

RE M (ABDUCTION: CHILD'S OBJECTIONS)
[2007] EWCA Civ 260

Court of Appeal

Sir Mark Potter P, Rix and Wilson LJ

27 March 2007

*Abduction – Hague Convention 1980 – Defences – Welfare – Child's
Objections – Evidence in Summary Proceedings*

An appeal in respect of return to Serbia of an 8-year-old girl born to an English mother and Serbian father. The parents never married but cohabited for a number of years and after the child's birth moved to Belgrade. On their separation, the father issued proceedings in Serbia in respect of the child. The Belgrade City Centre of Social Work (the competent authority) granted custody of the child to the mother with weekend and holiday contact to the father. The father renewed his applications seeking custody of the child, alleging that the mother could not cope and that she would remove the child from Serbia. The mother removed the child from Serbia twice during these proceedings, against a background of allegations of domestic violence and harassment. Following the first removal, the Serbian court granted the father custody of the child, as a 'Provisional Measure' as the removal to England thwarted father's contact. During a visit to England in the period of the first removal, the father admitted to the child's uncle and a mutual friend that he had been violent, had sought to get the mother evicted and that he would not stop until he had removed the child from her mother's care. On the first application for the child's return to Serbia, the mother consented to return subject to undertakings to keep the child in her care, maintained by father and protected from removal. After the order was made, the child refused to return; the mother sought to persuade the court to revoke the order for return. A Children and Family Court Advisory and Support Service (CAFCASS) officer was appointed and reported that the child's objections to returning to Serbia were based on genuine objections, independent of her mother and fears that the father would not abide by his undertakings. Despite the CAFCASS report, the judge ordered return on the basis that the undertakings given would protect the child's welfare. In Serbia things deteriorated. The mother successfully appealed the provisional order awarding custody to the father and applied for leave to remove the child from Serbia. The father breached undertakings to maintain and sought a non-molestation injunction against the mother and surrender of her passport, both of which were refused. The father continued to harass the mother and pester the child. On three occasions Serbian police were tipped off that there were class A drugs secreted in mother's car; the mother was arrested and questioned and released on satisfying the police that the drugs were planted. The father sought to enforce contact by coercion of the court whilst the mother was absent in England for a month's holiday with the child. On her return to Serbia, the mother believed herself to be targeted by a rifle. She returned to England and enrolled the child in an English school. On the father's further application for the child's return, the mother accepted that removal of the child from Serbia was wrongful under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). However, she argued that the child's welfare and objections to returning to Serbia provided defences under the Hague Convention to justify her remaining in England. She argued that the child was at risk of psychological harm because of the father's harassment, fears of the police and raids for planted drugs and that the child did not want to return to Serbia. The court ordered the child's return as there were ongoing proceedings in Serbia concerning the child's welfare, Serbia was the appropriate forum for litigating the disputed issues, provided mother with an adequate remedy having ordered that the child remain with her and that mother had dealt

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effectively with the drug raids. The mother appealed arguing that the court failed to take into account the child's views and the 'child's objection' defence, in particular the impact on her of the targeted drugs raids, and had improperly failed to hear oral evidence. It was agreed by the parties that the judge had failed to consider the child's objections in his reasoning and that the court of appeal should do so.

Held – granting permission to appeal and allowing the appeal refusing to return the child upon the basis of the child's objections –

(1) The judge was well within the ambit of his discretion in refusing to admit oral evidence. It was well established that Hague Convention proceedings for return are summary and intended to be resolved on the basis of written evidence and the authorities restrain judges from admitting oral evidence save in exceptional cases and restrain them from too readily making judgements on contested written statements. The authorities do not inhibit the hearing of oral evidence where such evidence may be determinative. In Art 13(b) and child objection defences, evidence may be heard from CAFCASS officers as to the child's objections or a relevant expert as to the effect on the child of return in Art 13(b) cases (see para [56], [57]).

(2) In normal circumstances, it is in the best interests of children that they should be promptly returned to the country whence they have been wrongfully removed. It is only in exceptional cases that the court has discretion to refuse immediate return. In exercising a discretion to refuse return under Art 13 of the Hague Convention, the court must balance the nature and strength of the child's objections against Convention considerations including respect for the other judicial system and general welfare considerations (see paras [58], [59]).

(3) In deciding cases concerning children's objections there are three stages; first, whether the objections are made out, secondly, whether the child's age and maturity mean that it is appropriate for the court to take account of the objections, and, thirdly, whether the court should exercise its discretion for return or retention (see para [60]).

(4) The most common method of hearing from the child is by interview with a CAFCASS officer skilled and experienced in talking to children and aware of the limited scope in which the child's views are relevant in Hague Convention cases. A discrete finding should be made as to age and maturity (see paras [61], [62]).

(5) In deciding the strength and validity of the child's views, the court should examine the child's perceptions of their short, medium and long-term interests; how far the objections are grounded in reality; how far they have been influenced, directly or indirectly, by the abducting parent; how far the objections will be mollified on removal from the influence of the abducting parent (see para [62]).

(6) M was a bright 8-year-old, well able to understand and assimilate questions put to her and give considered answers. Her clearly voiced objections required to be taken into account. M had been traumatised by her personal experiences in Serbia, particularly the police raids and consequent fear of being separated from her mother. Her views were materially different from a desire simply to be with mother rather than father. M's fears were rooted in reality as mother was the victim of persistent efforts to incriminate her in drug dealing and secure her arrest and imprisonment. The father's suggestion that mother had planted the drugs on herself to discredit him was fanciful (see para [76], [77]).

(7) It would not be surprising if M's views had been coloured by the unseemly tug of war in Serbia but the unsettling experiences of M as a result of police attention were enough in themselves to create the fears rationally expressed by M. It was, therefore, immaterial to find whether the drugs had been planted by father, although he was the most likely candidate. M's views would not be mollified by return to Serbia and removal from her mother would simply be the realisation of M's fears (see paras [77], [78]).

(8) M's objections were strong and undoubtedly exceptional in view of the unusual circumstances underlying them, namely a targeted campaign of planting drugs on the mother to secure her arrest, prosecution and imprisonment (see para [81]).

(9) Despite the proceedings in Serbia and the integrity and welfare based nature of those proceedings, the general welfare considerations of the case militated in favour of refusing to make an order. M could not be adequately protected from the eventualities she feared by the father's undertakings. Accordingly this was an exceptional case which merited refusal of an order for immediate return (see paras [82], [83]).

Statutory provisions considered

Child Abduction and Custody Act 1985

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 3, 12, 13(b), 18

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

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Art 11(2)

Cases referred to in judgment

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

S (A Minor) (Abduction: Custody Rights), Re [1993] Fam 242, [1993] 2 WLR 775, sub nom *S v S (Child Abduction) (Child's Views)* [1992] 2 FLR 492, [1993] 2 All ER 683, CA

T (Abduction: Child's Objections to Return), Re [2000] 2 FLR 192, CA

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

Zaffino v Zaffino (Abduction: Children's Views) [2005] EWCA Civ 1012, [2006] 1 FLR 410, CA

Marcus Scott-Manderson QC for the appellant mother

Henry Setright QC for the respondent father

Cur adv vult

SIR MARK POTTER P:

Introduction

[1] This is an application by the defendant mother (a 39-year-old British subject) in Hague Convention proceedings, (ie under the Child Abduction and Custody Act 1985) for leave to appeal from the order of Singer J dated 18 January 2007 whereby, on the application of the plaintiff father (who is a Serbian national aged 44), the judge ordered the return to Serbia of the parties' daughter M, born on 23 February 1999 and now just 8 years old, there being current between the parties substantive proceedings in Serbia relating to M's care and welfare. The judgment pursuant to which the order was made was an oral judgment delivered on 16 January 2007, a transcript of which is before us.

