

RE E (ABDUCTION: RIGHTS OF CUSTODY)
[2005] EWHC 848 (Fam)

Family Division

Sir Mark Potter P

19/20 April 2005

*Abduction – Rights of custody – Unmarried parents – Consent order
submitting to Spanish jurisdiction – Subsequent challenges to Spanish
determination – Individual and institutional rights of custody*

The unmarried British parents both lived in Spain, which was where they had met. After some years in a serious relationship together, they had a child. When the child was 4 years old the mother and father separated. In the following year, with Spanish proceedings pending between the parties, the mother moved back to England with the child. Shortly afterwards the father snatched the child away, removing her to Spain, but voluntarily returned the child to the mother some 5 days later, having been traced by the police. The father was still awaiting trial in England on a charge of abduction. The father then issued proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) seeking the return of the child to Spain, asserting that he had rights of custody, and that there were proceedings before the Spanish courts relating to the child's custody. The mother and child returned to Spain under the terms of a consent order, which included undertakings by both parents to engage in the Spanish proceedings, and to abide by the outcome of those proceedings. The mother and child duly returned to Spain, living there until the mother succeeded in obtaining from the Spanish court an order allowing her to return to live in London on an interim basis. After some months, the Spanish court made a provisional order requiring the child to return to Spain. They granted shared care and custody, to the effect that the child would live with the father (the Spanish resident) except when the mother (resident outside Spain) returned to Spain, at which time the mother would have care and custody of the child. If both parents were resident in Spain permanently they would have alternate weekends with the child, and if one parent were visiting Spain only occasionally advanced notice for visitation would be given. The child was to reside with the mother during the school holidays, provided the child had spent more than half the year with the father. This regime was to be reviewed annually. The mother disputed the terms of this order, and did not return the child to Spain immediately, as required under the order. The father renewed an application for the return of the child under the Hague Convention. In the context of the mother's legal challenges to the Spanish order, the father obtained a declaration from the Spanish court that the retention of the child in England by the mother was wrongful. The mother claimed that the father did not have any rights of custody.

Held – ordering the return of the child upon certain undertakings –

In the consent order the mother had plainly agreed to the Spanish court being the court of appropriate jurisdiction in matters relating to custody of the child. The father's rights of custody were rights which had been established or confirmed by order of the Spanish court, which had remained seised of the case throughout. In what are summary proceedings, it is not appropriate for the English court to go behind the decision of a competent court of another Contracting State dealing with custody where the terms of the order are clear, are apparently apt for that purpose and no appeal has been brought against the decision. In addition, the court was obliged not simply to give effect to the Hague Convention on the basis of breach of the rights of an individual; the infringement of the rights of custody of an 'institution or any other

body', such as, in this case, the Spanish court, would also lead to a finding that a removal or retention was wrongful (see paras [36], [37], [38]).

Statutory provisions considered

Hague Convention on the Civil Aspects of International Child Abduction 1980,
Arts 1(b), 3, 5, 13, 15
Spanish Civil Code, Arts 9, 154
Spanish Criminal Code, Art 225a

Cases referred to in judgment

H (A Minor) (Abduction: Rights of Custody), Re [2000] 2 AC 291, [2000] 2 WLR 337, [2000] 1 FLR 374, [2000] 2 All ER 1, HL
JB (Child Abduction) (Rights of Custody: Spain), Re [2003] EWHC 2130 (Fam), [2004] 1 FLR 796, FD

Henry Setright QC for the petitioner
Stephen Cobb QC for the respondent

Cur adv vult

SIR MARK POTTER P:

[1] These Hague Convention proceedings (Hague Convention on the Civil Aspects of International Child Abduction 1980) concern E, a female child born on 5 May 1998, now 7 years old. The applicant (the father) seeks an order for her return to Spain by the respondent (the mother) on the basis that she has wrongfully retained E in England, where she is at school, since the end of the school summer term on 22 July 2004. The mother raises an issue as to jurisdiction and, if that issue is resolved against her, a defence under Art 13(b) of the Hague Convention. The parties have never married. They are both British nationals. They commenced their relationship in 1993 in Spain where both of them were living and continued to live until August 2003. Since that time there has been a chequered history of proceedings in Spain and England. The mother has, however, been living with E in London, returning to Spain occasionally for business reasons, only save that in January 2004 she travelled with E to Spain in order to facilitate the welfare interview of E as directed in the Spanish proceedings.

