BDU v BDT

[2014] SGCA 12

Suit No:	Civil Appeal No 65 of 2013
Decision Date:	17 February 2014
Court:	Court of Appeal
Coram:	Sundaresh Menon CJ, Chao Hick Tin JA and Andrew Phang Boon Leong JA
Counsel:	Poonam Mirchandani and Ashok Chugani (Mirchandani & Partners) for the appellant; Patrick Tan Tse Chia, Lim Pei Ling June and Low Seow Ling (Patrick Tan LLC) for the respondent.

Subject Area / Catchwords

Family Law – Child

International Law – Conventions

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 3 SLR 535.]

17 February 2014

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 The present proceedings involve a child, [B], his Singaporean mother and his German father. This appeal was brought by the mother ("the Appellant") against the High Court's affirmation of the District Court's decision allowing the application of the father ("the Respondent") under s 8(1) of the International Child Abduction Act (Cap 143C, 2011 Rev Ed) ("the Act") for the return of [B] to Germany on the basis that he ([B]) had been wrongfully retained in Singapore by the Appellant. The Appellant resisted the application under, *inter alia*, Art 13(*b*) of the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") (which is given effect to in Singapore by the Act), which gives the court the discretion not to order the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. This is, in fact, the first case under the Act and the Hague Convention to be litigated in Singapore.

2 In the present appeal, the Appellant contended that an order for [B]'s return to Germany should be refused under Art 13(*b*) of the Hague Convention as [B] would be at grave risk of psychological harm or would otherwise be placed in an intolerable situation due to the separation of [B] from the Appellant, his mother. This impending separation was purportedly due to the Appellant's inability, on medical (specifically, psychological) reasons, to return to Germany with [B] should a return order be made. We made a return order in respect of [B], albeit subject to both parties providing certain specific undertakings. We now set out the detailed grounds for our decision.

Facts

Background to the dispute

3 The brief facts of the case are as follows. The Appellant and the Respondent got to know each other over the Internet in 2007, and met in person only in 2009 when the Appellant travelled to Germany to meet the Respondent. The Appellant became pregnant during the visit and the parties then married in Denmark on 30 October 2009, after which the couple set up home in Germany. [B] was born in Germany on 16 April 2010.

4 The Respondent lives with his parents in a three-storey apartment in the village of [S] in Germany and works as a registered nurse in the nearby town of [M]. The Appellant did not work during the marriage, and she and the child were supported by the Respondent. Initially the couple lived by themselves but they subsequently moved in with the Respondent's parents. The Appellant found life difficult in Germany partly because she could not speak the language and partly because the family was living in a very small town. There were quarrels and differences between the Appellant and the Respondent, and between the Appellant and her mother-in-law.

5 On 1 November 2010, the Appellant and [B] visited Singapore. The visit was supposed to have lasted five weeks but the Appellant extended it to February 2011 so that she could spend Chinese New Year with her family. On 30 January 2011, the Respondent came to Singapore to persuade the Appellant to return home, and eventually the family returned to Germany on 7 February 2011. Before coming to Singapore, the Respondent had made an application to a German court as a result of which, on 15 February 2011, the German court made an interim order that the Respondent was to have the sole right to determine [B]'s place of abode. On 14 July 2011, on an application by the Respondent to restore the Appellant's right to decide the place of abode of the child, the German court ordered that the parties should jointly exercise the right of determination of [B]'s abode.

6 On 18 January 2012, the Appellant, the Respondent and [B] travelled to Singapore to celebrate Chinese New Year with the Appellant's relatives. They were scheduled to return to Germany on 17 February 2012, but in the event

only the Respondent returned. The Appellant and [B] remained behind and have not left Singapore since. The Appellant was then pregnant again with the parties' second child, [J], who was born in Singapore on 21 August 2012.

7 On 2 March 2012, upon the application of the Respondent, the German court made an interim order that the exercise of "paternal authority" over [B] was to be transferred to the Respondent alone, and that the Appellant was to hand [B] over to the Respondent who was entitled to bring him back to Germany. Subsequently, the Respondent applied to the German Central Authority for a "Request for Return" pursuant to the Hague Convention. He also applied to the Singapore Central Authority for its assistance to help effect the voluntary return of [B].

8 The Singapore Central Authority contacted the Appellant on 4 April 2012 and, on 7 April 2012, the Respondent and the Respondent's father arrived in Singapore to retrieve [B]. The Appellant refused to hand over [B] and, on 24 April 2012, commenced proceedings for the sole custody and care and control of [B]. The Appellant's application was stayed pursuant to s 13 of the Act when, on 31 May 2012, the Respondent brought an application under the Act for a return order to Germany in respect of [B]. This is the application which gave rise to the proceedings culminating in the present appeal. It is to be noted that the application concerned [B] alone (who was about two years of age at the time of the application). It did not involve the parties' second child, [J].

The proceedings below

The District Court proceedings

9 The present proceedings were commenced in the District Court in accordance with the Transfer Order made by the Chief Justice on 1 March 2011 specifying that any proceedings under the Act are to be heard and determined by the District Court at first instance. The District Court judge ("the DJ") heard the parties over several days in July and August 2012.

