

DT v LBT (ABDUCTION: DOMESTIC ABUSE)
[2010] EWHC 3177 (Fam)

Family Division

Peter Jackson J

7 December 2010

Abduction – Habitual residence – Grave risk – Domestic violence – Degree of force needed for move to be involuntary

For most of the couple's 10-year marriage the British mother lived in England with the three children while the Italian father lived and worked in Italy. Throughout the relationship the mother suffered domestic violence at the hands of the father, who subjected her to sustained emotional, sexual and physical abuse. The evidence of the father's hold over the mother strongly suggested 'battered wives syndrome', in that the father used a combination of controlling behaviour, intimidation and threats to prevent the mother from ending the relationship. From time to time the father's violence towards the mother was witnessed by the children. The eldest child had been diagnosed with autistic spectrum disorder and AHDD. When the children were 6, 2 and 10 months old, the father bullied the mother into moving with the children to live with him in Italy. The mother was profoundly unhappy following this move, but she and the children remained with the father in Italy for 9 months, before escaping to a domestic violence refuge in Italy and then returning to England. The father sought the summary return of the children to Italy under the Hague Convention on the Civil Aspects of International Child Abduction 1980. The mother argued in response that the move to Italy had effectively been forced on her, and had, therefore, not involved a change of habitual residence; and that the children, now aged 7, 4 and 2, would be exposed to a grave risk of harm if they were to return. The mother had stated that she could not bring herself to accompany the children to Italy if the court ordered their return, and that if she were to do so the pressure on her would be insupportable. The father offered undertakings.

Held – refusing the father's application for summary return under the Hague Convention –

(1) A person was to be taken as acting voluntarily in adopting habitual residence in a country unless their presence there was enforced; bowing to pressure or agreeing with extreme reluctance did not make presence involuntary. The approach taken in forced marriage cases did not assist, because the adoption of habitual residence could be an extended process, whereas in a marriage pure consent was required at the moment of marriage. In this case the mother's will had not been so overborne that the children's presence in Italy would not amount to habitual residence: the period of time, the degree of the children's integration into normal Italian life and the nature of the mother's participation in that process were too extensive to be accounted for by the description of the mother as a 'zombie' under the father's total control. Despite the effect of the domestic abuse, the mother was not someone who had lost her free will to such an extent that she was not responsible for her actions (see paras [10], [31]).

(2) *Neulinger and Shuruk v Switzerland* had confirmed that Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 had to be considered in child abduction cases, but did not require a sea change in the way that abduction cases were approached and in particular did not require the court hearing an abduction case to conduct an 'in-depth examination of the entire family situation'. While *Neulinger* was not a warrant for approaching the Hague Convention exceptions broadly, liberally, or substantially differently from present established practice, by expressing matters in terms of the Convention, it might underscore the existing recognition given to the position of primary carers who had been subjected to

domestic abuse. It would be rare for domestic abuse, even when proven, to be so disturbing that it engaged Art 13(b), but, in cases on the margins, where there had been substantial domestic abuse, a focus on the abductor's Art 8 rights could be significant. By analogy with the decision in *Neulinger*, a return order might, in some cases, breach the rights of an abductor parent who had been subjected to domestic abuse and who, for good reason, declined to accompany children back to the country of habitual residence (see paras [35], [55], Appendix 3 (paras [11]–[15])).

(3) In balancing the Art 8 rights of the family in this case, full account must be taken of the mutual right of the father and children to enjoy each other's society, however, the father's rights must be qualified by the pernicious effect that his behaviour had had on the family, and in consequence the mother's rights were correspondingly weightier. The mother's acute emotional predicament, for which the father bore a heavy responsibility, and the very particular needs of the eldest child, amounted in combination to circumstances in which an order returning the children to Italy would create a grave risk of emotional harm to them, placing them in an intolerable situation. The return of the children without the mother, their primary carer, was an unacceptable option, which would undoubtedly expose them to a grave risk of harm, given their age and their dependence upon the mother, and if the mother changed her mind, and accompanied the children back to Italy, it would be at a heavy cost to her own right to respect for her family life: she would be highly emotionally unstable and vulnerable in Italy, and would struggle to meet the children's needs. There were no demonstrated or potential measures that could be taken to protect the children from these difficulties (see paras [10], [36], [65]).

Statutory provisions considered

Human Rights Act 1998, ss 2, 3

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 8

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 3, 12, 13(b), 20

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Part VII

Cases referred to in judgment

D (A Child) (Abduction: Custody Rights), *Re* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783, HL

F v M (Abduction: Grave Risk of Harm) [2008] EWHC 1467 (Fam), [2008] 2 FLR 1263, FD

M (Children) (Abduction: Rights of Custody), *Re* [2007] UKHL 55, [2008] 1 AC 1288, [2007] 3 WLR 975, [2008] 1 All ER 1157, sub nom *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251, HL

Neulinger and Shuruk v Switzerland (Application No 41615/07) [2011] 1 FLR 122, ECHR

R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions; *R (Holding & Barnes plc) v Secretary of State for the Environment, Transport and the Regions*; *Secretary of State for the Environment, Transport and the Regions v Legal and General Assurance Society Ltd* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 WLR 1389, [2001] UKHRR 728, [2001] 2 All ER 929, HL

S v B (Abduction: Human Rights) [2005] EWHC 733 (Fam), [2005] 2 FLR 878, FD

TB v JB (Abduction, Grave Risk of Harm) [2001] 2 FLR 515, CA

W (Abduction: Domestic Violence), *Re* [2004] EWCA Civ 1366, [2005] 1 FLR 727, [2004] All ER (D) 93 (Jul), CA

WF v FJ, BF and RF (Abduction: Child's Objections) [2010] EWHC 2909 (Fam),
[2011] 1 FLR 1153, FD

Philip Cayford QC and *Clare Renton* for the plaintiff
James Turner QC and *Geraldine More O'Ferrall* for the defendant

Cur adv vult

PETER JACKSON J:

Introduction

[1] This child abduction case raises questions about the requirement that the adoption of a habitual residence should be voluntary, and about the effect of the recent decision of the Grand Chamber of the European Court of Human Rights (ECHR) in *Neulinger and Shuruk v Switzerland* (Application No 41615/07) [2011] 1 FLR 122.

[2] I append three documents to this judgment:

- (1) A chronology
- (2) A list of authorities
- (3) Observations on *Neulinger*

[3] The proceedings concern three young children:

- D, a boy aged 7 1/2 with autistic spectrum disorder
- G, a girl aged 4
- L, a boy aged 2

[4] Their father is an Italian national, aged 39, and their mother a British national aged 38. He is a naval officer, currently under suspension; she is a teacher who is not currently working. They met in Italy and in November 2002 married in England, where the children, who are British citizens, were born in 2003, 2006 and 2008. In July 2009 the mother and children moved to join the father in Rome in disputed circumstances.

[5] By his summons under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention), issued on 18 May 2010, the father seeks the summary return of the children to Italy, from where the mother abducted them on 4 April 2010. The children have had no contact with the father since 23 March, the date on which the mother and children entered a domestic violence refuge in Rome before travelling to England.

