and expeditious’ examination. Accordingly, it is suggested here that a ‘thorough, limited and expeditious’ examination of disputed allegations of domestic violence should be carried out by the court in return proceedings, before the court proceeds to determining the availability of protective measures. This is important not only for the sake of the child and the abducting parent but also the leftbehind parent who, in the interests of fairness and justice, deserves a degree of adjudication on allegations that may well be exaggerated or even worse - false. Indeed, the left-behind parent may be seriously prejudiced with the stigma attached to measures made against him, either by way of undertakings or injunctions imposed on him such as non-molestation orders, occupation orders or orders that there be no interim contact between him and the child.

#### *Alternative approaches*

In some cases, no reference was made to any of the relevant authorities, leaving the court’s methodology unclear. Typically, in these cases the court conducted a limited investigation of the allegations of domestic violence on the basis of available written evidence, and then proceeded to the question of protective measures.<sup>335</sup> Sometimes the investigation appeared to be more detailed in that it involved a fact-finding oral hearing(s).<sup>438</sup> Nevertheless, interestingly,

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despite ostensibly having made findings, the court was frequently at pains to emphasise that no findings of fact had been made.<sup>336</sup>

In one case that fell within the ‘alternative approaches’ category the court’s methodology was at least to some extent conceptualized. It was the High Court case of *R v P*<sup>440</sup> Theis J appeared to adopt approach which combined elements of the two core approaches described above. The methodology proposed by Theis J displayed some features of the evaluative assessment

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<sup>334</sup> Application no. 27853/09, Grand Chamber [2013].

<sup>335</sup> E.g. *In the Matter of H, R and E (Children)* [2013] EWHC 3857 (Fam); *RB v DB* [2015] EWHC 1817 (Fam) (interestingly, in this case the court stated that the purpose of the limited investigation was only to determine whether protective measures were necessary. This, however, appears to be only a figure of speech as a decision on the necessity of protective measures would, in any case necessitate (at least in the judge’s mind) provisional conclusions regarding the allegations); and *LS v AS* [2014] EWHC 1626 (Fam) (as the allegations of domestic violence were not disputed by the left-behind father, the judge was able to rely in the investigation on the “factual matrix of the case” as it was set out the available written evidence). <sup>438</sup> E.g. *FQ v MQ* [2013] EWHC 4149 (Fam).

<sup>336</sup> E.g. *FQ v MQ* [2013] EWHC 4149 (Fam), paras 27, 64, 121-122; and *In the Matter of H, R and E (Children)* [2013] EWHC 3857 (Fam), paras 46-47; <sup>440</sup> [2017] EWHC 1804 (Fam).



approach in that the court appeared to examine the merits of the situation, however, at the same time commented that the presence of a grave risk of harm could be assessed only against the background of available protective measures.

Although not stating so expressly, the court appeared to conduct a “thorough, limited and expeditious”<sup>337</sup> examination of the merits of the allegations. In terms of evidence gathering, the court held a two-day hearing whereby the mother, the father and the child’s Guardian gave oral evidence. Thereafter, the court made directions for the filing of written submissions, allowing the mother enough time to consider the submissions that had been made on behalf of the father and the child. The judgement was given *ex tempore* with the mother present, allowing her “the benefit of the interpreter”.<sup>338</sup>

Nevertheless, the court commented that whether a situation will give rise to a grave risk of harm “must be evaluated in the context of the protective measures that can be put in place to mitigate the impact upon the child of a situation that they will face upon return.”<sup>339</sup> (see Table 3 below). This would imply (although perhaps only a theoretical) variation of the evaluative assessment approach under which the court first investigates the merits of the allegations, then concludes whether a grave risk of harm exists, and only afterwards proceeds to assessing available protective measures (see Table 2 above). Under this approach, protective measures play no role in determining whether a grave risk of harm exists; they come into play only after this determination has been made. In contrast, in *R v P* it appeared that the availability of protective measures was factored into the assessment of the existence of a grave risk of harm. Admittedly, however, in terms of the outcome, the practical difference between the two approaches may not be significant.

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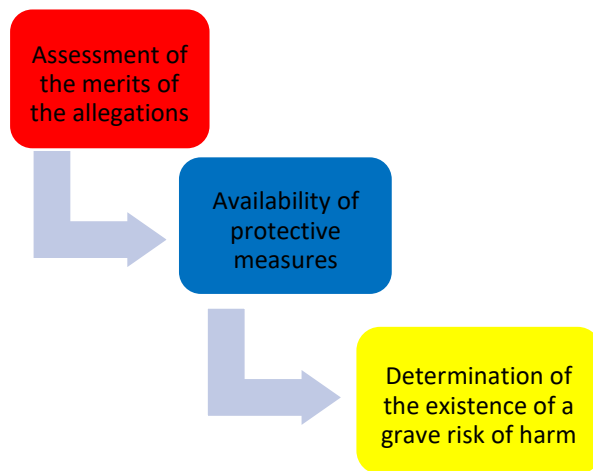
Table 3

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<sup>337</sup> *X v Latvia*, Application no. 27853/09, Grand Chamber [2013].

<sup>338</sup> *R v P*, [2017] EWHC 1804 (Fam), para 10.

<sup>339</sup> *R v P*, [2017] EWHC 1804 (Fam), para 63.



### *UK local workshops – participant experience*

The workshop organisers raised the question of how judges would approach the assessment of the grave risk of harm exception in cases involving allegations of domestic violence. Dr Momoh presented on this topic and suggested that investigating the merits of the allegations first before considering whether there were adequate protective measures to ameliorate the grave risk of harm was the correct approach; that way protective measures are assessed against a real and specific risk rather than stereotyped or assumed risk. Participants offered their opinions during case study discussions with differing views as to whether to undertake in return proceedings an investigation of the merits of the allegations or to proceed immediately to assessing the availability of protective measures.

It appeared that at times, the idea of “investigating” the merits of the allegations was misconstrued for undertaking a welfare assessment or a protracted investigation that would undermine the objectives of the 1980 Hague Convention. Dr Momoh set out the principle of “effective examination” in line Judge Albuquerque’s concurring opinion in *X v Latvia*<sup>340</sup>, in that a thorough, limited and expeditious examination should take place (see above). In practice, she expanded on asking the following questions: is there documentary evidence to find domestic violence that would pose a grave risk of harm to the child? Or is a fact finding/expert evidence required in order for effective examination to take place?

There was a debate in relation to evidential practices, including the commissioning of expert reports i.e. psychiatric or psychological report in child abduction cases involving domestic violence. One participant was surprised that reports were required at all, whereas others had experience of the use of expert report and felt that it was beneficial. Other evidential concerns including obtaining documentary evidence of the abuse were also discussed.

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<sup>340</sup> Application no. 27853/09, Grand Chamber [2013].

It was apparent that there was not enough literature on the issue as participants appeared somewhat unsure about the proposed approach to the assessment of the grave risk of harm.

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This lacuna in the understanding of the approach to the assessment of the grave risk of harm was identified.

### **3.3. Protective measures, including undertakings**

The Brussels Iia Regulation<sup>341</sup> prohibits a non-return order on the basis of Art 13(1)(b) of the 1980 Convention if it is established that adequate arrangements have been made to secure the child's protection upon his/her return. The appropriate protective measures and their effectiveness will differ from case to case and from jurisdiction to jurisdiction.<sup>342</sup> Therefore, when assessing "whether or not protective measures have been taken in that country and whether they will adequately secure the protection of the child upon his or her return",<sup>343</sup> courts may find it helpful to utilise the assistance of the central authority of the requesting State<sup>448</sup> and/or the international co-operation arrangements between liaison judges.<sup>344</sup>

In *Re E* the Supreme Court noted that Art 13(1)(b) was forward looking, meaning that the situation the court is evaluating is not the past but the future.<sup>345</sup> Therefore, it is not the past but the future risks that should be assessed. Moreover, the court should be conscious of the fact that the necessity for effective protection may persist, and therefore should be concerned not only with the child's immediate future.<sup>346</sup> The assessment of the future risks should be carried out against the background of available protective measures.<sup>347</sup> The left-behind parent shall describe in the return application (or when filing further evidence supporting the application)<sup>348</sup> "any protective measures (including orders that may be subject to a declaration of enforceability or registration under Art 11 of the 1996 Hague Convention or, where appropriate, undertakings)<sup>454</sup> the applicant is prepared, without prejudice to his or her case, to offer for the purpose of securing the child's return."<sup>349</sup> Similarly, the abducting mother, in filing her

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<sup>341</sup> Art 11(4).

<sup>342</sup> *Re E*, para 36.

<sup>343</sup> European Commission, 'Practice Guide for the Application of the Brussels Iia Regulation', p. 55, available at <https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed> ('EC Practice Guide'). <sup>448</sup> *Ibid*.

<sup>344</sup> *Re E*, para 36; and 'Practice Guidance' (n 390), para 3.12.

<sup>345</sup> *Re E*, para 35. See also *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 48.

<sup>346</sup> *Re E*, para 35.

<sup>347</sup> *Ibid*.

<sup>348</sup> Following a direction under Family Procedure Rules 2010, r. 12.46(a).

<sup>454</sup> See section 3.4 below.

<sup>349</sup> 'Practice Guidance' (n 390), para 2.5 (b).

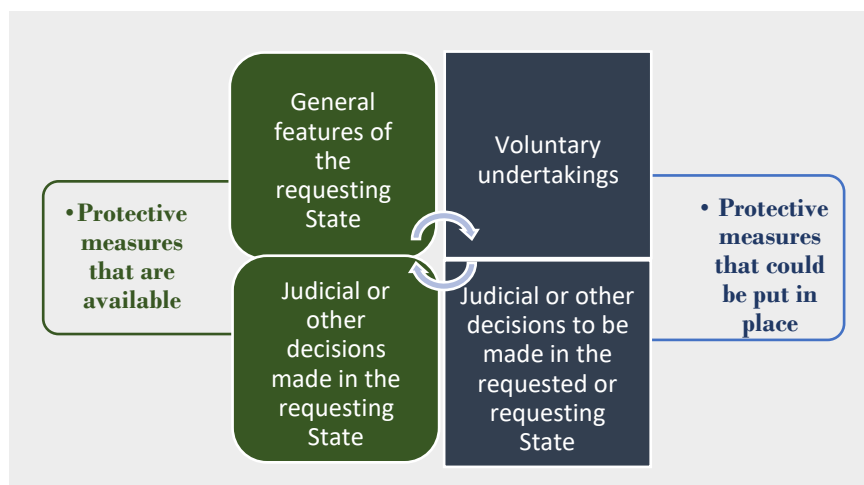
evidence,<sup>350</sup> shall include details of “any protective measures [she] seeks (including, where appropriate, undertakings) in the event that the court orders the child’s return.”<sup>351</sup>

The appraisal of the Art 13(1)(b) defence is a general process,<sup>352</sup> meaning *inter alia* that the court has to take into account all relevant matters, including all available protective

measures.<sup>353</sup> The Practice Guidance distinguishes between protective measures that “are available” and protective measures that “could be put in place”, making clear the potential extensive scope of the exercise.<sup>354</sup> Accordingly, the English courts have given a broad interpretation to the term ‘protective measures’ and held that the expression was not limited to specific measures but extended, for example, to “general features” of the requesting State.<sup>355</sup> This interpretation, however, seems to run contrary to the Practice Guide for the Application of the Brussels IIa Regulation which states that “[i]t is not sufficient that procedures exist in the Member State of origin for the protection of the child, but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question.”<sup>356</sup>

Nonetheless, the English approach to protective measures can be illustrated as set out in Table 4 below.

Table 4



<sup>350</sup> Following a direction under Family Procedure Rules 2010, r.12.50(1).

<sup>351</sup> ‘Practice Guidance’ (n 390), para 2.5 (d).

<sup>352</sup> *Re S*, para 22, and *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 40.

<sup>353</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, paras 40-41.

<sup>354</sup> ‘Practice Guidance’ (n 390), para 2.11(e). See also Moylan LJ’s comment in *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352, para 51.

<sup>355</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 41. See also *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352, para 50, where Moylan LJ referred to his judgment in *Re C* and reiterated that the “expression ‘protective measures’ has a wide meaning.”

<sup>356</sup> ‘EC Practice Guide’ (n 447), p. 55.

### *General features of the requesting State*

The Court of Appeal has held that “the general right to seek the assistance of the court or other state authorities might in some cases be sufficient to persuade a court that there was not a grave risk within Article 13(b).”<sup>357</sup> This type of protective measures includes e.g. access to courts and other legal services; state assistance and support, including financial assistance, housing assistance, health services, women’s shelters and other means of support to victims of domestic violence; responses by police and the criminal justice system more generally; and availability

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of protective measures to victims of domestic violence in the requesting State such as nonmolestation injunctions.<sup>358</sup>

### *Judicial or other decisions made in the requesting State*

In some cases, there may be decisions of courts and/or other competent authorities (as appropriate), which can facilitate (or contribute towards facilitating) the protection of the child and/or the mother upon the return, already available in the requesting State. These may include e.g. civil and/or criminal protection orders in favour of the abducting mother or, where appropriate, (an interim) non-contact order.

### *Voluntary undertakings*

The Supreme Court has held that the English courts have sought to address the grave risk of harm by “extracting undertakings” from the left-behind parent.<sup>359</sup> Undertakings can be described as “promises offered or in certain circumstances imposed upon an applicant to overcome obstacles which may stand in the way of the return of a wrongfully removed or retained child.”<sup>360</sup> Undertakings are often utilised to address also concerns related to the safety of the abducting mother upon the return, recognising the fact that the risk to the child and the risk to the mother are often intertwined.<sup>361</sup> Undertakings aim at ensuring a short-term welfare of the child and/or the returning mother, until the question of the child’s welfare, custody and access comes before the court of the requesting State.<sup>362</sup> Examples of undertakings include:

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<sup>357</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 41.

<sup>358</sup> *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)* [2019] EWHC 649 (Fam), para 24.

<sup>359</sup> *Re D* [2016] UKSC 34, para 52.

<sup>360</sup> P Beaumont & P McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999) p. 30. See also K Trimmings, *Child Abduction Within the European Union* (Hart Publishing, 2013) pp. 155-161.

<sup>361</sup> E.g. *MR v HS* [2015] EWHC 234 (Fam) and *LS v AS* [2014] EWHC 1626 (Fam).