10 On 21 August 2012, the DJ ordered the return of [B] to Germany. She also made certain orders regarding the arrangements pursuant to which [B]'s return would take place. In particular, the Appellant was to hand over [B] and his travel documents to the Respondent who would bring the child back to Germany. The child would thereafter reside with the Respondent in Germany pending resolution of custody proceedings by the German court, subject to the Appellant having access to [B] twice a week for a period of four hours each. Additionally, the Respondent undertook, *inter alia*, to pay for rental accommodation in Germany for the Appellant and the second child, [J], as well as to provide interim monthly maintenance in the sum of €491 for both the Appellant and [J].

11 Before the DJ, the Appellant had argued that returning to Germany with [B] would expose her to physical and psychological harm and [B] to psychological harm or would otherwise place [B] in an intolerable position. The Appellant alleged that she had been psychologically abused by the Respondent's parents and physically abused by the Respondent. The DJ considered these allegations in detail in her Grounds of Decision (see *BDT v BDU* [2012] SGDC 363 ("the DC Judgment")). Whilst accepting that there had been problems between the Appellant and her mother-in-law, the DJ held that this did not constitute grave harm and did not have an impact on [B] (see the DC Judgment at [76]). The DJ found that the evidence demonstrated that the Appellant did not regard the alleged domestic violence by the Respondent to be so serious as to affect the marriage or her ability to care for [B] (see the DC Judgment at [78]). She also noted that there was no allegation of any child abuse or mistreatment with regard to [B] himself (see the DC Judgment at [81]). The DJ concluded that the alleged harm from domestic violence could not be so grave or intolerable to the Appellant as to enable her to use it as a basis for a defence under Art 13(*b*).

12 The DJ made her decision on the basis of, *inter alia*, a report on [B] dated 13 July 2012 by Dr Lim Yun Chin ("Dr Lim"), a psychologist engaged by the Appellant. In the report ("Dr Lim's First Report"), Dr Lim noted that [B]'s feelings of security and well-being were contingent on the Appellant's physical presence, such that it would not be in [B]'s psychological and social interests to separate him from his mother. He opined that the Appellant could not return to Germany and to require her to do so would be to court disaster because of the absence of the support of the Respondent and her in-laws' hostility towards her.

13 The DJ accorded little weight to Dr Lim's First Report as it was based solely on information provided by the Appellant as well as three sessions of observation of interaction only between the Appellant and the child (see the DC Judgment at [83]). In the round, the DJ found that there was no compelling evidence that [B] would be placed in an intolerable situation if he were to be returned to Germany, or that the German authorities would not be able to protect him.

The High Court proceedings

14 The Appellant filed an appeal against the decision of the DJ on 31 August 2012. However, the appeal thereafter took over half a year to reach the High Court. This was partly because the Appellant's lawyers discharged themselves as the Appellant was unable to afford private representation and the Appellant then had to apply for legal aid. On 1 February 2013, the Appellant commenced divorce proceedings in the Family Court on the basis of the Respondent's alleged unreasonable behaviour. On 25 March 2013, the appeal against the DJ's decision was finally heard by the High Court judge ("the Judge").

15 Before the Judge, the Appellant relied greatly on a further report from Dr Lim dated 1 February 2013 ("Dr Lim's Further Report") as evidence of the deterioration in her mental health since the hearing before the DJ. In this report, Dr Lim expressed the view that the Appellant had been routinely abused both physically and emotionally. Dr Lim diagnosed the Appellant with a major depressive disorder and opined that the possibility of losing [B] would push her towards a situation of risk in which she could endanger herself and [J]. Dr Lim opined that it was doubtful if the Appellant could cope with life in Germany and that there was a real risk of suicide for the Appellant if she was forced to move there or if either child was removed from her. Dr Lim further opined that to separate [B] from his mother and brother, [J], would lead to severe emotional upheaval as well as long term harm to [B].

16 In her judgment dated 15 May 2013 in *BDU v BDT* [2013] 3 SLR 535 ("the Judgment"), the Judge dismissed the appeal on the ground that the Appellant had not discharged the requisite burden under Art 13(*b*). In particular:

(a) *In relation to the Appellant's allegations of domestic violence*, the Judge found that the DJ was entitled to find, on the evidence before her, that violence was not a serious issue in the marriage. The Judge observed (at [95] of the Judgment) that "[t]here may have been some violence in the marriage but the circumstances in which such violence occurred have not been established and therefore it is impossible to decide whether the aggressor was the mother or the father" and that "[t]he mother was not consistent in her reactions to the abuse". The Judge accordingly found that the alleged presence of violence in the marriage would not provide a legitimate reason for the Appellant not to return to Germany with [B].

(b) *In relation to the alleged risk of harm to [B]*, the Judge noted that such risk was alleged by the Appellant to arise from:

(i) any separation of [B] from his mother and brother, and

(ii) the impact on [B] if the Appellant harms herself.

(ii) In this regard, the Judge noted that the child's separation distress would be ameliorated somewhat if [B] had a reasonable relationship with a loving father and if the Appellant returned to Germany with [B] and had frequent contact with [B] (see the Judgment at [96]). She observed that the risk of separation of [B] from his mother arose mainly from the possibility that the Appellant would not return to Germany with him.