[6] The mother resists the father's summons on three grounds:

- (1) Habitual residence: She says that the children were not habitually resident in Italy on the date that she brought them to England even though they had been physically present there since 15 July 2009. She alleges that her presence in Italy with the children was not voluntary but was as a result of improper pressure by the father. She also contends that the children had not integrated in Italy in the sense necessary for habitual residence.

- (2) Child's objections: She says that D objects to return and has reached an age and degree of maturity at which it is appropriate to take account of his views.
- (3) Grave risk of harm: She claims that a return of the children to Italy would expose the children to a grave risk of psychological harm or otherwise place them in an intolerable situation. The mother states that, due to her own experiences, if the court ordered the return of children, she would not be able to accompany them.

[7] If the mother makes out her first contention, the father's summons must fail. If she makes out either of the other contentions, she argues that the court should not order the children's return to Italy.

[8] The father contests each of the issues, while accepting that the children should not be separated.

[9] Unusually, because of the irreconcilable gulf between the parents' written accounts in relation to the first and third issues, the court has heard evidence from them, a course acknowledged as necessary by both.

Summary of decision

[10] On 2 December 2010, at the end of a 4-day hearing, I dismissed the mother's first two grounds of defence and upheld the third. I informed the parties of my decision in the following terms, and reserved fuller reasons:

- (1) On the uncontested evidence, this was a highly unconventional marriage. Between 2002 and July 2009 the mother, and the children as they were born, lived in England, while the father lived in Italy. Over those years the mother and children visited Italy eight times for a total of about 7 months, while the father visited England over 20 times for a total of about 20 months. During the course of the parents' 10-year relationship they were together for no more than half the time at best.
- (2) The reason for this state of affairs is to be found in the mother's evidence. I accept her account that she has been subjected by the father to sustained emotional, physical and sexual abuse stretching back to the early days of their relationship and continuing until its conclusion. The degree of separation was a result of her remaining in England because she felt safer and more supported here.
- (3) The emotional abuse consisted of the father intimidating the mother by means of frequent and unpredictable outbursts of temper and shouting whenever he was displeased with her, accompanied by close control of her movements and actions when they were together. The father also frequently threatened violence against the mother if she did not fall in with his wishes. For example, when the mother started court proceedings in England in 2007, the father told her that if she went to a court hearing in September 2007 he would kill her.
- (4) Examples of the wider course of physical abuse are: throwing the mother, who was 3 months' pregnant and unwilling to have

intercourse, on to a bed and jumping on top of her while covering her nose and mouth with his hands so that she felt as if he was trying to suffocate her (June 2002); hitting the mother in the stomach when she was 16 weeks' pregnant with D (November 2002); pushing her into a bedroom cupboard when she asked him to change a nappy (January 2004); placing his hand over her face so that she again felt as if she was suffocating, resulting in her vomiting on the floor (May 2004); assaulting her so that she had bruising on her arms and body (August 2009); pushing her into a corner and beating her around the head so that she urinated in her pants (August 2009).

- (5) Examples of the wider course of sexual abuse are: forcing the mother to have sexual intercourse within days of a miscarriage (June 2002); committing oral rape on the mother by pushing her on to the floor and forcing his penis into her mouth until he ejaculated, hurting her mouth and causing injury to her neck and back (October 2007); multiple occasions of oral, vaginal and anal rape during the course of the relationship, the last being on 22 February 2010 when he woke her at 5 am, pulled her out of bed by her hair and repeatedly forced her to have intercourse with him.
- (6) The father's violence towards the mother was from time to time witnessed by the children and D has spoken of it to the Cafcass officer.
- (7) The mother's account of events is persuasively corroborated by contemporaneous complaints about the father's behaviour made down the years to third parties such as the police, her doctor and to some friends and colleagues. It is also corroborated by their observations of her unhappiness and on occasion her injuries. However, her disclosures at the time did not give the full picture as she was understandably unable to speak of some of her more distressing experiences.
- (8) The mother's account is further supported by my assessment of her evidence. I find her to be a truthful and generally accurate witness, possessed of a normal degree of resilience, but currently very emotionally vulnerable and stressed.
- (9) In contrast, I find that the father was a generally accurate witness in all matters except those concerning his behaviour towards the mother. Where that was concerned, I found him to be unconvincing and untruthful. There was nothing in his evidence that caused me to doubt the truth of the mother's allegations.
- (10) I reject the suggestion that the mother has exaggerated or invented incidents or that the father was acting in self-defence on occasions when she was injured. I do not accept his suggestion that she reported her experiences to others as a means of gaining an advantage over him, nor the argument that the behaviour described by the mother can be explained as a culturally different but acceptable form of conduct.
- (11) Over the years the father's behaviour has had a profound

emotional effect upon the mother. By badgering, intimidation, violence and playing on her affections and desire for a normal family life, he exerted sufficient emotional pressure on the mother to prevent her from separating from him until earlier this year. The pattern found in this case is typical of what is colloquially known as 'battered wives syndrome'.

- (12) The mother has always been the primary carer for the children, who have never been separated from her. The eldest, D, has special qualities which place heavy demands on carers and teachers. His autistic spectrum disorder and attention hyperactivity deficit disorder require highly specialised help and he is badly affected by unpredictability and change.
- (13) The mother's abduction of the children from Italy was an escape, carried out in a way that was designed to prevent the father from stopping it happening. He has been greatly distressed by the lengthy interruption of his relationship with his children.
- (14) Turning to the issues for decision, I have concluded that the children were habitually resident in Italy between 15 July 2009 and 4 April 2010. I accept the mother's evidence that she was bullied into agreeing to move with the children to live with the father in Rome, and that she was profoundly unhappy for most of the time that she was there. However, I do not find that, surveying the period as a whole, her will was so overborne that the children's presence did not amount to habitual residence. I find that it was yet another in a series of bad decisions made by the mother arising from her relationship with the father. The period of time, the degree of integration of the children into normal Italian life, and the nature of the mother's participation in that process are too extensive to be accounted for by the mother's description of herself as 'a zombie' whose will was broken and who was totally controlled by the father. Despite the effect of the domestic abuse, I am satisfied that it would be a misunderstanding to regard the mother as someone who had lost her free will to such an extent that she was not responsible for her actions. My conclusion is that this was habitual residence for the children, albeit reluctant and unhappy habitual residence for the mother.
- (15) D does not want to return to Italy, but I do not find that his views amount to an objection. Had they done so, it would have been appropriate to take account of them, but not to any great extent in the light of his age and the interests of the two other children. This case is not really about child's objections.
- (16) Although the mother has said that she cannot bring herself to return to Italy with the children, the depth of her distress when considering this question was very great and, in my view, genuine. While I cannot rule out the possibility that she would accompany the children if I order their return, I think it is more likely that she would find herself unable to do so. Having

accepted her as an essentially honest witness in relation to her experiences, I do not have any proper basis for doubting her on this issue.

