X v Y AND Z POLICE FORCE, A, B AND C (BY THEIR CHILDREN'S GUARDIAN) [2012] EWHC 2838 (Fam)

Family Division

Baker J

16 October 2012

Abduction – Hague Convention – Father abducted three children from Australia to UK – Father claimed a return would place them at grave risk of harm due to his previous employment as an undercover police officer – Whether the child's objections had been influenced by the father – Whether an order for summary return should be made

In response to the father's abduction of the three children from Australia to the UK, the mother brought Hague Convention on the Civil Aspects of International Child Abduction 1980 proceedings for their return. The father, supported by his employing police force, claimed a return would place the children at grave risk of harm or otherwise place them in an intolerable situation because he had been employed as an undercover police officer for a number of years and after being relocated to Australia, circumstances had arisen which would render it unsafe for the family to return at least until a thorough risk assessment had taken place. While in the UK the father had been deployed into situations in which he had come into contact with criminals involved in serious organised crime including: the importation and supply of controlled drugs, firearms and explosives; kidnap, extortion and contract killings; large scale cash-in-transit armed robberies and gang warfare. The father's exit strategy from deployment as an undercover officer was meticulously planned and he was seconded to a police force in Australia where the whole family relocated. Following the relocation the parents' relationship deteriorated and the father took the children back to the UK. The mother initiated proceedings for their return. The father asserted that the oldest child objected to a return, that the court should exercise its discretion and not order his return and that to return the other children without their brother would place them in an intolerable situation. The mother accepted that the children should not be separated and that if the oldest child should not be returned the other two children should remain in the UK also. During the hearing the court heard evidence from the employing police force that a clear threat to the safety of the father and his family remained although the level of the threat could not be measured with any certainty.

Held – refusing the mother's application for a return order –

(1) A defence under Art 13(b) was made out. The father was at a particularly high risk as a result of his employment as an undercover officer. That risk was much higher than in the case of others employed in the criminal justice system. The employing police force, in conjunction with the Australian Federal Government, were best placed to undertake a careful appraisal of the risk posed to the family in Australia which was likely to take several months. In those circumstances a summary return order would place the children at grave risk of harm or place them in an intolerable situation (see paras [29]–[35]).

(2) The oldest child was of an age and degree of maturity at which it was appropriate to take account of his views. He had a clear and unequivocal objection to returning to Australia. Despite the fact that the father had behaved in a highly manipulative way in an attempt to influence the mother and the children it could not be argued that the views expressed by the child were not his own (see paras [48]–[51]).

(3) Taking into account the factors identified in *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55 and: the fact that the children had already been in the UK for 6 months and had settled into a pattern of shared care between the parents;

the oldest child had settled well into school; a risk assessment of the situation in Australia would take several months; the tenancy on the property in Australia had been lost; there were powerful welfare considerations against exercising the discretion to order a summary return to Australia (see paras [53], [54]).

Statutory provisions considered

Child Abduction and Custody Act 1985

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

United Nations Convention on the Rights of the Child 1989, Art 12

Cases referred to in judgment

C (Abduction: Grave Risk of Psychological Harm), Re [1999] 1 FLR 1145, CA

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

E (Children) (Abduction: Custody Appeal), Re [2011] UKSC 27, [2012] 1 AC 144, [2011] 2 FLR 758, [2011] 4 All ER 517, SC

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

W (Abduction: Child's Objections), Re [2010] EWCA Civ 520, [2010] 2 FLR 1165, CA

WF v FJ, BJ & RF (Child's Objection) [2010] EWHC 2909 (Fam), [2011] 1 FLR 1153, FD

James Turner QC and *Michael Burdon* for the applicant X
Geraldine More O'Ferrall for the first respondent Y
Fiona Barton QC for the second respondent
David Vavrecka for the children A, B and C

Cur adv vult

BAKER J:

Introduction

[1] This application is brought under the Child Abduction and Custody Act 1985 and the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) by a mother, known during the proceedings as X, who seeks the summary return to Australia of her three children, known in the proceedings as A, B, and C, aged between 7 and 13 years. The first respondent is the children's father, known during these proceedings as Y, who, it is accepted, abducted the children from Australia to England. The other respondents in the proceedings are the children themselves, represented by their guardian Mr McGavin, of the Cafcass High Court team, and, most unusually – in fact in my experience uniquely – Y's employers, Z Police Force. The circumstances in which the police force came to be joined will become clear shortly from my summary of the background to the case.

[2] Y accepts that he wilfully removed the children without X's consent in breach of her rights of custody as defined under the Hague Convention. After some initial uncertainty, he has put forward two defences to their summary return. The first defence, advanced with the full support of the Z Police Force, is that a summary return would place the three children at grave risk of harm,

or otherwise put them in an intolerable situation, because Y has been employed as an undercover police officer for many years and, after being relocated in Australia a few years ago, circumstances have now arisen which render it unsafe for him or his family to return to Australia, at least until extensive further work has been carried by the Z Police Force and their Australian counterparts, including a detailed and thorough risk assessment. Secondly, he asserts that A objects to being returned summarily to Australia, that in light of that objection the court should exercise its discretion not to return him to Australia, and that to return the two younger children without their older brother would place them in an intolerable situation, so that the court should refuse to order their return under Art 13(b) of the Hague Convention. On this latter point, X accepts that the three children should not be split and that, if the court concludes that A should not be summarily returned on the grounds of his objection, all three children should remain in this country pending a final decision as to their residence and welfare.