[2] The mother acknowledged before the judge that the removal of M from Serbia was wrongful within the meaning of Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention), but she resisted the order for the return of M on the grounds: (a) of what her then counsel Mr Reddish described as her 'principal' defence, namely that there was a grave risk that the return of M to Serbia would expose her to physical or psychological harm or otherwise place her in

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an intolerable situation within the meaning of Art 13(b) of the Hague Convention; and (b) of M's objections to returning to Serbia as set out in the report of Olivia Fitch, a Children and Family Court Advisory and Support Service (CAFCASS) Children and Family Reporter, dated 8 December 2006.

[3] In giving judgment, Singer J adverted to various matters raised by the mother as demonstrating threats, hostility and intimidation on the part of the father (but which he denied) relating to the risk of harm to M. The judge took the view that he could not resolve them on the application before him and that they were matters for the Serbian court and, on the basis of a number of protective undertakings offered by the father, he ordered the return of M to Serbia. However, the judge overlooked, or at any rate failed in his judgment to refer to or deal with, the defence based on M's objections to her return. That being so, on 16 February 2007, the day before the mother was due to return to Serbia after a hold-up in obtaining the necessary passports under the order of Singer J, I granted her a stay of the order for M's return so as to enable her to make this application, in respect of which I ordered expedition and that, if leave were granted, the appeal should be listed to follow the application. The matter has a considerable history to which I now turn by way of background.

The background history

[4] The parties were never married. A number of years after they had commenced their relationship, but shortly after the birth of M, they moved via Spain to live in Belgrade where they subsequently made their home. However, after a difficult period, the relationship broke down as a result of which, in circumstances which are in dispute, the father left the family home in January 2005. It is the mother's case, which the father denies, that the parting was against a background of violence and personal abuse by the father. It is clear in any event that the relationship broke up in acrimony. It is the mother's case, which again the father denies, that after their separation the father would threaten and abuse the mother when they met for purposes of his contact with M. At various stages she sought assistance from British Consular Services and the police. However, she developed the view that the father had influence with the local police and that she was not able to obtain proper protection from them.

[5] On 3 March 2005 upon her application, the City Centre of Social Work in Belgrade, the competent first instance authority in charge of giving custody (so described in its own order), awarded custody of M to the mother with provision for contact to the father every second weekend, holiday and birthday and for half of the winter and summer holidays, the father to pick M up in front of the flat in which the mother lived and to return her at times to be agreed. Thereafter, between May and July 2005, the father made a series of applications to the Centre of Social Work seeking a change of custody based on accusations that the mother was suffering problems in bringing up M, that she was damaging M's psychological development by refusing to allow him to collect M from her nursery and by arranging for M to be cared for by various female friends and neighbours rather than himself; also upon the basis that the mother had accused him of having a bad influence on M and of making allegations against him in order to give her 'an alibi to leave Belgrade'. He also claimed that the mother had neglected her duties by preventing him from exercising his personal relationship with M; that the

mother had no regular source of income and that there was a real danger that she would remove M from Serbia. At the end of July the father returned M a week late after holiday contact and in early August the mother informed the father that she would be taking M to England on holiday, despite his attempts to persuade her not to do so.

[6] On 11 August 2005 the mother left Serbia with M and put her into school in England. In those circumstances, the Fifth Municipal Court of Belgrade, as the court by then in charge of the litigation, ordered as a 'Provisional Measure' that the father should be granted the custody and care of M, in lieu of the earlier order made.

[7] The narrative in the order based the decision of the Municipal Court on the fact that:

'By taking the child to the UK in July this year, the [mother] made impossible the execution of the Resolution by the Center for Social Welfare [which] stipulated the terms [in which the] relationship was to be maintained between [M] and her father ... [The court found that the mother] did not intend to come back with the child and make possible [that] relationship [and that it was therefore necessary] to establish a provisional measure before the proceedings were irrevocably closed.'

[8] In November 2006, the father came over to England for contact with M and, according to the evidence of the mother's uncle who sought to act as some type of broker between them, he admitted that he had been violent to the mother in Serbia and that he had threatened her landlord in order to get him to evict the mother and M. The father denied he had made any such admissions.

[9] On 4 November 2006, the husband, by an originating summons in the High Court, instituted Convention proceedings for the return of M to Serbia.

[10] While those proceedings were waiting to be heard, the father had staying contact for 1 week with M at the home of a mutual friend of the parties, Svetlana Virijevic. According to her uncontradicted evidence, M was nervous, subdued, and fearful and did not wish to be alone with the father, who spent his time throughout the visit speaking with animosity and in a negative fashion about the mother, constantly stating his adverse views of her and taking every opportunity to bring them into the conversation. He told Ms Virijevic that he would not stop until he had been successful in removing M from her mother.

[11] The matter came on for hearing before Sumner J on 23 January 2006, the mother being represented by solicitors and counsel other than those who now appear for her. However, there was no substantive hearing. No doubt upon advice, the mother consented to an order for the return of M to Serbia upon the basis of extensive undertakings given by the father and mother which were intended to cover the position in relation to M as between the parties until such time as the Serbian court could deal with the matter after the return of the mother and M to Serbia. The undertakings were designed to ensure that M remained in the care of the mother, properly maintained by the father and protected from removal by him, pending any further orders by the Serbian court in that respect.

[12] Before that order took effect however, the mother had a change of heart, prompted by the fact that M had made it clear to her that she did not

wish to go back to Serbia. The mother invited the court to engage the services of a CAFCASS reporter, Mrs Oliver, to investigate whether the child had objections or should be separately represented.

[13] Sumner J heard the oral evidence of Mrs Oliver on 21 February 2006. Mrs Oliver made clear that M had said that she did not want to go back to Belgrade because her father 'was always hitting mummy' and that she had seen him do so. Mrs Oliver also made clear her view that M, who was a very bright child, was describing what she had seen, rather than what she had been told. M also said that she did not want to go back to Belgrade as it was 'scary' for her. If she went back she would be scared that her father would not do as he said he would do. However, on 22 February, upon the basis of the undertakings already given, Sumner J declined to amend or recall the order to which the mother had earlier consented and the mother returned to Belgrade with M pursuant to that order.

[14] Unfortunately, conflicts and disputes quickly developed. The Regional Court of Belgrade had on 8 February 2006 allowed the mother's appeal against the November order of the Fifth Municipal Court which had awarded custody to the father and in March 2006, the mother applied for leave permanently to remove M from Serbia to England and for custody and maintenance. Before those applications could be dealt with, the Serbian court, on 21 March 2006, refused cross-applications by the father seeking a non-molestation order against the mother and surrender of her passport and, by the mother, for an increase in maintenance and an order preventing the father from entering her flat and harassing her. One of the father's undertakings to the English court had been to use his best endeavours to procure in the Serbian court an order against his molestation of the mother; but for some reason such was not able to be achieved.

[15] It is the mother's case that, thereafter, she was submitted to an escalating campaign of harassment by the father who was failing, but remained determined, to obtain from the Serbian court what he wanted, namely care of M. In this respect she relies upon a pattern of actions and events which she asserts were initiated by the father, not merely aimed at harassing her but directly or indirectly designed to support his case that he, and not she, should have custody of M. In this respect she complains that the husband was repeatedly and unnecessarily involving the police with whom, she alleges, the father has influence. I do not propose to itemise the chapter of matters relied on by the mother and denied by the father. The judge was no doubt right to consider that they were not susceptible of resolute findings of fact without lengthy oral evidence inappropriate to the summary proceedings before him. This, Mr Scott-Manderson QC, who now appears for the mother, has effectively acknowledged. However, I shall set out those more limited matters upon which Mr Scott-Manderson has placed reliance as events which are sufficiently established in evidence before the judge and which he submits could and should have been the subject of specific consideration and findings by the judge if he was to deal properly with the specific defences being advanced before him.