- (17) The return of these children to Italy without their mother is not an acceptable option. It would undoubtedly expose them to a grave risk of emotional harm to be separated from their primary carer. They are very young and they depend upon her. D has special needs, and the father has never cared for the children as a group alone.
- (18) In the alternative, even if the mother withdrew from her present position and accompanied the children back to Italy, it would be at heavy cost to her own right to respect for her family life. I find that the cumulative effect upon her of events up to April 2010 is such that she would be highly emotionally unstable and vulnerable and that would struggle to meet the children's needs. She would be a single parent, living away from her parents and looking after young children, while returning to a flat where she has been the victim of serious domestic abuse. She would be in difficulty obtaining work, due to the age of the youngest child. The financial difficulties which beset the parties when they had one and a half incomes would be exacerbated when they have only half an income, or one income after the father's suspension is lifted next year.
- (19) It is also the case that the mother has at long last taken the momentous step of separating from the father, something that she has repeatedly and unsuccessfully attempted in the past. The fact that the father has always denied his gross misconduct gives rise to grave concern about his future actions. If the mother returned to Italy I think it highly likely that he would once again attempt to get her to change her mind by all means at his disposal, particularly if it meant that he would as a result regain the company of the children, and that she would find it extremely hard to withstand this. The consequence for the children of the parents reuniting would be disastrous.
- (20) I further find that for D to be returned to Italy now would be harmful to him. Although the Italian school has good qualities, a return would involve yet further change which he would find difficult to understand and which would damage his precarious emotional and educational progress. It is moreover likely that following a return he would have to face further major changes of one sort or another which would compound the difficulties.
- (21) I do not find that there are any demonstrated or potential protective measures that could be taken to protect the children from these difficulties. The impact on their carer and on D is in the psychological sphere and the undertakings that are offered can only supply a thin layer of physical support in the circumstances of this family. Even together with any available Italian legal processes, they cannot provide what Mr Cayford QC described as relief from worry and insecurity. For

example, the mother took English court proceedings in 2007 but these were no deterrent to the father, who severely assaulted her at the next opportunity.

- (22) In the very unusual circumstances of this case, I have concluded that the mother's acute emotional predicament, for which the father bears heavy responsibility, and the very particular needs of the child D amount in combination to circumstances in which an order returning the children to Italy would create a grave risk of emotional harm to them and that it would place them in an intolerable situation.
- (23) In making the judgment that consequently arises, I do not believe that an order for return would in any way serve the interests of the children. I bear well in mind the father's right to respect for family life but I regret to say that the misfortune in his relationship with his children is the outcome of his long-term behaviour towards their mother, on whom they depend.
- (24) I encourage the parents, through their lawyers, to take steps now to reintroduce indirect contact at least between the father and the children and to give thought to how future meetings between them can safely be arranged.

Detailed history

[11] I have set this out in a chronology, which appears as Appendix 1. In relation to disputed events the chronology represents my findings of fact.

[12] I approach the mother's allegations in the normal way, the burden being on her to prove them on the balance of probabilities. It should be said that the individual incidents on which attention has focused do not represent the full extent of the mother's case on domestic abuse, nor, of course, was the relationship between the parents solely an abusive one. There were also better times, but the effect of the abusive behaviour was pervasive, so that even in the better times the mother was apprehensive about the return of trouble.

[13] As stated, reasons for preferring the mother's evidence are its internal consistency, its corroboration by contemporaneous complaints to medical staff, police, acquaintances, and its confirmation by what the child D has said. It also accounts for the parties' continual separations at times when they would in other circumstances be expected to want to be together. On this last point, the father's explanation that the mother is a habitually indecisive person is unconvincing.

The proceedings

[14] As a result of early directions, the eldest child, D, was interviewed by Mr A, a Cafcass officer, who provided a report on his wishes and feelings. At a hearing in July 2010 Coleridge J heard his evidence, which has been transcribed. He then adjourned the matter for a longer hearing which, in the event, he was unable to conduct. The hearing before me has, therefore, started from scratch, but with the benefit of the transcript of the Cafcass officer's evidence, which slightly amplified his written report.

[15] Because of fundamental discrepancies in the parties' accounts, and in particular the disputed allegations of serious domestic violence, I have heard evidence from the father and from the mother. This course, which is not the

norm in proceedings of this kind, was contemplated by Coleridge J and acknowledged as necessary by both parties. The reason for hearing evidence is to establish the necessary factual foundations from which to reach conclusions on the issues raised by the mother.

[16] Although the father speaks a fair amount of English, his evidence was given through an interpreter. The interpretation was excellent and the father was able to present his case without disadvantage.

[17] It will also be seen from the details of the representation that I have had assistance of the highest quality throughout the hearing.

Delay

[18] These proceedings have been unfortunately prolonged, having concluded in about 6 months rather than 6 weeks. Apart from the length of the father's separation from the children, the only other material consequence is that the child, D, has now embarked on a period of specialised schooling, which began in September 2010. Although relevant, this is not a factor that, in my view, tips the decision. In other words, the outcome is not affected by the delay.

[19] The mother filed a very late and rather lengthy statement on the morning of the hearing, despite there being no direction allowing this. In the event, the statement turned out to contain little new material. However, as was said at the time, the late filing was irregular and discourteous to the father, and should not have occurred.

Authorities in child abduction cases

[20] In this case, which involves the movement of three children from England to Italy and back again, I have been asked to consider some 30 authorities, mainly by the mother's representatives. Insofar as these relate to novel arguments, I intend no criticism. I nonetheless note the surprising profusion with which authority is deployed in child abduction cases in comparison to other areas of family law, even though the jurisdiction is exercised by a limited pool of judges and the basic law is very concise. The key articles of the Hague Convention (Arts 3, 12 and 13) collectively run to no more than five or six sentences and might be set out on one side of paper.

[21] There may be disadvantages in a process in which citation from authority plays so large a part. For one thing, it must seem alienating to the parties, one of whom is often not an English speaker, to listen to sometimes lengthy legal submissions about other people's cases when both of them are desperately anxious for a decision about their own children. Prolific reference to authority may also divert attention from the case in hand. In assimilating the key precedents one is placed on the shoulders of giants, but this is to get a better view of the landscape, not a better view of the giants.

[22] I will summarise the principles that I apply in reaching my decision. I attach as Appendix 2 the list of authorities produced during the hearing, which I can be taken to have considered.

Principles

[23] The principles that are relevant to this case are these:

- (1) The Hague Convention has the important deterrent aim of

combating the evils of child abduction for the benefit of individual children and children generally, but contains defences that act as safety valves to prevent the Hague Convention harming the children it is designed to protect.

- (2) The issue for a court hearing a summons under the Hague Convention is not 'what is best for the child?' but 'who should decide what is best for the child?' The decision should be taken in the State of habitual residence unless one of the specified exceptions applies and return is not then ordered.
- (3) A broad overview of the child's circumstances and best interests will be relevant when determining whether one of the exceptions in fact applies, and if it does, what consequences should follow.
- (4) The court must so far as possible give effect to the Hague Convention in a way that is compatible with the rights of family members under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention). Although the rights of children will generally prevail where they conflict with the rights of adults, the rights of adults must also be considered and in particular the predicament of the parent from whom the children have been separated must not be overlooked. I comment below on the decision of the European Court of Human Rights in *Neulinger*.
- (5) Procedure should be swift. It is not usually necessary for oral evidence to be taken, as this works against the essentially summary nature of the proceedings and may lead to a loss of focus on the essential question.
- (6) A person is habitually resident in a place if he lives there voluntarily for a settled purpose for an appreciable period of time, long or short, temporary or permanent. This entails a factual inquiry into factors such as the degree of social integration in the environment, the duration and reasons for the move and the stay, and nationality, language and schooling. I consider the requirement of voluntariness below.
- (7) In considering whether a child objects to returning to the country of habitual residence a distinction is to be drawn between, on the one hand, an objection and, on the other, a preference against returning or a reluctance to return.
- (8) The court requires clear and compelling evidence of a grave risk of harm or of a situation that the child should not be expected to tolerate. It is a high threshold.
- (9) The court will look narrowly at an assertion by an abducting parent that the child's situation will be intolerable as a result of the parent's refusal to return with the child. However, this is not to be elevated into an absolute rule. Primary carers who have fled from abuse and maltreatment should not be expected to return to it if this will have a seriously detrimental effect on the children.