Background summary

[3] X and Y met when they were in a previous profession and were married in 1990. As set out above, their children were born between 1999 and 2005. Y joined the police and in due course was deployed full time as an undercover officer. He was first deployed in support of an operation mounted by the Z Police Force on a part-time basis from his own force. Another officer, known during these proceedings as 'Officer 1', was appointed to the position of senior investigating officer and controller in the management of undercover operations in the Z Police Force and thus became responsible for the management of Y whilst deployed with that force. Later, as a result of Y's successful work, he was directly recruited by Z Police Force as their full-time employee.

[4] Y's work for Z Police Force has been described in some detail in two statements filed in these proceedings by Officer 1. His evidence is to the effect that over the years Y has been deployed into situations in which he has come into contact with hundreds of criminals involved in serious organised crime, including:

(a) importation and supply of controlled drugs, firearms and explosives throughout the UK;
(b) kidnap, extortion and contract killings;
(c) large scale cash-in-transit armed robberies; and
(d) gang warfare.

Officer 1 states that police intelligence suggests that some 40% of those individuals have access to firearms and 20% have used firearms to threaten, maim or kill. A number of enforcement operations have led to successful prosecutions of those individuals. As a direct result of intelligence, and latterly evidence, provided by Y as an undercover officer employed by Z Police Force, over 100 operations have been supported, leading to the recovery of about 500 kg of controlled drugs, the recovery of about 900 kg of cutting agents, the recovery of over 20 firearms, the prevention of serious harm or death on over 10 occasions and the arrest and charge of over 150 individuals who in turn have been sentenced to a total of some 800 years'

imprisonment. In the course of those prosecutions, it became necessary for Y to give evidence in a number of cases. His evidence was presented and delivered using the pseudonym that Y adopted when working as an undercover officer, with his real identity protected by a series of witness anonymity orders. Officer 1 informed the court that, on each occasion that Y has had to give evidence, a significant armed security operation has been mounted to counter the threat to his safety. On each occasion that armed security operation has been authorised by the senior presiding judge. It was Officer 1's evidence to this court that, as a result of his work, there was and remains a clear threat to the safety of Y and his family, although the level of that threat cannot be measured with any certainty.

[5] Officer 1 stated that Z Police Force were 'very clear from the outset' that Y's deployment as an undercover officer would cease and that, as a result of his long-time deployment using the same pseudonym, his withdrawal from that world would require a well-managed exit strategy. This would involve a plan to reduce the risk of Y coming across members of the criminal fraternity that he had infiltrated whilst acting as an undercover officer. An analysis was carried out to identify those areas in the UK where the safety of Y and his family would be at risk. Several geographical areas were identified that Y would have to avoid in order to minimise the risk of recognition. A map of the UK was prepared with areas marked red, amber and green, corresponding with areas of high, medium and low risk. However, both Y and X indicated in the course of discussions about the risks and exit strategy that they were interested in moving to live in Australia. A possible secondment to a law enforcement agency in Australia was identified and both Y and X seemed keen on the idea of such a move. Strategic support for the plan was secured from senior officers in both countries. The family visited Australia to investigate the option and explore the possibilities of housing and schooling. According to Officer 1, this initial proposal was abandoned when the first Australian law enforcement agency approached by Z Police Force withdrew from the arrangement. However, an alternative secondment was arranged and the family moved to Australia. Prior to doing so, Y and X and Z Police Force signed a memorandum of understanding covering detailed arrangements about the relocation placement.

[6] The first move to Australia proved to be unsuccessful. X and Y each encountered difficulties in settling in that country. Officer 1 became increasingly involved in trying to resolve these difficulties. The following year X returned to the United Kingdom on her own. A month later, Y returned with the children. At that point, it would seem that the relocation plan to Australia had been abandoned but, after further discussion with Officer 1, it became clear that Y and X were willing to return to Australia under a different relocation plan. On this occasion, it was proposed that, instead of secondment to an Australian law enforcement agency, Y would enter full-time education as a law student. Z Police Force identified the need for further support for the family, including psychological support. In addition, a more formal relocation plan was established through government to government dialogue and more detailed work with the Australian law enforcement agency responsible for the area. A series of risk assessments was carried out. Y visited Australia to conduct more detailed investigations about accommodation, schooling and employment prospects for X, who is a trained paediatric nurse. According to

Officer 1, this more intensive strategic planning took some 12 months to complete and was formalised through another signed memorandum of understanding between Z Police Force and Y and X, accompanied by a memorandum of arrangement between Z Police Force and the second Australian law enforcement agency.

[7] Meanwhile, the marriage had run into difficulties. During the family's period in the United Kingdom, X became involved in an intimate relationship with an old friend, who was a senior police officer in another force. The family again left the UK to live in Australia. It became clear, however, that X had been in contact with the other man, and, when Y discovered the affair, relations between the couple deteriorated. Thereafter, X and Y and Officer 1 engaged in lengthy discussions by telephone and email about the family's future in Australia. Officer 1, whose evidence I accept, described how Y and X each regularly change their minds about the future, sometimes stating a wish to remain in Australia and on other occasions indicating a preference to return to this country. The family moved house in Australia on at least two occasions. A was successful in obtaining a place at a respected selective school in the local area in Australia. In the autumn, the family returned to this country for several weeks, and whilst here looked at various possible areas to which they might relocate. In December, after returning to Australia, the family moved to another address in the same area.