[16] On 26 May 2006, with a court hearing date fixed for 30 May 2006, a specialist team working with children from problem families reported to the Fifth Municipal Court on the father's application for custody, in a manner highly favourable to the mother. It assessed the father as 'authoritative and

dominant' holding 'rigid attitudes' and having 'a neurotic need to obsessively control persons close to him'. He was described as having 'an authoritative style of upbringing' and achieving 'the desired behaviour through emotional conditioning of the child'. The mother on the other hand was described as holding 'a democratic style of upbringing' and considering the needs of her child. The report stated that M 'identifies with the mother and she finds her mother's 'disqualification' by the father hard to bear'. It was stated that M was 'very disturbed' and had conflicting loyalties towards her father and mother who both wanted her for themselves, according to their needs. It was further stated that the father was phoning M five or six times a day in order to see how she was, where she was, and what she was doing, and thereby disturbing her daily routine; and that he insisted on coming every day to her school bringing a snack which prevented the mother from preparing food for the child. The report recommended that it was in M's interest to stay with and continue to be cared for by the mother, but that she should have regular contact with the father as previously ordered.

[17] On 28 May 2006, 2 days before the next hearing date, when M and a friend were playing at home in Serbia, the police arrived at the mother's flat and asked her to attend at the police station for interview on a complaint (presumably by the father) that she had been removing M's mobile phone from her during school time. She went to the station the next day and made her statement. Later that day she was washing her car (which was a car supplied for her and M's use by the father) and she found concealed in a box on the floor of the car behind the driver's seat a packet of white powder which appeared to be drugs. She drove to the motorway, as she said in a panic, and threw the package away. Later, having driven to collect M from school, she was parked outside the school when police officers approached her asking for her documents and the documents for the car. They then proceeded to search the car, without saying why they were doing so. They then conducted a search of the car boot and the floor of the car, including the floor boxes.

[18] On 30 May 2006, the court adjourned the parties' cross-applications until 9 June 2006.

[19] On 2 June 2006 the mother found four further packages of white powder, apparently cocaine, in her car and handed them in to the police. On 5 June 2006 she found a further package, again apparently cocaine, planted in her car and again handed them into the police. Both these occasions are recorded in police documents before the court in translation. It appears that the police took no further action despite later testing having revealed that the packages indeed contained cocaine.

[20] On 7 June 2006 the father made complaints about the way in which the specialist team of the Family Centre had conducted their investigation for the purpose of making their report, accusing them of bias and being unduly close to the mother's lawyer.

[21] On the same day the mother complained that the father was not paying her and M any maintenance and sought a temporary order for payment to her of the equivalent of €500 per month for M, together with an injunction prohibiting the father approaching closer than 500 metres from the mother's residence or harassing her in any way.

[22] On 9 June, the court adjourned the hearing. On 12 June the father filed a response to the mother's application, seeking the calling of a number of

witnesses from M's school and an 'expert report' from the Institute for Mental Health in Belgrade. It is noteworthy that he stated that in the Convention proceedings in England the court had 'rejected all the mother's accusations against me'.

[23] Shortly thereafter the court awarded maintenance for M of equivalent to €350 per month.

[24] On 5 July the father issued a further application to prevent the mother from removing M from Serbia.

[25] On 27 July 2006, shortly after a disputed incident between the father and mother as to an altercation at the Family Centre when M was handed over by the father after a period of holiday contact, another incident concerning drugs occurred. It is corroborated by a letter by the Child Abduction Section of the Foreign and Commonwealth Office setting out their consular involvement in the incident as well as in police documents. Four policemen arrived at the flat of the mother, where she was with M, telling her that they had a warrant to search her premises and the car which she was using. Upon a telephone call from the mother the pro-consul attended. In the course of this search bags containing five small packets of a white substance, apparently cocaine, were found in one of the hubcaps of the vehicle. M witnessed these events. She was sent to stay with a friend whilst the mother was arrested by the police and taken to the police station to give a statement. The mother's lawyer was told to prepare to represent her at the emergency night court to be charged with possession of drugs in a quantity large enough to render her a dealer. However, the mother was released after 3 hours.

[26] On 31 July 2006, the father issued a request to the City Centre of Social Work complaining of the refusal of the mother to permit or encourage M to talk to him upon the telephone over the previous 5 days.

[27] On 1 August 2006, according to the mother, when she was at home sitting on her terrace, she was targeted by the small red dot of what she assumed to be a rifle's laser sight. She did not go to the police to report it but states that, having borrowed money next day, she left Serbia and went to England for a month with M, returning on 3 September 2006. In her absence, her lawyer issued on her behalf an application to deprive the father of his parental rights and he issued a series of applications/complaints to the Family Centre about the mother's breach of contact arrangements, and her alleged attempts to prevent him visiting M at school. He also applied for additional witnesses to be called in the custody proceedings.

[28] On 22 September 2006, the mother's application for custody and leave to remove was again adjourned. The father thereafter issued further demands for extra contact and enforcement of the contact previously ordered. On a date not identified by the mother but stated in her attorney's affidavit of 20 December 2006 to have been the end of September or the beginning of October, 2006, the police visited the mother in her flat to ask M if she wished to go for contact with the father. As they were doing so, according to the mother (and to M who stated that she saw it happen, as reported by Miss Fitch the CAFCASS reporter), the father removed the number plates from the mother's car, which was visible from the windows of the flat. This prevented the mother from being able to drive M to school. Both she and M spoke to the father to ask for the return of the plates, M being told it was not her business. According to M she replied 'It is, daddy. How will I get to school?'

[29] On 5 October 2006 the father applied to the City Centre for coercive enforcement of his rights of contact with M on the basis that, since 27 July 2006, he had not had contact in accordance with its provisions and seeking order for payment by the mother of a fine on any future breach.

[30] On 13 October 2006 the mother again left Serbia with M and brought her to England, where since 17 October, she has been attending primary school.

[31] The reasons which the mother gives for doing so are that, following the incident of the visit by the police and the discovery of the drugs on 27 July 2006, M had become anxious and tearful to the extent that she would not leave the mother's side even when they were at home alone, insisting on sleeping in the mother's bed. She was refusing to see the father or to go for contact visits and became tearful and angry when the mother tried to persuade her to do so, telling her that she did not care about her. The mother believed that, if M did not go for contact, the father would seek an immediate change of physical custody.

[32] So far as her defences were concerned the mother put the matter in the following way in her affidavit:

'I left Serbia with [M] because we are in an intolerable position there. [M] has suffered real psychological harm since our return in February. She is fretful and frightened and afraid of what will become of me and her. The plaintiff does have a great deal of influence with the local authorities and police, whereas I, as a foreign national, have none. He is able, and has been able to manipulate the court system to avoid the hearing of the case. When he is unsatisfied with the recommendations made [for] M's future care, he has sought to have the person removed from the case. I am a nervous wreck and lived in constant fear of whether I would be arrested or harmed. I now fear for my life. Whilst in Serbia I tried, despite the deeply wounding and traumatising effect on me, to 'keep going' for [M's] sake. I can do so no longer.' (para 45)

'[M] objects [to] returning to Serbia. She states that she will not return. Further there are no constraints or provisions that can be put in place to protect [M] and I from the plaintiff. The Serbian system and authorities cannot protect [M] or me. He has threatened and intimidated me and will continue to do so. His actions have had, and will continue to have, a grave impact on [M's] emotional and psychological wellbeing. I am deeply concerned for my safety and that of [M] if we were to return to Serbia. I am her primary carer and if there is any prospect of her losing me as her day to day carer she will suffer grave psychological harm.' (para 49)

[33] Once M had been taken to England, the father sought regular telephone contact with her. It has been his complaint that only about one in three of those calls has been successful in the sense that he has spoken to M. In those telephone calls, as the father accepts, M has repeatedly told him that she does not wish to speak to him on the telephone or come back to live in Belgrade.