- (10) In a Brussels II Revised¹ case, the court cannot refuse to return a child on the basis of grave risk of harm if it is demonstrated that the authorities in that State have made adequate and effective arrangements to protect the child after return.
- (11) A situation that might otherwise be intolerable can be alleviated by the provision of appropriate undertakings.
- (12) Where the defence of intolerability is made out, it is difficult to envisage an order for return being made.

Habitual residence: integration

[24] I am concerned with the habitual residence of the children.

[25] On behalf of the mother it is first argued that she and the children did not lose the habitual residence that undoubtedly existed in England prior to 15 July 2009. She points to the haphazard arrangements surrounding the departure from England and to the pressure applied to her by the father. As to integration in Italy, she makes some complaints about the quality of the apartment in Rome and of D's Italian school. She claims that the period spent in Italy can be considered an 'extraordinary sojourn' for the children.

[26] For the father, attention is drawn to the degree of the children's integration into normal Italian life over a 9-month period, with a long-term rented apartment, school for D and nursery for G, parties with schoolmates, a mother who worked and the father who remained at home, parents who socialised, and an initial 3-week visit to the paternal grandparents in Sicily.

[27] For the reasons given by the father, I cannot accept the argument that these children had not sufficiently integrated into the regular order of Italian life to have acquired habitual residence there, nor indeed that the mother had not done so herself.

Habitual residence: voluntariness

[28] There is no reported decision on the meaning of the word voluntary in this context. Mr Turner QC submits that the test is whether a person's free will is overborne by illegitimate pressure. He draws an analogy with forced marriage cases. He argues that the mother did not change habitual residence because her will was so overborne by the father. He relies upon, and I take account of, some 20 features of the evidence relating to the move to Italy: see [25–26] of his written submission. These details demonstrate, in my judgment, that in the light of her previous experience of the father the mother did not want to burn her boats in England.

[29] Mr Cayford accepts that in extreme circumstances a person might be described as acting involuntarily, but he argues that someone who is to all outward appearances capable of making decisions and leading a normal life faces a high hurdle in establishing that they are not responsible for their actions. He says that the mother in fact went to Italy, whatever her feelings about it may have been, and took all consequent steps.

[30] The word voluntary means different things in different contexts. The question of which side of the line a case falls will depend on the facts. A

¹ Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1.

person detained in Guantánamo Bay cannot be said to be there voluntarily. On the other hand, the spouse of an executive sent on a long-term posting to Montevideo may only agree to move in the face of a threat of divorce, but will not have forfeited responsibility for the decision. A change of habitual residence may be undertaken with a heavy heart and very cold feet.

[31] In the present context I am of the view that a person is to be taken as acting voluntarily in adopting habitual residence in a country unless their presence there is enforced. Bowing to pressure or agreeing with extreme reluctance does not make presence involuntary. Setting the bar too low would create a test that is difficult to apply, and the question of whether pressure is ‘illegitimate’ is too vague to be reliable. I do not believe that the forced marriage cases provide the answer. The adoption of habitual residence may be an extended process and is to be judged on the overall facts. It is to be distinguished from the requirement of pure consent that is required at the moment of marriage.

[32] On the facts of this case I prefer the argument advanced by the father. The mother was, as I have said, bullied into agreement, but she did in the end agree and she went, and then took the consequent steps over a significant period of time. Her situation was unenviable, but I do not find that her will was broken.

[33] Finally, and looking at the issue of habitual residence overall, Mr Cayford suggested a litmus test. Had the mother invoked the Italian jurisdiction in April 2010 instead of leaving the country, is it likely that the Italian court would have declined to act on the basis that the children were not habitually resident in Italy? The answer to this must surely be ‘no’.

The European Convention: Neulinger and Shuruk v Switzerland

[34] The parties made submissions about the effect of this decision. My observations on these appear at Appendix 3.

[35] So far as it affects the present case, my conclusions are that *Neulinger* is a reminder, if one is necessary, that the European Convention is not silent in child abduction cases. In that regard, the decision does not bring about a sea change in the way that these cases should be approached. By expressing matters in terms of Art 8 it may, however, underscore the recognition that our jurisdiction already gives to the position of primary carers who have been subjected to domestic abuse.

[36] In balancing the Art 8 rights of this family, full account must be taken of the mutual right of the father and children to enjoy each other’s society. However, the rights of the father must, in my view, be qualified by the pernicious effect that his behaviour has had on the family and in consequence the rights of the mother are correspondingly weightier.

Child’s objections

[37] On behalf of the mother it is submitted that D (aged 7) objects to returning to Italy. The material on which this submission is based arises from an interview with the Cafcass officer Mr A on 13 July 2010, recorded at [D4–7]. D said that he did not want to go back to Italy, repeating the sentence several times and saying that it was because it is too hot. He said that he

wouldn't hate going back but would mind a bit. He liked England better than Italy. D also gave some accounts of his father's behaviour, to which I will return.

[38] When giving evidence, Mr A said:

'I think he came back and said he wouldn't hate going back. He objected a little bit. I would say on what he told me that – I think I would leave it to the court to determine whether he stated a preference or an objection ... I would say it is not a particularly strong objection that he has made himself.'

[39] Objecting entails a strength of opposition that does not apply in this case. The evidence does not establish that D objects to returning to Italy, and the mother's case on this issue must, therefore, fail.

Grave risk of harm/intolerability

[40] This requires a broad survey of the background, and a particular examination of the circumstances surrounding and since the move to Italy.

The mother's case

[41] She claims that her treatment by the father is such that she should not reasonably be expected to return to Italy, and even if she did the emotional and practical pressures upon her would be insupportable. She says that no effective protective measures have been demonstrated. She is fearful of the father's behaviour, particularly in the light of his complete denial of past actions. She also relies upon the impact of further change on D.

The father's case

[42] He states that there is no identifiable 'grave risk' of any sort. The right to family life for the children and parents alike would be better guaranteed by both parents living in the same country and having an input into their children's upbringing. There is nothing intolerable about the education and social life on offer, nor the accommodation. He does not contest D's special needs but contrasts a generally favourable Italian school report with the worrying school assessments from England. The father's position is framed on the basis that he is in no way responsible for any mistreatment of the mother or the children.

[43] In my view, the father's submission on this issue could not be contradicted, were it not for the crucial issues of domestic abuse and D's particular needs.

Domestic abuse

[44] Giving evidence, the mother stressed that her relationship with the father was not characterised by mutual rows, as he described. Instead the father would get angry with her, unpredictably and often over trivial issues. At such times he would often say 'Ti amazzo' (I will kill you). The mother did not accept that he did not realise the effect of his behaviour on her. Giving an example from 2007, she described the father saying to her during a particularly serious assault: 'Why are you screaming – do you think someone will call the police?'

