

Neutral Citation Number: [2015] EWCA Civ 720

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION

MRS JUSTICE HOGG

FD14P01038

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2015

Before :

LADY JUSTICE ARDEN

LADY JUSTICE BLACK

and

LORD JUSTICE LEWISON

Between :

	RE K (1980 HAGUE CONVENTION)(LITHUANIA)	

Mr David Williams QC & Miss Anne-Marie Lucey (instructed by **Baxter Harries Ltd**) for
the **Appellant**

Mr Christopher Hames QC & Mr Hassan Khan (instructed by **Nelsons Solicitors Ltd**) for
the **Respondent**

Hearing dates: 18th June

JudgmentBLACK LJ :

1. This is an appeal by a mother against the order made by Hogg J on 12 March 2015 that E, her 11 year old daughter, be returned to Lithuania forthwith pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the 1980 Hague Convention”). The respondent to the appeal is E’s father.
2. Before Hogg J, the mother accepted that she had wrongfully retained E in this country. However, she asserted that the case came within the exceptions contained in Article 13 of the 1980 Convention on the basis that E objected to returning to Lithuania and had attained an age and degree of maturity at which it was appropriate to take her views into account and on the basis that there was a grave risk that her return would expose her to physical or psychological harm or otherwise place her in an intolerable situation (Article 13b). The father accepted that E did object and had the requisite age and maturity for her views to be taken into account but he contested the mother’s case that in the

circumstances his application for E's return to Lithuania should be dismissed. The mother's Article 13b case was disputed in its entirety.

3. The judge heard oral evidence only from the CAFCASS officer, Mr Power, who had interviewed E in January 2015, pursuant to a direction that CAFCASS provide a report "on the issues of (i) The views, wishes and feelings of the child in respect of returning to Lithuania and whether they amount to an objection (ii) Her maturity and level of understanding". There was no suggestion that either of the parties or any other witness should give oral evidence.
4. Apart from their statements for the proceedings, each party produced miscellaneous documents which cast some light on the history. There was a body of material from the police relating to an incident of central importance on 24 August 2014, and there was also a report ("the assessment report") from a social worker from the local authority for the area where the mother now lives, who had assessed the situation of E and D in September 2014.
5. Up to the very end of the hearing before Hogg J, the mother's position was that she would not return with E if E had to return to Lithuania. However, at the end of submissions, the judge was told that she intended to go back with E if a return was required.

The essence of the appeal

6. No points of general principle arose in this appeal. The issue was essentially whether, in the light of the authorities and of the facts of this particular case, Hogg J's treatment of E's objection was flawed and whether she took the correct approach under Article 13b. It was common ground that the relevant authorities in relation to child's objections were *Re M (Children)(Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288 and *Re M (Republic of Ireland)(Child's objections)* [2015] EWCA Civ 26. As far as Article 13b was concerned, the parties were content to have recourse to the usual authorities, including *Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *Re S (A Child)(Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257.

The background facts up to the commencement of the proceedings

7. The family is Lithuanian. Until October 2012, they all lived in Lithuania.
8. The mother has three children. In addition to E, she has a son (S) who is in his twenties and lives in Lithuania, and a daughter (D) who is 16 and lives with the mother and the mother's partner in England. The two older children are not the children of the father. The father has another child of his own by his partner with whom he lives in Lithuania. At least one of E's grandparents, her maternal grandmother, is also living in Lithuania.

