Neutral Citation Number: [2021] EWCA Civ 998

Case No: B4/2021/0553

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)
Mr Nicholas Cusworth QC (Sitting as a Deputy High Court Judge)
FD20P00580

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2021

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE COULSON
and
LORD JUSTICE NUGEE

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Re :

A-M (A Child)(1980 Hague Convention)

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- -

Mr Leslie Samuels QC & Mr Robin Powell (instructed by **LillyWhite Williams & Co.**) for the **Appellant Mother**
Mr Timothy Scott QC & Ms Clare Renton (instructed by **Birmingham Legal Ltd**) for the **Respondent Father**

Hearing dates : 11 May 2021

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Approved Judgment

LORD JUSTICE COULSON :

1 Introduction

1 The mother appeals against the order of Mr Nicholas Cusworth QC, sitting as a Deputy High Court Judge ("the judge"), to return her child A-M (who is 22 months old) to Norway, "in the care of" his father, pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Convention"). The application was determined by the judge on 1 March 2021 following a two day hearing on 15 and 16 February. He decided that the mother had failed to establish her Article 13(b) defence that "*there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation…"*

2 The single ground of appeal for which Moylan LJ gave permission on 1 April 2021 was that "the finding that the child is not at grave risk of physical or psychological harm is contrary to the weight of the evidence". However, by the time of the hearing, the arguments had broadened significantly. On behalf of the mother, Mr Samuels QC mounted a restrained but nonetheless root-and-branch attack on the judge's judgment. He contended that the judge misunderstood the applicable legal test, did not evaluate the risk to A-M in accordance with the law, focused almost exclusively on just one aspect of the evidence before him (thus failing to step back and review the evidence in its entirety), and failed to give any proper consideration to the particular protective measures that might be necessary in the circumstances of this case.

3 At the end of the hearing, the parties were told that the appeal would be allowed and the mother's application would be remitted for an urgent re-hearing by a Family Division judge. My reasons for that decision are set out below. They are tempered by the need to avoid, where possible, the expression of any concluded views about the evidence, because that will now be the subject of reconsideration in any event.

2 The Proceedings

4 The father is of Kurdish heritage and is a Norwegian citizen. He has lived in Norway for about 20 years. He works in the off-shore oil industry as a catering manager, where his shift pattern is one month on and one month off.

5 The mother is of Moroccan heritage and moved to the UK in 2010. She is now a British Citizen. She has one daughter, Z, from a previous relationship. Z is 9 years old.

6 The parties met in about 2013 in London. The mother's evidence is that they went through an Islamic marriage ceremony in November 2017, also in London. In February 2019, the mother moved to Norway, together with Z, to live with the father. At the time, she was pregnant with A-M, and gave birth to him in Norway.

7 On 25 July 2020, the mother took A-M (then aged 1) and Z and left Norway. By then, the mother was pregnant with her third child, T. T was born in the UK later in 2020. The mother accepts that, on the date she left Norway, A-M was habitually resident there, with the consequence that his removal was wrongful under Article 3 of the Hague Convention.

8 On 11 August 2020, a District Court in Norway, at a hearing without notice to the mother, granted the father sole parental responsibility for A-M on an interim basis. On 17 September 2020 he made an application pursuant to the Hague Convention for the return of A-M.

9 On 28 September 2020, the mother (who believed that the father was in the UK at that time) applied without notice to the Family Court for a non-molestation order against the father. The mother's application was supported by a statement dated 25 September 2020. That statement ran to 5 closely-typed pages. It contained detailed allegations of verbal and physical abuse by the father of the mother from the time that they began living together in Norway in February 2019 until she left in July 2020. It also contained some evidence of threats to the children. It is necessary to set out some of the detail of that statement, because it is said to form the cornerstone of the mother's Article 13(b) defence.

10 Prior to July 2019 there were a number of incidents with the father shouting at the mother and blaming her for a variety of financial issues. In the summer of 2019, just two days before the mother gave birth to A-M, the mother's evidence was that the father was drinking heavily and was verbally abusing her. When she tried to go to sleep he grabbed her hand and pulled it. When she tried to release his grip, her own hand hit her belly and she screamed in pain. The father reacted to that by slapping the mother across the face with great force, then grabbing her neck and pulling her head. He then went back to drinking.