[2] In June 2002 the mother and father separated in Spain. In the summer of 2003, with proceedings between the parties pending in the Spanish court, the mother made plans to return to live in England. On 28 August 2003 she arrived back in England with E and set up home in London.

[3] On 29 September 2003 the father removed E from her mother's care, by snatching E from the arms of the mother's sister as she was being taken to school. He took her to Spain where they were quickly traced by the police and, 5 days after the removal, E was voluntarily returned by the father at the request of the police to England to the care of the mother. The father was arrested in England and charged with E's abduction and (arising from the incident of the snatch) with assault. He is still awaiting trial in England on those charges, the date fixed for such trial being 19 September 2005.

[4] On 29 September 2003 the mother issued an originating summons in wardship seeking the return of E. Following her return, on 9 October 2003, the father issued Hague Convention proceedings to secure the return of E to

Spain, asserting that in August 2003 the mother had wrongfully removed E from Spain, her country of habitual residence, in breach of the father's rights of custody contrary to Art 3 of the Convention. Paragraph 10 of the particulars contained in his originating summons asserted:

'The plaintiff has rights of custody in respect of the minor. Further, there are proceedings before the Spanish Domestic Court relating to the custody of the minor which proceedings were issued by the defendant in May 2003 and which remain pending.'

[5] On 10 October 2003, at a hearing before Holman J at which both parties were represented by counsel, the mother submitted to a consent order on the basis of various undertakings, including the undertaking of the father and the mother:

(i) ... to engage in the proceedings in respect of the minor herein currently pending before the Granada Court of First Instance and in any other proceedings or application that they wish to institute in respect of the said child in the said court, and to abide by any decision of the said court (subject to a right of appeal) as being the court of appropriate jurisdiction in matters relating to the said minor on the basis that the Spanish court [is] the court of the minor[s] ... country of habitual residence.

(j) ... not to remove the minor herein from Spain without the prior permission of the Spanish court.'

[6] The first paragraph in the body of the consent order provided:

'That the minor herein ... be returned forthwith to the jurisdiction of the Kingdom of Spain pursuant to Articles 3 and 12 of the 1980 Hague Convention ...'

[7] The originating summons in wardship was discharged. The mother returned with E to Spain pursuant to the terms of the order, living there with E separately from the father.

[8] Thereafter the parties engaged in the pending proceedings between them in the Granada court pursuant to their joint undertakings, the mother applying for an order to permit her to return to live in London with E.

[9] On 12 November 2003, the Granada court (Senior Judge Jose Maria Robles Tarrago) made an order which recited the application made by the mother and the order of Holman J and provided that the mother:

'is hereby authorised to take E ... out of Spain, but is required to appear in this court on 13/01/04 to attend the interview with the psycho-social welfare panel attached to this court. It is expressly forbidden for the mother to go outside the European Union and to prevent this the mother will lodge the passport in this court, as a precautionary measure although she may request it if it is needed for a different purpose, in which case the most suitable measures will be agreed upon. This Order will be served on both spouses.'

[10] On 11 December 2003 the mother applied to the Granada court to remove the requirement of the Spanish court to file E's passport with it, as the passport was required for her and E to travel to England. An order was subsequently made by the Spanish court on the father's application that she lodge E's passport with the judicial authorities in London. After her return to England with E, following the interview of the latter in Spain in January 2004, the mother was ordered by the Spanish court to lodge E's passport with the English court in London. She did not do so, and the father issued proceedings in the inherent jurisdiction in London on 3 March 2004. On 27 April 2004 Wilson J granted the mother permission to collect her passport and subsequently the mother was given permission by the English court to take her own passport so that she might travel within the European Union and in particular to Spain.

[11] On 12 May 2004 the Granada court made an order (the 'provisional measures order') recording the presence of both parties' representatives at court on a provisional measures application by the mother 'with regard to the suit to be brought against [the father]'. Under the heading 'Legal Grounds' it recorded that the mother's suit was:

'based on Article 154 and following the Civil Code, which regulates the parent-child relationship and the awarding of care and custody of minors ... consequently the appropriate measures must be taken to ensure that each parent complies with their parental obligations even though they have separated.'