[8] In January, Y returned to this country for several weeks. Whilst here, he again looked at options for the family's possible relocation to this country. After his return to Australia, relations between the parties continued to deteriorate. X alleged that Y had committed acts of domestic violence. Y alleged that X had revealed some details concerning his past to various people in Australia, including the local police who attended the property on one occasion. Both parents continued to engage in lengthy conversations by telephone and email with Officer 1 about the future. According to Officer 1, each said different things on different occasions about where the family should live. The evidence suggests that the children were suffering as a result of the uncertainty and the difficult relationship between the parties. X asserts that Y caused the children emotional harm by damaging comments made to them in their presence. On one occasion, A became very distressed at school after finding in a school book a note, seemingly written by A's father, stating that he was leaving the family. In his first statement in these proceedings, Y asserted that, during this period, 'the mother refused to allow me any contact with the children at all'. Other evidence clearly demonstrates, however, that this is untrue. It is plain that the father was having contact with the children, although perhaps not at the level or frequency he would have wished. At the end of February 2012, X flew from Australia to the UK for several days without warning the children. According to X, Y informed the children that she had abandoned them.

[9] It is the mother's case that, whilst at times she had been unhappy living in Australia, by this stage her unhappiness arose out of the problems in her marriage rather than life in Australia as such. However, there is evidence that she continued to discuss with the father and Officer 1 the prospect of returning to this country. Towards the end of March, X informed Officer 1 that she had decided to return to the UK:

> 'I am backed into a corner so I have to leave to make the children not have to go through these constant draining and upsetting performances. You have all won. I have told Y then that I will return. I will leave it to him to find out where I have to live with nothing – I am sure he will be able to support the kids, as I am not able to, and I am sure he will contact a lawyer there to have me rendered unfit as a parent – as he has promised. I will give notice on the house today. The lease ends beginning of June anyway – that is only two months away.'

[10] Meanwhile, Y was clearly pursuing the possibility of a return to the UK. Emails passing between the parties and between Y and Officer 1 demonstrate that he was investigating the legal position should he remove the children from Australia.

[11] Y abducted the children from Australia to the UK. Y sent an email to Officer 1: 'sorry to say I have made a choice. I have come away with the children …'. It is the evidence of Officer 1 that neither he nor anyone else from Z Police Force was aware of the removal of the children, nor of any plan to remove them from Australia until after the event.

[12] X immediately started proceedings in Australia and obtained a residence and recovery order from the court in that country. It is alleged on behalf of Y that, during this period immediately after the abduction, the mother took steps which compromised the family's safety. Those steps include conversations with a number of friends and others in Australia in which the father's employment record was allegedly discussed; contacting the Daily Mail newspaper; contacting the Metropolitan Police and other departments in the Z Police Force and in the course of such conversations discussing Y's true identity; and placing various posts on the internet in which, it is said, some information was disclosed which could compromise the family's safety. X denies that any actions taken by her materially jeopardised the family's safety. In addition to the court proceedings in Australia, X promptly started proceedings in this country under the Hague Convention. On the same day, Holman J made a location order and gave preliminary directions, including a direction for Y to file a statement of defence. That document was filed, in its initial form. Further directions were given, including permission to the Z Police Force to file a statement signed by Officer 1. In addition, the judge directed that an officer at the Cafcass High Court team should interview the two elder children and prepare a report as to their wishes and feelings and any objections they may have to returning to Australia. Further directions were given as to the filing of statements. When the father's statement was filed, it became apparent that the statement of defence drafted on his behalf did not fully set out the matters relied on. Consequently, when the matter came before me I granted permission to the father to amend his defence to incorporate those matters. The case was listed for a final hearing but in the event was adjourned to a later date. At the second hearing before me, I joined Z Police Force and the children as parties to the proceedings. I further directed that Z Police Force should serve a bundle of documents relevant to the proceedings. As a result of that direction, a further statement was filed by Officer 1 exhibiting a large bundle of documents. In addition, five bundles of further documents were filed by Z Police Force in a redacted form. Mr McGavin of the Cafcass High Court team prepared an

initial report dated as to the children's wishes and feelings. A supplemental report was also prepared by Mr McGavin. I shall consider the contents of his reports below.

[13] By that stage, indeed from shortly after the abduction, the mother had returned to this country and arrangements had been put in place for the interim care of the children to be shared between the parties. The mother initially lived in a location some distance away from the father's accommodation, but subsequently moved to another rented property in the same town as the father, which is in an area designated 'green' (ie low risk) by the Z Police Force.

The law

[14] Article 13 of the Hague Convention, insofar as relevant to these proceedings, reads as follows:

> '… the judicial or administrative authority of the requested State is not bound to order to return of the child if the person, institution or other body which opposes its return establishes that—
>
> (a) …
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable position.
>
> The judicial or administrative authority may also refuse to order the return of the children if it finds that the child objects to being returned and has attained an age and degree of maturity of which it is appropriate to take account of its views.'

[15] The bar for establishing a defence under Art 13(b) has been set high. As Ward LJ observed in *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145, there is:

> '… an established line of authority that the court should require clear and compelling evidence of a grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'

[16] The word 'intolerable' means 'a situation in which this particular child in these particular circumstances should not be expected to tolerate' (per Baroness Hale of Richmond in *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961.