[34] On 4 November 2006, M wrote to her father to say that she neither wanted to talk to nor to live with him. The father questions the genuineness of

this letter in the sense of it being a true reflection of M's feelings. However, he exhibited to his own affidavit tape recordings of telephone calls to M which make clear that M told him that she does not wish to hear from him or to come back to Belgrade, but he asserts that in this respect she is acting under the influence of the mother.

Material before the judge

[35] Singer J had before him, as have we, the statements and affidavits from the father's previous Hague Convention proceedings which culminated in the consent order made by Sumner J, together with the transcript of the evidence of Mrs Oliver the CAF/CASS officer who gave evidence before him, following which he confirmed his earlier order. The further evidence filed in the instant proceedings was as follows. In addition to the short affidavit of Mrs Usher, the father's solicitor, there was a lengthy affidavit from the mother setting out the matters to which I have referred; the somewhat shorter affidavit of the father exhibiting many of the documents in the Serbian proceedings; an affidavit of the parties' mutual friend Miss Virijevec, relating to the father's stay at her home in the New Year period 2005–2006 in which she speaks of his extreme animosity towards the plaintiff; the affidavit of Miss Nikodinovic, the mother's Serbian lawyer, referring to various stages of the proceedings in Serbia and confirming the contemporaneous complaint to her by the mother of the incident when the father is said to have taken the registration plates from the mother's car; and various Serbian court orders and police reports in translation.

[36] So far as the state of the Serbian proceedings is concerned, Miss Nikodinovic made clear that these were continuing, the next (lawyers') discussion of the case before the court having been scheduled for 8 February 2007. She made it clear that the parties have not yet been heard nor have they yet made any statements for presentation to the court. All statements have so far been made simply through the words of the attorneys. She states:

'This procedure lasts surprisingly long, bearing in mind the complexity of the matter as well as the fact that this subject was twice the subject of complaints before the Court of Appeals (the District Court) due to appeals on the temporary measures.

According to my estimation, the procedure will not conclude before long, considering that a vast number of evidence should be presented. The circumstances were especially laden when [the mother] discovered white powder (the drug) several times in her own car, which was the reason for the search of her house and the apartment (which I attended) and when she was conveyed to the police and everything took place before M.'

[37] In broad terms, the evidence of the father, insofar as it was directed to the complaints of the mother, put all the matters raised against him in issue. He challenged the picture of emotional and psychological isolation spoken to by the mother, he denied entirely the wife's version of events as to disputes between them in relation to contact, and denied any incidents causing distress or upset to M, whom he stated was happy in contact with him and, rather than being fearful of him, was fearful of her mother. He denied all the allegations

of threats, intimidation and harassment alleged against him, denied (as the mother also alleged) that on occasions he stalked her in his car and he denied any responsibility for the planting of drugs in her car. He denied any special connections with the police or the authorities in Belgrade or that M had any reason to be worried or to fear him in relation to anything he had done. On the contrary he insisted that M was afraid of the mother and fearful of expressing anything positive about the father.

[38] So far as M's objections were concerned, the father accepted that M has been saying words to the effect that she did not wish to return to him, but attributed it to the influence of the mother who, he asserts, has kept M informed in relation to the court proceedings and has coached her into the attitude which she presently displays. He suspects that M is suffering psychological harm in the care of her mother and asserts that she should be returned so that the Serbian courts can conclude their inquiries and make a decision.

The judgment below

[39] Having referred to the law and rehearsed the procedural history, Singer J embarked on an outline of the events. He adverted to the fact that there had been huge difficulties about contact in Serbia, observing:

'I am not in a position to decide which came first, the chicken or the egg, whether it is the father's behaviour towards the mother and the child which has made the child seemingly reluctant to see the father, or whether it is the mother's denigration of the father and her ability to keep alive in the child's mind real or altered accounts of the fathers faults.'

[40] He went on to refer to the allegations of the mother that her liberty was threatened by the father by bringing her to the attention of the police, and by the 'laser sight' incident as being matters appropriate for complaint to and investigation by the police and other authorities (para [16] of the judgment). He also referred to the disputes in connection with M's schooling, and the allegations and counter allegations in that respect as being matters appropriately to be resolved by the Serbian court. Similarly the Serbian court was appropriate to decide the father's complaints of lack of professionalism and bias in the Family Centre Team.

[41] The judge then dealt at some length with his refusal of an application by counsel for the mother that he should receive oral evidence from both parties in order to assist the court in its decision. The judge made reference to various authorities and, in particular, the observations of Thorpe LJ in *Re W (Abduction: Domestic Violence)* [2004] EWCA Civ 1366, [2005] 1 FLR 727 as to the circumstances in which it may be appropriate to call oral evidence in what are essentially summary proceedings.

[42] At para [25] of his judgment, Singer J stated:

'The essential question, as it seems to me, is whether embarking upon oral evidence is likely to be determinative of the issues raised on the evidence. I have to say that in this case it seems to me that I would be unlikely to be able to form concluded views with sufficient clarity and

surety to have acceded to the request in any event, irrespective of its lateness. Moreover, it is a consideration that these very same issues are in the course of investigation or have been investigated in Serbia, the country where the primary materials where their truth or falsity are to be found.'

[43] The judge then moved specifically to consider the Art 13(b) defence, and in particular the submission of counsel that the information contained in the mother's written evidence should lead to the view that the father had embarked on an escalating campaign against her designed to make it impossible for her effectively to provide care for M, and that such pressure would be likely to be renewed upon any return of M to Serbia.

[44] In para [29] the judge stated:

'In relation to the period since the mother's return with M in February this year, the mother points to what undoubtedly have been increasing tension and upset on the part of the child, which, I have to say, is entirely what one might expect might well result from the degree of hostility and conflict that there is between the parties in whichever jurisdiction that occurred. She alleges that he has breached his undertakings in a variety of ways of which the most important, it seems to me, is her allegation that he has continued with his campaign of harassment and pressure. Insofar as that pressure has been applied in the form of applications and allegations and assertions made to the court or about the court proceedings, it seems to me that that is a matter which is entirely within the jurisdiction and the capacity of the court and indeed the prosecuting authorities in Serbia to cope with, as I have already stated.'

[45] In paras [30] and [31] the judge turned to the mother's allegations concerning the drugs and her invitation that the judge draw the inference that the father was responsible for planting them. He dealt with the matter in this way. He stated:

'There is no doubt that, certainly in relation to the three most recent incidents involving drugs that I have referred to, they took place. The father denies that it was anything to do with him. He suggest that the mother is not without support and assistance in Serbia, he raises the question whether these were in fact plants on herself, by herself, in order to found allegations against him. Be that as it may, the fact of the matter is that the mother appears to have found an effective and speedy way of dealing with the planting of drugs in her vehicle, whoever was the cause of the presence of those drugs in that car.'

[46] At para [32] of the judgment the judge turned briefly to the mother's complaints about targeting by the laser sight of a rifle and essentially dismissed it for lack of corroboration or complaint by the mother to the police.

[47] The judge then referred to the high burden of proof for the establishment of an Art 13(b) defence, in the sense that what must be

established must involve exceptional circumstances before the court will regard itself as freed of the obligation to order a return.

[48] In para [36] the judge accepted the submission of Mr Setright QC on behalf of the father that all the issues relied on by the mother had come, or remained, before the Serbian court or were for consideration by the Serbian police authorities and that it appeared that the mother had so far been able to make herself proof against the consequences of what she alleged to have been the father's progressively escalating behaviour. He stated:

'It is not suggested on her behalf that the authorities in Serbia are impotent to offer protection to the mother and indeed the history of the proceedings in relation to their child thus far shows that she has so far prevailed in certainly the most important aspect of the case from her point of view of retaining the custody of the child.'

[49] Having observed that the mother had nonetheless chosen to remove the child to this country at a time when her own application to the Serbian courts remained unresolved, the judge then stated at para [37]:

'I am therefore in a situation where I must indeed consider in a rigorous and unsentimental fashion the position as it will stand if this child is returned by my order to Serbia, bearing in mind the undertakings which it is agreed the father should offer and the mother is prepared to accept as part and parcel of the order.'