11 The following day, she asked the father for permission to speak to a friend. The father "slapped me with such force against my ear that I suffered great pain and loss of hearing for some time". The mother called a domestic violence helpline who called the police. The father was arrested. She was medically examined and a record made of her injuries (a point to which I return below).

12 According to the mother, the father's behaviour did not improve after the birth of A-M although, because social services in Norway were now involved, he was careful to control his behaviour when they were present. When they were not, he threatened that he would have her children removed and said that if she reported him no one would believe her.

13 In January 2020 the mother challenged the father for leaving the bedroom door open when he was naked where he could be seen by her daughter, Z. The father slapped the mother across the face, telling her she was a lowly woman who had spoken disrespectfully to him.

14 On a date subsequently identified as 29 January 2020, the mother said that the father was again drinking and told her that he would not be held accountable for what he did next. He took a knife and began hitting her with the blunt side of the knife even though, at that time, she was holding A-M in her arms. She ran to her room but the father chased her and head-butted her nose three times. He began strangling her and said that, before she called the police, he would stab her forty times, an apparent reference to a documentary that he had watched about an Iranian man who had stabbed his own wife forty times and been released after 20 years in prison. According to the mother, the father said that 'before the police got to our flat I would already be dead and he would kill my children in front of me'. The mother said that

on that occasion she was assaulted between about 1am and 4am with the father slapping her, pulling her and hitting her. She was not allowed to move and the father slept next to the knife in case she did so.

15 When the mother fell pregnant with T in Spring 2020, the father demanded that she have an abortion. He then jumped on her, covering her mouth and hitting her on the belly whilst holding her neck.

16 In July 2020 the mother said that the father threatened to assault her because she did not agree to him taking A-M to visit his own mother, who was suffering from Coronavirus. Later that month, the father slapped the mother with great force and snatched her telephone. When she said she would call the police, he dragged her by the arms bruising her and throwing her outside the house in her nightdress, daring her to call the police.

17 On 24 July 2020 the father began shouting at her that this was "all her fault" and that she needed to leave. He told her that she should seek help with housing from the police, but told her not to tell them about the abuse. He threatened to take A-M away from her if she did, as he was Norwegian and the authorities would give the child to him. She left and spent the night in Oslo. The following day she returned to the UK with A-M and Z.

18 There were a total of four further statements from the mother. Although they contained one or two new allegations in respect of the period between February 2019 and July 2020, they were largely repetitive of the evidence in the statement relied on in support of the non-molestation order. The father provided three statements in response, together with a statement to the Norwegian police in which he accepted that there were "disagreements" between them, and that they had had "fought" on the day the mother left. Beyond that, although the father generally denied the mother's allegations, he gave no detailed response to the specific details set out above.

19 By the time of the hearing before the judge, both the mother and the father were seeking to rely on videos and audio tapes in support of their respective positions. The father's videos were relatively unremarkable: they showed occasions when the family appeared to be happy and content together. However, the mother's longer videos were taken by her on her mobile phone and were of the father, sometimes with A-M, talking and drinking. Before the judge, it was the mother's case that "the strongest evidence that the child was at risk of harm from the father is the video of the father threatening to kill the child". However, it is now submitted on behalf of the mother that the judge paid too much attention to the videos at the expense of the other evidence, and in particular the evidence summarised at paragraphs 10-17 above.

3 The Judgment

20 At [1]-[12], the Judge set out the background to the dispute and the reasons why he was not prepared to allow either oral evidence or expert evidence at the hearing. No criticism is made by either side of those decisions. At [13]-[15] he identified the relevant test from *Re E (Children)* [2011] UKSC27, to which I shall refer in greater detail below.