[45] She said that he had little patience with the children and was often angry with them and disciplined them more severely than she felt comfortable with. She described being constantly fearful, trying to please and placate him, but it made no difference whether she appeased him or tried to stand up to him. Only once did the father acknowledge that he had a problem with his temper. This was in 2002 after he had assaulted her during pregnancy. He agreed to seek help, but then did nothing about it.

[46] Sex between the parents was at times consensual, particularly in the earlier stages of the relationship, but problems often arose because the father considered that he was entitled to demand sexual intercourse at will, insisting that she submitted. On occasions she submitted with reluctance, but on other occasions the father just forced himself on her. There were also many arguments about money, with each of them complaining that the other was not contributing enough.

[47] Asked why she had repeatedly returned to the father, she said that she was emotionally entangled and that he had a high degree of control over. It was not her desire to be with him but she had never found the right support to make the break. Explaining her feelings, she said:

‘I was always pleased to see him when he came but when he left I was always relieved that he’d gone. I do have feelings for him of course. I did love him, but every time he came he would do something again. Though I loved him and did want to see him, he would always, always hurt me.’

She said that she felt that she was persevering with the marriage until early 2007 but that after that the father would have known that she was trying to separate. She said ‘It is extremely difficult for people like me to speak about violence. It is not easy at all. It takes a great deal of strength to get out of the relationship.’

[48] Speaking of the departure for Italy, the mother said that she repeatedly tried to tell the father that she did not want to go, but he became angry and threatening. She did nothing to prepare for departure – her passport had not been renewed and the house was not made ready. Her parents were encouraging her to go, because they did not know about the violence. The father took the children’s passports and said that he would take the children anyway. She said ‘I went because he made me. I didn’t want to go.’

[49] Speaking of the departure from Italy, the mother described how she had entered the refuge with the children out of desperation and because she felt that her health was deteriorating. She said that if she had not got away she did not know what would have happened. As to returning to Italy, she said that she did not want to leave the children but that she could not carry on.

[50] She would like the children to have a relationship with their father but she is worried about his violent behaviour and about his use of child pornography.

[51] The father’s case is that he always wanted to live with his wife and children in Italy, but that until 2009 it never happened, for reasons to do with the mother wanting to be in England when the children were born, or reasons to do with her work or his. He described how he spent much of 2006 in England and the mother and children spent much of 2007 in Italy. So far as he

knew, the mother's move in the summer of 2009 was entirely voluntary. He said that after the move the children were doing well in Rome and that the mother, as she herself agrees, had an excellent job.

[52] As to his relationship with the mother, he said that there were times when she was depressed and that she is by nature someone who is indecisive. He described how their relationship had throughout been characterised by disagreements. He accepted that there were times when he became 'a bit heated' during arguments, but denied shouting at the mother except during occasional shouting matches. He absolutely denied any physical or sexual violence towards her. The only physical contact that he acknowledged was on a few recent occasions when he said that he had to restrain her and that this may have caused bruises to her arms. He said that almost all the incidents she describes were complete inventions. Asked about the contemporaneous occasions when the mother had complained about his behaviour to third parties, he said that these were dishonest reports as part of a plan to improve her position against him. In his view she had probably entered the refuge in Rome so that he could not do anything to stop her leaving the country.

[53] The discrepancy between the parties' evidence is so wide that it cannot be explained on the basis of two different views of the same facts. As I have said, I greatly prefer the mother's account to the father's.

Refusal to return

[54] It follows that, even though the mother's behaviour in removing the children from Italy was unlawful, her unwillingness to return to the father's orbit is understandable. At the end of her evidence I asked her whether she would in fact refuse to return if the children went back. She was unable to answer and her distress at either prospect was so profound that it was not appropriate to press her further. There will undoubtedly be abductors who will exploit this issue, but in my view, the mother's perplexity was genuine.

[55] There will be cases (for example *F v M (Abduction: Grave Risk of Harm)* [2008] EWHC 1467 (Fam), [2008] 2 FLR 1263, Ryder J) where an abductor alleges domestic violence without any convincing factual basis. It will be rare for domestic abuse, even when it is proven, to be so disturbing that it engages Art 13(b), but for the reasons that I have given I consider that this is such a case. As has been said:

'Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it.' Per Hale LJ in *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515 at [44].

and

'The court in a Hague Convention case is entitled to recognise the interrelationship and important inter-dependence between a mother and child who have lived in an abusive situation over a period of time. In my experience, it is well recognised, both in the domestic and the international jurisdictions, that in the context of domestic violence, the

position of the child is vitally affected by the position of the child's mother. If the effect on the mother of the father's conduct is severe it is, in my judgment, no hindrance to the success of an Art 13(b) defence had no specific abuse has been perpetrated by the father on the child.' Per Wall LJ in *Re W (Abduction: Domestic Violence)* [2005] 1 FLR 727 at [49].

The child D

[56] D is a child with particular qualities. He is described by Mr A as being charming and delightful. He is of high intelligence. He has, however, had major behavioural problems. When he started primary school in England in September 2008 there were immediate difficulties with his ability to cope with change and aggression towards adults. In November 2008 he was offered a place at a specialist short stay school where very serious problems with his behaviour continued. He was assessed by CAMHS and diagnosed with an autistic spectrum disorder and an attention deficit with hyperactivity disorder in July 2009.

[57] Between September 2009 and March 2010 D attended school in Italy. It appears from a report from the school that after a long period of integration and adjustment, he adapted well and related appropriately to his teachers and peers. However, as the mother explained, D was not attending school full time in the way that he does in England. While his classmates in Rome spent 2 full days to 4:30 pm and 3 half days to 1:30 pm, D was only going for an hour a day at the beginning, extending to 5 short half days ending at 11:45 am. An attempt to allow D to stay for lunch was made on two occasions but it was not successful.

[58] On returning to England D attended a different primary school, from which he was soon excluded for verbal and physical aggression, kicking, punching and biting teachers. His mother then home educated him for the rest of the summer term and he returned to the specialist short stay in school in September 2010, where there have been further instances of aggression. He was most recently assessed by an educational psychologist in October 2010. He will probably need to move to a long-term specialist school. A statement of special educational needs is being prepared.

[59] D's situation is very concerning. He has already experienced too much change in schooling and environment. The difficulties arising from further disruption might (just) be overcome if a return to Italy was surrounded by co-operation and security. Unfortunately, the signs are that a return would not be anything like that. Even if the mother was there, she will be acutely stressed and there would be likely to be difficulties for D in passing between his parents' homes even if this could be arranged. Despite the constant geographical separation between the parents, it should not be forgotten that the breakdown in the relationship did not take place until March 2010. The children have never previously been away from the mother.

[60] Although D's special needs give rise to great concern, they might not in themselves be sufficient to cross the threshold of grave risk of harm. It is when they are taken together with factors relating to his mother, upon whom he totally depends, that the threshold is crossed.

Children witnessing violence

[61] It is apparent that the children, and D in particular, have witnessed violent incidents. He told Mr A that when he and G were in bed, 'mummy got pushed on the wall by Papa, she got squashed, it hurt, and she screamed'. He felt 'scared, scared, scared' and his mother was 'crying, crying, crying'. He repeated the words as if reliving the experience. Once Papa had thrown food at mummy. He had also sworn, saying that he would punch D in the face and kick L and G in the face. He had threatened that he would kill mummy and was very angry.