At that point the transcribed judgment ends and further discussions ensue without the judge articulating the position as to the child on return, though we are told and do not doubt that the judge had made clear in argument earlier that he was intending to make an order for return subject to suitable undertakings to protect the position of the mother and M on return.

Grounds of appeal

[50] It will be apparent from that summary above that the judge made no reference whatever in his judgment to the defence of the child's objections which had been raised before him. Furthermore, when considering the defence under Art 13(b) of the Hague Convention, his focus appears to have been wholly upon the position of the mother rather than the position, views and fears of M, and whether there was a sound basis for them. It is those matters which form the basis of the appeal in this case.

[51] Whereas, below, counsel who then acted for the mother laid principal emphasis upon the Art 13(b) defence, Mr Scott-Manderson has on this appeal placed the child's objections defence in the forefront of his argument, cross-referring to those matters advanced to support the Art 13(b) complaint, of which he submits there was largely uncontested evidence which the judge should have accepted as affording substance to the child's objections. Mr Scott-Manderson submits that these matters should lead the court, having found M's objections (including her requisite age and degree of maturity) established, to exercise its discretion against an order for return.

[52] In the light of the judge's failure to refer to M's objections, the ground of appeal is put as a wrongful failure to take such objections into account.

However, given the experience of this judge in Convention cases and the unlikelihood of his ignoring a central issue in the submissions, Mr Scott-Manderson takes a realistic approach. Having checked the position with counsel who appeared on both sides below, he accepts that it was apparent in argument that the judge did not consider the defence to have been made out.

[53] Mr Setright QC, who did appear below, but who had been released and was not himself present in court on the morning that the oral judgment was delivered acknowledges the embarrassment of his position, expressing himself unable to assist on the judge's reasoning process in relation to M's objections. Save that he drew our attention to the judge's written remarks supporting his refusal of permission to appeal, which (in part) read 'Defences relied upon art 13(b) and the child's objections. In my view my decision involves no issue of principle not covered by reported cases; and involves an element of discretion'. He has, however, submitted to us that, for reasons to which I shall refer below, given the findings of Singer J in relation to the Art 13(b) defence, no reasonable judge could have held that the burden upon the mother to establish the defence of the child's objections was satisfied. Therefore, submits Mr Setright, we should dismiss the application for permission to appeal. Alternatively, if we take the view that permission should be granted, Mr Setright argues that we should, as Mr Scott-Manderson has submitted, ourselves proceed to consider and rule upon the validity of the defence, exercising our own discretion in relation to retention or return, should we find that the objections are established.

[54] In relation to the Art 13(b) defence, Mr Scott-Manderson submits that the judge carried out insufficient factual analysis in relation to the issue raised by the planting of the drugs. In relation to that issue, he submits that the fears and objections of M did not depend on whether the father was established as the perpetrator of the plants, but rather on the question whether the mother was plainly being targeted by someone and was the subject of regular police attention as a result. On that basis, in fact, or at any rate in the reasonable perception of M, there was a real danger that mother might be taken into custody, giving rise to a clear risk of harm to the child through the mother and/or an intolerable situation for the child if returned to Serbia. Lastly, Mr Scott-Manderson submits that the judge was in error not to accede to Mr Reddish's application for the taking of oral evidence to resolve any aspects of the evidence in relation to which he retained doubts on these matters.

[55] I propose to deal with that last matter first.

[56] I consider that the judge was well within the ambit of the discretion which he undoubtedly possessed in relation to the admission of oral evidence, when he refused to require it in this case. In *Re W*, the decision of the Court of Appeal to which the judge referred, Thorpe LJ set out the position as follows at para [23] of his judgment:

'... the experience and the instinct of the trial judge is always to protect the child and to pursue the welfare of the child. That instinct and experience is sometimes challenged by the international obligation to apply strict boundaries in the determination of an application for summary return. The authorities do restrain the judges from admitting oral evidence except in exceptional cases. The authorities do restrain the

judges from making too ready judgments upon written statements that set out conflicting accounts of adult relationships. What the authorities do not do is to inhibit the judge from himself or herself requiring oral evidence in a case where the judge conceives that oral evidence might be determinative. The judge's conduct of the proceedings is not to be restricted by tactical or strategic decisions taken by the parties. However, to warrant oral exploration of written evidence, the judge must be satisfied that there is a realistic possibility that oral evidence will establish an Article 13(b) case that is only embryonic on the written material.'

[57] As is repeatedly made clear in the authorities, Convention proceedings of this kind are summary proceedings, generally intended to be resolved on the basis of affidavits or statements which frequently embody vigorously disputed facts, assertions and counter-assertions. It is also the case that, generally speaking, those disputed issues will be able to be sufficiently resolved in the case of Art 13(b) of the Hague Convention and child objection defences, by receipt of independent evidence such as that of a CAF/CASS officer in child objection cases, or by evidence from a doctor or a psychiatrist in cases where the disputed issue principally concerns the effect of events on the child rather than the parties for the purposes of Art 13(b). Save that it is frequently the case that the court will hear oral evidence from a CAF/CASS officer as to a child's objections, the hearing of oral evidence is and remains necessarily a rarity, if the speedy and summary nature of the proceedings is to be preserved. It is necessary and proper that, where the judge concludes that oral evidence may be determinative of the question of whether a defence has been established or not, he should enjoy the discretion to require oral evidence, though such a situation will not often arise, bearing in mind the high threshold of the Convention defences. Plainly the judge did not consider that this was such a case and he was entitled to take that view. However, that still leaves open the question whether, on the evidence which was before him, the judge should have held that either of the defences advanced was established.

The child's objections

[58] The principles to be applied by the court in considering a 'child's objections' case under Art 13 of the Hague Convention are well established. In *Re S (a Minor) (Abduction: Custody Rights)* [1993] Fam 242, sub nom *S v S (Child Abduction) (Child's Views)* [1992] 2 FLR 492, Balcombe LJ summed the position up succinctly in this way at 251–252 and 501 respectively:

'(a) The scheme of the Hague Convention is that in normal circumstances it is considered to be in the best interests of children generally that they should be promptly returned to the country whence they have been wrongfully removed, and that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. That discretion must be exercised in the context of the approach of the Convention – see *Re A (Abduction: Custody Rights)* [1992] Fam 106 sub nom *Re A (Minors) (Abduction: Acquiescence)* [1992] 2 FLR 14 at p 28 per Lord Donaldson of Lymington MR.

(b) Thus if the court should come to the conclusion that the child's views have been influenced by some other person, eg the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention. Thus in the case of *Layfield* in the Family Court of Australia on 6 December 1991, Bell J ordered an 11-year-old girl to be returned to the UK because he found that, although she was of an age and maturity for her wishes to be taken into account, he believed that those wishes were not to remain in Australia per se, but to remain with her mother who had wrongfully removed the girl from the UK to Australia. On the other hand, where the court finds that the child or children have valid reason for their objections to being returned, then it may refuse to order the return.'

[59] That passage was expressly approved as the proper approach of the court by Thorpe LJ in *Zaffino v Zaffino (Abduction: Children's Views)* [2005] EWCA Civ 1012, [2006] 1 FLR 410, at para [19] where he added:

'Secondly, since the point undoubtedly demands decision in the present appeal, I am persuaded that, in the exercise of the discretion under Art 13 (possibly fortified by Art 18), the court must balance the nature and strength of the child's objections against both the Convention considerations (obviously including comity and respect for the judicial processes in the requesting state) and also general welfare considerations. To suggest otherwise seems to me to risk artificiality in judgments in future cases.'

See also, per Wall LJ, at paras [30]–[31].