21 At [16], having set out the question that he was obliged to ask himself in accordance with *Re E*, the Judge summarised some of the mother's evidence. Mr Samuels submitted that this was a cursory summary, which did not identify many of the relevant events noted at paragraphs 10-17 above. At [17] the judge referred to the mother's allegation that the father had threatened to kill the children and observed that, if that were true, "a grave risk of harm to both mother and children *would not be beyond contemplation*, before any thought is given to appropriate protective steps" (my emphasis).

22 From [18]-[23] the judge addressed the content of the mother's videos. He confirmed at [21] that in one of them which also included A-M, the father said "I will kill you, I will kill you". The judge went on to say that these words "do not appear spoken in anger or with intent, and there is no proper context provided for the situation." At [22] he noted that the mother was sitting (and continued to sit) close to the father during the relevant exchanges. The judge's conclusion at [23] was that:

> "I cannot find that without more the events recorded on this video have demonstrated to the required standard that the father was intending to make a serious threat of harm to [A-M] when the video was made, nor that either [A-M] or his mother perceived it as such."

23 At [26], the judge said this:

> "26. Overall, having considered all of the evidence in front of me, there remain serious allegations of violent conduct by the father toward the mother in the marriage. *And in relation to [A-M] there is an allegation by the mother which has not been made out on the evidence available, but cannot be completely dismissed on a summary basis, given the words apparently spoken.* However, I cannot find that if the mother felt able to return to Norway with [A-M], and presumably therefore also with Z and her new baby, and if she were to return to live in the former family home with the children, in the absence of the father, with appropriate funding provided by the father and with comprehensive protective orders in place, then in those circumstances that the situation for [A-M] would therefore become intolerable by any measure" (my emphasis).

24 These and other passages in the judgment presupposed that the mother would return to Norway with A-M if the court ordered his return. Indeed, at [28]-[32], the judge addressed a point about the mother's subjective perception of risk if she returned, and the possible effect on her mental health, by reference to *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257. Mr Samuels pointed out (and Mr Scott did not disagree) that this was rather odd because this had never been an issue in the present case, and so was irrelevant to the decision that the judge had to make.

25 I note that, as part of this analysis, at [30] the judge said:

> "30. So, I must first determine whether there is an objective risk to the mother in the event of a return being ordered. In the absence of any protective measures, then there may be such a risk as I have outlined above. However, with proper protective measures in place, then clearly that risk objectively

> recedes. If I determine that those measures would objectively be sufficient to provide suitable protection, then I must 'look very critically' at her 'assertion of intense anxieties not based upon objective risk' (per Lord Wilson in *Re S* at [27] [above]), and ask whether they can be dispelled. I quite accept that those anxieties, if they were to present in the mother upon her return to Norway, are capable of founding a defence under the article, whether or not objectively justified."

Although Mr Scott sought to argue at paragraph 38 of his skeleton argument that, in the first line of this paragraph, the judge intended to refer to the objective risk to A-M, and not the mother, that is plainly incorrect. This whole section of the judgment was dealing with the potential risk to the mother if she returned to Norway, which she had made plain she would not do.

26 The passage in paragraph 38 was not dealing with the risk to A-M if he was returned alone. Indeed, the judge did not address that separate question anywhere in his judgment, despite the fact that the mother had made it plain that, if A-M was returned to Norway, she would not go with him.

27 The main part of the judgment concerned with risk concluded with the following paragraphs:

> "33. Having found as I do that, with robust protective measures in place, any objective risk of harm to A-M will be appropriately mitigated, my critical appraisal of the mother's case as it stands does not satisfy me that, if she were in fact to return to Norway with the children, her ability to care for them would be in any way compromised. Indeed, I am quite satisfied from what I have seen and heard in the evidence, and read in the statements, that if she were to return she would cope well, particularly given the protective measures which would by then be in place. Consequently it would not be appropriate for me to decline to make a return order on that ground.
>
> 34. I accept that the mother does not wish to return, and her case is that she will not do so even if a return order is made in respect of A-M. I hope that the mother does choose to return with him, and her other children, whilst the longer term future of the children is resolved by the Norwegian courts. However, in the event that she elects not to, I have not seen any evidence which persuades me that the father has made a realistic threat to harm A-M. The only specific evidence on which the mother relies for this is the video clip, and I do not accept that that provides credible evidence of a real threat. This is only confirmed by the fact that as I have indicated, the mother evidently did not consider it to be so at the time, as she sat filming; such a threat evidently formed no part of her reasons for leaving Norway. I have no evidence before me which leads me to believe that the father is not perfectly capable of caring for A-M, if the mother does not return with him."