[62] Mr A remarked that:

'D has described a most concerning level of domestic violence in his home in Italy which appears to have had a profound effect on him. He has described feelings of fear for himself and his mother and siblings, and of being out of control. The almost matter-of-fact way in which he talked about the violence, interspersed with more normal observations about his circumstances suggests that it was very much part of his life.'

Mr A wonders whether D's developmental problems may relate to these experiences rather than to autism. In his oral evidence he said D described a household that would be very difficult and hostile for a child to live in.

Protective measures

[63] The father offers seven undertakings, six of which are found at [C220]. The seventh is to obtain a mirror order in Italy.

[64] The mother comments that the criminal proceedings against her in Italy are still alive. As to 'non-molestation' undertakings, she says that she does not trust the father and finds it difficult to accept that these would protect her. She does not understand his offer of financial support, bearing in mind that she has historically been the main source of income for the children, yet would be unable to work if she were in Italy.

[65] As I have indicated, the efficacy of these protective measures is not, in my view, demonstrated. If it were merely a matter of putting undoubtedly effective measures in place, there would be no difficulty. However, I am not satisfied that the father would provide adequate financial support, even in the short term, or that his assurances about his behaviour can be trusted in the light of his untruthful evidence. Moreover, and more fundamentally, the mother cannot be expected to trust those assurances in the light of her experiences.

Conclusion

[66] I keep in mind the purpose of the Hague Convention and considerations of comity with the Italian jurisdiction, which must weigh heavily, despite the lifelong connection of these children to this country. However, as already stated, the unusual combination of factors in this case (namely the mother's refusal to return as a result of domestic abuse, combined with special features relating to D and the absence of effective protective measures) lead me to conclude that the mother has made out her case on this issue to the necessary high standard.

[67] Exercising the discretion that consequently arises, I decline to direct the return of these children to Italy and I dismiss the father's summons.

Next steps

[68] I will consider any submissions that the parties wish to make on the question of how the children's best interests should now be secured. It would no doubt be easier for their relationship with their father to be re-established in some manner if he is able to acknowledge the effect of his past conduct and demonstrate that he is taking steps to deal with it.

Appendix 1: Chronology

1971: F born in Italy (39). His family lives in Sicily.

1972: M born in England (38). Her parents and sister live near her present home.

1996: M started work as a teacher in Sardinia.

1999: M and F met in Sardinia, where F was posted with the Italian navy. The parents' relationship was conducted in Italian, and this was the family language when they were together. When they were not together, the mother would speak to the children in English.

2000:

6.00: The parents began to cohabit in Rome. The M states that F's behaviour changed and that the first incident of forced sexual intercourse and of violence took place at about this time, following which F apologised.

9.00: They moved to Ostia. M alleges that F raped her for the first time. He is currently on bail in this country relating to that incident, and I make no finding about it.

2001:

4.01: They moved to Campo di Carne.

2002:

6.02: M suffered a miscarriage at about 6 weeks. F insisted upon sexual intercourse and M immediately became pregnant again.

8/9.02: F assaulted M, who was 3 months pregnant and unwilling to have sexual relations. He threw her on the bed face down, jumped on top of her and covered her mouth and nose with his hand. As a result M returned to England to live with her parents. In a telephone call, F agreed that he had a problem and would seek help.

10.02: F came to England and persuaded M to resume the relationship for the sake of the unborn child.

16.11.02: The parents married in England.

c11.02: F hit M in the stomach when she was 16 weeks pregnant, but immediately apologised. At this time there is a record [E5] of M visiting their GP in distress because of domestic violence, but the record is confusing as it refers to her already having a child by this time.

12.02: F returned to Italy, coming back to England for Christmas/New Year and again in February for D's birth.

2003:

2.03 Birth of D.

3.03: F returned to Italy.

4.03: F visited England.

6.03: M and D visited F's family in Italy for 10 days for D's baptism.

10.03: M rented her own property. F took a 6-month sabbatical in England.

2004:

10.1.04: M telephoned police for the first time, complaining of domestic violence [G9]. Although advised to remain away from the property, F immediately forced his way back in.

04: M obtained work as a primary schoolteacher. F assaulted M by trying to push her into a cupboard when she asked him to change a nappy so that she could leave for work. When she went to work, her superior offered to let her go home, but she said she felt safer at work.

4.04: F returned to Italy, having failed to persuade M to accompany him.

5.04: M moved into her own purchased property.

7.04: F came to England. He again assaulted M, putting his hand over her face, and as a result she vomited on the floor. F returned to Italy.

8.04: M and D visited F in Italy for a one-week holiday.

10.04: F came to England for 3 weeks.

12.04: F visited England for 2/3 weeks.

2005: Easter 05 F visited England for 2 weeks.

6.05: F visited England for 2 weeks.

8.05: M and D visited F in Italy for a one-month holiday.

10.05: F visited England for 2 weeks. M decided that she could no longer continue the relationship and that she would seek a divorce. Within a week she discovered that she was pregnant.

11.05: M considered having a termination because of the state of the relationship (probable meaning of GP letter at [G5]).

12.05: F visited England. M suffered a miscarriage at 13 weeks, but soon became pregnant again.

2006:

Easter 06: F visited England for 2 weeks.

4.06: M visited her GP, in doubt about whether to proceed with pregnancy because of the 'rocky relationship', and wanting to stay in England.

Summer 06: M and D spend 5 weeks in Italy with F. F wanted them to remain in Italy, but M and D returned to England.

10.06: F visited England for c.3 weeks.

10.06: Birth of G. F returned to England for 10 days

5.12.06: M, D and G moved to Ancona to be with F for a trial period. A vanload of household belongings was delivered from England.

2007:

2.07 After 2 months, M and the children returned to England. M visited her GP twice, complaining of depression. She had experienced violent and abusive behaviour and had found child pornography on F's computer, which he then deleted. F admits using adult pornography but denies deliberately accessing child pornography. I find that he had downloaded and saved the films described by M, and that she told a colleague about it at the time.

3.07: M and children returned to F, after he bombarded her with pleas and threats. She remained there for about 5 weeks before returning to England.

5.07: M issued an application for residence orders in her local county court, and interim orders are made.

5/6.07: F visited England on about four occasions for 2 days or so. M visited her GP twice, complaining of depression and F's behaviour. F accompanied M to her solicitors in an effort to persuade her to drop the proceedings.

Summer 07: M and the children spent about a month with F on holiday in Italy.

9.07: M and children returned. F exerted strong pressure on M to drop the proceedings, threatening her and stating that he had contacts and had had her followed. She resisted his threats and obtained a residence order in relation to D and G on 7.9.07.

9.07: Three weeks after the court order, F came to England. On the day of his arrival he orally raped M. On one night during this visit she fled the house for one night with the children. M made a complaint to police.

10.07: F returned to England for a week for G's first birthday. He again assaulted M, causing her injury and bruising to her neck and back. He prevented her going to work. She visited her GP and complained to the police. She also informed the head teacher and a colleague at the school where she worked. [Amid a number of contemporaneous complaints made by M to the police there are isolated sceptical comments by one or two more senior officers – see eg [G40] – which for me carry little weight in comparison to the impressions of the front line officers.]