<sup>362</sup> *In the Matter of the Child Abduction and Custody Orders Act, 1991 and in the Matter of R (A Minor)* [1994] 3 IR 507 (per Denham J).

non-molestation/non-harassment undertakings (e.g. ‘not to use violence or threats towards the mother, nor to instruct anybody else to do so’, or ‘not to communicate with the mother directly’), undertakings related to the occupation of the family home (e.g. ‘to vacate the family home and make it available for a sole occupancy by the mother and the child’), undertakings related to financial support (e.g. ‘to pay for the return tickets for the mother and the child’, or ‘to provide financial support/maintenance to the mother and the child upon their return’), and undertakings related to residence or access to the child (e.g. ‘not to seek to separate the mother from the child’, or ‘not to seek contact with the child unless awarded by the court or agreed’). As can be seen from the above examples, undertakings do not always contain protective measures as such but may instead encompass “more light touch” practical arrangements to facilitate and implement the child’s return and enable a “soft-landing” of the child in the requesting State (e.g. the funding of return flights and financial support upon the return).<sup>363</sup>

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The problem with undertakings, however, is that they are generally largely ineffective as a means of protection outside the common law world.<sup>364</sup> Importantly, for this reason undertakings are not utilised in return proceedings in the Scottish courts.<sup>365</sup>

#### *Judicial or other decisions to be made in the requested States*

As explained below,<sup>472</sup> in England, there is a trend towards facilitating the enforceability of undertakings in the requesting State through issuing orders for urgent measures of protection under Art 11 of the 1996 Hague Convention. Another example of this type of protective measures are civil/criminal protection orders in favour of the abducting mother made by an appropriate court (independent of the child abduction proceedings) with the intention that these protection measures will be enforceable in the requesting State under the Protection Measures Regulation or the European Protection Order Directive.<sup>366</sup>

#### *Judicial or other decisions to be made in the requesting State*

The Supreme Court has held that the English courts have sought to address Art 13(1)(b) risks by “relying on the courts of the requesting State” to provide protection to the child upon the return.<sup>474</sup> Such orders typically encompass so called ‘safe harbour orders’ or ‘mirror orders’ (whereby the court of the requesting State issues an order that will ‘mirror’ the undertakings order made in the requested State, with the aim to secure the enforceability of the undertakings

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<sup>363</sup> *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352, para 55.

<sup>364</sup> *Re E*, para 7. See section 3.4 below.

<sup>365</sup> Interview with a Judge of the Scotland’s Supreme Courts, 18 November 2019. <sup>472</sup>

See section 3.4.1 below.

<sup>366</sup> See section 3.4.3 and Part 5 below. <sup>474</sup>

*Re D* [2016] UKSC 34, para 52.

in the requesting State (see section 3.4 below). In the EU context, the problem with ‘safe harbour orders’ and ‘mirror orders’, however, is that such orders are not common in Europe as civil law judges do not generally believe that they are authorised to make such an order.<sup>367</sup> Safe harbour orders and mirror orders have been ‘invented’ by common law judges as the practice has developed mainly in the United States.<sup>368</sup> Another limitation concerns the length of the proceedings as the case must be dealt with by the courts of both the requested and the requesting State before the child is returned.<sup>477</sup> For example, in *TAAS v FMS*<sup>369</sup> the court referred to its past experience with the US State Florida where procedure resulted in a 6months’ delay, which in turn led to an application for the return order to be set aside.<sup>370</sup>

### 3.4. Effectiveness of protective measures

As explained above, undertakings as a legal concept are practically unknown to and thus unenforceable in civil law jurisdictions.<sup>480</sup> This means that, within the EU where most Member States’ legal systems are based on the civil law tradition,<sup>481</sup> compliance with undertakings depends largely only on the goodwill of the left-behind parent. This makes undertakings unsatisfactory remedies in cases involving domestic abuse,<sup>482</sup> as, unsurprisingly, they are frequently not complied with.<sup>371</sup> Indeed, as noted by the Permanent Bureau of the Hague Conference, it is “common” for the applicant parent to violate undertakings once the child and the abducting parent were returned.<sup>484</sup> The problem of effectiveness of protective measures was highlighted also by the Supreme Court in *Re E* when Lady Hale referred to concerns about the “too ready” acceptance by the courts of common law countries of undertakings which are not enforceable in the courts of the requesting State.<sup>485</sup> Similarly, the Court of Appeal has acknowledged the anxieties about “the court’s perhaps giving insufficient weight” to the efficacy of undertakings given to the English court and cautioned about reliance on undertakings if they cannot be made enforceable in the requesting State.<sup>372</sup> It was then held that

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<sup>367</sup> The Honourable Justice Jacques Chamberland, ‘Domestic Violence and International Child Abduction: Some Avenues of Reflection’ (2005) 10 Judges’ Newsletter 70, p. 72.

<sup>368</sup> ‘Child Abduction Within the European Union’ (n 466), p, 159.

<sup>477</sup> *Ibid.*

<sup>369</sup> [2017] EWHC 3797 (Fam).

<sup>370</sup> *TAAS v FMS* [2017] EWHC 3797 (Fam), para 48. See section 2.3.1 above.

<sup>371</sup> A research study conducted by a UK child abduction charity ‘Reunite’ revealed that non-molestation undertakings had been broken in 100% of the representative sample of cases in which they had been given. The study also showed that left-behind parents were often instructed by their lawyers to agree to the undertakings that were sought in the return proceedings because the legislation in the requesting State was different and ‘undertakings mean nothing’. Report by the Reunite Research Unit, ‘The Outcomes for Children Returned Following an Abduction’, September 2003, pp. 31 and 33. <sup>484</sup> ‘Report of the Fifth Special Commission Meeting’ (n 482), para 227. <sup>485</sup> *Re E*, para 7.

<sup>372</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 43, and *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352, para 54.

in deciding what weight should be given to protective measures, the court had to take into account the extent to which they were likely to be effective. In relation to undertakings, effectiveness includes: 1.) the likelihood of the undertakings being complied with; 2.) remedies in the absence of compliance – i.e. enforceability. This means that enforceability forms one element of the court's assessment.<sup>373</sup> If a judge concludes that the undertakings are effective, his/her conclusion as to the efficacy of the undertakings must be supported by reasoning.<sup>374</sup> The more obvious the need for protection, the more critical it is to ensure that the protective

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<sup>480</sup> See section 3.3 above.

<sup>481</sup> This means that of the 28 Member States only three are potentially in the position to enforce undertakings: Cyprus, Ireland and the UK.

<sup>482</sup> See expert discussion recorded in the meeting of the Fifth Special Commission to review the operation of the 1980 Convention: Permanent Bureau of the Hague Conference, 'Report of the Fifth Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 30 October-9 November 2006', para 229, available at [https://assets.hcch.net/upload/wop/abd\\_2006\\_rpt-e.pdf](https://assets.hcch.net/upload/wop/abd_2006_rpt-e.pdf) ('Report of the Fifth Special Commission Meeting').  
measures are effective<sup>489</sup> or, in other words, "the greater the scrutiny required in respect of their efficacy."<sup>490</sup>

### 3.4.1. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ('1996 Hague Convention')

In England & Wales, it is the view of the High Court that the recognition and enforcement of undertakings can be facilitated by the 1996 Hague Convention by treating undertakings as urgent measures of protection under Articles 11 and 23.<sup>375</sup> If orders are made under Art 11<sup>376</sup> then by virtue of Art 23 they shall be recognised by operation of law in all other Contracting States. Alternatively, instead of making a separate order, the court can simply incorporate

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<sup>373</sup> *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834, para 43.

<sup>374</sup> *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352, para 60.

<sup>375</sup> *Re Y (A Child) (Abduction: Undertakings Given for Return of Child)* [2013] EWCA Civ 129. Following *Re Y* it has become common in the High Court to make orders under Art 11 of the 1996 Convention which then have the effect of satisfying the terms of Art 11(4) of Brussels IIa (e.g. *RB v DB* [2015] EWHC 1817 (Fam); *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)* [2019] EWHC 649 (Fam); *In the Matter of S O D*, High Court, 31 January 2019 (unreported) (provided by one of the [POAM UK local workshops](#) attendees).

<sup>376</sup> Article 11 provides jurisdiction as it states that "(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection."



undertakings into the return order with the expectation that the requesting State will treat them as urgent measures of protection under the 1996 Convention.<sup>377</sup> There is an important difference here between England & Wales and Scotland as Scottish courts do not make return orders conditioned on undertakings.<sup>378</sup>

Alarming, in at least one case the court displayed an unmerited level of overconfidence regarding the utility of the 1996 Convention as it suggested that where the court “makes appropriate orders under Article 11 of the 1996 Convention it will be impossible to advance a case under Article 13(b).”<sup>379</sup> The judge then went even further by suggesting that where “fully efficacious measures of protection” have been made under Art 11 of the 1996 Convention, then except in exceptional circumstances (which, according to the judge, are “hard to envisage”) “all defences will cease to be available and will dissolve.”<sup>380</sup> With respect, this approach amounts to a rather dangerous over-reliance on the power of the reciprocal nature of the 1996 Convention, the applicability of which in the child abduction context has not yet been tested in the courts of other Contracting States.

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<sup>489</sup> *Re E*, para 52.

<sup>490</sup> *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352, para 56.

Notwithstanding, the argument in support of utilizing the 1996 Convention for the purposes of facilitating effective protective measures in return proceedings is not bulletproof and can be challenged on several grounds.

First, the recognition and enforcement procedure under the 1996 Convention is potentially too cumbersome to adequately facilitate the protection of domestic violence victims on an urgent basis. The first matter of concern is that the recognition of the measures of protection can be refused on a number of grounds. The relevant circumstances are as follows:

- “a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
- b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

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<sup>377</sup> *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)* [2019] EWHC 649 (Fam), para 25: “Protective measures may include undertakings, and undertakings accepted by this court or orders made by this court pursuant to Article 11 of the 1996 Hague Child Protection Convention are automatically recognised by operation of Article 23 in another Convention state (see *Re Y (A Child) (Abduction: Undertakings Given for Return of Child)*.”

<sup>378</sup> See section 3.3 above.

<sup>379</sup> *RB v DB* [2015] EWHC 1817 (Fam), para 14.

<sup>380</sup> *RB v DB* [2015] EWHC 1817 (Fam), para 16.

- c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;
- d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
- e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
- f) if the procedure provided in Article 33 has not been complied with.”<sup>497</sup>

Moreover, to be enforceable, the measures of protection must, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in the requesting State pursuant to Art 26 of the 1996 Convention. This means that if the undertakings have been breached, the abducting mother will first need to seek a declaration of enforceability or registration of the undertakings, before being able to commence proceedings for the actual enforcement of the protection measures. The declaration of enforceability or registration may be refused on the same grounds as the recognition of the measures.<sup>498</sup> Although the Convention requires that Contracting States apply to the declaration of enforceability or registration “a simple and rapid procedure”,<sup>499</sup> the matter of fact is that court proceedings in many Contracting States are far from swift, making thus the Convention enforcement mechanism an inadequate remedy in domestic violence cases where the enforcement of matters such as non-molestation undertakings is of a truly urgent nature – sometimes literally a matter of life and death. This is understandably so as the Convention was designed to facilitate cross-border protection of children and not adult victims of domestic violence.

Second, although the High Court and the Court of Appeal have been accepting of the utility of the 1996 Convention for the purpose of facilitating the enforceability protection measures in

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<sup>497</sup> 1996 Hague Convention, Art 23(2).

<sup>498</sup> 1996 Hague Convention, Art 26(3).

<sup>499</sup> 1996 Hague Convention, Art 26(2).

return proceedings, this view does not seem to be shared by the Supreme Court. In particular, in *Re E* the Supreme Court called on the Hague Conference “to consider whether machinery can be put in place whereby, when the courts of the requested state identify specific protective measures as necessary if the article 13b exception is to be rejected, then those measures can become enforceable in the requesting state, for a temporary period at least, before the child is returned.”<sup>381</sup>

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<sup>381</sup> *Re E*, para 37.

Third, it has been questioned whether the 1996 Convention applied in intra-EU cases. In particular, in the Court of Appeal case of *Re S (A Child) (Hague Convention 1980: Return to Third State)*,<sup>382</sup> an argument was raised that the 1996 Convention did not apply to intra-EU proceedings because of Article 61 of the Brussels IIa Regulation. This article is titled ‘Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children’ and states that “[...] this Regulation shall apply: (a) where the child concerned has his or her habitual residence on the territory of a Member State.” Does this mean that the Convention does not apply in intra-EU cases? Unfortunately, the Court of Appeal did not deal with this question.<sup>383</sup>

Fourth, it was also suggested in *Re S (A Child) (Hague Convention 1980: Return to Third State)*<sup>384</sup> that, even if the 1996 Convention applied in intra-EU cases, the jurisdictional scope of Article 11 was not unlimited.<sup>385</sup> Accordingly, the material scope of the 1996 Convention limited the type of undertakings that could be “converted” into measures of protection under Arts 11 and 23 of the Convention.<sup>386387</sup> For example, there are some matters which are explicitly excluded from the scope of the Convention such as maintenance obligations,<sup>506</sup> which would seem to exclude certain protective measures (i.e. those relating to maintenance) from the scope of Art 11 of the Convention. This reasoning appears to have been accepted by Moylan LJ in the above case as he explicitly stated that he “struggle[d] to see how it [the 1996 Convention] would apply to maintenance obligations covered by the undertakings (which would include the undertaking to provide a property).”<sup>388</sup>

Finally, it may be questioned whether the 1996 Convention can be utilised in relation to undertakings related exclusively to the abducting mother.

#### 3.4.2. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial

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matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (‘Brussels IIa Regulation’)

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<sup>382</sup> [2019] EWCA Civ 352.

<sup>383</sup> *Re S (A Child) (Hague Convention 1980: Return to Third State)*, para 53.

<sup>384</sup> [2019] EWCA Civ 352.

<sup>385</sup> *Re S (A Child) (Hague Convention 1980: Return to Third State)*, paras 6 and 53.

<sup>386</sup> *Ibid.*

<sup>387</sup> Hague Convention, Art 4 *e*.

<sup>388</sup> *Re S (A Child) (Hague Convention 1980: Return to Third State)*, para 61.

In *RB v DB*, Mostyn J commented that Art 20 of the Brussels IIa Regulation could potentially be utilized as a jurisdictional ground for the making of protective measures which would then be entitled to recognition under Chapter 3 of the Regulation.<sup>389</sup> The learned judge, however, concluded that it was, to his knowledge, not common to utilize Art 20 for this purpose.<sup>390</sup> It is true that Art 20 is not a suitable basis for facilitating the safe return of an abducted child, and the reason behind this is that a judgment granting provisional measures under Art 20 is not enforceable outside the Member State in which it was issued.<sup>391</sup>

Nevertheless, importantly, the Brussels IIa Recast Regulation, which will apply from 1 August 2022, will allow the cross-border recognition and enforcement of provisional measures granted by the court of the requested State in return proceedings.<sup>392</sup>

#### 3.4.3. Regulation (EU) 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters ('Protection Measures Regulation')<sup>393</sup>

On a few occasions, judges (both High Court and Court of Appeal) have referred to the Protection Measures Regulation recognizing its potential to fill the gap in the civil law protection of abducting mothers who return with their children to the requesting State in child abduction cases involving allegations of domestic violence. In particular, in *Re S (A Child) (Hague Convention 1980: Return to Third State)*<sup>394</sup> Moylan LJ noted that measures under Art 11 of the 1996 Convention were also measures under the Protection Measures Regulation.<sup>395</sup> In *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)*<sup>396</sup> Williams J also acknowledged the potential utility of the Protection Measures Regulation in the child abduction context and commented on the strengths of the Regulation as follows:

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<sup>389</sup> [2015] EWHC 1817 (Fam), para 11.

<sup>390</sup> *Ibid.*

<sup>391</sup> 'EC Practice Guide' (n 447), p. 38. See also CJEU case C-256/09 *Bianca Purrucker v Guillermo Vallés Pérez* (Second Chamber) [2010] ECR I-07353, judgment delivered on 15th July 2010 ('*Purrucker I*').