28 The judge set out at [37] various undertakings required of the father. This again presupposed that the mother would return to Norway, so they are matters of logistics,

principally concerned with her. The only reference to protective measures as such is in the last line of [36], where the judge said: "I am entirely satisfied that the Norwegian authorities will if needed offer entirely appropriate support and protection for this family upon any return". On the basis of these conclusions, the Judge ordered the return of A-M to Norway.

4 The Law

29 The starting point is *Re E*, noted above. The general guidance there given in respect of Article 13(b) can be summarised as follows:

a) Article 13(b) is, by its very terms, of restricted application: see [31];
b) The burden of proof lies with the person, institution or other body which opposes the child's return. The standard of proof is the ordinary balance of probabilities, subject to the summary nature of the Hague Convention process: see [32];
c) The risk to the child must be "grave" and, although that characterises the risk rather than the harm, "there is in ordinary language a link between the two": see [33];
d) "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. Amongst these are physical or psychological abuse or neglect of the child: see [34];
e) Article 13(b) is looking to the future, namely the situation as it would be if the child were to be returned forthwith to his home country: see [35].

30 The Supreme Court recognised the difficulties inherent in the summary evaluation required by a decision under Article 13(b), as compared to a more detailed fact-finding process. They said at [36]:

> "36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison Judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues."

31 In an Article 13(b) case, there is only one question: has the taking parent established the necessary "grave risk"? It is also important not to be too prescriptive about how any judge should go about answering that question. It is, however, of assistance to indicate the process of reasoning which the authorities indicate may be appropriate in such a case, before briefly identifying those authorities.

32 Although the process of reasoning will start with an assumption that the taking parent's allegations are true, that is not the end of the process. As part of its overall evaluation, the court will consider the 'nature, detail and substance' of those allegations[1], in order to determine the maximum level of risk to the child. That process may involve the making of what have been called "reasoned and reasonable assumptions" about the level of that risk. If the evidence is of sufficient nature, detail and substance to demonstrate a potentially grave risk, the court will then go on to determine whether the grave risk has been made out in all the circumstances of the case. If the evidence is not sufficient to establish a potentially grave risk, clearly the Article 13(b) defence will not have been made out.

33 Thus, in *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720, Black LJ said at [53] that she did not accept that a judge was bound to adopt the whole *Re E* process of reasoning "*if* the evidence before the Court enables [the judge] confidently to discount the possibility that the allegations give rise to an Article 13(b) risk" (my emphasis). In that case, the judge found that the mother's evidence about the violence that she said had happened was inconsistent with her own actions, in particular in allowing the father to have care of the child, and was wholly uncorroborated. She therefore found that a grave risk was not established and made a return order which was upheld by the Court of Appeal.

34 Similarly, in his judgment in *Re C (Children) (Abduction: Article 13b)* [2018] EWCA Civ 2834: [2019] 1 FLR 1045, which was primarily concerned with the issue of protective measures, Moylan LJ said at [39] that *Re E* was not suggesting that no evaluative assessment of the allegations could or should be undertaken by the court. This approach – stressing the need to look critically at the underlying allegations, and to make only such assumptions about the level of risk as appear to the court to be reasonable and justified - has been followed in a number of recent cases. In *UHD v McKay (Abduction: Publicity)* [2019] EWHC 1239 (Fam); [2019] 2 FLR 1159 at [70], MacDonald J said:

> "70. In the circumstances, the methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. **Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court**, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention." (My emphasis)

35 If the court concludes that there is potentially a grave risk to the child, then it must consider if there would be sufficient protective measures in place if the child is returned. The answer to that must be driven by the nature of the grave risk that has

[1] This phrase comes from *The Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part VI Article 13(1)(b)*, at [40].

been established; that will be what will dictate what are and are not proper protective measures: see, by way of example, [49] and [50] of Moylan LJ's judgment in *Re C*. On this point in *Re E*, the Supreme Court said at [52]:

> "…It is now recognised that violence and abuse between parents may constitute a grave risk to the children. Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be."