[17] More recently, Art 13(b) has received further consideration by the Supreme Court in *Re E (Children) (Abduction*: *Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, [2011] 2 FLR 758. In delivering the judgment of the court, Baroness Hale of Richmond and Lord Wilson of Culworth stated, at paras [35]–[36]:

> '[35] … Art 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution, or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that, if the risk is serious enough to fall within Art 13(b), the court is not only concerned with the child's immediate future, because the need for effective protection may persist.
> [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.'

In this jurisdiction, there is a well-established practice by which undertakings can be provided by a party seeking a return of the child to alleviate the problems that may arise on the return and thus reduce the possible scope for an Art 13(b) objection.

[18] If the court concludes that there is indeed a grave risk that the return of the child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable position, the court must refuse to order that return. In cases where the exception under Art 13(b) is established, there is no scope for any discretion to return the child. As pointed out by the House of Lords in *Re D (A Child) (Abduction: Custody Rights)* (above), at para [55]:

> '… it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose it to psychological or physical harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate.'

[19] The child's objections defence under Art 13 has also been considered many times by the courts in this jurisdiction and the principles are now clear. I am reminded by counsel of my earlier decision in *WF v FJ, BJ & RF (Child's Objection)* [2010] EWHC 2909 (Fam), [2011] 1 FLR 1153 in which I summarised the principles as follows (at para [27]):

'… it is well accepted that consideration of the child's objections exception to the obligation to return under Art 12 involves considering three broad areas.

(a) Does the particular child object to being returned? If so
(b) Has the particular child attained an age and degree of maturity at which it is appropriate to take account of his views? If so
(c) How should the court exercise its discretion? (See *Re M (Abduction*: *Child's Objections)* [2007] EWCA CIV 260 [2007] 2 FLR 72 at para 60).

… The child's objections exception is entirely separate from Art 13(b). The question of whether a child objects to being returned and, if so, whether he or she has attained an age and degree of maturity at which it is appropriate to take account of his or her views are questions of fact which are peculiarly in the province of the trial judge. The return to which the child objects is that which would otherwise be ordered under Art 12 of the Convention, that it is to say an immediate return to the country from which the child was removed or retained. There is no particular age at which a child is to be considered as having attained sufficient maturity for his or her views to be taken into account. It is permissible for the court to focus specifically as to whether the child has reached a stage of development at which, when asked the question, "Do you object to a return to your home country?" he or she can be relied upon to give a reliable answer, which does not depend on instinct alone, but is influenced rather by the discernment a mature child brings to the question's implications for his or her best interests in the long term and the short term.'

[20] I also bear in mind the observation of Wilson LJ (as he then was) in *Re W (Abduction: Child's Objections)* [2010] EWCA Civ 520, [2010] 2 FLR 1165 at para [22]:

'… the phrase "to take account" in Art 13 … means no more than what it says so, albeit bounded of course by considerations of age and degree of maturity it represents a fairly low threshold requirement. In particular it does not follow that the court should "take account" of a child's objections only if they are so solidly based that they are likely to be determinative of the discretionary exercise which is to follow …'

[21] If the court finds that the child has objections to being returned, and that he has reached an age and degree of maturity at which it is appropriate to take account of his views, the court must then consider whether to exercise its discretion to refuse the application for summary return. The leading authority on the exercise of this discretion is *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. The following passages from the speech of Baroness Hale of Richmond are particularly relevant:

> '[43] My Lords, in cases where the discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. …
> [46] In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and, second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of Art 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that it is far from saying that the child's objections should only prevail in the most exceptional cases.'

Article 13(b) exception in this case

[22] At the outset of the hearing before me, Mr Turner QC on behalf of the mother argued as a preliminary point that this court should reject the defence put forward under Art 13(b) ab initio. He submitted that, given the approach endorsed by the Supreme Court in *Re E (Children) (Abduction*: *Custody Appeal)* (above) and on the basis that the mother would give appropriate undertakings to cooperate with the Australian authorities and courts, this court could and should safely leave it to those authorities and courts to assess and address the extent of any risk to the children in Australia. He submitted that, given the strength and maturity of the Australian legal system, and the fact that the risks involved arose within Australia, it was for the Australian authorities and courts alone to address them. In short, he submitted that no further investigation was needed by this court because the risk of such harm as may exist can be safely and effectively managed and protected against by the Australian authorities and courts.

[23] I rejected that preliminary submission, and now summarise my reasons for doing so, having declined Mr Turner's invitation to do so at an earlier stage. It seemed to me manifestly obvious that this court has to carry out some sort of assessment of the type and extent of the risk which is said to exist, before determining whether adequate protective measures can be put in place. The facts of this case are a long way from those which commonly arise when the risk is said to derive from a history of domestic abuse between the parties. Such risks as arise in cases of domestic abuse can be guarded against by a series of undertakings given by the alleged abuser to the court in both countries, which can be enforced in the courts in the country to which the

children are returned. In this case, however, the alleged risk emanates not from one or other party but from an external force. Furthermore, such evidence as was put before me indicates that the Australian authorities, namely the local police force, did not consider that the risks in this case could be managed without a prolonged process of reassessment and analysis. In my judgment, therefore, it was unavoidably necessary on the facts of this case for this court to carry out some sort of investigation within this summary process to establish the truth of the allegation that there was a risk of harm should the children be returned to Australia. Adopting the last sentence of para [36] of the judgment in *Re E (Children) (Abduction*: *Custody Appeal)* quoted above, I concluded that, in the absence of any assurance that there would be protective measures put in place immediately upon the summary return of the children, I had no option but to do the best I could to resolve the disputed issues as to the existence and extent of the risk alleged by Y and the Z Police Force.