<sup>392</sup> Council of the European Union, 'Council agrees on more effective rules to solve cross border parental responsibility issues' (press release), 7 December 2018, available at [https://www.consilium.europa.eu/en/press/press-releases/2018/12/07/council-agrees-on-more-effective-rules-to-solve-cross-border-parental-responsibility-issues/?utm\\_source=dsmsauto&utm\\_medium=email&utm\\_campaign=Council+agrees+on+more+effective+rule+s+to+solve+cross+border+parental+responsibility+issues#](https://www.consilium.europa.eu/en/press/press-releases/2018/12/07/council-agrees-on-more-effective-rules-to-solve-cross-border-parental-responsibility-issues/?utm_source=dsmsauto&utm_medium=email&utm_campaign=Council+agrees+on+more+effective+rule+s+to+solve+cross+border+parental+responsibility+issues#).

<sup>393</sup> For a more detailed analysis see Part 5 below.

<sup>394</sup> [2019] EWCA Civ 352.

<sup>395</sup> *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352, para 26.

<sup>396</sup> *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)* [2019] EWHC 649 (Fam).

*“[the Regulation] sets up a mechanism allowing for direct recognition of protection orders issued as a civil law measure between member states, thus a civil law protection order such as*

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*a non-molestation order or undertaking issued in one member state, can be invoked directly in another member state without the need for a declaration of enforceability but simply by producing a copy of the protection measure, an Article 5 certificate and where necessary a transliteration or translation.”*<sup>397</sup>

Williams J then set out a definition of a protection measure under the Regulation: “[...] any decision, whatever it is called, ordered by an issuing authority of the member state of origin” which “[i]ncludes an obligation imposed to protect another person from physical or psychological harm.”<sup>398</sup> The learned judge then commented that “[o]ur domestic law provides this court can accept an undertaking where the court has the power to make a non-molestation order”, before concluding that “a non-molestation undertaking given to this court could qualify as a protection measure within the European Regulation on protection measures.”<sup>399</sup> The judge, however, did not develop this reasoning or take any steps to put it into practice (e.g. issuing of the Art 5 certificate, etc.) and, at the end of the judgment, referred only to the 1996 Convention as means of facilitating the enforceability of undertakings offered by the father.<sup>400</sup>

Finally, in *RD v DB*<sup>401</sup> Mostyn J issued orders under Art 11 of the 1996 Hague Convention<sup>402</sup> and noted that these would be “doubly enforceable”<sup>403</sup> in the requesting State – under the 1996 Convention and under the Protection Measures Regulation. The judge then described the Regulation in the following words:

*“This Regulation provides for [ldquo ]reciprocal enforcement throughout the Union of protection measures ordered for the protection of a person where there exist serious grounds for considering that a person[apos ]s life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk.[rdquo ] For example, it is extended to measures that seek to regulate and control violence, harassment, sexual aggression, stalking, intimidation or any other forms of indirect coercion, quoting from Recital (6). Where such orders are made which might extend inter alia to prohibiting the entering of a place where a protected person resides, works or visits or stays or contact in any form or approaching the protected person, then such measures are, by virtue*

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<sup>397</sup> *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)* [2019] EWHC 649 (Fam), para 25.

<sup>398</sup> *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)* [2019] EWHC 649 (Fam), para 26.

<sup>399</sup> *Ibid.*

<sup>400</sup> *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)* [2019] EWHC 649 (Fam), paras 39-41.

<sup>401</sup> [2015] EWHC 1817 (Fam).

<sup>402</sup> See section 3.4.1 above.

<sup>403</sup> *RB v DB* [2015] EWHC 1817 (Fam), para 31.

*of the Regulation, to be automatically recognised and enforced without any procedure being required or the need for a declaration of enforceability.*"<sup>404</sup>

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However, like Williams J (see above), Mostyn J did not go beyond this outline of the key features of the Regulation. Indeed, no suggestions were made concerning necessary practical arrangements to prepare the protective measures to 'travel' to the requesting State.

Interestingly, none of the judges engaged with the text of the Regulation at a deeper level. It would have been interesting to see comments related to issues such as jurisdiction and the relationship between Brussels IIa and the Protection Measures Regulation in particular.<sup>405</sup>

#### **4. PROTECTION MEASURES AVAILABLE IN THE UNITED KINGDOM**

This part outlines key aspects of the framework for responding to domestic abuse in Scotland, and in England and Wales. The criminal law response is covered, as well as some of the key civil law remedies that are available in each jurisdiction.

##### **4.1. England and Wales**

###### **Criminal law**

Incidents of domestic abuse in England and Wales may be prosecuted under a number of different offences, depending on the conduct alleged. Offences of particular relevance to acts of physical abuse may be, for example, those under Offences against the Person Act 1861. For example, assault occasioning actual bodily harm.<sup>406</sup> Other relevant offences, for example, are those contained in the Protection of Harassment Act 1997 which covers harassment,<sup>407</sup> as well as stalking offences.<sup>527</sup> These offences can apply where the parties do not know each other, but

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<sup>404</sup> "This Regulation provides for [ldquo ]reciprocal enforcement throughout the Union of protection measures ordered for the protection of a person where there exist serious grounds for considering that a person[apos ]s life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk.[rdquo ] For example, it is extended to measures that seek to regulate and control violence, harassment, sexual aggression, stalking, intimidation or any other forms of indirect coercion, quoting from Recital (6). Where such orders are made which might extend inter alia to prohibiting the entering of a place where a protected person resides, works or visits or stays or contact in any form or approaching the protected person, then such measures are, by virtue of the

<sup>405</sup> See Part 5 below.

<sup>406</sup> Offences Against the Persons Act 1861 s.47.

<sup>407</sup> Protection from Harassment Act 1997 s.2 (offence of harassment); s.4 (putting people in fear of violence).

<sup>527</sup> Protection from Harassment Act 1997 s.3 (offence of stalking); s.4A (stalking involving fear of violence or serious alarm or distress).

they also play a role in domestic abuse cases. For stalking and harassment offences, there must be two occasions of the relevant conduct.<sup>408</sup>

There was previously no specific domestic abuse offence covering non-physical forms of abuse in England and Wales. In 2015 an offence of ‘controlling or coercive behaviour in an intimate or family relationship’ was brought into force.<sup>409</sup> For this offence, a person (A) commits an offence if (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive, (b) at the time of the behaviour, A and B are personally connected, (c) the behaviour has a serious effect on B, and (d) A knows or ought to know that the behaviour will have a serious effect on B.<sup>410</sup> A’s behaviour has a ‘serious effect’ on B if (a)

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Regulation, to be automatically recognised and enforced without any procedure being required or the need for a declaration of enforceability.” *RB v DB* [2015] EWHC 1817 (Fam), para 30.

it causes B to fear, on at least two occasions, that violence will be used against B, or (b) it causes B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities.<sup>411</sup> According to the legislation, A and B are ‘personally connected’ if (a) A is in an intimate personal relationship with B, or (b) A and B live together and (i) they are members of the same family, or (ii) they have previously been in an intimate personal relationship with each other.<sup>412</sup> A and B are members of the same family if, for example, they are, or have been, married to/ civil partners of each other; they are both parents of the same child or if they have, or have had, parental responsibility for the same child.<sup>413</sup> A person guilty of an offence of controlling or coercive behaviour in an intimate or family relationship is liable (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both; (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or a fine, or both.<sup>414</sup>

In terms of recent developments, the Domestic Abuse Bill, currently before Parliament, will, if passed, also introduce a statutory definition of ‘domestic abuse’ into English Law. Under the Bill, behaviour of a person (A) towards another person (B) is ‘domestic abuse’ if (a) A and B are each aged 16 or over and are personally connected to each other, and (b) the behaviour is abusive.<sup>415</sup> Behaviour is ‘abusive’ if it consists of any of the following (a) physical or sexual abuse; (b) violent or threatening behaviour; (c) controlling or coercive behaviour; (d) economic abuse ; or (e) psychological, emotional or other abuse.<sup>416</sup>

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<sup>408</sup> Protection from Harassment Act 1997 s.7(3).

<sup>409</sup> Serious Crime Act 2015 s.76.

<sup>410</sup> Serious Crime Act 2015 s.76(1).

<sup>411</sup> Serious Crime Act 2015 s.76(4).

<sup>412</sup> Serious Crime Act 2015 s.76(2).

<sup>413</sup> Serious Crime Act 2015 s.76(6).

<sup>414</sup> Serious Crime Act 2015 s.76(11).

<sup>415</sup> Domestic Abuse Bill s.1 as introduced.

<sup>416</sup> *Ibid.*

## Civil law

### *Restraining order*

A court dealing with a person convicted of any offence, including those under the Protection from Harassment Act 1997, may, as well as sentencing him or dealing with him in any other way, make a restraining order prohibiting the defendant from doing anything described in the order.<sup>417</sup> Restraining orders can be used in cases where the defendant and witness have been in a previous intimate relationship (such as domestic abuse cases). Restraining orders can only be made in respect of the defendant.

Restraining orders can be imposed on conviction or acquittal for a criminal offence.<sup>418</sup> Following on from conviction, the order may, for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from conduct which (a) amounts to harassment, or (b) will cause a fear of violence, prohibit the defendant from doing anything described in the order.<sup>419</sup> The order may have effect for a specified period or until further

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order.<sup>420</sup> As noted, a court before which a defendant is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.<sup>421</sup> In contrast to restraining orders following on from conviction, restraining orders upon acquittal do not have the power to protect a person from fear of violence that falls short of harassment. It should also be noted that the ability to impose a restraining order upon acquittal does not apply where proceedings have been withdrawn or discontinued.

If without reasonable excuse the defendant breaches the restraining order, he is guilty of an offence. This applies irrespective of whether the restraining order was imposed on conviction or acquittal for a criminal offence.<sup>422</sup> A person guilty of such an offence is liable (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.<sup>423</sup>

Harassment can also be an action in the civil courts. A person can apply to the court for an injunction restraining the relevant person from pursuing any conduct which amounts to harassment in relation to any person or persons mentioned or described in the injunction.<sup>424</sup>

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<sup>417</sup> Protection from Harassment Act 1997 ss.5, 5A.

<sup>418</sup> Ibid.

<sup>419</sup> Protection from Harassment Act 1997 s.5(2).

<sup>420</sup> Protection from Harassment Act 1997 s.5(3).

<sup>421</sup> Protection from Harassment Act 1997 s.5A(1).

<sup>422</sup> Protection from Harassment Act 1997 ss.5(5)-(6); s.5A(2).

<sup>423</sup> Protection from Harassment Act 1997 s.5(6).

<sup>424</sup> Protection from Harassment Act 1997 s.3A(2).



Where the court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment, and the defendant does anything which he is prohibited from doing by the injunction without reasonable excuse, he is guilty of an offence.<sup>425</sup> A person guilty of this offence is liable (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.<sup>426</sup> It should be noted that where a person is convicted of an offence under this provision in respect of any conduct, that conduct is not punishable as a contempt of court;<sup>427</sup> and that a person cannot be convicted of an offence under this provision in respect of any conduct which has been punished as a contempt of court.<sup>428</sup>

### *Non-molestation order*

There are two types of injunction in the Family Law Act 1996 that a person can apply for in the Family Court to protect against domestic abuse. These include an occupation order which excludes its subject from the home, or part of the home or areas around the home; and a nonmolestation order.

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A non-molestation order<sup>429</sup> is a civil order that prohibits the perpetrator from molesting the applicant or a relevant child.<sup>550</sup> The application can be made in relation to behaviour of an ‘associated person’ and this includes, for example, current or former spouses, civil partners or cohabitantes; those who have/ have had an intimate personal relationship with each other which is or was of significant duration; or parents of/having parental responsibility for the same child.<sup>430</sup> Molestation is not defined in the statute, however it has been held by the courts that molestation is conduct that clearly harassed and affected the applicant to such a degree that the intervention of the court was required.<sup>431</sup>

Orders are made on application by the applicant or a representative to the Family Court under section 42(2) of the 1996 Act. The court may make a non-molestation order (a) if an application for the order has been made (whether in other family proceedings or without any other family proceedings being instituted) by a person who is associated with the respondent; or (b) if in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though

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<sup>425</sup> Protection from Harassment Act 1997 s.6.

<sup>426</sup> Protection from Harassment Act 1997 s.9.

<sup>427</sup> Protection from Harassment Act 1997 s.7.

<sup>428</sup> Protection from Harassment Act 1997 s.8.

<sup>429</sup> Family Law Act 1996 s.42(1).

<sup>550</sup> Ibid.

<sup>430</sup> Family Law Act 1996 s.62(3).

<sup>431</sup> *C v C (Non-Molestation Order: Jurisdiction)* [1998] 1 FLR 554.

no such application has been made.<sup>432</sup> The order can be made without notice (*ex parte*) if it is ‘just and convenient’ to do so,<sup>433</sup> with the court having regard to the circumstances.<sup>434</sup>

Following legislative development, the breach of a non-molestation order is now a criminal offence.<sup>435</sup> Previously if a person breached their non-molestation order, that person could only be arrested for a civil contempt of court if a power of arrest was attached to the order. It is now the case that a person guilty of breaching a non-molestation order is liable (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both; (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum, or both.<sup>436</sup> In the case of a non-molestation order made *ex parte*, a person can be guilty of an offence under this section only in respect of conduct engaged in at a time when he was aware of the existence of the order.<sup>437</sup> It should be noted that where a person is convicted of an offence under this section in respect of any conduct, that conduct is not punishable as a contempt of court.<sup>438</sup> Furthermore, a person cannot be convicted of an offence under this section in respect of any conduct which has been punished as a contempt of court.<sup>439</sup>

### *Occupation order*

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As noted earlier a person can apply for an occupation order which regulates the occupation of the dwelling-house by either or both parties. It can, for example, exclude its subject from the home, or part of the home. Occupation orders are civil measures and are governed by the Family Law Act 1996.<sup>440</sup>

The position with regard to occupation orders depends on the relationship between the parties. Occupation orders are available to ‘associated persons’ but the applicable legislative provisions will vary according to the nature of the relationship. If the parties are married or civil partners; or if they have lived in (or intended to live in) the property as their home, and have a legal right or interest in the home, then the relevant provision is s. 33 of the 1996 Act. Other provisions apply to other applications.<sup>441</sup> The key difference between these other provisions and s.33 is

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<sup>432</sup> Family Law Act 1996 s.42(2).

<sup>433</sup> Family Law Act 1996 s.45(1) (for *ex parte* applications).

<sup>434</sup> Family Law Act 1996 s.45(2) (for *ex parte* applications).

<sup>435</sup> Family Law Act 1996 s.42A, inserted by Domestic Violence, Crime and Victims Act 2004 s.1.

<sup>436</sup> Family Law Act 1996 s.42A(5).

<sup>437</sup> Family Law Act 1996 s.42A(2).

<sup>438</sup> Family Law Act 1996 s.42A(3).

<sup>439</sup> Family Law Act 1996 s.42A(4).

<sup>440</sup> See Family Law Act 1996 ss.33-41.