36 I turn therefore to deal with the issues as they have arisen on this appeal. In my view there are four critical questions. First, did the judge make appropriate – or any - assumptions based on the mother's evidence? Secondly, was there a clear evaluation of the risk to A-M? Thirdly, did the judge have regard to and consider all the evidence? Fourthly, what was his evaluation of the sufficiency of the protective measures? Although I deal with each in turn below, it is obvious that the first and second questions are closely linked (and significantly overlap), and that if this court concluded that the judge failed to make appropriate assumptions about the mother's evidence and/or failed to undertake a proper evaluation of the risk to A-M, the matter would need to be remitted for a further hearing, regardless of our views on the remaining questions.

5. Did The Judge Make Appropriate Assumptions?

37 As set out above, the judge had to consider the mother's evidence and, assuming it was true, make reasoned and reasonable assumptions about the nature and extent of the risk to A-M. He had to decide whether he should reasonably assume that there was, potentially, a grave risk or whether, in the words of Black LJ in *Re K,* the evidence enabled him confidently to discount the possibility that the allegations gave rise to an Article 13(b) risk. Perhaps most important of all, he needed to make plain the course that he was following and the assumptions that he was prepared to make on the evidence.

38 In my view, the judge did not do this. For example, nowhere in the judgment does he say that he was prepared to assume that the mother's allegations, or even some of them, were true. More importantly, nor is there an analysis of whether, if what the mother said was true, the nature, detail and substance of her evidence established or might establish a grave risk to A-M. For reasons which I will come on to explain in Section 7 below, I am not confident that the judge considered all of the mother's evidence in any event. But even in relation to those parts of the evidence which he did consider, he did not say what, if any, assumptions he made and what conclusions he reached, in consequence, as to the risk to A-M.

39 My conclusion that the judge failed to make any assumptions about the nature and extent of any risk to A-M is confirmed by a consideration of what – if any – evaluative assessment he made about whether or not A-M faced a grave risk pursuant to Article 13(b).

6. Was There A Clear Evaluation of the Risk to A-M?

40 Mr Scott's repeated submission was that the judge asked himself the right question at [16]:

> "So, firstly, would the allegations which the mother makes, if true, be sufficient to create a grave risk of such harm?"

That being so, I asked Mr Scott during the course of argument where we could find the judge's answer to that question. In a relatively short space of time, he gave what Mr Samuels correctly categorised in his submissions in reply as three wholly different answers to my question. That was not Mr Scott's fault: the problem was that, having asked himself the question, the judge failed to provide a clear answer.

41 The first answer that Mr Scott identified was to the effect that the judge had considered the mother's allegations and, in the same way as MacDonald J had done in *UHD*, concluded that the Article 13(b) allegations "did not get past first base". The judge had considered the allegations, found them wanting, and was thus able confidently to discount the possibility of an Article 13(b) risk.

42 There are certainly parts of the judgment which suggest that that is what the judge thought he might be doing. But there are other parts which make plain that the judge did not or could not discount the possibility that the allegations gave rise to an Article 13(b) risk: see for example the highlighted passages set out in paragraphs 21 and 23 above. Further, I would suggest that, if a judge has reached this conclusion, he or she should make clear that that is what they are doing, and explain why they are doing it. In my view, the judge did not do this, either expressly or impliedly.

43 The second answer that Mr Scott gave in answer to my question was at the very opposite end of the spectrum. He submitted that the judge had followed the approach in [36] of *Re E*, and that he had found that, assuming the allegations to be true, they demonstrated a grave risk to A-M. This answer seemed to come as a surprise to Mr Samuels; it certainly came as a surprise to me. The difficulty with it (apart from it being diametrically opposed to the first answer) is that nowhere in the judgment can such an important conclusion be found. Indeed, much of the latter part of the judgment would appear to be at odds with such a conclusion.