[12] Reference was made to the conclusions of the psycho-social welfare panel to the effect that:

'Our primary obligation is the welfare of the minor and therefore, on the basis of the psycho-social assessment, we feel it is in E's best interests to continue living in Spain, her habitual place of residence, because this would be less disruptive to her development and to her relationships with her parents, and also because the mother continues to have residence and business obligations here ... we feel that the minor should reside in Spain and care and custody rights should be awarded to the parent residing in Spain ...'

[13] Under the heading 'Arrangements' it was stated:

'The court ... hereby declares that the following measures will regulate the parent-child relationship of the under-age daughter of the common-law couple from this time on ... The court awards shared care and custody rights to the effect that (1) the minor will live with the parent who is resident in Spain except for when the parent who is resident outside Spain returns to Spain, at which time said parent will have the care and custody of the minor. (2) When both parents are resident in Spain on a permanent basis they will have visitation rights on alternate weekends, and when one parent is resident outside Spain and visits Spain occasionally, advanced notice for visitation will be given. (3) The minor will reside with the parent who is resident outside of Spain during the school holidays as long as it is shown that they

have spent more than half the year with the other parent. This regime will be reviewed annually.’ (The bracketed numbers have been added for convenience – see para [43] below)

[14] On 2 May 2004, the father filed an application in Spain for the immediate enforcement of the provisional measures order, seeking an order for the immediate return of E to Spain, that the father be permitted to go to England to collect her and that, if E came to Spain, he should be allowed to keep her there. Three days later the mother filed an application seeking an explanation of the provisional measures order. On that application, on 28 May the court granted an order asserting that the care and custody arrangements and visitation rights had been clearly explained in the arrangements section of the 12 May ruling and stating:

‘There are no objections to the minor finishing the school year in London this year, as it is in her best interests.’

[15] On the same day the father applied to appeal the 28 May order on the grounds that the judge’s consent to E residing in London until the end of the school year was a breach of the provisional measures order.

[16] The mother resisted the appeal by means of a cross-application made on 30 June 2004 in which she stated:

‘... I would also wish to say that it is not the intention to delay compliance with the provisional measures order. The only point at issue is the minor’s welfare, and it is only fair that she finishes the school year in London so that, like the rest of her classmates, she can take the exams that are going to be set and participate in all the end-of-year activities and celebrations that they have already begun to prepare enthusiastically, and which E should not be deprived of by having to return to Spain earlier than expected.’

[17] On 29 June 2004 the Granada court made an order confirming that both parties must comply with the provisional measures order.

[18] On 27 July 2004 the Granada court dismissed an application by the father that the provisional measures order be declared final and binding and ordering that:

‘As [the mother] has been enjoying the company of her daughter for an uninterrupted period of approximately 11 months, during which time the father has not been able to exercise his rights in relation to holiday arrangements as provided in the [provisional measures order] at all, it is appropriate to ... allow the father of the minor ... to have his minor daughter from now until the start of the new school year.’

The order of 27 July 2004 was not served on the mother’s court agent until 2 September 2004.

[19] The father made an application for ‘Adoption of Measures’ in relation to E. This was a new court procedure for the pronouncement of final custody/contact arrangements, as opposed to provisional measures. On 29 July 2004 the court ordered that the claim should proceed with the

proceedings being conducted by means of ‘oral small claims procedure’. It ordered service on the mother and on the public prosecutor with a direction that they should respond within 20 days from the day following service. It appears that this order has not been formally served upon the mother.

[20] On 11 August 2004 the originating summons in these proceedings was issued, seeking an order that the mother return E to the jurisdiction of Spain.

[21] On 3 September 2004 the mother made an application in Spain to set aside the order of 27 July 2004 on the basis that (a) the court had not been informed by the father about the criminal proceedings in England and the bail conditions at the time it made its determination, (b) in the circumstances a ‘system of visits without any supervision as provided for in that judgment was highly inadvisable’, and (c) the court had not applied Art 9.4 of the Spanish Civil Code, under the terms of which it should have applied the personal law of the child, namely English law. A further hearing was sought to amend the provisional measures order. However, such hearing has not yet taken place.