<sup>441</sup> Family Law Act 1996 ss.35-38.

that an order granted under the other provisions will be more limited in length and additionally the court is not mandated to make an order even if ‘significant harm’ is demonstrated.

Under s.33 if the applicant has shown that she or a relevant child is likely to suffer ‘significant harm attributable to conduct of the respondent’ without the order, then it must be granted unless doing so would cause the respondent or a child equivalent or greater harm.<sup>442</sup> If significant harm is not established, then the court retains the discretion to make an order if the court considers ‘that in all the circumstances it is just and reasonable to do so’.<sup>443</sup> The court must consider all the circumstances including the housing needs and financial resources of both parties; the likely effect of any order on their safety and wellbeing; and their conduct in relation to each other.<sup>444</sup> If an order is made, a power of arrest can be attached at the court’s discretion. Breach of an order will amount to contempt of court.

### *Further developments*

Domestic Violence Protection Notices (DVPN) and Domestic Violence Protection Orders (DVPO) were introduced by the Crime and Security Act 2010.<sup>445</sup> These are shorter term protection measures. At present, DVPNs only have effect for 48 hours. An application for a DVPO has to be made by the police to a magistrates' court and heard within 48 hours or else the DVPN ceases to have effect.<sup>446</sup> Where granted, the DVPO can last for no fewer than 14 days and no more than 28 days from the day it is granted.<sup>446</sup> For these orders, there must be actual violence or the threat of violence.<sup>447</sup> Furthermore, a breach of a DVPN or DVPO is a civil contempt of court.

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It should be noted that amendments have been proposed as part of Domestic Abuse Bill, currently before Parliament. Part 3 of the draft Domestic Abuse Bill proposes replacing DVPNs and DVPOs with Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs).<sup>447</sup> The Bill will also extend the potential duration of a DAPO, although a DAPO may not provide for an electronic monitoring requirement to have effect for more than 12 months.<sup>448</sup> The Bill contains provision for applications for DAPOs from the person for whose protection the order is sought; the appropriate chief officer of police; and any

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<sup>442</sup> Family Law Act 1996 s.33(7).

<sup>443</sup> Family Law Act 1996 s.33(5).

<sup>444</sup> Family Law Act 1996 s.33(6).

<sup>445</sup> Crime and Security Act 2010 ss.24-33.

<sup>446</sup> Crime and Security Act 2010 s.27.

<sup>446</sup> Crime and Security Act 2010 s.28(10).

<sup>447</sup> Crime and Security Act 2010 s.28(2).

<sup>447</sup> Domestic Abuse Bill Part 3 ss. 19-52 as introduced.

<sup>448</sup> Domestic Abuse Bill s.35 as introduced.

other eligible applicant.<sup>449</sup> The Bill also makes provision for a DAPO to be issued by the High Court or Family Court without application, or the criminal courts where a person is convicted or where they are acquitted.<sup>450</sup> Significantly, the breach of a DAPO will become a criminal offence, subject on conviction on indictment to a maximum penalty of 5 years' imprisonment, a fine, or both; and on summary conviction to a maximum penalty of 12 months' imprisonment, a fine, or both.<sup>451</sup> Further, to safeguard victims within court proceedings, the Bill makes important proposals that will see the imposition of special measures<sup>452</sup> and the prohibition of cross-examination in person (the alleged perpetrator) of a victim of domestic abuse in family proceedings.<sup>453</sup> There are, however, no proposals in the draft Bill to repeal the provisions of the Family Law Act 1996 relating to non-molestation orders and it therefore appears that such an order will continue as an alternative option.

## 4.2. Scotland

### Criminal law

In Scotland domestic abuse can be prosecuted under a range of offences as relevant to the specific incident. These may include, for example, assault and breach of the peace at common law, as well as statutory offences such as stalking<sup>454</sup> and threatening or abusive behaviour.<sup>455</sup> The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 introduced a statutory aggravation of domestic abuse.<sup>456</sup> This provides that an offence is aggravated if it involves the abuse of a partner or ex-partner of the person convicted of the offence, where the person convicted either intended to cause, or was reckless as to whether their conduct would cause, physical or psychological harm to their partner or ex-partner.<sup>457</sup> A single source of evidence is sufficient to establish the aggravation.<sup>458</sup> In practice, the most common convictions with a

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domestic abuse aggravator recorded are breach of the peace etc. (which includes convictions for 'threatening or abusive behaviour') (46%) followed by common assault (29%).<sup>459</sup>

A significant change in Scotland has been the introduction of the Domestic Abuse (Scotland)

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<sup>449</sup> Domestic Abuse Bill s.25 as introduced.

<sup>450</sup> Domestic Abuse Bill s.28 as introduced.

<sup>451</sup> Domestic Abuse Bill s.36 as introduced.

<sup>452</sup> Domestic Abuse Bill s.46 as introduced.

<sup>453</sup> Domestic Abuse Bill s.31 as introduced.

<sup>454</sup> Criminal Justice and Licensing (Scotland) Act 2010 s.39.

<sup>455</sup> Criminal Justice and Licensing (Scotland) Act 2010 s.38(1).

<sup>456</sup> Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s.1(1).

<sup>457</sup> Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s.1(2).

<sup>458</sup> Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s.1(4).

<sup>459</sup> Scottish Government, *Domestic abuse in Scotland: 2017 - 2018 statistics*, available at: <https://www.gov.scot/publications/domestic-abuse-recorded-police-scotland-2017-18/pages/5/>.

Act 2018 ('2018 Act'), which has been in force since April 2019. The 2018 Act creates a statutory offence of domestic abuse against a partner or ex-partner, as well as instituting numerous consequential changes to the procedural, evidential and sentencing approach to such cases. The new offence of domestic abuse created by the 2018 Act targets a 'course of behaviour' by the accused rather than a single incident – two occasions of abusive behaviour are a minimum condition for the offence.<sup>460</sup> Therefore it should be noted that, where there is no evidence of a course of conduct by the accused, but there is corroborated evidence that a person has committed an offence it will remain possible for the domestic abuse aggravation to be labelled with that specific charge.

The 2018 Act provides that A commits an offence if he engages in a course of behaviour which is abusive of his partner or ex-partner and two further conditions are met.<sup>461</sup> The further conditions are (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm; and (b) that either (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.<sup>462</sup> The 2018 Act also makes clear that, in these further conditions, the 'references to psychological harm include fear, alarm and distress'.<sup>463</sup>

Section 2 of the 2018 Act covers what constitutes abusive behaviour. It should be noted that an exhaustive list is not given and therefore it remains open to the courts to decide in a particular case that the behaviour involved was abusive in another way. Behaviour which is abusive of B includes (in particular) (a) behaviour directed at B that is violent, threatening or intimidating, (b) behaviour directed at B, at a child of B<sup>464</sup> or at another person that either (i) has as its purpose (or among its purposes) one or more of the 'relevant effects', or (ii) would be considered by a reasonable person to be likely to have one or more of the 'relevant effects'.<sup>465</sup> The 'relevant effects' listed in the legislation are of (a) making B dependent on, or subordinate to, A; (b) isolating B from friends, relatives or other sources of support; (c) controlling, regulating or monitoring B's day-to-day activities; (d) depriving B of, or restricting B's, freedom of action, or (e) frightening, humiliating, degrading or punishing B.<sup>466</sup>

The policy memorandum to the 2018 Act explained that abusive behaviour could 'consist of both physical violence and threats which can be prosecuted under existing laws, and

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<sup>460</sup> Domestic Abuse (Scotland) Act 2018 s.10(4).

<sup>461</sup> Domestic Abuse (Scotland) Act 2018 s.1(1).

<sup>462</sup> Domestic Abuse (Scotland) Act 2018 s.1(2).

<sup>463</sup> Domestic Abuse (Scotland) Act 2018 s.1(3).

<sup>464</sup> The reference to a child is to a person who is under 18 years of age: Domestic Abuse (Scotland) Act 2018 s.2(4)(b).

<sup>465</sup> Domestic Abuse (Scotland) Act 2018 s.2.

<sup>466</sup> Domestic Abuse (Scotland) Act 2018 s.2(3).

psychological and emotional abuse which either cannot be or, at the very least, can be difficult to prosecute under existing laws.<sup>467</sup> Under the new legislation all abusive behaviour occurring – whether physical, mental or emotional - can be labelled together allowing for the full context of the abusive relationship to be put before the court in a single charge of ‘abusive behaviour towards a partner or ex-partner’. Significantly, so termed ‘coercive and controlling behaviour’ that could not readily be prosecuted is captured by the 2018 Act.

The 2018 Act also creates an aggravation where at any time in the commission of the offence A directs behaviour at a child, or A makes use of a child in directing behaviour at B.<sup>468</sup> The offence is also aggravated if a child sees or hears, or is present during, an incident of behaviour that A directs at B as part of the course of behaviour,<sup>469</sup> or if a reasonable person would consider the course of behaviour, or an incident of A’s behaviour that forms part of the course of behaviour, to be likely to adversely affect a child usually residing with A or B (or both).<sup>470</sup> To prove the aggravation, there does not need to be evidence that a child (a) has ever had any (i) awareness of A’s behaviour, or (ii) understanding of the nature of A’s behaviour, or (b) has ever been adversely affected by A’s behaviour.<sup>471</sup> A single source of evidence is sufficient to prove the aggravation.<sup>472</sup> The 2018 Act also has extra territorial application and an offence under the Act can be constituted by a course of behaviour engaged in by A even if the course of behaviour occurs wholly or partly outside the UK.<sup>473</sup>

A person who commits the domestic abuse offence under the 2018 Act is liable (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years or a fine (or both).<sup>474</sup>

## Civil law

### *Non-harassment orders*

Non-harassment orders (NHOs) can be imposed by the criminal courts following conviction or by a civil court on application from the person suffering harassment.

In an a civil action for harassment brought by a pursuer the court may issue a ‘non-harassment order’, which requires the defender to refrain from such conduct in relation to the pursuer as

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<sup>467</sup> Scottish Government, *Domestic Abuse (Scotland) Bill: Policy Memorandum* (Scottish Government 2017) para 4.

<sup>468</sup> Domestic Abuse (Scotland) Act 2018 s.5(2).

<sup>469</sup> Domestic Abuse (Scotland) Act 2018 s.5(3).

<sup>470</sup> Domestic Abuse (Scotland) Act 2018 s.5(4).

<sup>471</sup> Domestic Abuse (Scotland) Act 2018 s.5(5).

<sup>472</sup> Domestic Abuse (Scotland) Act 2018 s.5(6).

<sup>473</sup> Domestic Abuse (Scotland) Act 2018 s.3(1).

<sup>474</sup> Domestic Abuse (Scotland) Act 2018 s.9.

may be specified in the order for a specified period (which includes an indeterminate period).<sup>475</sup> It is significant to note that the pursuer making an application for an NHO does not have to establish there has been a course of conduct but can rely on conduct on only one occasion

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where the conduct referred to amounts to domestic abuse.<sup>476</sup> This contrasts to the position in non-domestic abuse cases, where a course of conduct must involve conduct on at least two occasions.<sup>477</sup> In a civil action for harassment, the court may grant an interim interdict or an interdict rather than an NHO.<sup>478</sup> However, a person may not be subjected to the same prohibitions in an interdict or interim interdict and NHO at the same time.<sup>479</sup>

There are relevant changes to the imposition of NHOs by the criminal courts resulting from the 2018 Act. The 2018 Act now *requires* the court to consider making an NHO in domestic abuse cases, so where there is a conviction for the new domestic abuse offence or in cases where the domestic abuse aggravation is proven.<sup>480</sup> This is in contrast to the previous position, where the court could only consider imposing an NHO following an application from the prosecutor.

After hearing from the prosecution and the accused, the court must make an NHO unless satisfied that there is no need for the victim or child to be protected by such an order.<sup>481</sup> The 2018 Act explicitly provides that an NHO imposed in favour of a victim of a domestic abuse offence can also make provision to protect any child living with the victim or perpetrator, or any child named in an aggravation.<sup>482</sup> This differs from the previous position whereby an NHO imposed by a criminal court could not make provision for someone who was not a victim of the offence (and therefore could not be used to protect a child of the victim).<sup>483</sup>

Breach of an NHO (obtained through either the civil route or by the criminal courts) is a criminal offence. A person who is in breach of a NHO is guilty of an offence and liable (a) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both such imprisonment and such fine; and (b) on summary conviction, to imprisonment for a period not exceeding six months or to a fine not exceeding the statutory maximum, or to both such imprisonment and such fine.<sup>484</sup>

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<sup>475</sup> Protection from Harassment Act 1997 s.8.

<sup>476</sup> Domestic Abuse (Scotland) Act 2011 s.1, inserting s.8A into Protection from Harassment Act 1997.

<sup>477</sup> Protection from Harassment Act 1997 s.8.

<sup>478</sup> Protection from Harassment Act 1997 s.5(b).

<sup>479</sup> Ibid.

<sup>480</sup> Domestic Abuse (Scotland) Act 2018 Schedule Part 1 Ch. 4 Para 9, inserting s.234AZA into the Criminal Procedure (Scotland) Act 1995.

<sup>481</sup> Ibid.

<sup>482</sup> Domestic Abuse (Scotland) Act 2018 Schedule Part 1 Ch. 4 Para 9, inserting s.234AZA into the Criminal Procedure (Scotland) Act 1995.

<sup>483</sup> *SJS v HM Advocate* [2015] HCJAC 64.

<sup>484</sup> Protection from Harassment Act 1997 s.9(1).

## *Domestic abuse interdicts*

An interdict is a civil remedy that is granted by the courts. An interdict may prohibit specific actions by a named individual such as continuation of a certain act or activity. Breaching an interdict is not of itself a criminal offence, so the police do not generally have a power to arrest the person in breach unless the behaviour which resulted in the interdict being breached is itself a criminal offence. Therefore, where a breach is concerned the individual who was granted the

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interdict must raise a further action in the civil court for breach of interdict, as the breach of the interdict is a form of contempt of court.

An interdict can have a power of arrest attached. A person who is applying for, or who has obtained, an interdict for the purpose of protection against abuse may apply to the court for a power of arrest to be attached to the interdict.<sup>485</sup> The court must, on such application, attach a power of arrest if satisfied that the interdicted person has been given an opportunity to be heard by, or represented before, the court; and that attaching the power of arrest is necessary to protect the applicant from a risk of abuse in breach of the interdict.<sup>486</sup>

In Scotland there is also what is known as a ‘domestic abuse interdict’. The concept of the domestic abuse interdict was introduced through the Domestic Abuse (Scotland) Act 2011, which added s8A to the Protection from Harassment Act 1997. In an action for harassment, the court may grant an interim interdict or an interdict, or an NHO (as mentioned above).<sup>487</sup> It is significant to note that, due to s.8A of the Protection from Harassment Act 1997, the pursuer making an application for an interdict does not have to establish there has been a course of conduct but can rely on conduct on only one occasion where the conduct referred to amounts to domestic abuse.<sup>488</sup> In other cases, a course of conduct must involve conduct on at least two occasions.<sup>489</sup>

A person who is applying for, or who has obtained, an interdict may apply to the court for a determination that the interdict is a domestic abuse interdict.<sup>490</sup> The court may make the determination if satisfied that the interdict is, or is to be, granted for the protection of the applicant against a person who is (or was) (a) the applicant's spouse, (b) the applicant's civil partner, (c) living with the applicant as if they were husband and wife or civil partners, or (d) in an intimate personal relationship with the applicant.<sup>491</sup> It should also be noted that before

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<sup>485</sup> Protection from Abuse (Scotland) Act 2001 s.1(1). The court, on attaching a power of arrest, must specify a date of expiry for the power, being a date not later than three years after the date when the power is attached: Protection from Abuse (Scotland) Act 2001 s.1(3).