(c) Whilst the Appellant maintained that she was unable (as opposed to unwilling) to return to Germany with [B], the Judge was not convinced by this. The Judge was primarily of the view that she could not overturn the findings of

the DJ unless they were against the weight of evidence. The Judge observed that whilst the practical living situation facing the Appellant in Germany would not be an easy one, there were support facilities available to her and she would also have access to legal advice (see the Judgment at [97]). Further, the undertakings given by the Respondent (with respect to, *inter alia*, the Appellant's and [J]'s maintenance and accommodation) (see above at [10]) were intended to alleviate her difficulties. Whilst the Appellant had criticised these undertakings as being inadequate, she had not made any concrete suggestions as to what undertakings would satisfy her. Finally, whilst it remained a concern that the Appellant expressed suicidal thoughts, the Judge noted that these had *not* been made known to Dr Lim until *after* the DJ's decision ordering the return of [B]. The Judge also considered it noteworthy that the Appellant had continuously refused the recommended course of antidepressant medication on account of her breastfeeding her second child, [J], notwithstanding that other suitable methods were available for feeding the child. In the words of the Judge, "[t]he mother has not helped herself very much" (see the Judgment at [106]).

The Judge therefore concluded that the Appellant had not discharged her burden under Art 13(*b*), and affirmed the return order in respect of [B]. However, noting the Appellant's argument that it would be highly stressful for [B] to see her only twice a week for four hours each time, the Judge required a further undertaking from the Respondent that as long as the Appellant was in Germany, she would be able to have daily access to [B] (see the Judgment at [107]).

The parties' respective cases

17 On appeal, the Appellant argued that an order for [B]'s return to Germany should be refused under Art 13(*b*) of the Hague Convention as [B] would be at grave risk of psychological harm or would otherwise be placed in an intolerable situation if the return order was made. This grave risk or intolerable situation was said to emanate from the separation of [B] from his mother and his brother, [J], owing to the Appellant's *inability due to medical (and in particular, psychological) reasons* to return to Germany with [B] should a return order for [B] be made. The Appellant cited various reasons to justify her alleged inability to return to Germany, namely:

(a) the alleged physical and emotional violence inflicted on her by the Respondent during the marriage;

(b) her difficulties in adapting to life in Germany and her difficult relations with the Respondent's family, and in particular, his mother; and

(c) the alleged risk that she will commit suicide in Germany if she returns with [B].

18 In response, the Respondent disputed the Appellant's allegations of physical and emotional violence, and alleged that she was the aggressor during these incidents. The Respondent contended that Dr Lim's assessment of the Appellant's mental state and her account of her alleged abuse should be disregarded as Dr Lim did not have the benefit of the Respondent's account of the relevant matters. The Respondent also contended that there was no increased risk of suicide to the Appellant if she returned to Germany, and that the Appellant was in fact *unwilling as opposed to unable* to return to Germany.

The present appeal

19 The present appeal was heard before us on 22 July 2013. Given that a central question in the proceedings was the Appellant's alleged inability for medical reasons to return to Germany with [B], we appointed an independent court expert, Dr Rathi Mahendran ("Dr Mahendran"), to assess the risk of physical and psychological harm to the Appellant (including any risk of suicide and/or self-harm) should an order be made returning [B] to Germany in the company of the Appellant pending the determination of custody issues by the German courts. We adjourned the matter to allow Dr Mahendran to examine and provide a psychiatric report on the Appellant.

Dr Mahendran's report

20 Based on interviews with the Appellant and, *inter alia*, the Respondent, his parents and the Appellant's mother and brother, as well as the relevant court and medical documentation, Dr Mahendran prepared a psychiatric report on the Appellant dated 16 September 2013 ("Dr Mahendran's Report"). Her findings are summarised as follows:

(a) *Diagnosis*

(i) Dr Mahendran diagnosed the Appellant with "*Delusion Disorder (Jealous and Persecutory types)*". In particular, Dr Mahendran noted that the Appellant had delusional beliefs about the Respondent's infidelity as well as unwarranted suspicions and hostility towards her in-laws.

(ii) Dr Mahendran noted that the Appellant did *not* have a *depressive disorder*. However, she had poor insight into her illness and her judgment was affected by the illness.

(iii) Whilst the Appellant had made verbal threats of suicide and threats to harm her children, these were not in relation to a depressed mood but were threats intended to frighten the Respondent and were possibly made out of desperation.

(iv) The Appellant's ability to provide physical care for her children was not impaired in any way. However, the decisions she might have to make for them may be affected by poor judgment and delusional beliefs.

(b) *Prognosis*

(i) According to Dr Mahendran (at para 4.2 of her report), "[w]ithout treatment for the Delusional Disorder [the Appellant] will continue to act on her delusions and create problems for her husband whether she is in Singapore or Germany". Dr Mahendran also noted the Appellant is more likely to become disruptive and grow worse in Germany, and may become functionally impaired and incapable of managing herself or [J]. All in all, Dr Mahendran opined that the "prognosis [was] poor".

(ii) Whilst an accurate prediction of suicide risk was difficult, Dr Mahendran stated that the general indicators showed that the risk of suicide was low.

(c) *Recommendation*

(i) In the circumstances, Dr Mahendran recommended that the Appellant start treatment in Singapore in order to minimise the risk of non-adherence to treatment and achieve some symptom control before (and if) she leaves for Germany.