9. The mother and the father were never married to each other but their relationship was of relatively long duration. It is difficult to put together a picture of the family's life because so much of the history is in dispute between them. In the current proceedings, the mother made serious allegations about the father's conduct during their relationship, including that:
 - i) In 2002, in the early days of the relationship, the father tried to set the maternal grandmother's flat on fire and in a separate incident, doused the mother in petrol and held a lighter to her; and
 - ii) In 2005, the father tried to strangle S when he intervened in an altercation between the father and her.
10. In 2008, the father was sent to prison in Lithuania for fraud. The mother maintained her relationship with him during his imprisonment and also took E to visit him. He was released in June 2011. Later that year (the father said in August and the mother said in November), E went to live with the father. S and D remained living with the mother and the maternal grandmother. The circumstances in which this occurred are disputed.
11. The father's account, in a witness statement made for these proceedings, was that upon his release, he went to live with the mother, but other men started coming to her door at night causing problems and he "decided that it was not the environment that I wanted my daughter to live in and therefore ...took my daughter away from [the mother's] home and we lived together happily from August 2011 until April 2012 when [the mother] decided that she then wanted to see E" and made an application to the authorities (C69). The mother said in her statement that the father threatened her with a knife and she told him that he had to leave the house, which he did, taking E with him. She said that E did not want to go and was crying but he took her anyway and did not tell her where he had gone (C56).
12. In March 2012, the mother made an application to the authorities in Lithuania in which she complained of the father having taken E and prevented the maternal family from seeing her and made reference to him having been treated more than once at "mental institutions and hospitals". There was available to Hogg J a response from the Child Rights Protection Services in Lithuania (C83) which records that a senior inspector of the department had spoken to E who had said that she liked living with her father, that he did not stop her communicating with the mother and that E would like the mother to call more often but did not like the mother's partner. It is further recorded that the parents had made an agreement in April 2012 for the mother to have contact with E every weekend from Friday until Sunday.
13. Contact duly took place between E and the mother. Then, in October 2012, the mother moved to England leaving E and D in Lithuania, E with the father and D with the maternal grandmother who lived very nearby. Her evidence was that her business in Lithuania went bankrupt and she came to England looking for work.
14. In June 2014, the father agreed to E spending the summer holidays with the mother. The

mother brought her to England. On 24 August 2014, there was an unpleasant incident at the mother's flat when the father attended in the evening with the intention of taking E back to Lithuania with him. The chain of events that preceded his arrival is not clear and the events at the flat are hotly disputed. I cannot do better than set out what Hogg J said of the lead up to the father's arrival:

“The child was clearly expecting to go back to Lithuania at the end of the summer holiday 2014. The father says that in the middle of August E telephoned him in tears saying that the mother would not send her back. There was some discussion on the telephone at some point between the father and the mother. This is asserted by the father and also indicated in what the mother said to [a social worker] about telephone calls. E may have been involved with this. The mother indicated that she could not pay the fares to go back to Lithuania with E; the father said he said [sic] he would come and the mother agreed that he should come to collect. He says that E was excited at the prospect of seeing him and returning to him. In her discussions with Mr Power she referred to an agreement that she would be collected by the father from ‘the tube’. Very little is known about this and, indeed, the mother denies there was such an agreement, but that is what E said to Mr Power and that she would have gone with her father had that arrangement been fulfilled.” (§13 of the judgment)

15. When the father arrived at the flat and knocked on the door, there was a fracas between the father and the mother's partner. In the course of it someone used CS gas. Both men were injured, as was the mother. E was also seen to have a red mark on the back of her head after the incident. The mother said that she saw the father holding E by her neck and dragging her out of the flat with her partner trying to stop him. The father's account to the police was that E was trying to get to him but was being held back by her hair, legs and clothing, and, wanting to protect her, he told her to run away. When the police arrived on the scene, having been summoned by various people, they heard shouting and encountered the father coming down the stairs. One of the two police officers who attended said in his statement that E was “trying to leave with [the father] shouting ‘I want my Daddy’”. The father and E remained at the scene whilst the officers investigated and eventually the father was arrested and E returned to the mother. The father was interviewed the following day. No criminal proceedings were ultimately pursued against anyone.
16. Hogg J observed that no doubt feelings were running high in the mother's household after the incident. The father communicated with the mother in terms that the judge classed as “unfortunate” and “not happy reading”.
17. On 17 September 2014, the social worker made an unannounced visit as part of her assessment and spoke to E and D; the mother was absent and was seen separately on 24 September. E was said by the social worker to appear “emotionally affected by the recent incident perpetrated by her father”; she was “all tearful” during the conversation with the social worker. What E said to the social worker was neither wholly helpful to the mother

nor wholly helpful to the father. For example, she said that on the day of the incident “she was ready to follow her dad as she was dragged by the neck”. She mentioned him screaming on the phone and said it was frightening. However, she blamed the incident on her mother’s partner because he tried to fight her dad and her dad could not take it, and she said that it was upsetting not to talk to her father since the incident, her mother having stopped all means of communication with him.