[60] Where a child's objections are raised by way of defence, there are of course three stages in the court's consideration. The first question to be considered is whether or not the objections to return are made out. The second is whether the age and maturity of the child are such that it is appropriate for the court to take account of those objections (unless that is so, the defence cannot be established). Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return. The relevant considerations on both aspects appear conveniently set out of the judgment of Ward LJ in *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192, at 203–204. As to the first two questions, the matters to be established are:

(1) Whether the child objects to being returned to the country of habitual residence, bearing in mind there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated. Hence there is a need to ascertain why the child objects.

(2) The age and degree of maturity of the child. Is the child more mature or less mature than, or as mature as, her chronological age? By way of example only, I note that in *Re R (Child Abduction:*

Acquiescence) [1995] 1 FLR 716 Ewbank J's decision that boys aged 7½ and 6 were mature enough was upheld by Balcombe LJ and Sir Ralph Gibson, Millett LJ dissenting. I would not wish to venture any definition of maturity. Clearly the child has to know what has happened to her and to understand that there is a range of choice. A child may be mature enough for it to be appropriate for her views to be taken into account even though she may not have gained that level of maturity that she is fully emancipated from parental dependence and can claim autonomy of decision-making. The child's "right" – and I use the word loosely – is, consistently with Art 12 of the United Nations Convention on the Rights of the Child 1989, to have the opportunity to express her views and to be heard, not a right to self-determination. Article 12, which is often judged to be one of the most important in that Convention, assures to children capable of forming their own views:

“... the right to express those views freely in all matters affecting [them], the views of the child being given due weight in accordance with the age and maturity of the child.”

[61] The importance of hearing from children in Hague Convention cases has recently been emphasised in the speech of Baroness Hale of Richmond in *Re D (a Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2006] 3 WLR 989, at paras [58]–[61]. In relation to Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, she observed that the provision of Art 11(2), which provides:

‘When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age and degree of maturity.’

is a principle of universal application. At the same time, she accepted that, in most Hague Convention cases, the most common method of hearing from the child is by means of an interview with a CAFCASS officer:

‘who is not only skilled and experienced in talking with children but also, if practising in the High Court, aware of the limited compass within which the child’s views are relevant in Hague Convention cases.’

She went on to state that, whereas in most cases that should be enough:

‘In others, and especially where the child has asked to see the judge, it may also be necessary for the judge to hear the child.’

[62] As to the appropriateness of taking into account a child’s objections, in *Re T (Abduction: Child’s Objections to Return)* [2000] 2 FLR 192, Ward LJ, having observed that each case would depend upon its own facts, set out the position thus, at 204:

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‘(3) So a discrete finding as to age and maturity is necessary in order to judge the next question, which is whether it is appropriate to take account of the child’s views. That requires an ascertainment of the strength and validity of those views which will call for an examination of the following matters, among others—

- (a) What is the child’s own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is her views which have to be judged appropriate.
- (b) To what extent, if at all, are the reasons for objections rooted in reality or might reasonably appear to the child to be so grounded?
- (c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?
- (d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?’

[63] Both Mr Setright and Mr Scott-Manderson are agreed that, in the light of the failure of the judge to address and consider those principles in the course of his judgment, the appropriate course is for us to do so upon this appeal. I therefore proceed to do so upon the basis of the evidence before us, and upon the assumption that the evidence of Miss Fitch, the CAFCASS reporter, is to be taken at face value, the judge having expressed no criticism of her account of the nature and quality of M’s views/objections.

[64] Mr Scott-Manderson submits first that M plainly objects to return to Serbia, having made this clear not merely to her mother and her father (see paras [32]–[34], above), but to the CAFCASS reporter Miss Fitch. Asked by Miss Fitch whether she understood why she had been asked to see her, M replied immediately ‘It’s because I don’t want to go back to Serbia’.

[65] Asked by Miss Fitch how things had been since the mother and M returned to Serbia in February 2006, M said ‘mummy kept pushing me to see daddy and I am scared, I don’t want to’. She stated that she was scared because she had seen her father hit her mother. She said that she was scared that her father would do the same to her. She said that, after they had gone back to Belgrade, her father had started causing trouble for her mother. She said that he had come to their house one evening about 10 pm with the police. M had looked out of the window and seen her father removing the number plates from the car. She showed Miss Fitch a letter she had written in Serbia giving an account of that evening in which she had stated that she had never been scared so much and had clung to her mother when told by the police that she needed to be with her father for that weekend. She said that when the police were going out of the house they had said that if this did not stop between mummy and daddy, they were going to take her from both of them, which she took to mean putting her in a home. If she went back to Serbia she was scared the police would take her and she would never see her mother.

[66] She spoke of another incident when the police had arrived and had searched the house (cf para [25] above). The police had taken the hubcaps off the car and removed something wrapped in foil. She said that her mother had

been taken to the police station and was nearly in jail. In a response to a question as to why her mother and she had come to England she said 'daddy made me not like Belgrade ... We did like it loads. When all this started mummy didn't have any money and I couldn't live there. Mummy had to borrow money cos she couldn't pay the rent. Daddy didn't want to give mummy any money ...' M showed Miss Fitch a note she had written in English addressed to her father stating that she did not want to see him and in which she accused him of putting drugs in her mother's car and sending the police to scare her in her house. She ended the letter with 'I don't want to live with you' written in large letters.

[67] Asked by Miss Fitch about her objections to returning to Serbia, M said that she did not wish to go back and was very scared. Asked what she was scared of, she answered 'this time they are bound to take me from mummy and give me to daddy and I will never see mummy again'. When Miss Fitch put to her the possibility of the judge saying that she had to go back, she repeated 'I won't go back', shaking her head.

[68] In the assessment at the end of her report, Miss Fitch assessed M as a troubled and anxious child who appeared to be different now from how she might have been when seen by Mrs Oliver in February 2006 in that, unlike on that occasion, she barely relaxed or showed any signs of humour. At para 18 of her report she summed it up in this way:

'[M] has strong feelings about returning to Belgrade. She has deeply negative associations with the place and with her father. Her anxiety is largely connected to fears about her mother's safety and the threat she will become separated from her. This threat is very real and comes from seeing her mother questioned on more than one occasion by the police. I believe that she may be traumatised by these experiences and is finding them very difficult to cope with.'

[69] In oral evidence, Miss Fitch was challenged by Mr Setright to the effect that M was a child who in interview was recognising that she had a task to perform as a responsibility given to her by her mother. Miss Fitch stated that she had considered that, but that it was not the impression she had gained. It was put to her that M had been exposed to the forthright views of the mother and her uncle who were exercised about the financial aspects of the case, it appearing that M had herself acquired knowledge of the difficulties over money and maintenance. Miss Fitch stated that she did not find this surprising as M was an intelligent child of almost 8 and that, if her mother had tried to explain to her why they were struggling to eat, it would not be surprising that M was aware of their monthly living allowance. It was also put to her that the documents M had produced had been written either by the mother or by M herself to provide evidence in support of the mother's case. Miss Fitch stated that, while she could not rule it out, it had not seemed to her that that was the case, the position being that writing things down could be cathartic and was not unusual for children in such cases. She agreed that, if M had been told that she was to be returned to Belgrade it would have put an enormous amount of pressure on her. However, she stated that her fears for her mother's safety and the threat that M would become separated from her were very real in the mind of M and that they came from seeing her mother

questioned on more than one occasion by the police. At the time of the interview Miss Fitch had the impression that M had been traumatised by her experiences with the police though there might be a number of contributing factors. Miss Fitch made clear that she considered the feelings expressed by M were tantamount to objections to returning to Belgrade where she had had the experiences of seeing her mother being assaulted by her father, her mother pushing her to see her father when she was scared and did not wish to do so, and the experience and fears associated with the mother being questioned by the police. She did not consider that the negative associations that M had with Belgrade were simply because of her mother's objections; her negative associations were based on her own experience. She had a strong impression that the incidents with the police had been frightening and there was a fear on M's part that the police might remove her mother and cause her to be separated from her.