Xmas 07: F returned to England for 4 days. M asked him to stay in a hotel, but he refused. M became pregnant.

2008:

1.08: F was suspended from work, facing allegations of bribery and corruption.

Summer 08: F pleaded guilty to bribery in connection with the issuing of marine permits. In evidence at this hearing he denied that he was in fact guilty.

8–12.08: F visited England for several months. Relations between the parents briefly improved.

9.08: D started primary school, involvement of educational psychology service began.

9.08: Birth of L.

11.08: D moved to GH special short-stay school.

12.08: F returned to Italy and was reinstated at work.

12.08: F visited England for 3 weeks. The parents agreed to the mother, who was now a single parent with three children, moving to Italy before the beginning of D's next school year.

2009/2010:

1.09: F moved from Ancona to Rome. There were discussions about the choice and furnishing of the apartment, and schooling, which F put into action.

4.09: M and L visited Rome for 3 days to inspect the accommodation and so that M could satisfy herself about D's school. On the second day, F assaulted M by waking her up and violently verbally abusing her when she refused to have sex with him. Following her return to England, M expressed reluctance to go ahead with the planned move during telephone calls with F, but he continued to press her to come.

6.09: D was formally diagnosed by CAMHS as having an autistic spectrum disorder and ADHD.

7.09: F came to England to bring M and the children to Italy, arriving a couple of days before departure. During the visit he accompanied M to the passport office to renew her passport. He took possession of the children's passports.

The parents said goodbye to M's parents and sister. There was a major row on the eve of departure because M had not packed. She had a panic attack, from which she calmed down. She had made none of the expected arrangements for a permanent departure, such as giving notice to employers, school or utility companies. She had not prepared the house for departure. Clothes were left in the washing machine, washing up in the sink and food in the cupboards.

15.7.09: F, M and the children flew from England to Italy. M states that she had given in to F's threats. She was sick at the airport.

7.09: After a short time in Rome, M, F and the children spent a 3-week holiday in Sicily with F's parents. During this period, F assaulted M so that she had bruising that was seen by F's mother, who told her that she should 'be strong'.

The family then returned to the apartment in Rome. D started in a small class in a mainstream school with several additional teaching assistants. G went into the school's nursery. M found herself a good teaching job and F remained at home looking after L.

During the time the family was in Italy there were no return visits to England. This is despite the fact that M's mother was ill with a suspected stroke in August 2009 and that her father was hospitalised in early 2010. Nor did M attend the celebration of her father's 80th birthday in February 2010. She says that F forbade it. He denies this but says that he would not have been happy for her to go because of a shortage of money.

My assessment is that, while it would be too strong to say that M was kept prisoner by F, the period in Italy was characterised by deep unhappiness on the part of M and sporadic violence by F, who maintained an oppressive influence over her. On one occasion in August 2009 he beat her around the head after finding an email to England, causing her to urinate in her pants. This was typical of several other incidents, of which D witnessed at least one. On the night before she left him, F woke M at 5 am and repeatedly raped her vaginally and anally.

23.3.10: M and the children entered the Centro Antiviolenza della Provincia di Roma, which had been supporting her since 22 February. The children and F have not seen each other since that date.

4.4.10: M and the children flew to England.

6.4.10: M made a complaint to the police and visited her GP.

9.4.10: M issued proceedings in her local county court (since stayed) and visited her local domestic violence service.

end 4.10: D began at mainstream primary school, but soon stopped attending because of behavioural difficulties.

c4.10: F faced a court-martial in relation to his criminal conviction and was suspended for one year at half pay.

14.5.10: M interviewed for 3 hours by police.

13.7.10: D interviewed by Cafcass.

22.7.10: Hearing before Coleridge J

9.10: D started again at GH short-stay school

10.10: Educational psychology report on D.

26.10.10: F was interviewed by police by appointment and bailed until 24.3.11 for alleged rape in 2000. His conditions of bail prevent contact with M except through her solicitors.

29.11.10: Hearing of F's Hague Convention summons (4 days).

Appendix 2: Authorities

- [1] *Re W (Abduction: Domestic Violence)* [2004] EWCA Civ 1366, [2005] 1 FLR 727, CA.
- [2] *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam), [2004] 1 FLR 216, Munby J.
- [3] *Re A (Area of Freedom, Security and Justice)* (Case C-523/07) [2009] 2 FLR 1, ECJ
- [4] *Re S (Habitual Residence)* [2009] EWCA Civ 1021, [2010] 1 FLR 1146, CA.
- [5] *Ikimi v Ikimi* [2001] EWCA Civ 873, [2002] Fam 72, [2001] 3 WLR 672, [2001] 2 FLR 1288, CA.
- [6] *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, CA
- [7] *Re W (Abduction: Acquiescence: Children's Objections)*, *Re* [2010] EWHC 332 (Fam), [2010] 2 FLR 1150, Black J; appealed in the next authority:
- [8] *Re W (Abduction: Child's Objections)* [2010] EWCA Civ 520, [2010] 2 FLR 1165, CA.
- [9] *WF v FJ, BF and RF (Abduction: Child's Objections)* [2010] EWHC 2909 (Fam), [2011] 1 FLR 1153, Baker J
- [10] *D (A Child) (Abduction: Custody Rights)*, *Re* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, HL
- [11] *Re A (A Minor) (Abduction)* [1988] 1 FLR 365, CA.
- [12] *Neulinger and Shuruk v Switzerland* (Application No 41615/07) [2011] 1 FLR 122, ECHR.
- [13] Explanatory Report to the Hague Convention, by Prof Eliza Pérez-Vera.
- [14] *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390, CA.
- [15] *TB v JB (Abduction, Grave Risk of Harm)* [2001] 2 FLR 515, CA.
- [16] *S v B (Abduction: Human Rights)* [2005] EWHC 733 (Fam), [2005] 2 FLR 878, Sir Mark Potter P
- [17] *F v M (Abduction: Grave Risk of Harm)* [2008] EWHC 1467 (Fam), [2008] 2 FLR 1263, Ryder J.
- [18] *Re M (Abduction: Psychological Harm)* [1997] 2 FLR 690, CA.
- [19] *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548, CA.
- [20] *Re W (Abduction Procedure)* [1995] 1 FLR 878, Wall J.
- [21] *T v T (Abduction: Consent)* [1999] 2 FLR 912, Charles J.
- [22] *Hirani v Hirani* (1983) 4 FLR 232, CA.
- [23] *P v R (Forced Marriage: Annulment: Procedure)* [2003] 1 FLR 661, Coleridge J.
- [24] *NS v MI* [2006] EWHC 1646 (Fam), [2007] 1 FLR 444, Munby J.
- [25] *Re S (Practice: Muslim Women Giving Evidence)* [2007] 2 FLR 461, Macur J.
- [26] *Re P-J (Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588, [2009] 2 FLR 1051, CA.
- [27] *RS v KS (Abduction: Wrongful Retention)* [2009] EWHC 1494 (Fam), [2009] 2 FLR 1231, Macur J.
- [28] Human Rights Act 1998 ss 2 and 3
- [29] *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, [1982] 2 WLR 803, HL

[30] Practice Guide in respect of the Brussels II Revised regulation, Part VII

[31] *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, [2007] 3 WLR 975, [2008] 1 All ER 1157, sub nom *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251, HL

[32] *Clarke Hall and Morrison on Children* (Looseleaf) (Butterworths), Division 2, Chapter 3

[33] *Re G (Abduction)* [2008] EWHC 2558 (Fam), [2009] 1 FLR 760, Black J.