44 To take just one example, at [34] the judge said:

> "I have no evidence before me which leads me to believe that the father is not perfectly capable of caring for [A-M], if the mother does not return with him."

In my view, that conclusion, which I should say appears to be based on no supporting evidence at all (certainly none is identified in the judgment), is completely at odds with a finding that A-M was at grave risk of harm if returned to Norway without the mother.

45 The third possible answer to the question, which Mr Samuels concentrated upon during his main submissions, was that the judge adopted a 'half-way house' approach, in which he made no assumptions as to the risk to A-M based on the mother's allegations being true, but instead considered the credibility of some but not all of them. Although this approach was not expressly identified or explained, its result was

that the judge appeared to be sceptical about the allegations, but could not discount there being a grave risk altogether. Where that approach took him is unclear.

46 This mixed approach to the evaluation can be seen in a number of places in the judgment. At [17] the judge said that if there were threats to kill the children then "a grave risk of harm to both Mother and children *would not be beyond contemplation*", which was perhaps a rather grudging conclusion, and not the approach set out in *Re E*. At [20] the judge said that, although he could not say that the violent incidents had not happened, the videos "are not *conclusive evidence* that they have". That would appear to be wrong in principle: it was not for the mother to provide "conclusive evidence" of anything, particularly as this was not a fact-finding process.

47 The most that the judge was prepared to do in [20] was to say that he had to proceed "*on the basis that they* [the allegations of violence] *may have happened*". That he felt that the allegations had not been established beyond that low threshold can be seen from his comments in [19], [20], [22] and [26]. This approach was summarised at [26] when the judge said, again rather grudgingly, that the allegations "*cannot be completely dismissed on a summary basis*".

48 In undertaking his analysis in this way, the judge appears to have been first applying a form of strike out test under CPR 3.4 or 24.2 (that the mother's allegations could not be struck out because they had a real, rather than fanciful, prospect of success); but then going on to a disposal on the merits (the allegations having not been made out on the balance of probabilities). On the basis of this approach, the judge appeared to decide that there was a small risk that the allegations may be true, rather than evaluating the risk to the child if the allegations were true. His evaluation failed to address the question posed at the start of [16] (paragraph 40 above). Accordingly, I consider that the judge erred in law in carrying out the evaluation and arriving at the answer in the way that he did.

49 I should add, in fairness to the judge, that this was not an easy exercise, and I am not persuaded that he got the assistance to which he was entitled. Two particular matters stand out which were not addressed at the hearing below. First, *Re E* was not a case about a child who, if the Article 13(b) defence failed, would be left in the sole care of a parent alleged to have been abusive. That potential complication arises starkly on the facts of this case[2]. Secondly, *Re H-N and Others* [2021] EWCA Civ 448, which was decided after the judgment in this case was handed down but gathered together many of the strands discernible from the authorities concerned with domestic abuse over the last decade, highlighted the importance of patterns of behaviour when considering allegations of domestic abuse, and emphasised the importance of considering the evidence in the round, not concentrating solely on the most significant events. That too would seem to be of direct relevance here.

50 If my lords agree, this analysis of the first two issues raised on this appeal explains why the appeal must be allowed and the matter remitted to the Family Division. However, for completeness, I should deal with the other two criticisms of the judge's judgment raised by Mr Samuels, because they too may have some relevance to that further hearing.

[2] Because this case is being remitted for a rehearing, it is unnecessary to say anything more about this aspect of the appeal.

7 Did the Judge Consider All The Evidence?

7.1 The Legal Framework

51 Paragraphs 9-24 of the skeleton argument produced by Mr Scott and Ms Renton on behalf of the mother take their cue from the well-known passage in *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ5: (2014) FSR29 at [114], where Lewison LJ made crystal clear the principle that it is not for the Court of Appeal to remake findings of fact made by the trial judge. Although a contested Hague Convention application is not a fact-finding exercise, I accept that Lewison LJ's eloquent warnings have at least some application to the present appeal. A more directly relevant authority might be *Re S (A Child) (Abduction: Rights of Custody)*, where the Court of Appeal overturned the judge's order in a Hague Convention case. The Court of Appeal was itself subsequently criticised by the Supreme Court, who said that it was not for this court to substitute its own view of the facts for that of the first instance judge.