[70] Before this court, Mr Setright has repeated by way of submission the questions which he put to Miss Fitch. He has not, indeed cannot, dispute the substance of what M said to Miss Fitch, but he submits that the judge may well have considered that M's statements were coloured by coaching from the mother or, at the very least, immersion in the atmosphere of hostility to the father which apparently exists within the mother's milieu. Alternatively, he may have simply taken the view that M was of insufficient maturity to have her views considered.

[71] So far as the question of the mother's influence is concerned, that may well be so. However, on the basis of the evidence I have recited, it is quite clear to me that M has, and has expressed, strong objections to returning to Serbia. While based in part upon her wish to stay with her mother and not to return to her father, her objections ('deeply negative associations with the place' per Miss Fitch) are based, in large measure, upon her experiences with the police and fear of repetition of similar incidents should she return. M has a real and understandable fear of return to possible further involvement with the Serbian police and fear of being parted from her mother as a result.

[72] As to the question of the age and maturity of M, it is apparent from the transcript of the evidence of Miss Fitch that the judge was much exercised by the purpose of the order of Baron J made on 27 November 2006 requiring that the child be interviewed by the CAFCASS officer at a point before the mother had filed her evidence. McFarlane J had declined the mother's request to order a CAFCASS interview on 9 November 2006 on the basis that it could be renewed following the filing of evidence. Whereas Mr Reddish asserted that the mother's case of objections by the child had by then become apparent, albeit she had not filed her evidence, Singer J speculated that Baron J had simply made her order for a report pursuant to the observations of Baroness Hale in *Re D*, in which she had emphasised (at para [58]) the need in all Convention cases to give a child the opportunity to be heard 'unless this appears to be inappropriate having regard to his or her age or degree of maturity' and in this connection to make provision for such opportunity to be exercised 'at the outset' (see para [61]). That decision became known only after the date of the appointment before McFarlane J and prior to that before Baron J. This led the judge to question whether Miss Fitch, when formulating her report, had had in mind the wording of Art 13 or that her task was to report in relation to a child's objections defence raised under the Hague

Convention as opposed to being simply a means by which the child's 'views' were placed before the court. Miss Fitch stated that while it was quite unusual for a child of M's age to be interviewed, she considered that she did have the Convention in mind, not least because her focus in reporting was on whether M's views were tantamount to objections, and she had discussed the meaning of the word 'objection' with M.

[73] In the light of the wording of Miss Fitch's report, there seems to me no reason to doubt the answers which she gave to the judge and I regard it as unnecessary to explore them further. Baroness Hale's remarks were made in the context of a case where a defence of child's objections was raised very late in the day on appeal, in respect of a child of 7½ at the time of trial. It is plain that Baroness Hale of Richmond's concerns that the views of the child had not previously been heard by the court were not limited to 'voice of the child' concerns generally, but were directed to the need to hear that voice through an interview with a CAFCASS officer:

'who is not only skilled and experienced in talking with children but also, if practising in the High Court, aware of the limited compass within which the child's views are relevant in Hague Convention cases.'
(para [60])

[74] So far as the age and maturity of M is concerned, she is now 8 years old. It is stated in the report of the school psychiatrist at her Serbian school that in May 2005 she was showing 'a high level of psychological and physical maturity and a high IQ' before a number of incidents 'outside school negatively affected her social psychological and physical status' so that, in April 2006, she was 'scared, insecure and confused' and had become 'serious, sad and torn between her parents'.

[75] In her evidence before Sumner J, on 21 February 2006 Mrs Oliver of CAFCASS described her thus:

'She comes across as an intelligent little girl. She is quite measured in her responses. She does not easily engage but when she does she thinks about what she is going to say and then talks. I felt that she certainly was a child that is bright for her age and understood why she was there to speak with me.'

In her report dated 8 December 2006, Miss Fitch stated:

'I would concur with my colleague that [M] is intelligent and bright for her age. I would assess her maturity as commensurate with her chronological age but she has clearly witnessed and experienced events from which at her age she should be protected.'

[76] It seems clear to me, from the evidence of both CAFCASS officers that M is a bright 8-year-old well able to understand and assimilate the questions which were put to her and to give them considered answers. In my view her age and maturity are such that her clearly voiced objections require to be taken account by the court. Applying myself in order to the questions stated by Ward LJ to require examination in cases of this kind (see para [62])

above) it is not easy confidently to enter upon a consideration of M's own 'perspective' of what is in her interests. That is because Miss Fitch does not appear to have explored that aspect to any great extent in her report; nor does Mr Setright appear to have engaged her on that question in cross-examination, beyond exploring at length the question of whether or not, in the views which she expressed, M was reflecting the attitude of the mother and the atmosphere in her home. Although Miss Fitch acknowledged that she had not specifically addressed that question in her report, she made clear in her oral evidence that she had not formed the impression that M was simply propounding the views of the mother; rather had she taken the view that M had been traumatised by her personal experiences in Serbia, in particular by her exposure to the activities of the police and her consequent fear of being separated from her mother. On that basis, no doubt M's own perspective is simply that her mother and she should be permitted to live a quiet life, free from the attentions of the police and the risk of her mother being taken into custody, and she is fearful that that will not be the position in Serbia. That is something materially different from a desire simply to be with the mother rather than the father.

[77] These being the fears of M, it also seems clear to me that they are rooted in reality, in the sense that the mother has plainly been the victim of persistent efforts to incriminate her in relation to drug-dealing. I pause in parenthesis to note that, while the judge referred to the suggestion of the father that the mother might herself have planted the drugs on the occasions complained of, I read it as no more than a recitation of the father's position and not as a suggestion by the judge that this was something which merited serious consideration. I note that, having made his observation, the judge went on 'Be that as it may ...'. However, the real point, as it seems to me, is that such a suggestion is fanciful. Given that the mother herself already had the care of M under an order of the court, given the appallingly risky nature of any such stratagem, given the repetition of the incidents and mechanical ingenuity of the final planting exercise, I cannot think that for the purposes of these proceedings the judge could or should have been in any doubt that the mother had been the victim of malicious attempts to secure her arrest and imprisonment. Whether or not that is so, from the point of view of M the fears grounding her objections are plainly rooted in the reality of the incidents concerned.

[78] As to the question whether M's views have been shaped by 'undue influence' and pressure from the mother, it would not be surprising if, as a result of the atmosphere in which M has been living and the mother's hostility to the father, her views had been coloured by the unseemly tug of war which appears to have gone on in Serbia, as recognised in the reports to which I have referred. However, in my view, quite independently of those matters, the deeply unsettling experiences of M as a result of police attention have been enough in themselves to create the fears rationally expressed by M. In this respect, it is largely immaterial whether the planting of the drugs was effected or instigated by the father, though, on the information before the court, no other candidate realistically emerges. Finally, it does not seem to me that the objections of M will be mollified on return in the sense that, whether or not her fears prove justified, they are unlikely to recede, and so far as any

‘pernicious influence’ from the abducting party is concerned, removal of M from her mother would simply be the realisation of the very fears which M harbours.

[79] It seems to me that these various matters all required express consideration by the judge below; unfortunately they did not receive it. I am further of the view, contrary to the implicit findings of the judge, that M has a valid reason for her objection to being returned for the reasons I have stated.

[80] That leaves only the question of whether the objection of M is such that this is one of the ‘exceptional’ cases justifying the court in using its discretion to refuse to order an immediate return. That involves balancing the nature and strength of M’s objections against both the Convention considerations (including comity and respect for the judicial processes in Serbia as well, of course, as the policy behind the Convention) and general welfare considerations.

[81] I consider that the objections of M in this case are undoubtedly strong and their nature is undoubtedly exceptional in the sense of the unusual circumstances underlying the strength of those objections, namely a campaign by someone (whether or not the father) who is bent upon planting drugs upon the mother in an effort not simply to harass her but, inferentially, to secure her arrest, prosecution and imprisonment.