[22] On 7 September 2004, Bracewell J ordered that, pursuant to Art 15 of the Hague Convention, the plaintiff should obtain with expedition from the Spanish authorities a decision or other determination that the retention of E in England on or about 23 July 2004 was wrongful within the meaning of Art 3 of the Convention and that the originating summons stand adjourned meanwhile.

[23] On 14 September 2004 the father’s lawyers submitted the application to the Spanish court for an Art 15 decision and the mother’s lawyers made submissions in answer on 23 September 2004.

[24] On 19 October 2004 the Granada court made an order to the following effect:

‘A report having been received; in accordance with the request from [the father’s lawyer] in her writ dated 19.9.04, it is declared that the retention of the child E in England is wrongful within the meaning of Articles 3 and 15 of the Hague Convention of 25 October 1980.’

[25] The order went on to authorise the father immediately to pick up E in London and return her to Spain and that the decision be communicated to the English court, and co-operation requested in its enforcement. The order also warned the mother that her conduct might constitute the offence of serious disobedience of authority, as well as an offence of inter-parental abduction of children according to Art 225a of the Criminal Code for which she would be answerable as perpetrator. The order concluded:

‘The parties are advised that the measures governing the care and custody of the child, E, although procedurally they are described as “provisional” are of compulsory, immediate enforcement.’

[26] The jurisdiction issues raised on behalf of the mother to which I have already referred are: first, whether the retention of E by the mother in England at the end of the school term on or about 23 July 2004 was wrongful under Art 3; in particular, was it in breach of the father’s rights of custody in Spain in terms of Arts 3 and 5 of the Convention and as set out in the provisional measures order. In the light of certain deficiencies in procedure identified by

Mr Cobb QC, on behalf of the mother, a secondary issue arises as to the effect on the father's application of the Art 15 decision made in Spain.

[27] In this connection the relevant provisions of the Hague Convention are as follows.

[28] Article 3 of the Convention provides that:

'The removal or retention of a child is to be considered wrongful when—

- (a) It is in breach of rights of custody attributed to a person, institution or any other body, either jointly or alone, under the law of State in which the child was habitually resident immediately before the removal or retention; and
- (b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention.

The rights of custody mentioned in (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State.'

[29] Article 5 of the Convention provides that:

'For the purposes of this Convention—

- (a) "Rights of Custody" shall include rights relating to the care of the person of the child and, in particular the rights to determine the child's place of residence;
- (b) "Rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.'

[30] Article 15 of the Convention provides that:

'the judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practical assist applicants to obtain such a decision or determination.'

[31] Shortly stated, Mr Cobb's submissions are these. He points out that the wrongful retention relied upon by the father in the originating summons and pronounced upon by the Granada court in the Art 15 decision is the act of the mother, on or about 23 July 2004, of keeping E in England rather than returning her to the father in Spain at the end of the school year in London. Mr Cobb rightly submits that the burden is upon the father to demonstrate that such retention was a breach of rights of custody attributed to a person,

institution or other body by the law of the child's country of habitual residence prior to retention.

[32] In this connection Mr Cobb has developed two main arguments. First, he seeks to go behind the Art 15 decision of the Granada court on the basis of the evidence of Sr Domenech, an expert in Spanish law to the effect that, in adjudicating upon the various stages of the dispute, the Granada court overlooked and wrongly failed to apply Art 9.4 and 9.1 of the Spanish Civil Code which provides that the character and content of affiliation and parent-child relations 'shall be governed by the personal law of the child' and that the personal law corresponding to individuals 'is that determined by their nationality'. Sr Domenech states that 'English law is the correct law to apply when considering [E]'s relationship with her parents' and that:

'since [E] is a British national and both her parents are English [E]'s personal law is the law of her nationality – that is the law of England and Wales. So it is the law of England and Wales that the Spanish court should apply when considering matters such as whether [the father] has any rights of custody under Article 3 of the Hague Convention.'

Mr Cobb submits that upon that basis and in reliance upon the decision of Munby J in *Re JB (Child Abduction) (Rights of Custody: Spain)* [2003] EWHC 2130 (Fam), [2004] 1 FLR 796, the father did not have Hague Convention rights of custody in respect of E in that (a) he did not have parental responsibility for her in accordance with English law and (b) he had not acquired any 'inchoate' rights of custody.

[33] In my view, that submission cannot assist the mother in this case for a variety of reasons.