52 It is, however, necessary for this court to consider the criticism, forcefully made here by Mr Samuels, that the judge failed to take into account all the evidence. As to that, Lewison LJ said in *Staechelin v ACLBDD Holdings Limited* [2019] EWCA Civ817 at [31] that the mere fact that the trial judge has not expressly mentioned some piece of evidence does not lead to the conclusion that he or she overlooked it. The same point was made at [48] of *Henderson v Foxworth Investments Limited* [2014] UK SC 41: [2014] 1 WLR 2600. Whilst it may be a question of degree, the starting assumption must always be in the first instance judge's favour: that all the evidence was considered, whether it is expressly identified in the judgment or not, unless it is plain from the judgment itself that something significant was obviously overlooked.

53 Even keeping these warnings well in mind, I have concluded that it is arguable that the judge did not have regard to all of the evidence in this case. That was not entirely his fault; he was not assisted by the presentation of the mother's case before him, with its over-reliance on the videos. But it meant that some of the important evidence in the mother's first statement seemed to have been forgotten by the time the judge prepared his judgment. There are three principal examples of that process.

7.2 The Mother's Evidence of Violence

54 I have set out the details of the mother's evidence of violence in paragraphs 10-17 above. Some of those events are referred to in [16] of the judgment, but they are not set out in detail, neither are they all identified. [16] gives the impression, maybe quite wrongly, that the judge was playing down the seriousness of the alleged events. There is no subsequent reference to any of these events in the subsequent paragraphs of the judgment, save for one reference at [21] to the threat to kill the children on 29 January 2020, about which the judge expressed no concluded views at all.

55 In particular, given that this case was primarily concerned with the gravity of any risk to A-M, I note that [16] failed, amongst other things:

i) to identify the violence which caused the mother's own hand to hit her belly when she was heavily pregnant with A-M;

ii) to mention that, when the father was hitting the mother with the blunt side of the knife, she was actually holding A-M in her arms;

iii) to mention the father's demand that she abort the baby she discovered she was carrying in April 2020; and

iv) to note the subsequent assault when he attacked her belly when she was pregnant with T.

On one view, these were critical elements of the mother's evidence as to the direct risk posed by the father; they were allegations which directly involved A-M or his unborn sibling. They are not addressed in the judgment. Plainly they should have been.

56 The allegations of violence by the father against the mother are potentially relevant to any indirect risk posed by the father to A-M. They might be said to form part of a pattern of controlling and coercive behaviour which the courts must be astute to recognise: see paragraphs [29]-[32] of *H-N*. In particular, the court noted that "…the harm to a child in an abusive household is not limited to cases of actual violence to the child or to the parent. A pattern of abusive behaviour is as relevant to the child as to the adult victim": see [31] of *H-N*. The allegations of violence are only noted in [16] in very summary form and, in contrast to the videos, are not referred to thereafter in the judgment at all. It is therefore arguable that those events too were not considered by the judge (properly or at all) when carrying out the Article 13(b) evaluation.

7.3 The Corroborative Evidence

57 The judge does not identify or address in his judgment the corroborative evidence of the father's violence against the mother. This can best be illustrated by the report of the medical centre where the mother was examined after the incident noted in paragraph 10 above. The record of the injuries suffered by the mother is as follows:

> "US: sees a bruise on the right arm, one on top of the arm; approximately 2cms in diameter, one on the elbow: approximately 1cm in diameter, have several purple coloured, striped-shaped bruises on the upper-arm: approximately 5x1cm."

There are also police records of the same incident.

58 In addition, in respect of both the incident on 29 January 2020 (paragraph 14 above), and the incident in July 2020 (paragraph 16 above) the mother took photographs of her injuries which were exhibited to her first statement. Again, no reference is made to that evidence in the judgment.