[24] That risk, described by Officer 1 as set out above, can be summarised as follows. As a consequence of Y's successful career as an undercover police officer, in which he infiltrated and betrayed a number of criminal organisations and gangs, and assisted in securing the conviction of a significant number of dangerous criminals, his life, and the lives of other members of his family, would be at risk were his identity, background and location to become known within the community in which he lives. That risk would be greater were he to live in areas with links with members of those criminal organisations or gangs or their associates. In order to minimise those risks, no move of the family can safely take place without a full assessment and very careful planning. As a result of the conduct of both Y and X, the previous placement of the family in Australia has been compromised, to an extent currently unknown. X proposes to return to the part of Australia where some of this compromising behaviour is said to have occurred and is unwilling to consider moving to a different part of that country. Before any decision can be taken as to whether the family can safely return to that location, the Australian Federal Government must decide in principle whether it is willing to endorse and support the family's return to Australia, and Z Police Force and its Australian counterpart must carry out a further comprehensive assessment of the risks, and identify ways in which those risks can be avoided or minimized to a level which would permit the family to return safely, and a new relocation plan must be incorporated into a new memorandum of agreement between the two police forces and X and Y. Miss More O'Ferrall, therefore, submits on behalf of Y that for this court to order the children's summary return at the conclusion of this hearing would expose them to a grave risk of harm or would otherwise place them in an intolerable position. This submission has the strong support of the Z Police Force.

[25] In reply, Mr Turner makes a number of submissions which can be summarised as follows.

[26] First, he submits that the risks have been grossly exaggerated by the Z Police Force in general and Officer 1 in particular and by Y himself. He submits that the evidence of Officer 1, in particular in his written statement, lacked objectivity. Mr Turner submitted that there are many people working in the criminal justice system, including other police officers, lawyers and judges, who are similarly at risk but do not require the extraordinary degree of protection afforded to Y hitherto. He submits that there is no real evidence of

risk and that, in effect, Z Police Force's case was based on supposition without substantial support. He reminded me in his closing submissions of a comment by Y during his evidence to the effect that people in Australia were not really interested in his past life and work. Furthermore, Mr Turner submits that X has lived all her life in the knowledge of Y's work and its impact upon family life and it is implausible that she, who is manifestly a responsible parent, would expose her children to any genuine risk.

[27] Secondly, Mr Turner submits that the evidence suggests that the risk to the family is no greater – and in all probability far less – in Australia than it is in the UK. Australia is a large country, 10,000 miles away. The UK is a much smaller country in which common sense suggests there is a greater risk of Y running into a member or associate of the criminal organisations and gangs he infiltrated, even if the family lives in an area designated 'green' in the Z Police Force classification. There is no guarantee that Y will not bump into criminal associates, either when they visit the green area or when he visits a red or amber area, as he inevitably will. Mr Turner therefore submits that, insofar as there is a risk of harm or intolerable situation in Australia, it is no greater, and in all probability much less, than exists here.

[28] Thirdly, at the conclusion of the court's limited examination of the evidence of this, Mr Turner reiterated and developed the argument he made by way of preliminary submission, that the assessment of risk is a matter for the Australian authorities and courts. The Australian court will be equally equipped – indeed, submits Mr Turner, better equipped – to assess the risk that exists in that country, and to impose protective measures to meet such risks as it finds. The fact that a new memorandum of agreement is not in place between the two police forces does not prevent those forces cooperating immediately upon the family's return to Australia during the process of risk assessment. Mr Turner therefore submits that this court is not properly concerned with any risk, save for the short-term period before the Australian court is seised. If the Australian court felt that there was a need for a full risk assessment, and that in the interim the children should be in the UK, it would be open to the Australian court to return them here while the assessment was carried out. Importantly, however, Mr Turner accepted that it would be 'a few months' before the Australian court would be in a position to make and form decisions of this sort on the question of interim welfare.

[29] In all the circumstances, therefore, Mr Turner submits that the Art 13(b) defence is not established. I, however, reject his submissions, and conclude that the defence is established, for the following reasons.

[30] First, I accept the evidence of Officer 1. I reject the submission that his evidence lacked objectivity. On the contrary, I found him to be a careful and impressive witness who clearly takes his responsibilities towards undercover officers and their families very seriously. He has devoted much of his time over the past few years to supporting Y and his family, and has forged a good relationship not only with Y but also with X, which he has managed to sustain until very recently. I reject any suggestion that he has exaggerated his perception of the risk.

[31] Secondly, I accept Officer 1's evidence that Y is at a particularly high risk as a result of his work as an undercover officer, given the extent of that work and his successful involvement in a number of serious operations against organised crime. I find that the level of risk to Y is much higher than the risks

to others employed in the criminal justice system in this country. The care and resources devoted by Z Police Force to protecting Y and his family demonstrate that this is so. I firmly reject Mr Turner's somewhat dismissive characterisation of the level of risk.

[32] Thirdly, whilst not questioning the mother's devotion to her children, I find that she is not as well equipped as Officer 1 or the Z Police Force to assess the level of risk. In my judgment, it is the specialists within the police force who are best equipped to make that assessment.