[34] First, the opinion of Sr Domenech is not uncontroversial. It is disputed for the father by the expert evidence of Adolfo Alonso Carvajal, a professor of Spanish matrimonial law and a practitioner experienced in parental child abduction. In his evidence, he supports the Spanish court's application of Spanish domestic law in relation to custody; he speaks to the effective grant of the father's custody rights by judicial decision (ie the provisional measures order) and the propriety of the Spanish process, not merely in respect of that order, but the subsequent orders of 28 May, 29 June and 27 July 2004; and he confirms, both as to content and process, the Art 15 declaration by the Spanish court. There is plainly a dispute in this respect which this court is in no position to resolve.

[35] Nor should this court seek to do so. In what is a summary proceeding brought pursuant to the terms of the Hague Convention, it cannot be appropriate for the English court to go behind the decision of a competent court of another Contracting State dealing with the custody of the child where the terms of the court's order relied on as establishing the applicant's custody right for the purpose of the Convention are clear, are apparently apt for that purpose, and no appeal has been brought against the decision. Such an exercise would run counter to the whole ethos and purpose of the Convention as set out in Art 1(b).

[36] Finally, the rights of custody in respect of which the father here seeks enforcement are rights of custody which have been established or confirmed by order of the Spanish court, which court has remained seised of the case

ever since. The case of *Re JB (Child Abduction) (Rights of Custody: Spain)* is simply not in point. In that case, although the basic facts as to the nationality of the parties, their unmarried status, their cohabitation in Spain and the abduction of the child by the mother to England were the same as in this case, the position for the purpose of establishing breach of the father's custody rights was wholly different. By way of contrast with this case, there had been no previous order by or application to the Spanish court; nor was it disputed that, if the matter were before a Spanish court, English law would be applied. On that basis, Munby J held that the application should be dismissed because in English law the father did not have parental responsibility for the child, even though indubitably its father.

[37] In this case, by the consent order of 10 October 2003 and the undertakings therein, made and given pursuant to an originating summons which cited extant Spanish proceedings *relating to the custody* of E (see paras [4]–[6] above), the mother plainly agreed to the Spanish court being the court of appropriate jurisdiction in matters relating to the custody of E, and E's return to Spain was made upon the basis of such concession. Thereafter there was voluntary inter-partes recourse to welfare proceedings in the Spanish court concerning E, the mother raising no jurisdictional objections and making no submission to the Spanish court that the ordinary domestic law of Spain was inapplicable. The first time that argument surfaced was in the mother's as yet unresolved application of 3 September 2004 (see para [21] above). Nor did she earlier submit that the father did not or should not have rights of custody. By the provisional measures order of 12 May 2004 (see paras [11]–[13] above), the Spanish court awarded 'shared care and custody rights'. It thereafter has remained seised of the case, retaining and exercising a right to determine and control the place of residence of E.

[38] In such a case, this court is obliged under the Hague Convention not simply to give effect to the Convention on the basis of breach of the rights of an individual. The infringement of the rights of custody of an 'institution or any other body' will also lead to a finding that the removal or retention was wrongful: see Art 3(a). For this purpose a court in the State in which the child was habitually resident at the time of its removal may itself be such an institution or body: see *Re H (A Minor) (Abduction: Rights of Custody)* [2000] 2 AC 291, [2000] 1 FLR 3741. No such element was of course present in the case of *Re JB (Child Abduction) (Rights of Custody: Spain)*.

[39] That being so, as Mr Cobb has been obliged to accept, the ingredients of an Art 3 retention are present in this case if it can be demonstrated that the mother was in breach of the terms of the provisional measures order by failing to return E at the end of her school term.

[40] It thus becomes unnecessary to rule upon the status and effect of the Art 15 declaration obtained from the Spanish court, in relation to which Mr Cobb has raised various concerns. In particular, he submits that, in making an application to the Spanish court for an Art 15 declaration, the father's Spanish lawyers misled the Spanish court in a number of respects and that, while the mother had the opportunity to (and did) make written submissions on her behalf, the decision of the Spanish court appears to follow the wording of the father's application and there is no reference to the submissions of the mother or, in particular, the question of the appropriate law which was by then being pursued by the mother. For that and other reasons, Mr Cobb submits

that, while the court is bound to take account of the Art 15 decision, it should not treat it as definitive.