<sup>486</sup> Protection from Abuse (Scotland) Act 2001 s.1(2).

<sup>487</sup> Protection from Harassment Act 1997 s.5(b).

<sup>488</sup> Domestic Abuse (Scotland) Act 2011 s.1, inserting s.8A into the Protection from Harassment Act 1997.

<sup>489</sup> Protection from Harassment Act 1997 s.8.

<sup>490</sup> Domestic Abuse (Scotland) Act 2011 s.3(1).

<sup>491</sup> Domestic Abuse (Scotland) Act 2011 s.3(2).



making a determination the court must give the person against whom the interdict is, or is to be, granted an opportunity to make representations.<sup>492</sup>

A person who breaches a domestic abuse interdict or interim interdict can be guilty of an offence where certain conditions are met.<sup>493</sup> This is the case where an interdict has been granted against a person; a determination has been made that it is a ‘domestic abuse interdict’ and that determination is in effect; and a power of arrest is attached to the interdict and that power of arrest is in effect.<sup>494</sup>

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In these circumstances a person who breaches such an interdict will be guilty of a criminal offence and liable (a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both, or (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both.<sup>495</sup> It should be noted that, following conviction, a breach of such an interdict is not punishable other than in accordance with these terms.<sup>496</sup> Where a person is convicted of an offence under this section in respect of any conduct, that conduct is not punishable as a contempt of court.<sup>497</sup> However, a person cannot be convicted of an offence under this section in respect of any conduct which has been punished as a contempt of court.<sup>498</sup>

### *Exclusion orders*

Exclusion orders in Scotland are governed by the Matrimonial Homes (Family Protection) (Scotland) Act 1981.<sup>499</sup> This legislation confers upon the court the power to exclude either of the spouses from the matrimonial or family home. The order can be sought by either the entitled or non-entitled spouse, and can also be made ‘whether or not that spouse [the applicant] is in occupation at the time of the application’.<sup>500</sup>

A court ‘shall’ make an exclusion order where the court is satisfied that the order is ‘necessary for the protection of the applicant or any child of the family from any conduct or threatened conduct or reasonably apprehended conduct of the non-applicant spouse, which is or would be injurious to the physical or mental health of the applicant or child’.<sup>501</sup> However, the legislation

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<sup>492</sup> Domestic Abuse (Scotland) Act 2011 s.3(3).

<sup>493</sup> Domestic Abuse (Scotland) Act 2011 s.2(2). References to interdict include interim interdict, s.7.

<sup>494</sup> Domestic Abuse (Scotland) Act 2011 s.2(1). Power of arrest attached by s.1(1A) or (2) of the Protection from Abuse (Scotland) Act 2001.

<sup>495</sup> Domestic Abuse (Scotland) Act 2011 s.2(3).

<sup>496</sup> Domestic Abuse (Scotland) Act 2011 s.2(4).

<sup>497</sup> Domestic Abuse (Scotland) Act 2011 s.2(5).

<sup>498</sup> Domestic Abuse (Scotland) Act 2011 s.2(6).

<sup>499</sup> See also the Civil Partnership (Scotland) Act 2004 s.104.

<sup>500</sup> Matrimonial Homes (Family Protection) (Scotland) Act 1981 s.4(2)

<sup>501</sup> Ibid.

also states that the court shall not make an exclusion order if it appears to the court that the making of the order would be unjustified or unreasonable having regard to all the circumstances of the case,<sup>502</sup> including, for example, the respective needs and financial resources of the parties; and their conduct in relation to each other and otherwise.<sup>503</sup> The court can also grant an interim order.<sup>504</sup>

### *Further developments*

The Scottish Government ran a consultation - *Consultation on Protective Orders for People at Risk of Domestic Abuse* - until the end of March 2019.<sup>505</sup> This consultation arose out of concerns raised during the passage of the 2018 Act about the insufficiency of immediate or

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long-term remedies available to victims of domestic abuse.<sup>629</sup> The Scottish Government subsequently announced in October 2019 that it will introduce legislation in this current session of Parliament to introduce a new scheme of protective barring orders for people at risk of domestic abuse,<sup>506</sup> but further details are not yet available.

## **5. EUROPEAN UNION INSTRUMENTS ON PROTECTION MEASURES**

This part will first set out the core features of the Protection Measures Regulation and the European Protection Order Directive and explain how the application of these instruments is facilitated within the UK legal systems (England & Wales and Scotland respectively). It will then comment, from the UK perspective, on the potential utility of these instruments in the child abduction context.

### **5.1. Regulation (EU) 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters ('Protection Measures Regulation')**

The Protection Measures Regulation provides for the mutual recognition of civil protection measures across the EU by establishing “rules for a simple and rapid mechanism for the

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<sup>502</sup> Matrimonial Homes (Family Protection) (Scotland) Act 1981 s.3.

<sup>503</sup> Matrimonial Homes (Family Protection) (Scotland) Act 1981 s.3(3).

<sup>504</sup> Matrimonial Homes (Family Protection) (Scotland) Act 1981 s.6.

<sup>505</sup> Scottish Government, *Consultation on Protective Orders for People at Risk of Domestic Abuse* (Scottish Government 2018).

<sup>506</sup> Scottish Government, *Protecting People from Domestic Abuse* (Scottish Government News, 15 Oct 2019), available at <https://www.gov.scot/news/protecting-people-from-domestic-abuse/>. <sup>631</sup> Regulation 606/2013, Art 1.

recognition of protection measures ordered in a Member State in civil matters”<sup>631</sup> on or after 11 January 2015.<sup>507</sup> The Regulation enables a ‘protected person’<sup>508</sup> who has had his/her protection measure certified by the court or other authority that issued it (‘issuing authority’<sup>634</sup>), to travel to any other Member State (except Denmark) and “have the protection of that measure effectively travel with her or him for up to twelve months.”<sup>509</sup> Importantly, a ‘protected person’ does not need to undertake any court proceedings in the other Member State (“Member State addressed”<sup>510</sup>) to secure recognition of the measure because recognition is automatic. It is not

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<sup>629</sup> Scottish Government, *Consultation on Protective Orders for People at Risk of Domestic Abuse* (Scottish Government 2018) 4.

necessary to obtain any ‘mirror’ other either.<sup>637</sup> The protection measure is treated as if it had been ordered in the Member State addressed. The only formal requirement is the presentation of a certificate issued by the Member State of origin<sup>638</sup> (see below).

### *Application of the Regulation in the UK*

The Protection Measures Regulation has direct effect in the UK,<sup>639</sup> and the provisions in this instrument “essentially confer on certain courts the requisite jurisdiction and powers to conduct proceedings under the Regulation.”<sup>511</sup> Nevertheless, the application of the Regulation is facilitated in England & Wales and Northern Ireland by the Civil Jurisdiction and Judgments (Protection Measures) Regulations 2014<sup>512</sup> (‘the 2014 Regulations (England)’ or ‘the English

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<sup>507</sup> Regulation 606/2013, Art 22.

<sup>508</sup> Defined as “a natural person who is the object of the protection afforded by a protection measure.” Regulation 606/2013, Art 3(2). <sup>634</sup> Defined as “any judicial authority, or any other authority designated by a Member State as having competence in the matters falling within the scope of this Regulation, provided that such other authority offers guarantees to the parties with regard to impartiality, and that its decisions in relation to the protection measure may, under the law of the Member State in which it operates, be made subject to review by a judicial authority and have similar force and effects to those of a decision of a judicial authority on the same matter.” Regulation 606/2013, Art 3(4).

<sup>509</sup> Ministry of Justice, ‘Explanatory Memorandum to the Civil Jurisdiction and Judgments (Protection Measures) Regulations 2014’, para 7.2, available at [https://www.legislation.gov.uk/ukxi/2014/3298/pdfs/ukxiem\\_20143298\\_en.pdf](https://www.legislation.gov.uk/ukxi/2014/3298/pdfs/ukxiem_20143298_en.pdf) (‘Explanatory Memorandum’).

<sup>510</sup> Defined as “the Member State in which the recognition and, where applicable, the enforcement of the protection measure is sought.” Regulation 606/2013, Art 3(6).

<sup>511</sup> ‘Explanatory Memorandum’ (n 635), para 8.1.

<sup>512</sup> SI 2014/3298. Regulations 5 and 6 relate exclusively to Northern Ireland (Reg 5 concerns proceedings in the magistrates’ courts in Northern Ireland and seeks to ensure that such proceedings under the Protection Measures Regulation fall within scope for legal aid for legal representation in Northern Ireland in circumstances in which legal aid is required to be provided under Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. Reg 6 makes consequential provision the aims of which is to guarantee that the privacy protections which apply to domestic proceedings in magistrates’ courts in Northern Ireland apply to proceedings in those courts under the Protection Measures Regulation. SI 2014/3298, Explanatory Note.

Regulations’), and in Scotland by the Civil Jurisdiction and Judgments (Protection Measures) (Scotland) Regulations 2014<sup>513</sup> (‘the 2014 Regulations (Scotland)’ or ‘the Scottish Regulations’) (hereafter referred to collectively as ‘the Regulations’).<sup>514</sup>

### *Meaning of ‘protection measure’*

The restrictions that can be placed on the ‘person causing risk’<sup>515</sup> include preventing individuals from entering areas or approaching or contacting a protected person. In particular, the Protection Measures Regulation defines a protection measure as “any decision, whatever it may be called, ordered by the issuing authority of the Member State of origin in accordance with its national law and imposing one or more of the following obligations on the person causing the risk with a view to protecting another person, when the latter person’s physical or psychological integrity may be at risk:

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<sup>637</sup> ‘EU protection measures’ (Update Extra) [2015] Fam Law 214, p. 214.

<sup>638</sup> Defined as “the Member State in which the protection measure is ordered.” Regulation 606/2013, Art 3(5).<sup>639</sup> Treaty on the Functioning of the European Union, Art 288. The direct effect of European law is one of the fundamental principles of European law, which allows individuals to invoke European law before domestic courts regardless of whether national law test exists. See ‘Summaries of EU Legislation: the Direct Effect of European Law’, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114547>.

- (a) a prohibition or regulation on entering the place where the protected person resides, works, or regularly visits or stays;
- (b) a prohibition or regulation of contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means;
- (c) a prohibition or regulation on approaching the protected person closer than a prescribed distance.”<sup>516</sup>

The English and Scottish Regulations both state that ‘protection measure’ has the same meaning as given to the term by Art 3 of the Protection Measures Regulation.<sup>517</sup> Protection measures that fall within the scope of the Regulation are contained primarily in the law of England and Wales in non-molestation orders under the Family Law Act 1996 or injunctions

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<sup>513</sup> SSI 2014/333.

<sup>514</sup> Issued under s 2(2) of the European Communities Act 1972.

<sup>515</sup> Defined as “a natural person on whom one or more of the obligations referred to in point (1) have been imposed”. Protection Measures Regulation, Art 3(3).

<sup>516</sup> Regulation 606/2013, Art 3(1).

<sup>517</sup> SI 2014/3298, Reg 2 and SSI 2014/333, Reg 2. The same definition can be found in the Family Procedure Rules 2010, SI 2010/2955, r. 2.3, and the Family Court (Composition and Distribution of Business) Rules 2014, SI 2014/840, r. 12A.

under the Protection from Harassment Act 1997.<sup>518</sup> The Scottish Government considers that the Art 3 definition of protection measures could, for example, cover interdicts and civil nonharassment orders.”<sup>519</sup>

### 5.1.1. Incoming protection measures

#### *Meaning of ‘incoming protection measure’*

The English and Scottish Regulations define an ‘incoming protection measure’ as a protection measure that has been ordered in a Member State other than the UK or Denmark.<sup>520</sup> Additionally, the Scottish Regulations emphasise that an ‘incoming protection measure’ is a protection measure “within the meaning of Article 3 of the Protection Measures Regulation”.<sup>650</sup> The Explanatory Memorandum to the English Regulations explains that in England & Wales such protection measures “are found most commonly [...] in non-molestation orders under Part 4 of the Family Law Act 1996 or injunctions under section 3 of the Protection from Harassment Act 1997.”<sup>521</sup> In Scotland, incoming protection measures are treated as interdicts granted by the Scottish courts,<sup>522</sup> indicating that the prohibitions contained in the definition of a “protection measure” in Art 3 of the Protection Measures Regulation are comparable to

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prohibitions that might be contained in interdicts granted by the Scottish courts.<sup>523</sup> The Scottish Government has helpfully suggested that “treating incoming protection measures as interdicts means that a person with a protection measure can apply to the court under section 1 of the Protection from Abuse (Scotland) Act 2001 for a power of arrest to be attached to it and/or apply to the court under section 3 of the Domestic Abuse (Scotland) Act 2011 for the measure to be declared a domestic abuse interdict.”<sup>654</sup>

#### *Jurisdiction*

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<sup>518</sup> ‘Explanatory Memorandum’ (n 635), para 7.1. For an overview of protection measures available in England & Wales, see section 4.1 above.

<sup>519</sup> Scottish Government, ‘Policy Note: The Civil Jurisdiction and Judgments (Protection Measures) (Scotland) Regulations 2014, available at [https://www.legislation.gov.uk/ssi/2014/333/pdfs/ssipn\\_20140333\\_en.pdf](https://www.legislation.gov.uk/ssi/2014/333/pdfs/ssipn_20140333_en.pdf) (‘Policy Note’). For an overview of protection measures available in Scotland, see section 4.2 above.

<sup>520</sup> SI 2014/3298, Reg 2 and SSI 2014/333, Reg. 2. The same definition is contained in the Family Procedure Rules 2010, SI 2010/2955, r. 2.3; the Family Court (Composition and Distribution of Business) Rules 2014, SI 2014/840, r. 12A; and the Civil Procedure Rules 1998, SI 1998/3132, r. 74.34. <sup>650</sup> SSI 2014/333, Reg 2.

<sup>521</sup> ‘Explanatory Memorandum’ (n 635), para 7.1.

<sup>522</sup> See SSI 2014/333, Reg 4 and below section ‘Recognition and enforcement’.

<sup>523</sup> ‘Policy Note’ (n 648).

<sup>654</sup> Ibid.