[33] Fourthly, I accept Officer 1's evidence as to the process that must be followed before the family can safely return to Australia. I accept that the agreement of the Federal Government is needed and that, in view of all that has happened with this family, it is by no means clear that such agreement will be forthcoming. I also accept that a careful reappraisal of the risk is necessary by the Z Police Force and its Australian counterpart leading to a further memorandum of agreement. I do not accept Mr Turner's suggestion that the Australian court would be in a position to make an informed decision about interim welfare in a matter of months. In my judgment it is likely to take considerably longer than that. In any event, as Mr Turner conceded, there will be a short-term period of several months when the Australian court and authorities will not be able to put in place safety protection, even on an interim basis. In those circumstances, I find that to return the children to Australia, and in particular to the same part of that country as before, would put them in an intolerable situation where the risk of harm could not be safely or effectively understood or managed.

[34] I accept Mr Turner's argument that risks exist in this country. I note that Y's unwise and dangerous removal of the children from Australia exposed the children to risks which Officer 1 and the Z Police force have had to manage as best they can. The fact that both X and Y are now living in a 'green' area may reduce the risk of harm but does nothing to justify Y's action in abducting the children which was, in my judgment, wholly irresponsible. However, the fact that Y, by abducting the children, exposed them to a grave risk of harm does not justify this court ordering the return of the children if such a return would equally expose them to such a risk. If the court concludes, as I do, that the summary return would expose them to a grave risk of harm or place them in an intolerable situation, then the court's duty is to refuse the application for summary return.

[35] I therefore hold that the father has established a defence under Art 13(b).

Child's objections in this case

[36] In order to assist with the assessment of the children's wishes and feelings concerning the question of a summary return to Australia, the court had the benefit of two reports from Mr McGavin. Mr McGavin is a member of the Cafcass High Court Team and, as he related in evidence, has a 'vast amount of involvement in interviewing children', including work in child protection as well as 7 years' experience in child abduction cases in which he has on many occasions interviewed children in the context of a defence of child objections under Art 13. For the purposes of his first report, Mr McGavin interviewed A and B. For the purposes of his second report, he

observed all three children in the company of each parent, re-interviewed A, and conducted a further interview of B and C together.

[37] The first interviews of the children were conducted after they had been in this country for about 8 weeks. Reporting on his first interview with A, Mr McGavin described A as a 'sad, lonely and troubled' child who at times appeared close to tears. Mr McGavin reported that A was able to talk about worries in a way that A may not have been able to do elsewhere, and therefore, in Mr McGavin's opinion, appeared to derive some therapeutic benefit from the interview, to such an extent that A appeared to find it difficult to leave at the end. Mr McGavin described A as a particularly articulate and intelligent child, with a wide vocabulary and use of sentence structures unusually advanced for a child of A's age. Mr McGavin asked A about life in this country. A replied: 'I like it better. I didn't have many friends in Australia but I've got friends here. Not many people liked me. I was getting told off every day'. A went on to explain that the reason A had no friends in Australia was because of A's English accent. A said: 'over there they were really racist unless you were born in Australia'. A added that, at school in Australia, A had found the academic work easy. At the time of the first interview, A had been attending school in England for about 4 weeks. A had found a new hobby, 'Warhammer', through which A had acquired two friends who lived down the road.

[38] Mr McGavin conducted a scale exercise to gauge A's views about the return to Australia, where zero indicated that A would not mind about returning and ten that A would hate to go back. A put his objections at a level of 9.9, adding that 0.1 would be because of the dog who is still in Australia. Mr McGavin concluded in his first report that A was an intelligent, thoughtful and well-read child with maturity at least in line with A's age. A's views appeared rooted in A's own experience. There was balance and realism in what A had to say and A 'seemed to speak from the heart'. Mr McGavin expressed the opinion that A's views were an objection 'in Convention terms' to being returned to Australia.

[39] For the purposes of his second report, Mr McGavin not only interviewed the children but also observed them separately with X and Y. His overall impression was that each child had a good relationship with each parent. So far as the mother was concerned, Mr McGavin observed a positive relationship between her and the children. Mr McGavin described her as loving and attentive, adding that: 'she was, I felt, particularly in tune with them emotionally. She was sensitive and very nice with each of them'. Later in his report, Mr McGavin added: 'the mother appeared during my visit particularly well connected with the children emotionally and 'mind-minded' (defined as 'a parent's ability or willingness to represent their children's likely thoughts and feelings'). Mr McGavin also observed a close relationship between the father and the children, although he added that the father seemed to run a 'tighter ship' than the mother. In the course of his contact observations, Mr McGavin was also able to observe a close relationship between the children, in particular between A and B.

[40] In his second interview with Mr McGavin, A described how the mother had 'got on to' A regarding the negative comments that A had made to Mr McGavin as set out in the first report. Mr McGavin observed that it may well be that A's ability to openly criticise X could be interpreted as a strength

in their relationship. When Mr McGavin asked A about how things were going at school, A replied: 'I don't really have a lot of friends'. A added, however, that work at school is going well. A's views about a return to Australia had not changed. A said: 'I want to stay in England. I have more friends here. I prefer school, it's more challenging'.