18. It can be seen from the assessment report that both the mother and D expressed negative views to the social worker about the father, D in E’s presence.

Mr Power’s evidence

19. Mr Power’s evidence was a central focus of the appeal and I need therefore to deal with it in some detail. Like the assessment report, it was a mixed bag including material which was damaging/helpful to both sides.

20. Mr Power’s written report set out a number of things that E said her mother (or maternal family) told her, including that her father could pay someone to have her killed, that her father doused her mother in petrol and held a lighter to her, and that he tried to strangle her brother. She spoke of her father’s care of her before she came to England including saying, using a phrase (italicised) that impressed itself upon Mr Power, “*I am ashamed to say* but I have to tell that I was often hungry in school.” When asked to say what happened in August 2014, she said she gave her father her address and asked him to come and get her. On her account, her mother saw that she wanted to live with her father, packed her bag and agreed to drop her at the tube station. She said she would have returned to Lithuania if the tube station arrangement had been honoured and the incident involving her father had not happened. She told Mr Power that she would not go back now and, when asked why not, referred to her father having done sexual things to his sister and appeared to consider herself at risk of sexual abuse.

21. Mr Power considered that when he met her:

“she was resolutely afraid of her father, having perhaps had time to reflect on what had happened on 24 August 2014, having ceased to be in contact with him, being exposed to the influences/pressures, however understated, of her mother and sister and having commenced and experienced a degree of settlement in this country through school and friends.” (§50 of Mr Power’s report)

22. He concluded that she objected to being returned to Lithuania and that:

“her objections are rational, and have strength and conviction because the bubble of respite, fashioned by her mother for her and her sister, was terrifyingly pierced by her father on 24 August 2014 and this she claims echoes his previous abduction of her from the home she shared with her maternal grandmother, sister

and brother in Lithuania.” (§57 *ibid*)

23. Mr Power was in the witness box for upwards of two hours. He was asked questions first by counsel on behalf of the father, then by counsel on behalf of the mother, both parties being represented by junior counsel alone at that hearing. It seems that he was committed to attend another appointment some distance away in the afternoon, although ultimately he did not manage to get to it and in fact returned to conclude his evidence after lunch. It seems that he felt that the time pressure he was under had made him somewhat distracted during the morning session whilst counsel for the father was questioning him and, at the end of his evidence, he explained this and apologised for the quality of his earlier evidence.
24. In his oral evidence in answer to counsel for the father, he said that he thought there was a tipping point in E’s relationship with her father around the August incident because up to then it was a fairly positive relationship (D18) and after the incident it went “massively downhill” (D20). He agreed that the things she had been told about her father’s behaviour in the past had “fused in [her] mind as a consequence of the incident in August” (D21) or been “contextualised by her experience in August” (D22). He accepted that she was in an environment that was “significantly unsympathetic to the father” and that there had been “considerable time and opportunity for the child to be negatively influenced against the father” (*ibid*). He was prepared to agree that this was “an extreme level of influence” (D23) and that she had “aligned herself with her mother” (D28).
25. In her examination of Mr Power, counsel for the mother wished to establish that the mother’s views about the father (which she had passed on to E) were grounded in the father’s behaviour. To that end, she worked through the mother’s allegations with Mr Power, although ultimately, of course, it was for the judge to determine how she approached them in the context of this summary Hague procedure. Counsel also put to Mr Power the messages from the father to the mother in an attempt to cement the foundation for E’s apparent fears of him. In due course, Mr Power came back to the August incident again. Near to the end of his evidence he said that he stood by his view that E was resolutely afraid of her father and that he thought there was a constellation of factors that had led to that position. He would be fearful for her if she returned to Lithuania, he said. He said:

“I do find what happened in August, however you read it, quite alarming. I think the child has reacted to this. She has been privy to conversations within the home that are clearly unsympathetic to the father but may have some element of truth in them.” (D46)
26. He spoke of her reaching her view in part from experiences and in part influenced by what her mother and sister think of her father, a part also being played by her enjoying living in England (D47). He said she was quite mature and clearly committed to remaining here and he thought it would be “immensely distressing” for her to be returned. For all the criticism he levelled at the father, however, he remarked that given the way she presented, “something good has happened to this child in terms of her parenting in respect of both her mother and her father” (D49).