(ii) Dr Mahendran then opined (at para 5.1 of her report) that "[h]er care can then be transferred to Germany with clear management plans formulated for continuity of care" and that "[h]er symptoms would be better controlled and hopefully this would increase treatment compliance and her ability to cope in Germany".

The order and undertakings

21 On 18 October 2013, the court convened to hear the submissions of the parties on the appropriate course of action, given the findings in Dr Mahendran's Report. After hearing both parties, we indicated that we intended to make a return order of the child to Germany subject to the Respondent giving satisfactory undertakings. However, having regard to Dr Mahendran's Report and the views expressed therein, we were prepared to defer the return order for a specified period (possibly a period of up to three months) if the Appellant undertook to immediately undergo treatment in accordance with the recommendations set out in Dr Mahendran's Report. Whilst we could have taken the view that the Appellant had failed unreasonably to avail herself of treatment thus far, we were prepared to put this to one side if the Appellant fulfilled the aforesaid undertaking.

22 Over three hearing dates on 28 and 29 November and 3 December 2013, and with the input of both counsel, we convened to finalise the respective undertakings to be given by the parties. These undertakings were different from (and more detailed than) those in the courts below, and were intended to take into account the Appellant's psychological condition as well as to ensure that the substantive proceedings in the German court with regard to the custody and/or care and control of [B] proceed on a level playing field in all respects. We were happy to note that the Appellant indicated that she would return to Germany together with her other child, [J], when the return order in respect of [B] takes effect. In these circumstances, we considered it more appropriate for [B] to reside with the Appellant and [J] in Germany, with reasonable access being granted to the Respondent (the details with respect to such access being set out in the parties' undertakings). The parties' undertakings were eventually incorporated into the return order.

23 In summary, we ordered the return of [B] to Germany before the expiry of 2.5 months from 1 December 2013 subject to the parties providing, *inter alia*, the following undertakings:

(a)

Undertakings by *the Respondent* to:

(i)

source and pay for the Appellant and both children's airfares to Germany;

(ii)

provide the Appellant and both children with rented accommodation at a reasonable rental rate with the proper furniture, lightings, utilities, heating and ventilation;

(iii)

provide a total maintenance of €1,100 or €1,200 per month (depending on which town the Appellant chooses to reside in) for the Appellant and the two children;

(iv)

ensure that the Appellant's medical (including psychiatric) and legal expenses are paid for (if necessary, out of the Respondent's own pocket); and

(v)

apply to the German court seized of the matter to incorporate the parties' undertakings as an order of that court prior to the Appellant and the children returning to Germany.

(b) Undertakings by *the Appellant* to:

(i)

undergo the appropriate medical (including psychiatric treatment) with immediate effect in Singapore and continue such treatment in Germany; and

(ii)

perform certain obligations so that the Respondent's undertakings are not undermined.

The order of court incorporating the parties' undertakings is annexed to this judgment ("the Annex") and will be discussed further in our section dealing with the reasons for our decision (below at [78]–[85]). In the meantime, we turn to the relevant legal principles which informed our decision.

The applicable legal principles

24 The relevant Convention which constitutes the legal focus of the present appeal is the Hague Convention, which is now given effect to in the Singapore context pursuant to the Act.

The general rule and the rationale of jurisdiction selection

25 It is of the first importance to note right at the outset what the Hague Convention covers and (perhaps more importantly) what it does *not*. An excellent starting-point in this regard is the following summary by Prof Leong Wai Kum (see Leong Wai Kum, *Elements of Family Law in Singapore* (2nd ed, LexisNexis, 2013) at p 270):

> It follows from the above that these objectives [of the Hague Convention] are fairly limited. The [Hague] Convention may be understood, particularly by a conflicts lawyer, as ***an agreement among nations on 'jurisdiction selection' in matters relating to custody and care of a child.*** *The participating nations agree to select the courts of the country of habitual residence of the child to be the courts to decide all issues of custody and care. Every other court will thus seek only to, as quickly as possible, return the child to the court of her habitual residence. In particular, every other court will not seek to investigate for itself what might be the best possible order regarding the custody and care of the child.* This, as agreed, should be left to the court of her habitual residence.
>
> It is, therefore, not a valid criticism that, in ordering the return of the child to her habitual residence, the court has overlooked some argument relating to her welfare. *Every court other than the court of her habitual residence has agreed to desist from investigating into the substantive issues relating to her welfare to defer to the court of her habitual residence*. Put another way, the understanding of the child's welfare under the [Hague] Convention is not the substantive understanding (as under the domestic law of guardianship and custody) but rather the more limited understanding, that where she has been unlawfully removed from her habitual residence, her welfare is best served by swiftly returning her to her habitual residence. There the courts will look into the substantive issues.