The English and Scottish Regulations both contain jurisdictional rules and confer jurisdiction in relation to incoming protection measures for the following purposes:

- (a) enforcement of an incoming protection measure;<sup>524</sup>
- (b) adjustment of a factual element of an incoming protection measure;<sup>525</sup>
- (c) refusal of recognition or enforcement of an incoming protection measure;<sup>526</sup> and (d) suspension or withdrawal of the effects of recognition or enforcement<sup>527</sup>

as follows:

- England & Wales: the family court, the county court and the High Court (Family Division);<sup>528</sup>
- Northern Ireland: a county court and the High Court;<sup>529</sup> and
- Scotland: the Court of Session and the sheriff court.<sup>661</sup>

The Explanatory Memorandum to the English Regulations clarifies that the above rule “makes the ‘incoming’ jurisdiction concurrent amongst the specified courts, so that there is no question of having to decide whether an incoming protection measure or applicant met any requisite grounds of jurisdiction for a particular court.”<sup>530</sup>

### *Recognition and enforcement*

As indicated above, “a protection measure ordered in a Member State shall be recognised in the other Member States without any special procedure being required and shall be enforceable

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without a declaration of enforceability being required.”<sup>531</sup> A protected person who wishes to invoke their protection measure in another Member State, is required to produce:

- 1.) A copy of the protection measure;
- 2.) A certificate issued by the Member State of origin (see below ‘Certificate’); and

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<sup>524</sup> Protection Measures Regulation, Art 4.

<sup>525</sup> Protection Measures Regulation, Art 11.

<sup>526</sup> Protection Measures Regulation, Art 13.

<sup>527</sup> Protection Measures Regulation, Art 14(2).

<sup>528</sup> SI 2014/3298, Reg 3.

<sup>529</sup> SI 2014/3298, Reg 3.

<sup>661</sup> SSI 2014/333, Reg 3.

<sup>530</sup> ‘Explanatory Memorandum’ (n 635), para 7.3.

<sup>531</sup> Protection Measures Regulation, Art 4(1).

3.) Where necessary, a translation or transliteration of the certificate.

The protected person can bring enforcement proceedings in the Member State addressed if necessary, and enforcement is left to the law of that Member State.<sup>532</sup> The Regulations grant the enforcing courts the same powers in relation to incoming protection measures as they have in relation to domestic protection measures made by those courts.

In particular, the English Regulations state that for the purposes of the enforcement of an incoming protection measure by the enforcing court the incoming protection measure has the same force and effect, the enforcing court has the same powers, and the enforcement proceedings may be taken, as if the incoming protection measure were a protection measure ordered by the enforcing court.<sup>533</sup> In England & Wales, the procedure in respect of committal for breach of an incoming protection measure is set out in Rule 37 of the Family Procedure Rules 2010, which is titled ‘Applications and Proceedings in Relation to Contempt of Court’.<sup>534</sup>

The Scottish Regulations provide that, for the purposes of enforcement, incoming protection measures should be treated as interdicts granted by the Scottish courts. In particular, Reg 4 states that the Court of Session and the sheriff court have “the same powers, and may undertake the same procedure for enforcement,” as if the incoming protection measure were in the form of an interdict granted by a domestic court.<sup>535</sup>

There are only limited grounds on which a court in the Member State addressed can refuse to recognize and, where applicable, enforce a protection measure issued in another Member State (upon application by the person causing the risk). These grounds are:

- Manifestly contrary to public policy in the Member State addressed; or
- Irreconcilable with a judgment given or recognised in the Member State addressed.<sup>536</sup>

In England & Wales, an application by a person causing the risk for refusal of recognition or enforcement must be made to:

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“(a) the family court if—

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<sup>532</sup> Protection Measures Regulation, Art 4(5).

<sup>533</sup> SI 2014/3298, Reg 4.

<sup>534</sup> SI 2010/2955, as amended by the Family Procedure (Amendment No 4) Rules 2014 (SI 2014/3296).

<sup>535</sup> See SSI 2014/333, Reg 4, and ‘Policy Note’ (n 648). See also European E-Justice Portal, ‘Mutual recognition of protection measures in civil matters – Scotland’, available at [https://e-justice.europa.eu/content\\_mutual\\_recognition\\_of\\_protection\\_measures\\_in\\_civil\\_matters-352-scen.do?member=1](https://e-justice.europa.eu/content_mutual_recognition_of_protection_measures_in_civil_matters-352-scen.do?member=1) (‘Mutual Recognition’).

<sup>536</sup> Protection Measures Regulation, Art 13(1).

- (i) there are proceedings relating to the same protection measure before the family court; or
  - (ii) proceedings relating to the same protection measure were dealt with by the family court;
- (b) the High Court if—
- (i) there are proceedings relating to the same protection measure before the High Court; or
  - (ii) proceedings relating to the same protection measure were dealt with by the High Court; or
- (d) the family court, unless, applying rule 5.4,<sup>537</sup> the application should be made to the High Court.”<sup>670</sup>

Nevertheless, the Family Court (Composition and Distribution of Business) Rules 2014 state that such application will be allocated to a High Court judge<sup>538</sup> as an order under Article 13 of the Protection Measures Regulation refusing to recognise or enforce an incoming protection measure is among the remedies which may not be granted by lay justices, judges of district judge level or judges of circuit judge level in the family court.<sup>539</sup>

In Scotland, a ‘person causing the risk’ can apply to either the Court of Session or a sheriff court to refuse to recognise or enforce the incoming protection measure.<sup>540</sup>

Unlike under the European Protection Order Directive, it is not possible to refuse recognition of the protection measure on the ground that the law of the Member State addressed does not allow for such a measure based on the same facts.<sup>541</sup> Also, importantly, the Member State addressed may “under no circumstances” review the substance of the protection measure.<sup>675</sup>

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<sup>537</sup> Rule 5.4. (titled ‘Where to start proceedings’) provides: (1) Where both the family court and the High Court have jurisdiction to deal with a matter, the proceedings relating to that matter must be started in the family court. (2) Paragraph (1) does not apply where: (a) proceedings relating to the same parties are already being heard in the High Court; (b) any rule, other enactment or Practice Direction provides otherwise; or (c) the court otherwise directs.” Family Procedure Rules 2010, SI 2010/2955, r. 5.4. <sup>670</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.14.

<sup>538</sup> Family Court (Composition and Distribution of Business) Rules 2014, SI 2014/840, Sch 1, r. 15(4) (g).

<sup>539</sup> Family Court (Composition and Distribution of Business) Rules 2014, SI 2014/840, Sch 2, Table 3.

<sup>540</sup> ‘Mutual Recognition’ (n 667).

<sup>541</sup> Protection Measures Regulation, Art 13(3).

<sup>675</sup> Protection Measures Regulation, Art 12.



### *Time limit on the effects of recognition*

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The Regulation provides that, “[i]rrespective of whether the protection measure has a longer duration, the effects of recognition [...] shall be limited to a period of 12 months, starting from the date of the issuing of the certificate.”<sup>542</sup> The Scottish Government Policy Note explains that this limitation is “directly applicable in Scotland” and therefore “no implementing provision in domestic legislation is required.”<sup>543</sup>

### *Adjustment of factual elements*

In some cases, it will be necessary to adjust the factual elements of the protection measure in the Member State addressed in order to give the protective measure effect in that Member State. The Regulation envisages such situation as it contains the following provision:

*“If necessary, the competent authority of the MS addressed shall adjust the factual elements of the protection measure in order to give effect to the protection measure in that Member State, and bring this adjustment to the notice of the person causing risk.”*<sup>544</sup>

The Family Procedure Rules 2010 clarify that such adjustment will be carried out on application to the court made by the protected person.<sup>545</sup> The procedure for the adjustment of the protection measure is governed by the law of the Member State addressed.<sup>546</sup> Similarly, in case an appeal is lodged by either the protected person or the person causing risk against the adjustment of the protection measure, the appeal procedure will be governed by the law of the Member State addressed.<sup>547</sup> Importantly, the lodging of an appeal does not have suspensive effect.<sup>548</sup>

The person causing risk must be notified of the adjustment of the protective measure.<sup>549</sup> If the person causing the risk is resident in the Member State addressed, “the notification shall be effected in accordance with the law of that Member State.”<sup>550</sup> If the person causing the risk is resident in a Member State other than the Member State addressed or outside of the EU, “the notification shall be effected by registered letter with acknowledgment of receipt or

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<sup>542</sup> Protection Measures Regulation, Art 4(4).

<sup>543</sup> ‘Policy Note’ (n 648).

<sup>544</sup> Protection Measures Regulation, Art 11(1).

<sup>545</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.12.

<sup>546</sup> Protection Measures Regulation, Art 11(2).

<sup>547</sup> Protection Measures Regulation, Art 11(5).

<sup>548</sup> Protection Measures Regulation, Art 11(5).

<sup>549</sup> Protection Measures Regulation, Art 11(3).

<sup>550</sup> Protection Measures Regulation, Art 11(4). See Family Procedure Rules 2010, SI 2010/2955, Part 6.

equivalent.”<sup>551</sup> The Family Procedure Rules 2010 slightly re-word and specify this requirement by stating that in such circumstances “[t]he court officer must give Article 11 notice by sending it by registered letter with acknowledgment of receipt or other confirmation of delivery or equivalent to the last known place of residence of that person.”<sup>552</sup> Finally, circumstances such

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as when the whereabouts of the person causing risk are unknown or that person refuses to accept receipt of the notification will be governed by the law of the Member State addressed.<sup>553</sup>

### *Application to stay, suspend or withdraw the effects of recognition/enforcement of the protection measure*

In case the protection measure has been suspended or withdrawn in the Member State of origin, or its enforceability has been suspended or limited, or the certificate has been withdrawn,<sup>554</sup> “the issuing authority of the Member State of origin shall, upon request by the protected person or the person causing the risk, issue a certificate indicating that suspension, limitation or withdrawal using the multilingual standard form established in accordance with Article 19.”<sup>689</sup>

Where such a certificate has been issued, the competent authority of the Member State addressed (upon submission of the certificate by the protected person or the person causing the risk) “shall suspend or withdraw the effects of the recognition and, where applicable, the enforcement of the protection measure.”<sup>555</sup> The Family Procedure Rules 2010 reiterate that such application must contain a copy of the Art 14 certificate issued in the Member State of origin, and add that the court is obliged to “make such orders or give such direction as may be necessary to give effect to the Article 14 certificate.”<sup>556</sup>

## **5.1.2. Outgoing protection measures**

### *Meaning of ‘outgoing protection measure’*

The Civil Procedure Rules 1998,<sup>692</sup> which apply in England & Wales, contain a definition of

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<sup>551</sup> Protection Measures Regulation, Art 11(4).

<sup>552</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.13.

<sup>553</sup> Protection Measures Regulation, Art 11(4).

<sup>554</sup> See Protection Measures Regulation, Art 9(1): “Without prejudice to Article 5(2) and upon request by the protected person or the person causing the risk to the issuing authority of the Member State of origin or on that authority’s own initiative, the certificate shall be: [...] (b) withdrawn where it was clearly wrongly granted, having regard to the requirements laid down in Article 6 and the scope of this Regulation.” <sup>689</sup> Protection Measures Regulation, Art 14(1).

<sup>555</sup> Protection Measures Regulation, Art 14(2).

<sup>556</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.15. <sup>692</sup> Civil Procedure Rules 1998, SI 1998/3132, r. 74.34.

‘outgoing protection measure’, describing such measure as “*any protection measure included in any of:*

- (i) *an injunction issued for the purpose mentioned in section 3(3)(a) of the Protection from Harassment Act 1997;*
- (ii) *any other injunction or order of the County Court;*
- (iii) *an undertaking accepted by the County Court;*
- (iv) *in proceedings to which these Rules apply—*
  - (aa) *any other injunction or order of the High Court;*

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(bb) *an undertaking accepted by the High Court.*”<sup>557</sup>

### *Jurisdiction*

The Protection Measures Regulation does not provide for jurisdiction to issue outgoing protection measures. Neither do the English or Scottish Regulations contain any such jurisdictional rules. The secondary legislation addresses only the question of jurisdiction for ‘related proceedings.’ In particular, the Explanatory Memorandum to the English Regulations states that “for measures issued in the UK, the Regulation provides for the court issuing the measure to have jurisdiction for related proceedings.”<sup>558</sup> This view is reiterated in the Explanatory Note to the Regulations which says that “[j]urisdiction to deal with proceedings under the Protection Measures Regulation relating to protection measures ordered in the United Kingdom, is conferred on courts in the United Kingdom directly by that Regulation.”<sup>695</sup>

In Scotland, Regulation 3 of the Scottish Regulations implies that the Court of Session or the sheriff court which ordered the protection measure have jurisdiction to deal with related proceedings. Specifically, the provision grants the Court of Session or the sheriff court which ordered the protection measure jurisdiction in relation to the issue of outgoing EU certificates.<sup>559</sup> Regulation 3 also confers jurisdiction on the Court of Session or the sheriff court which ordered the protection measure, to rectify or withdraw a certificate under Art 9 of the Protection Measures Regulation and to issue a certificate indicating suspension, limitation or withdrawal of the protection measure under Art 14 of the Protection Measures Regulation.<sup>697</sup>

### *Certificate*

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<sup>557</sup> Civil Procedure Rules 1998, SI 1998/3132, r. 74.34.

<sup>558</sup> ‘Explanatory Memorandum’ (n 635), para 7.3.

<sup>695</sup> SI 2014/3298, Explanatory Note.

<sup>559</sup> SSI 2014/333, Reg 3. See also ‘Policy Note’ (n 648).

<sup>697</sup> SSI 2014/333, Reg 3.

A protected person who has been granted a protective order may apply to the issuing authority of the Member State of origin for a certificate so that the measure is recognised across the EU.<sup>560</sup> This certificate is contained in a multi-lingual standard form established by the European Commission.<sup>561</sup> The Regulation makes it clear that there is no right of appeal against the issuing of the certificate.<sup>562</sup> The certificate may be rectified<sup>563</sup> or withdrawn<sup>564</sup> if there is a  

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clerical error or it was clearly wrongly granted.<sup>703</sup> A further certificate may be granted reflecting any suspension, limitation or withdrawal of the original protection measure.<sup>704</sup>

### Requirements for the issuing of the certificate

The Regulation sets out three requirements that need to be met before the certificate may be issued. First, the certificate may only be granted where the protection measure has been brought to the notice of the person causing the risk.<sup>565</sup> Second, where the protection measure was ordered in default of appearance, the person causing risk must have been informed of the initiation of the proceeding in sufficient time and in such a way as to enable that person to arrange for his or her defence.<sup>566</sup> This obligation will normally be met by serving the person causing risk with the document which instituted the proceeding (or an equivalent document).<sup>567</sup> Third, “where the protection measure was ordered under a procedure that does not provide for

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<sup>703</sup> Protection Measures Regulation, Art 9(1). The procedure for the rectification or withdrawal of the certificate, including any appeal, shall be governed by the law of the Member State of origin: Art (2).

<sup>704</sup> Protection Measures Regulation, Art 14. Like for Art 5, the European Commission has established a standard multi-lingual form for the purpose of Art 14, in accordance with Art 19. The form is available at [http://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1410275245533&uri=OJ:JOL\\_2014\\_263\\_R\\_0004](http://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1410275245533&uri=OJ:JOL_2014_263_R_0004). In England, the Family Procedure Rules 2010 specify when an application for a certificate under Art 14 may be made, and the rules are as follows: “(a) at the time of application for variation or discharge of the order containing

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<sup>560</sup> Protection Measures Regulation, Art 5.

<sup>561</sup> The multilingual standard form has been established in accordance with Art 19, and is available at [http://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1410275245533&uri=OJ:JOL\\_2014\\_263\\_R\\_0004](http://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1410275245533&uri=OJ:JOL_2014_263_R_0004).