[34] *M v T (Abduction)* [2008] EWHC 1383 (Fam), [2009] 1 FLR 1309, Pauffley J.

Appendix 3: *Neulinger and Shuruk v Switzerland*

The facts

[1] A Swiss couple moved to Israel, where a child was born in 2003. The father became involved in extreme religious behaviour and created what social services described as an atmosphere of verbal aggression and threats that terrorised the mother in the home. The parents divorced in 2005. Following an allegation of assault by the father on the mother, orders were made against him and an order was also made preventing the mother from removing the child from Israel. However, in June 2005 she abducted the child, then 2, to Switzerland.

[2] It took some time to find the mother and Hague Convention proceedings in Switzerland were not invoked until May 2006. In August 2006 the father's summons came before the court of first instance and was dismissed on the basis of the mother's Art 13(b) defence. In May 2007 the Cantonal Court dismissed the father's appeal, finding that the defence applied whether or not the mother returned with the child. By that stage a child psychiatrist's report had been obtained.

[3] In August 2007 the Swiss Federal Court allowed the father's appeal. It held that the Art 13 exceptions should be applied 'restrictively' and that an abductor cannot take advantage of unlawful conduct. The child was by then 4 years old.

[4] In September 2007 the mother applied to the European Court of Human Rights, which immediately indicated to the Swiss authorities that as an interim measure the child's return should not be enforced while the case was being considered. In January 2009 a Chamber of the court held by a 4-3 majority that there had been no violation of Art 8. The matter was referred to the Grand Chamber, where a hearing took place in October 2009. Its decision was given on 6 July 2010, by which time the child was 7 years old.

The ECHR decision

[5] The entire court found that enforcement of the return of the child to Israel in 2010 would amount to a breach of the Art 8 rights of the mother and of the child: para 151. By contrast, the majority held, with some misgivings, that the 2007 order for return was within the Swiss court's margin of appreciation: para 145, while a minority considered that the 2007 order also amounted to a breach.

[6] In considering Art 13(b) the ECHR stated at para 138:

‘It follows from Article 8 that a child’s return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child’s best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of majority, the presence or absence of his parents and his environment and experiences ...’

This statement accords with the approach taken in this court. It is self-evidently necessary to consider such matters when considering whether a child would suffer a grave risk of harm. Likewise, in relation to other defences, broad assessments of this kind are needed in order to reach conclusions about whether a child is settled, or about the child’s level of maturity. Considerations of the child’s best interests also arise at the ‘discretion’ stage.

[7] At para 139 the ECHR when somewhat further. It stated that:

‘In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully ... To that end the court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin ...’

[8] At paras 150–151 the court observed that the mother’s refusal to return to Israel did not appear totally unjustified and that she would sustain a disproportionate interference with her right to respect for her family life if she were now forced to return with her son.

Comment

[9] Restrictive application of the exceptions? – Mr Turner QC submits that *Neulinger* shows that the Hague Convention should be applied so as to cause minimum interference with Art 8 rights. The exceptions should be read without gloss and with regard to the ultimate intention of the Hague Convention to promote the welfare of children. He states that it is not appropriate for the exceptions to be applied restrictively (as the Swiss court had done). In this he has the support of the joint concurring opinion of Judges Jociene, Sajo and Tsotsoria. It is, however, to be noted that the point was not made by the majority, who would have upheld the original order for return.

[10] In *Re D (A Child) (Abduction: Custody Rights)* (above) at para [56], Baroness Hale of Richmond stated obiter that ‘... the policy of the Convention is, of course, a reason for giving a restrictive application to the art 13 “defences”’.

[11] I believe that it is sufficient to recognise that the exceptions provided by the Hague Convention are by definition exceptional (cf Baroness Hale of Richmond in *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL

55, [2008] 1 AC 1288, [2007] 3 WLR 975, [2008] 1 All ER 1157, sub nom *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251 at para [40]) and they should be approached as such when giving effect to their clear terms. It may add nothing to speak of applying them restrictively. To that extent I am in sympathy with Mr Turner's submission. However, I do not read *Neulinger* as a warrant for falling over in the other direction and approaching the Hague Convention exceptions broadly, liberally (or however else it might be described), or substantially differently from present established practice.

[12] Non-returning abductors – As stated above, the ECHR found at paras 150–151 that, in consequence of the delay caused by its own interim measures, a return would breach the mother's Art 8 rights. A like situation might arise where for good reason an abductor parent who has been subject to serious domestic abuse declines to accompany children. Historically, the court has been reluctant to take account of a position seen as driving a coach and horses through the Convention; nevertheless, it has not elevated that reluctance into an absolute rule: see Sir Mark Potter P in *S v B (Abduction: Human Rights)* [2005] EWHC 733 (Fam), [2005] 2 FLR 878 at [49].

[13] The majority of Hague Convention cases lead to an order for return, sustaining the non-abducting parent's Art 8 rights. There may on the other hand be cases at the margins where there has been substantial domestic abuse and where a focus on the abductor's Art 8 rights will be significant. By expressing matters in terms of the European Convention, *Neulinger* may underscore the existing recognition in our jurisdiction of the position of primary carers who have been subjected to domestic abuse.

[14] A sea change? Neither party to the present proceedings has argued that *Neulinger* represents a 'sea change' or 'seismic shift' in the way that these cases should be approached. In particular it has not been argued that the decision requires the court to conduct in-depth welfare inquiries in Hague Convention cases, as might be suggested on a wide reading of para 139 – see para [7] above.

[15] Although the point does not arise for decision, I would not have accepted that *Neulinger* requires the court to transform its approach to Hague Convention proceedings, whether in terms of principle or procedure. In particular I do not believe that the true effect of the decision is to require the court to carry out 'an in-depth examination of the entire family situation' in each and every case: to do so would defeat the very purpose of the Convention.

[16] If I am wrong, *Neulinger* would conflict with established binding authority in this jurisdiction. This court must take an ECHR decision into account (HRA 1998, s 2(1)) and should follow it to the extent that it represents that court's clear and consistent jurisprudence: *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions*; *R (Holding & Barnes plc) v Secretary of State for the Environment, Transport and the Regions*; *Secretary of State for the Environment, Transport and the Regions v Legal and General Assurance Society Ltd* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 WLR 1389, [2001] UKHRR 728, HL per Lord Slynn of Hadley at [26]. With respect, I do not believe that the *Neulinger* decision falls into that category.

[17] It has also been argued elsewhere (see the submissions recorded in the judgment of Baker J in *WF v FJ, BF and RF (Abduction: Child's Objections)*,

above at para [49]) that the human rights arguments arising from Art 20 of the Hague Convention and *Neulinger* might provide a separate defence to an application for summary return. Although Baker J did not need to resolve this ambitious submission, I agree with his doubts about whether it is likely to prove well founded.

Order accordingly.

Solicitors: *Hornby and Levy* for the plaintiff
Jones Myers for the defendant

PHILIPPA JOHNSON
Law Reporter