The judge's determination

27. Because of the nature of the challenge to it by way of appeal, I also need to refer in a little detail to Hogg J's judgment. It has to be read as a whole, the earlier paragraphs very much forming the foundation for the determination of the central issues. In so far as the child's objections exception is concerned, it is also important to read it keeping firmly in mind the concession made by the father that E did, in fact, object to returning and was of an age and degree of maturity at which it was appropriate to take her views into account. This meant that as far as the issue of child's objections was concerned, (putting it in the terminology commonly used in these cases) the gateway stage was satisfied and the concentration was entirely on how the judge was to exercise her resulting discretion.
28. In the first half of the judgment, Hogg J set out the various accounts of the history, making observations about it along the way. She noted the absence of evidence that the mother had made allegations in Lithuania of the type that she was now making about the father, and that, in relation to the alleged strangling of S (as to which S's father had complained to the child protection services in Lithuania), there was no documentation as to whether Children's Services did anything. She also noted, in recounting the history, that despite what she said the father had done, the mother continued her relationship with him up to 2011 and that, whatever the accounts she gave elsewhere, she told social services here that it was by agreement that E lived with the father from November 2011 (E63).
29. The judge made no findings about what happened in August other than that the father came to collect E and there was a fracas between him and the mother's partner (§§14, 15 and 33). She recorded that it was said on the mother's side that E was put in a headlock by the father and dragged from the flat but inferred from the absence of any reference to that in the police officers' statements that they did not see that. She noted that they described E trying to leave with the father, shouting "I want my daddy" (§14).
30. She set out in a little detail what emerged from the social services' discussion with the family in September, clearly recognising the importance of this. She compared it with what E had told Mr Power nearly four months later.
31. Hogg J treated the evidence of Mr Power as of central importance and devoted a significant part of her judgment to it. She had "a number of concerns about Mr Power's evidence and conclusions" (§24). She considered that his views had been influenced by the view he took of the August incident, referring to his description of the bubble of respite being "terrifyingly pierced by the father" (see above at §22) which she considered was "not a balanced way of putting the facts" (§§32 and 33). However, she did not discount entirely what Mr Power said. The judgment shows her picking her way through his contribution and considering it critically alongside her own impressions of the evidence as a whole.
32. She was concerned that what E told Mr Power made it clear that she had been exposed to material, namely the various allegations emanating from the maternal family about the father which she mentioned to Mr Power but not to social services (§31) and also the

content of her father's court statement (§24), that should not have been brought to her attention and that had "thoroughly scared and upset her" (§34). She shared Mr Power's view that E must have been living in a negative environment with, as she put it, "three adults" (she was including D) "harping on about the awfulness of [her] father" (§30).

33. She accepted (§34) that E was disturbed by the August incident which "thoroughly worried and upset her" (§34) and of which there had been constant reminders in the form of the police involvement, social services, and the court proceedings, and upset by her father telling her that her cat had been found a new home. She also accepted that E prefers life here to life in Lithuania.
34. However, she put weight on Mr Power's evidence that something good had happened in the parenting of E, including her parenting by her father, and on the evolution of E's accounts of family life and of the incident, and her conclusion (set out at §31 and developed from §34 onwards) was that "although she is intelligent and mature and poised, [E] has been influenced by what has been going on and what has been said in her company". Hogg J described this at §40 as "deep influence over a lengthy period by the mother and her team".
35. Whilst accepting that E was expressing an objection to return, the influence brought to bear on E made Hogg J "by no means certain that those objections are valid" (§34) and at §35 she asked herself what weight she should give to the objections, bearing in mind the influences. She said:

"I ask myself what weight should I give to these objections bearing in mind the influences that she has been under. The truth is that I acknowledge that she now says she objects, but she has been brought to this by her mother and her team. I do not think her objections are entirely genuine. I wonder what would happen if the child did go back. Would she be depressed at going back because it is contrary to her current view or would she even feel some form of relief back home? Maybe she feels she has to say things on her mother's behalf because she is dependent on her mother. I am not satisfied that I should place a considerable amount of weight on what she says. I am not satisfied that it is determinative in any way at all."