[82] As to the Convention considerations, they are as significant in this case as in any other. Indeed, they carry the extra weight of a case in which the mother has removed the child whilst engaged in the course of proceedings in the foreign court concerning the custody of the child in which she has herself sought the permission of the Serbian court to remove M to England. Nor is there any reason to question the integrity or welfare-based nature of the proceedings in Serbia, in respect of which the question of comity under the Convention is plainly of great importance. Nevertheless, I have no doubt that the general welfare considerations in this case militate strongly in favour of refusing to make an order. The evidence of Miss Fitch plainly indicates that M is deeply frightened for her mother’s safety on the basis of her experiences in Serbia and that she spoke of every day becoming more scared, when she was out there, of being taken from her mother’s care. M was troubled and anxious and understandably has deeply negative associations with Serbia generally, though largely connected to fears for her mother’s safety.

[83] Unlike the judge, I do not consider this to be a situation in which M can be adequately protected from the eventualities which she fears by the undertakings offered by the father and incorporated into the judge’s order. M is a very troubled child whose state of mind, fears and uncertainty have increased substantially since she was seen by Mrs Oliver in February 2006, as a result of the experiences with the police of which there was ample evidence before the judge. To send her back now will be to consign her to continued fear and uncertainty and further distress. In my view, this is an exceptional case which merits refusal of an order for immediate return and I would allow this appeal on that ground.

Article 13(b)

[84] In those circumstances it is not necessary to consider the defence under Art 13(b) of the Hague Convention. Outside the confines of Convention jurisprudence, the welfare considerations as I have described them in relation

to the child's objection defence might well be regarded as giving rise to an 'intolerable' situation for M if she were returned. However, there is a difference in the intensity of scrutiny and a higher threshold of proof to be crossed for a finding under Art 13(b) than is necessary when considering the child's welfare as part of the discretionary exercise in relation to the child's objections once established. The judge, having considered the case under Art 13(b) fairly and squarely, decided that the mother's defence had not been made out; and I am not prepared to say that he was wrong. However, I am prepared to say that in my view he was wrong, in doing so, to brush aside, as he effectively did, the defence of child's objections, in respect of which the evidence sufficiently established the substratum of alarming facts which underlay M's objections to return.

[85] For those reasons, I would grant the mother's application for permission to appeal and would allow the appeal.

RIX LJ:

[86] I agree with the judgments of both Potter P and of Wilson LJ. Coming as I do comparatively fresh to the subject matter of the Hague Convention, I remind myself, with some severity, of the policy considerations behind it, and of the comity owed to the judicial proceedings which are on foot in Serbia, as well as of the judgment of the experienced judge below. Nevertheless, the Art 13 exceptions are themselves part of the Convention, however much it is necessary to regard them as subject to the Convention's underlying philosophy.

[87] In the circumstances laid out so well in the narrative of the President's judgment, what has struck me as quite remarkable in this case, and Wilson LJ confirms its truly exceptional nature, is the striking evidence of the drug and police involvement. Even if the reasons for the repeated discovery of drugs in the mother's car and of the police involvement, clearly as a result of repeated tip-offs, have not as yet been laid bare, the essential facts have been established and are not in dispute. Those facts are therefore quite unlike the vast array of disputed material which depend essentially on the mother's and the father's counter-allegations. The father's suggestion that the planting of the drugs (and therefore it must be assumed also the mother's informing against herself) was part of her scheming against him seems to me to be wholly unrealistic. The undisputed occurrence of the facts relating to the police involvement itself lends support to the child's fearful reaction to such events.

[88] The judge put the incidents relating to the drugs to one side – while accepting that they undoubtedly took place – on the ground that the mother had found a speedy and effective way of dealing with them: see para [45], above. I cannot accept, however, that that does justice to the frightening nature of the police interventions (at the child's school and at the mother's home), even if there has been no repetition of such events in the drugs context since the last of them on 27 July 2006. The father denies any involvement, and relies on his own protesting to the police on 27 July that he did not believe the mother to be involved with drugs. The judge appears to have regarded the incident as closed ('and that, as far as I am aware, was the end of the matter', at para [32] of his judgment). However, as the evidence relating to the child has made clear, it is not the end of the matter as far as she is concerned. She

also refers to a further incident when the police arrived at her home to enforce her stay with her father on the coming weekend (see at para [65], above).

[89] Mr Setright QC, on behalf of the father, submitted that, if this court were to get as far as this in its considerations, then he would himself be asking for oral evidence, so as to give the father the opportunity of being heard in person on the subject of his innocence of any complicity in the events regarding the drugs and the police. As it is, I agree with my Lords that, for the purpose of giving effect to the child's objections in this essentially summary procedure, it is unnecessary to make any positive finding on that issue. It is enough that the incidents took place, have given rise to a realistic concern of a plot to frame the mother in matters of the utmost gravity and in circumstances which cast a prima facie suspicion on the father, a fortiori in the absence of any other reason for such events, and have caused the child to object to her return in a way which this court cannot ignore.

WILSON LJ:

[90] I agree with both judgments.

[91] The circumstances of the case are unlike any within my direct professional experience. There is a quantity of credible, independent material which supports the mother's case that last summer in Belgrade either the father or a third party was taking extreme measures in order to incriminate her so that she would be prosecuted and imprisoned for the possession of cocaine with intent to supply. By his honeyed words Mr Setright persuaded the judge to approach this feature without the gravity which it deserved. It was, with great respect to him, simply too glib for the judge to put it to one side on the basis that 'the fact of the matter is that the mother appears to have found an effective and speedy way of dealing with the planting of drugs in her vehicle'.

[92] To order the return of M with the mother to Serbia in circumstances in which the mother might well again be the object of a criminal attempt to secure her imprisonment by reference to evidence planted in her possession might well have to be described as to place M in an intolerable situation. But I agree that there is no need for us further to examine the judge's decision to the contrary. For M was witness to some of the events referred to above as well as having allegedly been witness to other events, such as the father's removal of the registration plates, which fall into a different category because they are strongly in issue. There is no doubt, for example, that on 27 July 2006, pursuant to a warrant issued by reference to information the source of which remains a mystery, the police searched the mother's flat in M's presence as well as the mother's car; and no doubt that the mother was thereupon arrested, taken to the police station and detained for three hours for questioning. The father himself confirms that he was called to the police station that day because the mother was detained there. So, when M told Miss Fitch that the police had found drugs in the mother's car and had taken the mother to the police station and that the mother was 'nearly in jail', she was speaking the truth. When she also told Miss Fitch that on another occasion the police had told her that they might have to remove her from the mother (and indeed perhaps also of the father), there is therefore no reason to doubt her. So, notwithstanding her young age, there is the most solid foundation for her objection to a return to Serbia, namely an acute fear that, to

use her words to Miss Fitch, 'this time they are bound to take me from Mummy and give me to Daddy and I will never see Mummy again'.

[93] For us so to exercise the discretion, not exercised by the judge in circumstances entirely uncharacteristic of him, as to refuse to order M's return to Serbia by reference to her objections is not to cast any aspersion whatever on the family justice system in Serbia. The mother does not criticise it and, apart from permitting a degree of delay of which our own system is also too often guilty, it has to date demonstrated itself as focussed entirely on the interests of M and admirably impervious to such parental manipulation, if any, as has been brought to bear on it. But no family justice system can protect a child from the sudden, protracted removal of a parent to prison, on remand and/or on conviction, by its criminal justice counterpart on trumped-up charges of the utmost gravity. Such risks are perceived by M to exist and in my view they do exist; and it is they which dictate the proper result of the discretionary exercise.

Permission to appeal granted and appeal allowed.

Solicitors: *Dawson Cornwell* for the appellant
Reynolds Porter Chamberlain for the respondent

CATHERINE SHELLEY
Law Reporter