[emphasis added in italics and bold italics]

26 Put simply, the court of the country to which the child has been brought (in this case, Singapore) is – pursuant to the Hague Convention – concerned *only* with the return of the child concerned to his or her country of habitual residence from which he or she was first abducted, subject only to the limited exceptions set out in, *inter alia*, Art 13 of that Convention. It is *not* concerned with the substantive merits relating to the relevant issues of custody and/or care and control between the parents concerned (still less is it a Convention for the reciprocal recognition and enforcement of foreign custody orders (see David McClean, *The Hague Convention on the Civil Aspects of International Child Abduction – Explanatory Documentation prepared for Commonwealth Jurisdictions* (Commonwealth Secretariat, London, 1997) ("*McClean*") at p 6). Indeed, this point is made clear beyond peradventure by Art 19 of the Hague Convention, which reads as follows:

A decision under this Convention concerning the return of the child shall ***not*** be taken to be a determination on the merits of any custody issue. [emphasis added]

27 This is imperative because, as noted by Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ in their joint judgment in the High Court of Australia decision of *De L v Director-General, New South Wales Department of Community Services and Another* (1996) 187 CLR 640 ("*De L*") (at 648–649) (these observations were also referred to in the subsequent High Court of Australia decision of *DP v Commonwealth Central Authority* (2001) 206 CLR 401 ("*DP*") at 406):

[T]he [Hague] Convention is concerned with reserving to the jurisdiction of the habitual residence of the child in a Contracting State the determination of rights of custody and of access. ***This entails preparedness on the part of each Contracting State to exercise a degree of self-denial with respect to "its natural inclination to make its own assessment about the interests of children who are currently in its jurisdiction by investigating the facts of each individual case"*** [citing John Eekelaar, "International Child Abduction by Parents" (1982) 32 Univ Toronto LJ 281 at 305 ("*Eekelaar*")]. [emphasis added in bold italics]

Compromise, balance and Art 13(b)

28 It is important to note that the concept of jurisdiction selection embodied in Art 13 of the Hague Convention represents *a compromise* which is intended to ensure that the Convention is practical and workable across the various jurisdictions (indeed, this has been described as "a fragile compromise" (see Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* (HCCH Publications, 1982) ("*Pérez-Vera*") at para 116);

reference may also be made to the New Zealand High Court decision of *El Sayed v Secretary for Justice* [2003] 1 NZLR 349 ("*El Sayed*") at [53]).

29 Conceptually, it is not difficult to understand why a compromise was needed. There appear (see below at [34]) to be two extreme ends of the legal spectrum. On the one end was the need to have regard on an *individual* level to the paramount interests of the child concerned. On the other end, there was the need on a *more general policy* level to ensure that abducted children were returned swiftly to their respective countries of habitual residence. It is easy to see how the former might in fact impede the latter. Given that the entire *raison d'être* of the Hague Convention is to ensure the latter (see Art 1 of the Convention), it comes as no surprise that the Convention focuses instead on the *general* concept of jurisdiction selection.

30 However, there are understandable concerns that, in ensuring the swift return of abducted children to their respective countries of habitual residence, this more general aim could simultaneously result (in some instances at least) in detrimental effects on those children such that exceptions to their return are justified. As observed by A E Anton, who in fact chaired the Commission which drafted the Hague Convention (see A E Anton, "The Hague Convention on International Child Abduction" (1981) 30 ICLQ 537 ("*Anton*") at 542):

> It was decided … to draft a Convention which would concern itself with custody *rights* rather than with custody *decisions* and which would concentrate upon securing the prompt return of a child who had been removed in breach of custody rights effectively exercised under the law of his habitual residence [emphasis in original]

31 This reflects – once again – the perennial tensions in the law between the universal and the particular; between the need for certainty and predictability on the one hand and the need for flexibility and fairness on the other. In the circumstances, efforts were made to ensure that the more general policy underlying the Hague Convention did not override (at least wholly) the paramount interests of the children. It is in this context that the resulting compromise in the Hague Convention arose, in the form of *exceptions* to the general policy (embodied, *inter alia*, within Art 13 of the Hague Convention). It is not surprising, though, that these exceptions are of a very *limited* nature. Indeed, if such exceptions were broader, they would "swallow up" the general policy and (to utilise the very apt turn of phrase in the judgment of Butler-Sloss LJ in the English Court of Appeal decision of *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654 ("*C v C*") at 661), "would drive a coach and four horses through the [Hague] Convention".

32 Any country which adopts the very broad approach referred to at the end of the preceding paragraph would, in the words of Kirby J in *De L* at 685, "undermine the reciprocity upon which the [Hague] Convention rests" (see also *per* Lord Donaldson of Lymington MR in *C v C* at 663). This would be very unfortunate, not least because the

decision taken by a country to be a signatory to the Hague Convention is not one to be taken lightly. For example, the Singapore Parliament wanted to be very certain before it ultimately adopted the Hague Convention (see *Singapore Parliamentary Debates*, *Official Report* (16 September 2010) vol 87 at col 1267, *per* Dr Vivian Balakrishnan, the Minister for Community Development, Youth and Sports during the Second Reading of the International Child Abduction Bill (Bill No 22 of 2010) ("the *Debates*")), despite the many calls for it to do so (see, for example, Leong Wai Kum, "International Co-operation in Child Abduction Across Borders" (1999) 11 SAcLJ 409 ("*Leong*"); Leong Wai Kum, "The Convention on the Civil Aspects of International Child Abduction – A Case for Singapore to be a Member State" *The Singapore Law Gazette*, July 2005, pp 19–26; Debbie S L Ong, "Parental Child Abduction in Singapore: The Experience of A Non-Convention Country" (2007) 21 International Journal of Law, Policy and the Family 220; and Nigel Lowe & Debbie Ong, "Why the Child Abduction Protocol Negotiations Should Not Deflect Singapore from Acceding to the 1980 *Hague Abduction Convention*" [2007] Sing JLS 216 ("*Lowe & Ong*")).