36. There followed a consideration of wider factors. In the course of this, the judge despatched the Article 13b ground (§36). She accepted that E had had a difficult time, that she was suffering badly because of the influence on her and the difficulties in which she finds herself, and that counselling would probably be very sensible if she were to be returned. But she did not accept that E would be at grave risk of suffering psychological or physical harm. The basis for this conclusion appears to have been twofold. First, something good had happened in E's parenting by the father, as emerged from Mr Power's evidence. Secondly, the mother's allegations about the father lacked substance or, as the judge put it, "the mother has done nothing to corroborate her own evidence" on the subject of grave risk and, despite her allegations dating back as far as 2002, she had allowed E to remain in the care of the father from 2011, including when she left the country in 2012, and she was originally intending to return her to the father after the

2014 summer holiday.

37. From the concluding paragraphs of the judgment, commencing at §38, it can be seen that in deciding upon a return order, the judge also had in mind a range of other factors. She considered the question of contact (which had been taking place with the mother with the agreement of the father, including the summer holiday in 2014, but was presently not taking place with the father, “being severely fettered” by the mother). She took into account that this is a Lithuanian family, and that E is a Lithuanian child, who has lived in Lithuania all her life until June 2014 and was wrongfully retained here when she came on holiday; in returning home, she would be “returning home, where she had lived with the father for nearly three years without complaint to the authorities”. Mr Power would inform the Lithuanian services and provide them with relevant reports and documents. The father had offered undertakings to safeguard the situation and matters would be put before the Lithuanian court.

The criticisms of Hogg J’s judgment

38. It was argued that Hogg J failed to apply the proper test in relation to the child’s objections exception and in consequence failed to give proper weight to the relevant considerations. A cornerstone of this argument was that the judge had made no mention of the two *Re M* cases, although they had been cited to her by counsel in their submissions.
39. The mere fact that a judge has not mentioned a particular authority does not mean that the judge has not had it well in mind. Hogg J has enormous experience of Hague abduction cases and had had the latest position in relation to child’s objections set out for her by counsel. It can be assumed that she approached her judgment on that basis unless the contrary is demonstrated by what she said in it. Counsel for the mother submitted that the contrary *was* demonstrated by the judgment which he argued omitted to address important features of the case. It will be convenient to consider that argument in conjunction with the challenge to the judge’s treatment of the CAFCASS evidence, which was the second main theme of the grounds of appeal.
40. It was submitted that the CAFCASS officer’s evidence as to the child’s views, and his evaluation of them, should have been regarded as determinative on issues which were within the officer’s expertise, such as maturity, strength of feeling, objectivity and rationality. Reliance was placed on §§42 and 56 of *Re KP (Abduction: Child’s Objections)* [2014] EWCA 554, [2014] 1 WLR 4326 for this proposition. These paragraphs from *Re KP* do not bear the weight that counsel sought to put upon them. The central issue in *Re KP* was the role adopted by the judge in questioning the child; it did not turn in any way on how the court should approach the evidence of a CAFCASS officer. In any event, in making his oral submission to us on behalf of the mother, Mr Williams QC did not go so far as to say that the judge was *bound* by the conclusions of Mr Power. In that, he was realistic, as it is trite law that a judge can differ from the views of a CAFCASS officer or guardian, although reasons must be given for so doing. So, the question becomes whether the judge erred in her treatment of Mr Power’s evidence and whether she explained sufficiently why she differed from him.

