

Provision of undertakings in response to defence under Article 13(b) of Hague Convention 1980 (*S (Father) v D (Mother)*)

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Family analysis: Poonam Bhari, barrister at 3 Paper Buildings (3PB), considers the decision in *S (Father) v D (Mother)* in which the court was concerned with whether or not undertakings offered by the father would be sufficient in circumstances involving an admission of assault.

S (Father) v D (Mother) [\[2019\] EWHC 56 \(Fam\)](#), [\[2019\] All ER \(D\) 88 \(Jan\)](#)

What are the practical implications of this case?

The case of *S (Father) v D (Mother)* considers the information and evidence the court needs to make a summary decision under the [Child Abduction and Custody Act 1985 \(CACCA 1985\)](#) (incorporating The Hague Convention on the Civil Aspects of International Child Abduction 1980 (The Hague Convention 1980)) and Article 11 of EC [Council Regulation \(EC\) 2201/2003](#) (Brussels II bis).

The mother raised a defence under Article 13(b) of The Hague Convention 1980 against the return of the child as to a grave risk of physical or psychological harm, based on allegations of domestic violence. In circumstances where the court finds domestic abuse has taken place, it is not precluded from ordering a return of the child but needs to be satisfied that adequate safeguards can be put in place to protect the child and the returning parent until such time as the domestic courts of the country of return can consider the issues. In this case the father had promised to give whatever undertakings the court required to secure the return of the child. As highlighted in *S (Father) v D (Mother)*, the court will require particularised undertakings as early in the proceedings as possible, but considered that the absence of detailed undertakings in this case was not to be due to any deficiencies of the father per se, but rather in respect of the preparation of the father's statements.

This case was unusual in that the return of the child was sought to a third country and not the country the parents and child were living in when the child was removed and retained in England and Wales, which the court noted was unobjectionable in principle but each case will be fact-sensitive.

What was the background?

The child and parents were Hungarian nationals—all were born and lived in Hungary until they moved together to live in Germany. The child, aged four years, had started attending nursery in Germany. Both parents had been in previous relationships. The father had three adult children. The mother had two minor children who, following the outcome of court proceedings in Hungary, lived with their father.

During Easter 2018 the family went on holiday to Hungary, where the maternal grandfather lived. The father returned to Germany before the end of the holidays to go back to work. The mother and child were expected to return to Germany a short time later a few days before the nursery opened after the holidays. However, the mother arrived in England with the child and did not return to Germany as expected. The father, immediately on learning the child and mother had not returned to Germany, made various enquiries with the authorities, including the police and social services agencies. On learning that the mother and child were in England at the home of the maternal aunt the father travelled to the UK to speak to the mother.

When the father arrived in England an incident of assault on the mother took place for which the father pleaded guilty at the earliest opportunity and accepted a restraining order. The mother's position was that there was a history of domestic violence. The father's position was that the incident of assault was out of character for him, and it took place when he was very vulnerable and had been told by the mother that he would not see his child again and that she and the child would be remaining in England. The father further said that he and the mother had cohabited for eight years

and only married shortly before they moved to live in Germany. The father denied historical domestic violence and said that the mother would not have married him if the relationship had been abusive as she claimed.

The father issued proceedings for the return of the child. The court had before it disclosure of the incident of assault, including the police and social services records as well as the parties' statements and supporting evidence. The father had by this time left Germany and moved back to live in Hungary. The father clarified to the court that he sought the return of the child to Hungary and not Germany. The child had extended paternal and maternal relatives living in Hungary, including the child's maternal half-siblings.

What did the court decide?

The outcome was as follows:

- the court found that the child had been wrongfully removed from Germany in breach of the father's rights of custody
- the child was wrongfully retained in the jurisdiction of England and Wales
- the court found that domestic abuse had taken place in April 2018, based on the father's own admission of assault against the mother
- the court found (not having heard oral evidence) that the incident was unlikely to have been a one off and there was likely to have been historical domestic abuse
- the court set out in the judgment the detailed undertakings the father was invited to offer, and had adjourned making a final order pending the father's response to the judgment
- at the adjourned hearing the father gave concrete undertakings in the terms sought by the court, attending court in person to confirm his position, and the court accepted the father's undertakings
- the court made an order for the summary return of the child to Hungary, having considered the approach in *O v O (abduction: return to third country)* [\[2013\] EWHC 2970 \(Fam\)](#), [\[2014\] 1 FLR 1406](#)
- as a postscript Cobb J, having reviewed the recent decision in *C (Children) (Abduction: Article 13 (b))* [\[2018\] EWCA Civ 2834](#), [\[2019\] All ER \(D\) 02 \(Jan\)](#) and the approach of Moylan LJ to safeguards and undertakings when an Article 13(b) defence is raised, considered that he had followed the correct approach

Poonam Bhari's practice encompasses all aspects of family law, with experience in public law proceedings, private law applications, international child law and financial remedy applications and also undertakes Court of Protection cases. In S v D Bhari was counsel for the applicant father.

Interviewed by Kate Beaumont.

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