[41] Mr McGavin also interviewed the younger children. For the purposes of his first report he interviewed B alone, and, for his second report, both B and C together. In his first report, he described B as 'a particularly young' child, although after his second interview he no longer felt that that was necessarily the case. In the first interview, B was unable to give a view about going back to Australia. B agreed with Mr McGavin that this was really something for the adults to sort out. When he interviewed the two younger children together for the purposes of his second report, it was C who did most of the talking. Mr McGavin describes how C seemed to know exactly why he was there, namely that it was to do with mum wanting them to go back to Australia and dad wanting them to stay here. C told Mr McGavin that C would prefer to be in Australia 'because we have more friends there and we have our dog there'. On this occasion, B told him that B would prefer to be in this country because 'it's not too hot and not too cold'. B's basic position, however, remained the same, namely that it was for the adults to sort this out. C put this point more forcefully, saying: 'they really need to sort it out, they should forgive each other, they shouldn't argue in front of us. They should change their attitude, give themselves a hug. That would be very nice. They should stop arguing'. Well said, C.

[42] In his oral evidence, Mr McGavin confirmed his view that A's views could be considered an objection 'in Convention terms'. He described A's objection to a summary return as 'very, very strong'. It is a central feature of the mother's case that A's views reflect the influence of his father. Mr McGavin told the court that he always is on the lookout for influence of this sort. There are some cases where the influence of the parent is evident from the moment the child walks in the door. This was not such a case. Mr McGavin regarded A as a child who had really opened up to him in a way which children who are really influenced by an adult usually don't do. Mr McGavin was asked by Miss More O'Ferrall whether A's views may have been influenced by Y's assertions that he would not return to Australia. It was Mr McGavin's view that this had not played a significant part in A's views. He is not sure that A believes that Y will not go back.

[43] Asked about the discretion under Art 13, Mr McGavin stated his view that, if satisfied that A's views amount to objections in 'Convention terms' the court should exercise its discretion by not ordering a return to Australia. The children have been here for 6 months. If the court accepted the evidence of Officer 1 and Z Police Force, it would be months before any plan to return the children would be put into effect. The children are already becoming settled and would clearly become more settled after the passage of a further period of months. Mr McGavin also observed that there was now a lot less for the children to go back to in Australia. The tenancy of their previous home has been surrendered. Their belongings are in storage.

[44] In answer to Mr Turner, Mr McGavin agreed that the mother has done her best to make life for the children as settled as possible. He agreed that it was to her credit that she was not saying to the children that she would go

back to Australia come what may and thereby putting them in an emotional trap. He felt, however, that he had got to know A well and understood A's wishes and views as well as any child in the circumstances. The key to Mr McGavin's analysis was that A demonstrated a degree of balance in A's views.

[45] In her evidence, the mother states that she firmly believes that A's views as expressed to the Cafcass officer were heavily influenced by Y and by the views that Y has expressed to the children about her and by emotional pressure exerted by Y. One particular example of emotional pressure upon which X relies is the note which Y allegedly left in A's schoolbook in Australia, stating that he was leaving the home, which, according to the Australian school, caused A particular anguish. X also suggests that A's expressed wishes may result from a hope that A harbours that the parents may reconcile and a belief that this would be more likely to happen in England than in Australia. It is the mother's case that, although A is academically very bright, A is quite immature in emotional terms and very susceptible to pressure. Furthermore, X believes that Y is doing all he can to make life in England seem attractive to the children. X's evidence was that, apart from the inevitable upsets caused by the breakdown of the marriage, all three children have in fact been extremely happy in Australia. She challenges the impression given by A to the Cafcass officer that A had no friends in Australia. X also draws attention to the very positive comments from the two schools in Australia attended by A. Reports from the schools have been produced for these proceedings. The first school describes A as 'a happy student who is enthusiastic in many areas of school life.' The second school observes: 'during the short time with us' A 'adjusted to the High School environment …' A 'was very proud of A's achievement in gaining entry' and, even though A did not know any of the other children, A 'was making new friends and becoming an integral part of the year group and the school'.

[46] X reiterated and developed these points in her oral evidence. In particular, she said on a number of occasions that she did not believe that A's comments came from A but, rather, they were said under the influence of Y. 'Although A says A wants to stay here, the things A says don't come out of A'. One example she gave of such a comment was A's observation to the Cafcass officer that Australians were racist, a comment which, according to X, reflected views expressed by Y. The mother observed that she thought that the reason A feels able to criticise her is because A feels secure in her love. In contrast, she believes that A feels unable to criticise the father – 'when Y says jump, A says how high'. She insisted in answers to Mr Vavrecka on behalf of the children that: 'I know my child well. There's stuff in this report [from Mr McGavin] I've never heard before'.

[47] In his closing submissions on behalf of the mother, Mr Turner QC stressed that it was the court's assessment, rather than that carried out by the Cafcass officer, that mattered most. He reminded the court that, unlike Mr McGavin, the mother has had a lifetime of understanding and assessing her child. He submitted that, given several instances where A's account departed from reality, the court should treat expressions of A's wishes as to future residence with caution.

[48] I have carefully considered the extent of the father's influence over A which, the mother says, is reflected in A's expressed wishes. I find that the

father has indeed behaved in a highly manipulative way in an attempt to influence both the mother and the children. On the basis of the evidence put before me, I find that he did indeed leave a note in A's notebook, which led A to believe that he would be leaving the family, and that this clearly caused A considerable anguish. The father is unquestionably a manipulative man. It is inevitable that his behaviour has had a degree of influence on A. All children are influenced by their parents. I am satisfied that A's views have to some extent been influenced by things said by both parents at various times. This factor has undoubtedly had some impact on A's thinking.