41. Before I deal with the mother's argument that the judge did err in this respect, I can deal briefly with ground 2 of the grounds of appeal, which is also associated with Mr Power. It was asserted that there was "a serious procedural or other irregularity in the conduct of the trial as the judge 'cherry picked' from the evidence in the trial bundle....and made interventions which may have given an onlooker the impression that the judge had made up her mind" prematurely. It was also asserted that there was a serious procedural irregularity in that the CAFCASS officer was distracted by his need to get to his afternoon commitment and therefore agreed too readily to points put to him in cross-examination by the father.
42. There is no evidence whatsoever of the judge having made her mind up prematurely or approaching the case on the basis of a selective version of the evidence. The transcript of Mr Power's evidence shows her asking the sort of unexceptionable questions of the officer that a judge routinely asks as part of his or her consideration of the evidence, expressed in neutral terms, and often prefaced by the word "if". An example is:

"In some cases, if a court feels that a parent has excessively influenced a child – some cases, I am not talking necessarily about this one – the view is that the child should be restored to the other parent as soon as possible." (D26)
43. There is similarly nothing in the point about the impact on the CAFCASS officer of his afternoon commitment. True it is that he apologised for the quality of his evidence in the morning, although it was not readily apparent to a reader of the transcript that he had anything for which to apologise. He did not suggest that he wished to retract what he had said and, in any event, he had had the opportunity in cross-examination by counsel for the mother, which took place after he had resigned himself to being unable to honour the other commitment, to redress the balance. The real question is not one of procedural or other irregularity but of what Mr Power said and what the judge made of it.
44. I return therefore to the question of the judge's treatment of Mr Power's evidence and to her approach to the case generally. Mr Williams criticised the judge for discounting Mr Power's evidence because he had taken a particular view of the August incident. He conceded that she could have taken this approach had she made factual findings about the incident which differed from his view of it, but she had not done so and therefore this was no basis on which to depart from his evidence. This argument tied in with the argument that it was incumbent on the judge to make at least provisional findings about what occurred in August and that it was not appropriate, on the facts of this case, for her to remain neutral on the subject.
45. I do not accept these arguments. I will deal first with the argument that Hogg J had to make provisional findings. A judge trying a Hague abduction case has a difficult job deciding what to do about factual disputes. As I observed at §119 of *Re M (Republic of Ireland)*, the authorities are punctuated with reminders of the summary nature of these proceedings. The proper working of the Convention, and the interests of children, would be damaged if the courts allowed applications to become bogged down in protracted hearings and investigations. Oral evidence is rightly rare in such proceedings and, in fairness to Mr Williams, he did not suggest that Hogg J should have heard oral evidence about the events in August. He was simply arguing that she should have come down one

way or the other on the evidence that was available to her. It seems to me, however, that it is very much a matter for the judge whether it is necessary and/or possible, on the facts of the particular case, to make findings. Hogg J demonstrated that she had a grasp of the various accounts given about the incident in question, including what E said about it to social services in September, and had them in mind. However, she felt unable to determine who was the aggressor without having heard evidence and did not consider that she needed to do so. She did isolate certain aspects of the evidence about that night and appears, understandably, to have felt able to rely upon the independent evidence of the police, noting particularly that E was trying to leave with the father and shouting that she wanted her daddy. I see no problem with her approach.

46. As far as Mr Power was concerned, in my view the judge was justified in being critical of him for having attributed blame to the father for the incident and describing what happened in colourful terms (“the bubble of respite...was terrifyingly pierced”). She did not need to make her own findings of fact before doing so. I do not think she was asking anything more of Mr Power than to approach the facts in a “balanced way” (§33), recognising the impossibility of determining who was at fault, just as she had done. As he had gone further than this, she was entitled to approach his evidence with caution. Even then, she by no means dismissed it entirely.
47. I turn then to the argument that the judge’s failure to cite the two *Re Ms* led her to fail properly to consider relevant matters. In particular, it was submitted that she had failed to look at the nature and strength of E’s objections, the extent to which they were authentically her own (and linked to that, her maturity) and the extent to which they coincided with or were at odds with other considerations which were relevant to her welfare. The essence of this submission was that the judge had concentrated on the issue of influence, to the exclusion of virtually everything else, and that the exercise of her discretion was therefore flawed. It was suggested that certain passages in the judgment gave rise to doubt as to whether the judge had even accepted that E objected at all, as she commented that she was by no means certain that her objections were “valid” and said she did not think they were “entirely genuine”. This led to the submission that the judge did not really exercise her discretion at all.
48. I do not think that the judge’s comments about validity and genuineness ultimately take the appellant’s argument anywhere. It is important to remember when reading the judgment that whether E objected and whether her views should be taken into account was not in issue. The judge’s only concern was therefore how to exercise the resulting discretion. When she looked at the genuineness/validity of E’s objections, she was scrutinising them to determine what weight should be given to them (as can be seen, for example, from the beginning and end of §35, *supra*) and also in order to evaluate how the child might be expected to react if she was returned to Lithuania against her wishes (“I wonder what would happen if the child did go back...”, see the middle of that paragraph).
49. It is certainly correct to say that the question of influence weighed heavily in the judge’s mind. She was bound to consider it because it was relevant to the weight that should be put on E’s views, but it was far from being the only thing she considered. Furthermore, the fact that E had been influenced certainly did not lead her to leave E’s views