[41] On the material before me, there may well be some substance in the procedural concerns raised by Mr Cobb. I would accept that, in appropriate circumstances, an English court is not obliged to treat what is *prima facie* a valid and authoritative Art 15 declaration by a foreign court as determinative. However, it is not only unnecessary, it would also be inappropriate and inadvisable, for this court to embark on any investigation of the status of the Art 15 declaration because this court is itself in a position to hold that the provisions of Art 3 are satisfied without recourse to that decision.

[42] In pursuing his second main argument, Mr Cobb has taken a variety of points of construction upon the meaning of the order to support his contention that, at best, the terms of the order are ambiguous or unclear and that in those circumstances the father cannot establish his right to an order for return. Suffice it to say, I find none of his arguments persuasive.

[43] It is plain, in my view, that the provisional measures order was one which conferred rights of custody upon the father, the parties being awarded 'shared care and custody rights' on the basis that, under sentence (1) of the 'arrangements' (see para [13] above) E was to live with the father as 'the parent resident in Spain' save that, if and when the mother as 'the parent resident outside Spain' returned there, she would have the care and custody of E. Under sentence (2), on that basis (ie after the mother's return) provisions were made for visitation rights in Spain. Under sentence (3), E would reside with the mother, as the parent resident outside Spain, during the school holidays *provided* E had spent more than half the year with the father ('the other parent'). Thus, given that at the time of the order, E was with the mother in England, at the end of the school term in July she was due to be returned to the father in Spain. It is clear that the mother understood that to be the position provided for in the order, in the light of her stated intention when she applied to retain E at school in London following the making of the provisional measures order (see para [16] above). The confirmation of the terms of the provisional measures order made by the Spanish court on 29 June requires to be read in that light. Thus, whether or not the Spanish court order of 27 July 2004 made upon the application of the father was served upon the mother is of no relevance to the question whether or not, by her retention of E in London on 23 July, she was in breach of the provisional measures order. It is plain that she was, and that she knew it. In those circumstances, it seems to me that breach of the father's and/or the Spanish court's rights of custody is clearly established as at 23 July, subject only to the defence of the mother raised under Art 13.

[44] The mother relies upon three matters which, taken in combination, are said to establish her Art 13 defence. First, it is said that E has spent very little time indeed with the father over the last 2 years. A return to Spain would be likely to lead to E being suddenly placed in the full-time or substantially full-time care of her father, because her mother's medical condition is such that she is likely to be unable to accompany E to Spain and/or to remain with her there for a substantial period of time. Secondly, it was said that by, and in the course of, his counter-abduction of E from the care of the mother in September 2003, the father behaved in a way which revealed a disregard for E's physical and psychological welfare, which has left her nervous and fearful of him. Thirdly, it is said to be plain that the father has sought the mother's

punishment in Spain for the abduction and that, were she to be imprisoned in Spain and the father to be imprisoned in England (as may well happen), this would place E in an intolerable situation.

[45] I propose to deal with the last two matters first.

[46] So far as the father's snatching of E is concerned, this was undoubtedly a reckless and ill-advised incident. At the same time, it is clear that the father was then under a considerable state of stress and suffering from the belief that the mother who had started proceedings in Spain in respect of E was seeking to wean E from him. E was plainly, and not surprisingly, upset by the incident as the witness statements of the mother and of Viviane Green, a senior child psychotherapist, show. Ms Green says that:

'[E] is now in the grip of strong negative feelings towards her father and quite anxious about her mother. These feelings will take some time to process. She will also need some reassurance that in future she will be kept safe and that such an event will not repeat itself. Furthermore she needs to be reassured that her mother will also be able to keep herself safe ... It is also crucial that there is no further exposure to erratic, inconsistent or frightening adult behaviour.'

[47] Nonetheless, there is nothing in the evidence before me which suggests that, if mature and sensible efforts are made by both parents to encourage E to see and have affection for her father, they would not be successful. Nor do I see reason to suppose that, having learned his lesson in relation to his intemperate conduct, the father will be other than calm, controlled and affectionate in relation to his contact with E, which is plainly to be encouraged in her long-term interests. There is no suggestion on the part of the father that he regards the mother as unsuitable to have the day-to-day care of E as a primary carer or that, if she were to return to Spain, he would seek to disturb that position pending an inter partes hearing.