<sup>562</sup> Protection Measures Regulation, Art 5(2).

<sup>563</sup> In England, the Family Procedure Rules 2010 specify that an application for rectification of an Art 5 certificate must be made to the court that issued the certificate. The certificate may be rectified either on application by the protected person, the person causing risk or by the court on its own initiative. Family Procedure Rules 2010, SI 2010/2955, r.38.8.

<sup>564</sup> In England, the Family Procedure Rules 2010 specify that an application for withdrawal of an Art 5 certificate must be made by the protected person or the person causing risk to the court that issued the certificate. It is also possible for the court to withdraw the certificate on its own initiative. Family Procedure Rules 2010, SI 2010/2955, r.38.9.

<sup>565</sup> Protection Measures Regulation, Art 6(1). This obligation must be carried out in accordance with the law of the Member State of origin.

<sup>566</sup> Protection Measures Regulation, Art 6(2). This obligation must be carried out in accordance with the law of the Member State of origin.

<sup>567</sup> Protection Measures Regulation, Art 6(2).

the outgoing protection measure, or for acceptance of a variation or discharge of the undertaking containing the outgoing protection measure, as the case may be; (b) at any time after the variation or discharge of the order containing the outgoing protection measure has been ordered or the variation or discharge of the undertaking containing the outgoing protection measure has been accepted, as the case may be; (c) at the time of application under Article 9 of the Protection Measures Regulation for withdrawal of an Article 5 certificate; (d) at any time after an Article 5 certificate has been withdrawn under Article 9 of the Protection Measures Regulation; (e) at the time of application for an order staying or suspending enforcement of the order or undertaking containing the outgoing protection measure; or (f) any time after, the making of an order staying or suspending enforcement of the order or undertaking containing the outgoing protection measure. Family Procedure Rules 2010, SI 2010/2955, r. 38.10. The Family Procedure Rules 2010 also set out a lengthy list of rules to determine the court to which an application for a certificate under Art 14 must be made. The rules are as follows: “ (a) if the order containing the outgoing protection measure has not yet been varied or discharged or a variation or discharge of the undertaking containing the protection measure has not yet been accepted, as the case may be, to— (i) the family court if the application for such variation or discharge is before the family court; or (ii) the High Court if the application for such variation or discharge is before the High Court; (b) if there has been an application under Article 9 of the Protection Measures Regulation for withdrawal of the Article 5 certificate, and that application has not yet been decided, to— (i) the family court if the application for such withdrawal is before the family court; or (ii) the High Court if the application for such withdrawal is before the High Court; (c) if the order containing the outgoing protection measure has been varied or discharged or the variation or discharge of the undertaking containing the outgoing protection measure has been accepted, as the case may be, to— (i) the family court if the family court ordered or accepted such variation or discharge, as the case may be; or (ii) the High Court if the High Court ordered or accepted such variation or discharge, as the case may be; (d) if an Article 5 certificate has been withdrawn under Article 9, to— (i) the family court if the family court ordered such withdrawal; or (ii) the High Court if the High Court ordered such withdrawal; (e) where enforcement of the order has been stayed or suspended, to— (i) the family court if the family court made the order for the stay or suspension; or (ii) the High Court if the High Court made the order for the stay or suspension. Family Procedure Rules 2010, SI 2010/2955, r. 38.11.

prior notice to be given to the person causing the risk (*‘ex-parte proceeding’*), the certificate may only be issued if that person had the right to challenge the protection measure.”<sup>708</sup>

In England, the Family Procedure Rules 2010 specify the service requirements under Art 6 as follows:

*“(1) Where the outgoing protection measure is included in an order, the court may only issue an Article 5 certificate if satisfied that the order has been served upon the person causing the risk in accordance with the requirements specified in rule 37.5, unless the court has dispensed with service of the order in accordance with the requirements specified in rule 37.8.*

*(2) Where the protected person is responsible for serving the order on the person causing the risk, any application for an Article 5 certificate must be accompanied by a certificate of service.”*<sup>568</sup>

The Family Procedure Rules 2010 provide also further details, including as to the timing of the application for an Art 5 certificate. In particular, the Rules instruct a protected person to make their application for an Art 5 certificate either at the same time as when applying for an order containing the outgoing protective measure, or at any time after such application provided that the protective measure is still in force.<sup>569</sup> The Family Procedure Rules 2010 also specify to which court an application for an Art 3 certificate must be made, laying down a separate rule

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<sup>568</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.6.

<sup>569</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.2. This period includes the time between an application for the outgoing protective measure was made and the order (or the undertaking) containing the outgoing protective measure was issued or accepted (as appropriate). *Ibid.*

for situations where the protection measure has not yet been ordered or accepted,<sup>570</sup> and situations where the protection measure has been ordered or accepted.<sup>571</sup> Importantly, an application for an Art 5 certificate may be made without notice.<sup>572</sup>

### Transliteration or translation

The protected person may request the issuing authority of the Member State of origin for providing them with a transliteration and/or a translation of the certificate.<sup>573</sup> For this purpose, the issuing authority will use a multi-lingual form which has been established by the European

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<sup>570</sup> Protection Measures Regulation, Art 6(3). The right to challenge the protection measure must have existed under the law of the Member State of origin.

Commission.<sup>574</sup> In England, the Family Procedure Rules 2010 provide further details, in particular regarding the timing of a request for a translation of an Art 5 certificate, and the court to which such a request must be made.<sup>575</sup> In particular, a protected person may request a translation of an Art 5 certificate either at the time of the application for the certificate or at any time after such application as long as the certificate is still in force.<sup>576</sup>

### Content of the certificate

Art 9 of the Protection Measures Regulation sets out the content of the certificate, as follows:

*“(a) the name and address/contact details of the issuing authority;*

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<sup>570</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.3. The application must be made to the family court if the proceedings relating to the outgoing protection measure are before the family court; and to the High Court if the proceedings relating to the outgoing protection measure are before the High Court.

<sup>571</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.3. The application must be made to the family court if that court made the order or accepted the undertaking as the case may be, unless there are proceedings relating to that order or undertaking before the High Court, in which case the application must be made to the High Court; and to the High Court if that court made the order or accepted the undertaking as the case may be, unless there are proceedings relating to that order or undertaking before the family court, in which case the application must be made to the family court.

<sup>572</sup> Family Procedure Rules 2010, SI 2010/2955, r.

<sup>573</sup> Protection Measures Regulation, Art 5(3). Note also Art 16(2) which states that “[a]ny transliteration or translation required under this Regulation shall be into the official language or one of the official languages of the Member State addressed or into any other official language of the institutions of the Union which that Member State has indicated it can accept.” Importantly, no legalisation of documents (or other similar formality) is required under the Regulation: Art 15.

<sup>574</sup> See Arts 5(3) and 19. The form is available at [http://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1410275245533&uri=OJ:JOL\\_2014\\_263\\_R\\_0004](http://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1410275245533&uri=OJ:JOL_2014_263_R_0004).

<sup>575</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.5. If the certificate has been applied for or issued by the family court, then the request for translation must be made to the family court. If the certificate has been applied for or issued by the High Court, then the request for translation must be made to the High Court.

<sup>576</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.4. This period includes the time between an application for Art 5 certificate was made and the certificate was issued. *Ibid.*

- (b) the reference number of the file;*
- (c) the date of issue of the certificate;*
- (d) details concerning the protected person: name, date and place of birth, where available, and an address to be used for notification purposes, preceded by a conspicuous warning that that address may be disclosed to the person causing the risk;*
- (e) details concerning the person causing the risk: name, date and place of birth, where available, and address to be used for notification purposes;*
- (f) all information necessary for enforcement of the protection measure, including, where applicable, the type of the measure and the obligation imposed by it on the person causing the risk and specifying the function of the place and/or the circumscribed area which that person is prohibited from approaching or entering, respectively;*
- (g) the duration of the protection measure;*
- (h) the duration of the effects of recognition pursuant to Article 4(4);*
- (i) a declaration that the requirements laid down in Article 6 have been met;*
- (j) information on the rights granted under Articles 9 and 13;*
- (k) for ease of reference, the full title of this Regulation.”<sup>577</sup>*

### Notification of the certificate

The certificate and the fact that it results in the recognition and, where applicable, in the enforceability of the protection measure in all Member States must be brought to the notice of

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the person causing the risk.<sup>719</sup> This notification obligation rests on the issuing authority of the Member State of origin.<sup>720</sup> If the person causing the risk is resident in the Member State of origin, “the notification shall be effected in accordance with the law of that Member State.”<sup>721</sup> If the person causing the risk is resident in a Member State other than the Member State of origin (or in a third country), “the notification shall be effected by registered letter with acknowledgment of receipt or equivalent.”<sup>578</sup>

In England, the Family Procedure Rules 2010 specify that if the person causing risk resides in the UK, the court officer must give the notice by serving it in accordance with Ch 3 of Part 6

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<sup>577</sup> Protection Measures Regulation, Art 7.

<sup>578</sup> Protection Measures Regulation, Art 8(2). If the whereabouts of the person causing the risk is not known or that person refuses to accept receipt of the notification, the law of the Member State of origin will govern such circumstances: Art 8(2).

of the Rules.<sup>579</sup> If the person causing risk resides in another EU Member State or a third country, the court officer must give the notice “by sending it by registered letter with acknowledgement of receipt or confirmation of delivery or equivalent to the last known place of residence of that person.”<sup>580</sup>

### *Brexit*

At the time of the writing of this report, provision had been made as to the future of the Protection Measures Regulation in England & Wales and Northern Ireland post Brexit. In particular, after Brexit the Regulation is to be retained although in an amended form to ensure that, as retained EU law, it operates effectively.<sup>581</sup> These amendments have been made by the Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019/493 (‘the 2019 Regulations’),<sup>582</sup> and enable the continued recognition and enforcement, in England and Wales and Northern Ireland, of protection measures ordered in a Member State. The Protection Measures Regulation will form part of domestic law on and after the EU Exit day<sup>727</sup> under s 3 of the European Union (Withdrawal) Act 2018 (EU (Withdrawal)

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<sup>719</sup> Protection Measures Regulation, Art 8(1).

<sup>720</sup> Protection Measures Regulation, Art 8(1). <sup>721</sup> Protection Measures Regulation, Art 8(2).

Act).<sup>583</sup> The 2014 Regulations (England) as domestic legislation supplementing the Regulation will continue to have effect in domestic law under s 2 of the EU (Withdrawal) Act.<sup>584</sup>

Pursuant to the 2019 Regulations, protection measures made in other EU Member States will continue to be recognised without any special procedure being required and enforceable without the requirement for a declaration of enforceability in England & Wales and Northern

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<sup>579</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.7.

<sup>580</sup> Family Procedure Rules 2010, SI 2010/2955, r. 38.7.

<sup>581</sup> Ministry of Justice, ‘Explanatory Memorandum to the Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019’, para 2.1, available at [http://www.legislation.gov.uk/ukdsi/2019/9780111176740/pdfs/ukdsiem\\_9780111176740\\_en.pdf](http://www.legislation.gov.uk/ukdsi/2019/9780111176740/pdfs/ukdsiem_9780111176740_en.pdf) (‘Explanatory Memorandum to EU Exit Regulations’).

<sup>582</sup> SI 2019/493. The 2019 Regulations do not extend to Scotland as the Scottish Government is legislating independently on these matters. *Ibid*, para 4.1. Part 2 of the 2019 Regulations amends the Senior Courts Act 1981, and Part 3 amends the Family Court (Composition and Distribution of Business) Rules 2014 and the Civil Jurisdiction and Judgments (Protection Measures) Regulations 2014. Part 4 amends the Protection Measures Regulation. See 2019 Regulations, Explanatory Note, available at <http://www.legislation.gov.uk/ukxi/2019/493/note/made>. <sup>727</sup> Currently set at 31<sup>st</sup> January 2020.

<sup>583</sup> ‘Explanatory Memorandum to EU Exit Regulations’ (n 725), para 6.3.

<sup>584</sup> *Ibid*.



Ireland.<sup>585</sup> In case the UK leaves the EU without an agreement on the future operation of the Regulation, courts in England & Wales and Northern Ireland will be unable to issue Art 5 certificates.<sup>731</sup> Therefore, Arts 5-10 of the retained Regulation, which are relevant to the issuing of certificates, will be repealed.<sup>732</sup> Consequently, the Regulation will no longer apply to protection measures and certificates issued in the UK, meaning that courts in other EU Member States would no longer be obliged to recognise and enforce them.<sup>586</sup>

## **5.2. Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (‘European Protection Order Directive’)**

The Directive entered into force on 11 January 2015 and applies to protection measures adopted in criminal matters. For a protection measure to fall within the scope of the Directive, it is not necessary for a criminal offence to have been established by a final decision.<sup>587</sup> Interestingly, nor is the criminal, administrative or civil nature of the authority adopting a protection measure relevant.<sup>588</sup>

Recital 9 explains that the Directive “applies to protection measures which aim specifically to protect a person against a criminal act of another person which may, in any way, endanger that person’s life or physical, psychological and sexual integrity, for example by preventing any form of harassment, as well as that person’s dignity or personal liberty, for example by preventing abductions, stalking and other forms of indirect coercion, and which aim to prevent new criminal acts or to reduce the consequences of previous criminal acts.” Importantly, the Directive applies only if the harmful conduct is criminalized; it is not enough that violations of the protective measure are subject to criminal act.<sup>736</sup>

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The restrictions that can be placed on the person causing risk are the same as those under the Protection Measures Regulation, and include “a prohibition or regulation on entering the place where the protected person resides, works, or regularly visits or stays; a prohibition or regulation of contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means; or a prohibition or regulation on approaching the

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<sup>585</sup> Ibid, para 2.2. <sup>731</sup> Ibid, para 2.5. <sup>732</sup> Ibid, paras 2.4. and 7.12. The Explanatory Memorandum clarifies that “[t]o allow UK civil courts to issue certificates post EU-exit would, potentially, mislead protected persons as to the recognition and enforceability of their UK issued protection measures in EU Member States post exit potentially placing them at risk.” Ibid, para 7.12.

<sup>586</sup> Ibid, para 7.12.

<sup>587</sup> European Protection Order Directive, Recital 10.

<sup>588</sup> European Protection Order Directive, Recital 10.

<sup>736</sup> European Protection Order Directive, Art 1.

protected person closer than a prescribed distance.”<sup>589</sup> However, unlike under the Regulation, the continuation of the protection measure is not automatic but presupposes a decision by the ‘executing State’.<sup>590</sup> In this decision the executing State adopts any measure that would be available under its national law in a similar case, unless it decides to invoke one of the grounds for non-recognition referred to in Article 10. One of these grounds is that “the protective measure relates to an act that does not constitute a criminal offence under the law of the executing State.”<sup>739</sup> This may be problematic for example in respect of the new criminal offence of domestic abuse in Scotland,<sup>591</sup> which explicitly recognises the range of behaviours that can constitute domestic abuse, including behaviours amounting to coercive and controlling behaviour and psychological abuse.<sup>592</sup> As such behaviour is not likely to be recognised as criminal in other EU Member States, a protection measure issued in connection with this new offence is likely to be refused recognition under the Directive.