33 That having been said, the paramount interests of the individual child *will* be considered and given effect to in *exceptional situations* by the court in the country to which the child was abducted. What these situations are will depend, of course, on the precise fact situation concerned. Whilst this might not sound satisfactory, it is a practical reality and the court simply cannot avoid the inevitable issue of *application* (see also *per* Gleeson CJ in *DP* (especially at 408)).

34 But what, then, of the *general* situation? In our view, adhering to the concept of jurisdiction selection in the *general* situation pursuant to the spirit of the Hague Convention itself is not *necessarily* inconsistent with the paramount interests of the *individual* child concerned. The relationship between the general and the specific is, in the *usual* situation, more often than not *complementary* (as opposed to contradictory) in nature. For this reason, the tension alluded to above (at [29]) is (in most situations at least) more apparent than real. In particular, it will be seen that the so-called (general) policy is not *necessarily* inconsistent with the (particular) rights of the individual child (*cf* *Lowe & Ong* (at 228) who refer to "the individual child's welfare [being] subjected to the higher goal of preventing future abductions").

Balance, complementarity and fairness

35 In the general situation, the child concerned is returned as swiftly as possible to the country of his or her habitual residence. However, this does *not* mean that his or her interests have been wholly ignored. Indeed, as has been perceptively observed, "[t]he right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child" (see *Pérez-*

Vera at para 24). Perhaps more importantly, what it *does* mean is that the other interests relating to the welfare of the child are not adjudicated upon by the court of the country to which the child has been abducted. Nevertheless, this does not mean that such interests are not adjudicated upon at all; such interests will, in fact, be adjudicated upon in the courts of the child's habitual residence.

36 Looked at in this light, there is no *unfairness* to the child concerned inasmuch as the Hague Convention ensures that the issues of custody and/or care and control are adjudicated upon in the appropriate forum, whilst simultaneously depriving the abducting parent of any juridical or other advantage which he or she has unfairly sought to gain through the abduction. (In this last-mentioned regard, it has been pertinently observed that "[i]t frequently happens that the person retaining the child tries to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about" (see *Pérez-Vera* at para 14)). In a similar vein, Prof Leong has observed thus (see *Leong* at p 432; reference may also be made to the observations by Dr Vivian Balakrishnan *Debates* at cols 1258 and 1271–1272):

That no court other than the child's habitual residence should decide on the child's custody should not be regarded as reneging from pursuing the welfare of the child. ***It is simply the realisation that the welfare of the child is best served when the court so desists and leaves the matter in the hands of the court of proper jurisdiction.*** It is irrefutable that, among all the courts that are interested in the child's custody, the interest of the child's habitual residence is the strongest. [emphasis added in bold italics]

37 We would also note that the country of the child's habitual residence would be a signatory to the Hague Convention. Given that that country is a signatory, there is at least a presumption that the courts of that country would consider the paramount interests of the child concerned when deciding upon the substantive merits in the context of issues relating to that child's custody. It is of course possible that that might not be the case – although this is likely (in the nature of things and following from what has just been said) to be extremely rare. But that is also precisely the type of situation where one or more of the exceptions embodied in Art 13 can then be invoked to ensure fairness to the child concerned. For example, as Doogue J observed, delivering the judgment of the New Zealand Court of Appeal in *A v Central Authority for New Zealand* [1996] 2 NZLR 517 (at 523):

In most instances where the best interests of the child are paramount in the country of habitual residence the Courts of that country will be able to deal with any possible risk to a child, thus overcoming the possible defence of the abducting parent. That does not gainsay the fact that *in some instances there will be situations where the Courts of the country to which the child has been abducted will not be so satisfied.* ***This will not necessarily be limited to***

cases where there is turmoil or unrest in the country of habitual residence*. There may well be cases, for example, where the laws of the home country may emphasise the best interests of the child are paramount* ***but there are no mechanisms by which that might be achieved****, or it may be established that* ***the Courts of that country construe such provisions in a limiting way***,*or even that* ***the laws of that country do not reflect the principle that the best interests of the child are paramount.*** [emphasis added in italics and bold italics]

38 It bears reiterating, however, that Art 13 of the Hague Convention will not be lightly invoked; on the contrary, the parent seeking to invoke one or more of the exceptions contained in this particular Article bears the onus of proof (the standard of which, as the Judge correctly pointed out, is a high one (see the Judgment at [24])). Indeed, as already noted, the *presumption* is that the court of the country to which the child is returned will consider the paramount interests of the child when deciding upon the substantive merits in the context of issues relating to that child's custody. As Butler-Sloss LJ pertinently observed in the English Court of Appeal decision of *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021 ("*Re M*"), which involved an application to direct the return of the children concerned from England to Israel (at 1027):

[T]his court ***must trust*** the Israeli judge, who will soon be dealing with this case, to do what is right for these children so that they would not be harmed by the return to Israel. *We have no reason to think other than that* ***the Israeli judge will deal with these children as we would hope our courts would deal with similar cases***. [emphasis added in italics and bold italics]