[48] The risk of disturbance to that position appears to me to stem principally from the mother's medical condition and the likelihood that she will shortly require major surgery. The mother has Crohn's disease and ulcerative colitis, in relation to which there are before me medical reports from Dr Sawyerr, a consultant gastro-enterologist. His evidence confirms that the mother suffers 'severely' from those conditions. She has not had any sustained remission from the Crohn's condition since May 2003. A person suffering from this condition is prone to relapse when suffering from stress. The doctor is of the view that, if the mother's condition is left untreated or inadequately treated, her health will deteriorate with serious consequences. Surgery to remove the colon has been indicated. The timescale for this is uncertain. However, I have been informed that, depending upon the results of biopsy tests likely to take place within the next 3 weeks, surgery may follow sooner rather than later.

[49] The mother has been treated in England and would wish surgery to take place here conducted by a medical team in which she has confidence. Thus if she were to return to Spain with E in the immediate future, she might soon have to travel back to England, in which event E would be left in Spain with a father whom she has scarcely seen over the past 18 months, and without access to a mother on whom she is very dependent, at considerable

risk of psychological harm. Such an eventuality might well place her in an intolerable situation.

[50] Nonetheless, the position as I have indicated is uncertain and it seems to me that, with good sense on both sides, and a recognition that E should, so far as possible, not be deprived in the near future of the day-to-day care of her mother, the risk of psychological harm and/or an intolerable situation of the kind envisaged by Art 13 can be avoided.

[51] Having so indicated to the parties, they had the good sense with the encouragement of the court to agree upon a number of undertakings appropriate to allay the court's concerns to be incorporated into any order for return of E to Spain, so there may be full and proper consideration by the Spanish court of the evidence and submissions of the parties as to the care and custody of E from the point of view of her welfare in the light of the situation as it presently exists. It seems to me clear that such undertakings are appropriate for the limited function of protecting E prior to the Spanish court's reconsidering the matter on a measured, rather than an emergency, basis, with full opportunity to both parties to place all relevant matters before the court, including any psychological or medical report relating to E and a copy of the judgment of this court.

[52] The undertakings are to remain binding until there is a judicial decision relating to E following an inter-partes hearing before the judge of the Court of First Instance No 10 in Granada. The principal undertaking of the mother is to return E to Spain and upon her return not to remove E from staying at an address within the Province of Granada until the judicial decision unless, prior to that date, the mother returns to England for medical treatment as advised in writing by her treating doctor or in order to give evidence in the criminal proceedings against the father or the mother and father otherwise agree in writing, in which case E should be permitted to travel to England with the mother and remain in her care, or the care of the maternal family, for the period of hospitalisation and treatment and necessary recuperation and/or for the duration of the criminal trial. The mother also undertakes to facilitate contact with the father, the terms and duration of which are to be agreed in writing through the parties' Spanish lawyers.

[53] The father's principal undertakings are not to remove E from the physical care of the mother save for the purpose of the agreed contact; following the return of E to Spain, not to remove her from the Province of Granada; not to seek to enforce against the mother the provisional measures order or associated orders for the placement of E in the father's immediate day-to-day care; and not to institute or voluntarily support any proceedings for the punishment or committal of the mother (whether criminal or civil) in respect of any matter relating to E, including her abduction, which have arisen prior to the date of the order for her return.

[54] Finally, the mother and the father jointly undertake to engage in the proceedings in the Spanish court to seek a final order in the definitive measures proceedings in relation to E; to facilitate the effective and expeditious listing of an inter-partes hearing; and as soon as practicable following their return to Spain, to appear before the court in Granada to confirm that they will not seek to enforce the provisional measures order until there is a judicial decision relating to E in the Spanish inter-partes hearing, their respective relationships with E being governed by the present undertakings until that time.

[55] On the basis of those undertakings and certain supplemental undertakings which I have not troubled to recite, but which are contained in draft in a document already placed before me by the parties, there will be an order for the return of E to Spain. The final form of the order should be agreed between counsel following receipt of a copy of this judgment prior to its handing down. I will hear oral submissions on any matter which cannot be agreed.

Order accordingly.

Solicitors: *Dawson Cornwell* for the petitioner
Bindmans for the respondent

PHILIPPA JOHNSON
Law Reporter