completely out of account. Instead, she weighed them up critically to see where they took her in deciding whether to order a return.

50. A wide range of factors came into the judge's evaluation in addition to influence. Into §§38 and 39 of the judgment, for example, are packed a number of other matters which were relevant to the judge's exercise of discretion following the child's objections exception having been established, including the fact that E is suffering psychologically now, the question of contact, the fact that her home is in Lithuania, the fact that the father may have upset her on the telephone or on Skype and needs to consider the way in which he approaches things, and the fact that the Lithuanian social services would be informed and the Lithuanian court involved on her return. From earlier passages in the judgment, it is clear that the judge was also influenced by the good parenting that E must have received from the father and her willingness to go home to Lithuania with him on the evening of 24 August. I do not therefore accept that the judge can be faulted for concentrating unduly on influence. Furthermore, her conclusion was reached bearing in mind that E was "intelligent and mature and poised" (see §31) so I do not accept the argument that she failed to consider E's maturity either. Similarly with the authenticity of E's objections and the nature and strength of them, to which issue the judge *had* turned her mind, as can be seen from, for example, her acceptance that the information E had been given about her father had "thoroughly scared and upset her" (§34) and her analysis of E's assertion that her father controlled contact between her and her siblings and of her comments about food (§27).
51. In short, the judge's conclusion that there should be a return notwithstanding E's objections was one which was undoubtedly open to her on the evidence and it was, in my view, explained in terms which showed that she had taken into account the appropriate factors and weighed them in a way which has not been demonstrated to be wrong.
52. The judge's rejection of the Article 13b argument was also criticised by the appellant. She was said wrongly to have rejected it without adequate explanation and to have failed to follow the test set out in §36 of *Re E* in her treatment of the mother's allegations. In summary, the argument was that she should have adopted the "sensible and pragmatic solution" referred to in §36 of *Re E* and asked herself whether, if the allegations were true, there would be a grave risk within Article 13b and then, whether appropriate protective measures could be put in place to obviate this risk. That would have required evidence as to what protective steps would be possible in Lithuania, the submission went.
53. I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Article 13b exception (see *Re E* supra §32) and for the court to evaluate the evidence within the confines of the summary process. Hogg J found the mother's evidence about what had happened to be inconsistent with her actions in that she had continued her relationship with the father and allowed him to have the care of E, see for example what she said in §37 about the mother not having done anything to corroborate her evidence. She also put the allegations in context,

bearing in mind what Mr Power had said about something good having happened in E's parenting, which she took as a demonstration that E would not be at risk if returned to Lithuania (§36). The Article 13b argument had therefore not got off the ground in the judge's view. The judgment about the level of risk was a judgment which fell to be made by Hogg J and we should not overturn her judgment on it unless it was not open to her (see the important observations of the Supreme Court on this subject at §35 of *Re S*, supra). Nothing has been said in argument to demonstrate that the view Hogg J took was not open to her; in the light of it, it was unnecessary for her to look further at the question of protective measures. She would have taken the same view even if the child had been going back to the father's care, but the Article 13b case was weakened further by the fact that the mother had ultimately agreed to return with E.

54. For all the above reasons, I would dismiss the appeal. Given that some time has elapsed since Hogg J's decision, I would return the question of the management of E's return to Lithuania, in terms of its timing and so forth, to Hogg J unless she is unavailable within a reasonable period of time. If that is the case, the matter should be put before another judge of the Family Division.

LEWISON LJ:

55. I agree.

ARDEN LJ:

56. I also agree.