39 The following observations by Prof Eekelaar also merit quotation, not only because they were made at the inception of the Hague Convention itself, but also because they constitute an excellent summary of aforementioned points (see *The Hague Convention on the Civil Aspects of International Child Abduction – Explanatory Documentation prepared for Commonwealth Jurisdictions by Mr J M Eekelaar in association with the Commonwealth Secretariat* (Commonwealth Secretariat, London, February 1981) at para 1.1 ("*Explanatory Documentation*") (reference may also be made to *Eekelaar* at 305–306)):

The Preamble to the [Hague] Convention makes explicit the twin premises upon which the [Hague] Convention is based: first, that the interests of children are of paramount importance in matters relating to their custody and, second, that, in cases of international abduction, these interests are best served by the establishment of procedures ensuring their prompt return to the place where they were habitually resident prior to their removal. *The acceptance of the second premise entails a willingness on the part of a State to exercise a degree of self-denial regarding its natural inclination to make its own assessment about the interests of children who are presently in its jurisdiction by*

investigating the facts of each individual case. To do this would generally give abductors important advantages over the other parent. It will usually be difficult for the latter effectively to present his or her side of the case from what may be a great distance and in foreign courts. By the time these questions are all investigated the child may have begun to settle in its new environment and it may be difficult to argue that its return will be in its best interests. *The longer the abductor can delay the decision, the stronger the likelihood that his abduction will succeed. Hence the necessity, in dealing with this problem, for prompt action to return the child. This accounts for the distinction, which runs through the [Hague] Convention, between a decision on an application for the return of the child and a decision on the merits of the case. No decision on the merits can be made until it is decided that a child is not to be returned under the [Hague] Convention (or unless there has been an unreasonable delay in seeking the return) (Article 16) and a decision to return a child is not to be taken as a decision on the merits (Article 19).* ***This does not mean that the merits of the custody issue- will go undetermined. It means simply that they will be determined in the place where it is most appropriate, both for the child and the parties, that they should be determined, namely, the place where the child normally lives. It is in this spirit that the [Hague] Convention should be approached and implemented.*** [emphasis in underlined italics in original; emphasis added in italics and bold italics]

40 We note that one of the basic premises of the Hague Convention (to the effect that it is in the child's interests generally to be returned to his or her home jurisdiction) has nevertheless been subject to critique. However, it has, in our view, been persuasively responded to thus (see N Lowe, M Everall & M Nicholls, *International Movement of Children – Law, Practice and Procedure* (Jordan Publishing Limited, 2004) ("*Lowe, Everall & Nicholls*") at para 17.140):

[I]t does not necessarily follow that the [Hague] Convention has become fundamentally flawed. There surely remains an overwhelming argument that it is basically wrong for children to be uprooted from their home by the unilateral act of either parent and taken to a foreign jurisdiction and thus to be separated from the other parent. Admittedly, that argument becomes weaker if the left-at-home parent has been violent and the abducting parent is escaping to find sanctuary by returning to her family abroad. But, even then, it surely remains a strong argument that, provided the child and abducting parent can properly be protected, the best court to deal with the merits of the dispute is that of the *child's* home jurisdiction. Whether Art 13(b), as it currently operates, properly draws the balance can and, no doubt, will continue to be debated. [emphasis in original]

We would only observe that, given the various interests and arguments, there can – in the nature of things – be no perfect solution as such. However, as we have sought to explain briefly above, the situation is really one of balance and complementarity which is intended to lead to a just and fair result based on the particular facts of each case.

Art 13(b) proper

Introduction

41 This would be an appropriate juncture to turn specifically to Art 13(*b*) of the Hague Convention ("Art 13(*b*)"), which reads as follows:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is ***not bound to order the return of the child*** if the person, institution or other body which opposes its return establishes that –

…

(*b*) There is ***a grave risk*** that his or her return ***would expose the child to physical*** *or* ***psychological harm*** *or otherwise place* ***the child in an intolerable situation***.

[emphasis added in italics and bold italics]

42 Prof Eekelaar aptly observes that Art 13(*b*) is an "emergency clause" (see *Explanatory Documentation* at para 2.4(iii) and *Eekelaar* at 313). This is consistent with the very nature of Art 13 in general and Art 13(*b*) in particular, *ie*, that of an exception to the general rule under the Hague Convention which requires the swift return of the child concerned to his or her country of habitual residence. That having been said, Art 13(*b*) "is the most litigated of all the exceptions" (see N V Lowe & G Douglas, *Bromley's Family Law* (10th ed, Oxford University Press, 2007) ("*Bromley*") at p 654; reference may also be made to *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 ("*In re E*") at [9]).

Onus and standard of proof

43 As noted above, the *onus of proof* is on "the person, institution or other body which opposes [the child's] return" (*viz*, the Appellant in the present appeal) (see Art 13(*b*) as well as *Pérez-Vera* at para 114). Moreover, as has been pertinently observed, "it is *a stringent burden* to discharge" (see *Lowe, Everall & Nicholls* at para 17.87 [emphasis added] (reference may also be made *ibid* at paras 17.88–17.94 as well as to *Bromley* at p 654 and Paul R Beaumont & Peter E McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999) ("*Beaumont & McEleavy*") at p 140)). This is consistent with the fact that Art 13(*b*) is intended to be an exception to the general rule just mentioned.