59 This corroborative evidence was potentially important: on one view, it showed that the mother was not inventing her basic allegation that the father was sometimes violent towards her, and so it might have given the judge some confidence that, on an evaluation of all the evidence, assumptions could be made in the mother's favour. It should on any view have been addressed in the judgment.

7.4 The Father's Evidence

60 Another way in which the evaluative process should work is for the judge to assess, not only what is alleged, but also what is said in response. The judge did not subject the father's evidence to anything like the same degree of scrutiny that he did the mother's evidence. Although the father accepted "disagreements" and at least one "fight", he otherwise denied the mother's allegations. But in contrast to the mother's statements, the father's statements are generalised. There is no detail. He does not deal with the incidents which are the subject of the medical evidence and photographs. That ought to have been something which the judge considered, but he did not appear to do so.

61 This was perhaps of particular significance when the judge came to consider the evidence from the video that the father said to A-M "I will kill you". As set out at paragraph 22 above, the judge recorded that statement, but appeared to discount it because of the lack of context or intent in the words. The judge made no reference to the father's explanation for saying such a thing to his son. In his statement of 25 January 2021, the father suggested that he said what he said because A-M had problems with his eyes and "we wanted to test his reactions". On behalf of the mother, Mr Samuels argued forcefully that that seemed an incredible reason for saying to A-M (who was 8 months old at the time), "I will kill you". Although the judge dwelt on this video in some detail, he failed to address the father's explanation for it.

7.5 Summary

62 For the reasons set out above, I consider that, even making every possible allowance for the fact that a judge does not need to set out in the judgment every item of evidence which he or she has considered, it is arguable that the judge did not consider all of the evidence when evaluating the Article 13(b) defence. It is unnecessary for me to say more about that aspect of the appeal, given that the matter has been remitted for rehearing.

8 Protective Measures

63 Mr Scott's principal submission was that, even assuming that the judge had found that there was a grave risk to A-M, he had also found that there were sufficient protective measures to deal with that risk. He therefore said that the judge's conclusion should not be overturned. In my view, there are two fundamental difficulties with that submission.

64 First, because the judge had not clearly identified whether or not he potentially found a grave risk to A-M, he could not deal with the necessary protective measures. It is necessary first to evaluate the risk of harm before evaluating the appropriate protective measures. As Mr Samuels rightly submitted, the question of the protective measures cannot be looked at in the abstract. In the absence of a proper evaluation of risk, there could be no meaningful consideration of the protective measures necessary to address that risk.

65 Secondly, this is a case where the mother had made it plain that she would not return to Norway with A-M, even if the court ordered his return. Of course I understand that this can be asserted by the taking parent in a Hague Convention dispute, and the court has to be astute to ensure that such a stated position is not misused to obtain an

advantage in the proceedings. But here, the mother had made her position quite clear at the outset, and there was no suggestion before the judge or before this court that this was not a bona fide position for her to have adopted.

66 In those circumstances, the Judge needed to consider what the protective measures were going to be for A-M if he was returned to Norway on his own, and going from the parent who had previously had care of him, in Norway and then England, to a parent who had never previously had care of him. This is of course particularly important in a case like this where, on the *Re E* assumption, A-M would be being returned to a parent against whom serious allegations had been made.

67 In such circumstances, to the extent that protective measures were even discussed in the judgment, they were beside the point, because they were all protective measures relating to the mother, when she returned to Norway. On this analysis, the mother will not return. What matters are the protective measures which can be put in place to protect A-M if there is a grave risk of harm to him posed by the father. That is the relevant question, and it is not one which the judge addressed.

9 Conclusions

68 For the reasons that I have given, I consider that the judge failed to adopt the approach set out in *Re E*; failed to answer the question that he himself rightly posed at [16] of his judgment; arguably failed to have regard to all of the evidence; and did not consider the issue of protective measures in the factual circumstances that were likely to apply, namely A-M being returned to Norway without his mother.

69 For all those reasons, this matter will have to be remitted for a further hearing, if possible before a judge of the Family Division.

Lord Justice Nugee

70 I agree.

Lord Justice Moylan

71 I also agree.