The enforcement of the protection measure imposed in the executing State on the back of the European protection order is left to the national law of that State.<sup>593</sup>

In the UK, the Directive is given effect by the Criminal Justice (European Protection Order) (England and Wales) Regulations 2014<sup>594</sup> in England & Wales, the European Protection Order (Scotland) Regulations 2015<sup>595</sup> in Scotland and the Criminal Justice (European Protection Order) (Northern Ireland) Regulations 2014<sup>596</sup> in Northern Ireland. The Directive has not been referred to by the UK courts in the context of parental child abduction.

After Brexit, the Regulations that implement the Directive will be revoked, as set out in the Criminal Justice (Amendment etc.) (EU Exit) Regulations 2019/780. These Regulations will come into force on exit day<sup>597</sup> and extend to the whole of the United Kingdom.<sup>598</sup>

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<sup>589</sup> European Protection Order Directive, Art 5.

<sup>590</sup> European Protection Order Directive, Art 9. ‘Executing State’ is defined as “the Member State to which a European protection order has been forwarded with a view to its recognition”: Art 1(6). <sup>739</sup> European Protection Order Directive, Art 10(1) (c).

<sup>591</sup> Domestic Abuse (Scotland) Act 2018, s. 1.

<sup>592</sup> See Part 4 above.

<sup>593</sup> European Protection Order Directive, Art 11(1).

<sup>594</sup> SI 2014/3300.

<sup>595</sup> SSI 2015/107.

<sup>596</sup> SR 2014/320.

<sup>597</sup> European Protection Order Directive, Art 1(1).

<sup>598</sup> European Protection Order Directive, Art 1(2).

### **5.3. Analysis: utility of the Protection Measures Regulation and the European Protection Order Directive in the child abduction context**

As demonstrated in sections 2.3.1 and 3.4.3 above, the English courts have on several occasions referred to the Protection Measures Regulation in return proceedings, endorsing thus the view that the instrument is a suitable tool to secure protection post-return. However, the analysis of the Regulation in these cases was rather brief, and it appeared that in none of these cases the Regulation was actually applied.<sup>599</sup> With regard to the European Protection Order Directive, this instrument has not been referred to in the child abduction context in any of the relevant reported decisions of the UK courts.

The application of the Protection Measures Regulation and the European Protection Order Directive in the specific circumstances of return proceedings under the 1980 Convention and the Brussels IIa Regulation is not entirely straightforward. It appears that there are three main issues:

- 1.) Abducting mothers can rightly be considered as a specific group of domestic violence victims. The typical scenario envisaged by the Protection Measures Regulation and the European Protection Order Directive is that the victim will move from one Member State to another in pursuance of her right to move and reside freely within the territory of Member States<sup>600</sup> and the instruments are therefore designed to protect the victim in this situation. The instruments do not explicitly foresee the situation that arises in child abduction cases, i.e. where the victim is indirectly compelled to return to the original Member State – i.e. where the acts of domestic violence occurred and thus requires cross-border protection in the state where the perpetrator still resides.
- 2.) There are justified concerns over the level of awareness of these two instruments amongst relevant professionals and, consequently, their practical utility. This may impede the protection of abducting mothers who have been victims of domestic violence given that protection is a complex matter and therefore requires specialist knowledge of the rules on the cross-border protection of victims of domestic violence as well as knowledge of the legal landscape pertinent to child abduction. The problem of the lack of awareness was acknowledged by the experts who participated in the UK local workshops.

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<sup>599</sup> Although this is not clear, it seems that the Art 5 certificate was not issued in any of the cases.

<sup>600</sup> Protection Measures Regulation, Recitals 1, and European Protection Order Directive, Recital 6. See also European Parliament, ‘European Protection Order Directive 2011/99/EU: European Implementation Assessment’, September 2017.

- 3.) The final problem which needs to be addressed concerns the underlying private international law questions which these two instruments raise, in particular characterisation and jurisdiction,<sup>601</sup> but also the inter-relationship between the

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Regulation and the Directive on one hand and other international/regional instruments on the other. Interestingly, however, the participants of the UK local workshops did not consider any of these issues as presenting an obstacle to utilizing the Regulation or the Directive in child abduction cases.

### *Characterisation*

The problem of characterisation in this context relates, in particular, to determining whether the measure falls within the civil or criminal law domain. As mentioned above,<sup>602</sup> the Regulation facilitates the recognition of protection measures issued in civil law matters whereas the Directive applies to protection measures issued in criminal law matters. Neither the Regulation nor the Directive define what gives a protection measure a criminal or a civil character; nevertheless, it is clear that the instruments are not intended to overlap. The Directive applies only if the harmful conduct is criminalized,<sup>603</sup> i.e. applies only if the measure is taken to protect against acts that are criminal *per se* and it is not sufficient that violations of the protection order are subject to criminal sanctions. Therefore, protection measures against harmful but not criminal conduct do not fall within the scope of the Directive. They can be circulated under the Regulation, however, does this also mean that the Regulation cannot be used in order to prevent criminal conduct? This is far from clear as the Regulation should apply to protection measures ordered with a view to protecting a person's "life, physical or psychological integrity, personal liberty, security or sexual integrity, for example so as to prevent any form of gender-based violence or violence in close relationships, such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion",<sup>604</sup> and the fact that a person is the object of a protection measure in civil matters does not necessarily preclude that person from being defined as a victim under the EU rules on minimum standards protecting victims of crime.<sup>605</sup>

The civil, administrative or criminal nature of the authority ordering a protection measure is not determinative for assessing the civil character of the measure.<sup>606</sup> The Regulation does not

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<sup>601</sup> In terms of the applicable law, the question is how far is the law governing protection measures determined by the law of the forum (because of the procedural nature of these measures), by the 1996 Hague Protection Convention (as a matter connected to parental responsibility), by Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) in

<sup>602</sup> Sections 5.1 and 5.2 respectively.

<sup>603</sup> European Protection Order Directive, Art 1.

<sup>604</sup> Protection Measures Regulation, Recital 6.

<sup>605</sup> Protection Measures Regulation, Recital 8.

<sup>606</sup> Protection Measures Regulation, Recital 10, and European Protection Order Directive, Recital 10. <sup>756</sup> Protection Measures Regulation, Recital 10.

leave the interpretation of the term ‘civil matters’ to national law but instead provides that the notion should be interpreted autonomously, in accordance with the principles of Union law.<sup>756</sup> This means that the term is to be defined by the Court of Justice of the European Union (‘CJEU’), however, there is no CJEU case-law on this point in the specific context of the Protection Measures Regulation yet.

Against this background, one may ask whether it is left to the issuing Member State to decide which of the two instruments applies to its protection measures. In other words, does the issuing of a certificate under the Regulation rather than of a European Protection Order under the

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case of general protection measures) or by national conflict rules? See A. Dutta, ‘Cross-Border Protection Measures in the European Union’ (2016) 12 *Journal of Private International Law* 169, pp. 171-172.

Directive bind the other Member States? The answer seems to be ‘yes’ as, based on the principle of mutual recognition, protection measures ordered in civil matters ‘should’ be recognized in the Member State addressed as protection measures in civil matters in accordance with the Regulation,<sup>607</sup> and the necessary adjustments the Member State addressed is allowed to make in the protection measure (e.g. change of address of the protected person) may not affect the ‘civil nature’ of the measure.<sup>608</sup>

From the UK perspective, however, the above questions seem to be theoretical rather than practical. The participants of the UK local workshops unanimously and without hesitation expressed the view that, in the absence of relevant CJEU jurisprudence, the civil or criminal nature of an outgoing protection measure would be determined by the nature of the issuing court, i.e. protection measures issued in civil proceedings will be accompanied by an Art 5 certificate and expected to be recognized under the Regulation, whereas protection measures issued by a criminal court will fall to be recognized under the Directive. With regard to incoming protection measures, the workshop participants believed that protection measures accompanied by an Art 5 certificate would simply be recognized in the UK under the Regulation. This approach is in line with the above analysis.

### *Jurisdiction*

Neither the Regulation nor the Directive contain rules on international jurisdiction. Interestingly, the European Commission’s proposal for the Protection Measures Regulation<sup>609</sup> contained a jurisdictional rule, however, this rule was not included in the final version of the Regulation. The proposed rule was as follows: “The authorities of the Member State where the person’s physical and/or psychological integrity or liberty is at risk shall have jurisdiction.”<sup>760</sup> Had this rule been adopted, how would have it applied in a child abduction scenario? Would

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<sup>607</sup> Protection Measures Regulation, Recital 14.

<sup>608</sup> Protection Measures Regulation, Recital 20.

<sup>609</sup> Proposal of the Commission for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, COM (2011) 276 final. <sup>760</sup> Ibid, Art 3.

the requested State have had jurisdiction to issue a protection measure if the left-behind abuser father was still in the requesting State as would normally be the case? In some cases, the left-behind father may travel to the requested State, posing a danger to the abducting mother, or may threaten her with abusive phone calls or correspondence whilst he remains in the requesting State. In both situations, the abducting mother's 'physical and/or psychological integrity or liberty' would be at risk and the authorities of the requested Member State would have jurisdiction to issue a protection measure.

Does the failure to include a jurisdictional rule to issue protection measures in the final version of the Regulation mean that jurisdiction is to be governed by other EU instruments or national law? There is no clear answer to this question as the intention of the legislator on this point is uncertain. Nevertheless, although the jurisdictional basis is unclear, the Regulation seems to accept the possibility that the person causing the risk resides in a Member State other than the Member State where the protection order was issued. In particular, Arts 8 and 11, which deal

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with the obligation to notify the person causing the risk of the issuing of the certificate and of the adjustment of the protection measure, both refer to a situation "where the person causing the risk resides in a Member State other than the Member State of origin or in a third country."

As explained above,<sup>610</sup> the secondary legislation that facilitates the application of the Regulation in England & Wales and Scotland respectively does not address the question of jurisdiction to issue outgoing protection measures. The Scottish Regulations as well as the Explanatory Note and the Explanatory Memorandum to the English Regulations deal only with jurisdiction for related proceedings – i.e. jurisdiction to issue, rectify or withdraw outgoing EU certificates<sup>611</sup> and to issue a certificate indicating suspension, limitation or withdrawal of the protection measure.<sup>612</sup> Similarly, the statutory instruments that transpose the Directive into the legal systems of England & Wales, Northern Ireland and Scotland respectively do not contain rules on jurisdiction to issue a protection measure, but only rules regarding the power to make a European protection order in respect of an outgoing protection measure.<sup>613</sup>

The problem of the lack of jurisdictional rules in the Regulation, the Directive and the related statutory instruments was raised with the participants of the local workshops, however, no particular views on this issue were expressed by the participating experts. Similarly, this problem was not commented on in the court decisions that were issued in return proceedings and contained references to the Protection Measures Regulation.<sup>614</sup>

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<sup>610</sup> See section 5.1 above.

<sup>611</sup> Protection Measures Regulation, Arts 5 and 9 respectively.

<sup>612</sup> Protection Measures Regulation, Art 14.

<sup>613</sup> See SI 2014/3300, Regs 3 and 4; SSI 2015/107, Reg 254B; and SR 2014/320, Reg 5. Additionally, the statutory instruments contain provisions related to renewing, modifying or revoking a protection measure and related European protection order. SI 2014/3300, Reg 10; SSI 2015/107, Regs 254B and 254E; and SR 2014/320, Reg 10.

<sup>614</sup> See section 3.4.3 above.

*Delineation between the European Protection Order Directive and other international instruments, and between the Protection Measures Regulation and the Brussels IIa Regulation*

Art 20 of the Directive provides that the instrument should not affect the application of the Brussels IIa Regulation, the 1996 Hague Protection Convention, or the 1980 Hague Child Abduction Convention. Similarly, Art 2(3) of the Protection Measures Regulation makes it clear that it does not apply to protection measures that fall within the scope of Brussels IIa. In addition, Recital 11 to the Protection Measures Regulation states that “[t]his Regulation should not interfere with the functioning of [Brussels IIa], and that “[d]ecisions taken under the Brussels IIa Regulation should continue to be recognised and enforced under that Regulation.”

This issue was, however, not commented on by any of the judges who referred to the Protection Measures Regulation in their decisions on return. In particular, in *RB v DB*<sup>615</sup> Mostyn J appeared to suggest that the protection measures had been issued solely as orders under Art 11

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of the 1996 Hague Convention,<sup>616</sup> and noted that these orders would be “doubly enforceable”<sup>617</sup> in the requesting State – under the 1996 Convention and under the Protection Measures Regulation. No mention was made of the fact that the case was an intra-EU child abduction to which the Brussels IIa Regulation applied, and where, effectively the protection measures could be seen as orders taken under Art 11(4) of that Regulation to ensure that ‘adequate arrangements’ to facilitate the return are in place. Similarly, in *Re S (A Child) (Hague Convention 1980: Return to Third State)*<sup>618</sup> and *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)*<sup>619</sup> Moylan LJ and Williams J respectively appeared to link protection measures under Art 11 of the 1996 Convention with protection measures under the Protection Measures Regulation, whilst making no reference to Brussels IIa. No particular views on this topic were expressed by the participants of the UK local workshops either. Consequently, the problem of the interrelationship between the Protection Measures Regulation and the Brussels IIa Regulation remains largely unexplored by the relevant UK stakeholders.

## **6. CONCLUSION**

There have been some general developments in the area of domestic violence that may be seen as having the potential to contribute towards a more uniform approach to domestic violence in

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<sup>615</sup> [2015] EWHC 1817 (Fam).

<sup>616</sup> See section 3.4.1 above.

<sup>617</sup> *RB v DB* [2015] EWHC 1817 (Fam), para 31.

<sup>618</sup> [2019] EWCA Civ 352.

<sup>619</sup> *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)* [2019] EWHC 649 (Fam).

the context of the grave risk of harm defence. For example, as Lady Hale has explained “nowadays we understand that domestic violence or abuse can take many forms; it is not limited to physical violence but can extend to psychological or emotional and financial abuse. [...] Nowadays, we also understand that domestic violence directed towards a parent can be seriously harmful to the children who witness it or who depend upon the psychological health and strength of their primary carer for their well-being.”<sup>620</sup> Nevertheless, many inconsistencies in the approach to domestic violence in return proceedings remain. As demonstrated by the case law overview and analysis earlier in this report, one of the major discrepancies is the court’s approach to the assessment of the grave risk of harm in cases involving domestic violence, including the availability of protective measures. Similarly, the question of effectiveness of protective measures is approached differently by different judges, although it is encouraging to see that some UK judges consider the Protection Measures Regulation as a viable tool to secure the enforceability of protective measures issued in return proceedings and have referred to this instrument in their judgments. Nevertheless, the analyses would benefit from deeper engagement with the Regulation, in particular regarding the underlying issues of scope, jurisdiction, and the inter-relationship between the Protection Measures Regulation and the Brussels IIa Regulation. Unfortunately, no reference has been made in the case-law to the

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European Protection Order Directive, thus making the Directive less pertinent in the child abduction context than the Protection Measures Regulation.

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<sup>620</sup> B Hale, ‘Taking Flight—Domestic Violence and Child Abduction’ (2017) 70 *Current Legal Problems* 3, p. 7.