[49] Ultimately, however, this factor does not lead me to conclude that the views expressed by A are not genuinely A's own. I accept Mr McGavin's assessment that A is a mature and articulate child. The mother says that, whilst A may be intellectually able, and ahead of his peers at school, A is not emotionally mature. But one would not expect full emotional maturity in a young person of A's age. Mr McGavin has great experience in meeting, interviewing and assessing children on precisely the issues that arise in this case. I accept his analysis of A's maturity and level of understanding. I accept his view that A's expression of wishes is genuinely A's own. The mother in her evidence and Mr Turner in his submissions on her behalf adduce examples of statements made by A which did not reflect reality. One example is said to be A's inconsistent and implausible descriptions of life at school in Australia. It is therefore submitted that A's expressions of wishes may be equally unreliable. I accept that there is some inconsistency between A's statements to Mr McGavin about school life in Australia and other evidence about how A was getting on at that school. I do not, however, consider that this calls into question the genuineness of A's express wishes about the prospect of a summary return.

[50] I accept Mr McGavin's assessment of A's wishes and feelings. I am satisfied that the views he expressed to the Cafcass officer represent A's clear genuinely held opinion about being returned to Australia. In making that assessment, I attach particular weight to Mr McGavin's observation that A showed a degree of balance about the issue which distinguished A from younger, less mature children and demonstrated that A had thought and reflected about the matter carefully. Miss More O'Ferrall on behalf of the father made the perceptive observation that it is likely that an intelligent 12 year old such as A would be influenced by the way in which, since the family arrived in England, their life has become more settled, contact has been agreed between the parties, and they have, to some extent at least, been working together in the interests of the children.

[51] I am entirely satisfied that A has a clear and unequivocal objection to returning to Australia and that A is of an age and a degree of maturity at which it is appropriate to take account of A's views.

[52] In contrast, such views as have been expressed by B are manifestly not sufficient to amount to a clear and unequivocal objection of the sort that should be taken into account. No party has sought to argue otherwise.

[53] I therefore have a discretion whether or not to return A to Australia. In considering how to exercise this discretion, I consider the various factors identified by Baroness Hale of Richmond in *Re M (Children) (Abduction: Rights of Custody)* (above), namely:

(1) the nature and strength of the child's objections;
(2) the extent to which they are authentically his or her own;
(3) whether on the other hand they are a product of the influence of the abducting parents;
(4) the extent to which they coincide or are at odds with other relevant welfare considerations; and
(5) the general considerations under the Hague Convention, including the important policy considerations underpinning it.

[54] I have already indicated my view that A has a strong objection to returning to Australia, that I consider those objections to be authentically A's own and that they are not, in my judgment, significantly influenced by the father's comments and behaviour. As Mr McGavin has observed, there are, in addition, a number of relevant welfare considerations that would justify exercising my discretion by refusing to return A to Australia. The children have been here for 6 months, and have to an extent settled down in a pattern of shared care established by their parents. A has started at school in England last term and has settled there. On behalf of the mother, Mr Turner conceded that it would be several months before any effective hearing about 'risk' in the courts in Australia following a return. For reasons set out above, I have accepted the evidence of the Z Police Force that it is likely to take a considerably longer period, possibly as much as a further year, before a safe return could be effected, if indeed it could be effected at all. Furthermore, the children's home in Australia has been lost as the tenancy has now been surrendered. There are, therefore, powerful welfare considerations against exercising my discretion by ordering a summary return of A to Australia.

[55] On the other hand, there is the very important matter of the policy considerations underpinning the Hague Convention, namely to protect children from the harmful effects of a wrongful removal by ensuring their proper return to the State of their habitual residence. Mr Turner is right to describe this case as a particularly flagrant example of a wrongful removal. The father abducted the children in a planned and calculating way, without, it must be said, having any proper regard to their safety, given the dangers that exist as a result of his past employment. Mr Turner is entitled to say that the policy considerations should, therefore, carry even greater weight in this case than they normally do in other cases of child abduction.

[56] This is a difficult decision, but on balance, I have concluded that, in view of A's objections, I should exercise my discretion by refusing to order A's return to Australia. Notwithstanding the importance of the policy considerations underpinning the Hague Convention, and the blatant and disgraceful way in which the father went about arranging the abduction of the children, I have concluded that the clarity of A's objections, representing the genuine and independent views of a relatively mature 13 year old, supported by the welfare considerations identified above, prevail in the circumstances of this case.

[57] All parties are agreed that, if I conclude, as I do, that A should not be returned to Australia then the younger children should also remain in this country. It is to the credit of both parents, and particularly the mother, that they do not seek to argue that this sibling group should be separated.

Conclusion

[58] I therefore dismiss the mother's application for the summary return of the children to Australia. But that is not necessarily the end of the matter. If the mother pursues a relocation application, it is quite possible that a court will decide, after a thorough welfare investigation, to allow her to take the children back to Australia. The effect of my decision on this application is that any litigation about the future of these children will be conducted before the courts of this country. I hope, however, that X and Y will follow the wise advice of their youngest child and try to resolve their differences by agreement.

Order accordingly.

Solicitors: *A local authority solicitor*
Cafcass Legal for the children, A, B and C

SAMANTHA BANGHAM
Law Reporter