44 As already noted above (at [31]), care must be taken in order to ensure that the exception does not "swallow up" the general rule. Indeed, the high standard just mentioned was also acknowledged in the court below (see the Judgment at [24]). In the circumstances, there appears to be merit in Gaudron, Gummow and Hayne JJ's view in *DP* (at 418) that the courts need not to go out of their way to give Art 13(*b*) a "narrow" construction but that "[t]he exception is to be given the meaning its words require" (reference may also be made to *El Sayed* at 360). This approach in *DP* was endorsed more recently by the UK Supreme Court in *In re E* (at [31]–[35]) (reference may also be made to the even more recent (also) UK Supreme Court decision of *In re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257 ("*In re S*") at [6]).

45 The following observations by La Forest J (with whom Lamer CJC and Sopinka, Gonthier, Cory, Iacobucci as well as Major JJ concurred) in the Supreme Court of Canada decision of *Thomson v Thomson* (1994) 119 DLR (4th) 253 ("*Thomson*") (at 286) might also be usefully noted:

> It has been generally accepted that the [Hague] Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word "grave" [in Art 13(*b*)] modifies "risk" and not "harm", this must be read in conjunction with the clause "*or otherwise* place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of art. 13(*b*) is harm to a degree that also amounts to an intolerable situation. [emphasis in original]

Discretion remains in the court of the requested State throughout

46 It is also of no mean significance that (as Art 13(*b*) itself makes clear), even if one or more of the conditions set out in the Article is satisfied, "the requested State is *not bound to order* the return of the child" [emphasis added]. Put simply, what this means is that the court of the requested State (here, Singapore) has a *discretion* in the matter and is not, *ipso facto*, duty-bound to refuse the return of the child even if one or more of the conditions set out in Art 13(*b*) are satisfied (see also, for example, *Pérez-Vera* at para 113, the Judgment at [35], as well as the New Zealand High Court decisions of *Clarke v Carson* [1996] 1 NZLR 349 at 351 and *El Sayed* at [67]). To that extent, the entire process is very much *a fact-centric one*. We encounter – once again – the important issue of *application* to which we referred earlier (see above at [33]), albeit in a slightly different context.

The overriding importance of the relevant facts

47 The issue of *application* is also significant in relation to its impact on the utility (or otherwise) of the relevant precedents. In particular, given the myriad fact situations, it is difficult for the most part to discern clear strands of

legal principle (apart, perhaps, from those which are pitched at a relatively high level of generality) (see also, for example, *Lowe, Everall & Nicholls* at para 17.100). That this is so will also be evident in the context of the present appeal. Indeed, as we shall see, the overriding theme is that a *close and granular analysis of the precise facts* is *imperative.* This is not, perhaps, surprising in view of the delicate nature of the balancing process, given the very personal nature of the subject matter. Bearing this in mind, let us now turn to what we consider to be the specific (albeit non-determinative as well as non-exhaustive) strands of legal principle.

48 It should also be noted at this juncture that an appellate court will not overturn the judgment of the court below unless, whether by reference to the law or to the evidence, it had not been open to the judge in the court below to make that judgment (see, for example, *In re S*).

The abducting parent cannot take advantage of his or her own wrong

49 This first strand of legal principle is a logical, commonsensical and fair one inasmuch as the abducting parent cannot seek to rely upon his or her own conduct in order to create a situation of grave risk of physical and/or psychological harm to the child concerned in order thereby to rely upon that alleged risk to argue against the return of that child pursuant to Art 13(*b*) (see also, for example, *McClean* at p 11; *Lowe, Everall & Nicholls* at paras 17.101–17.104; and *Beaumont & McEleavy* at p 146). This is based on the broader rationale to the effect that *a person cannot take advantage of his or her own wrong*. As Butler-Sloss LJ aptly expressed it in *C v C* (at 661) (reference may also be made to the (also) English Court of Appeal decision of *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478 ("*Re C*") at 486 and the Scottish Outer House decision of *McCarthy v McCarthy* [1994] SLT 743 at 745):

Is a parent to create a psychological situation, and then rely upon it? *If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four horses through the [Hague] Convention, at least in respect of applications relating to young children.* I, for my part, cannot believe that this is in the interests of international relations. ***Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent.*** [emphasis added in italics and bold italics]

50 The broad principle just mentioned underpins legal principles across diverse areas of the law. Take, for example, the principle that *self-induced* frustration does not constitute operative frustration under the common law of contract (see generally *The Law of Contract in Singapore* (Academy Publishing, 2012) (Andrew Phang Boon Leong

gen ed) ch 19 at paras 19.143–19.188). Another example is the principle that criminals cannot profit from their crimes (see, for example, the oft-cited English High Court decision of *In the Estate of Crippen* [1911] P 108).

51 Not surprisingly, however, the situation will not always be clear-cut. In the English Court of Appeal decision of *D v D (Child Abduction: Non-Convention Country)* [1994] 1 FLR 137, the mother (the abducting parent) had initially indicated that if the children were sent back to their home country, Greece, she would not go with them. The trial judge had nevertheless ordered the children's return to Greece. However, at the hearing of the appeal, it was discovered that the mother had become pregnant by an Englishman living in England (with the baby being due in a few months) and that, in those circumstances, she was no longer prepared to go back to Greece. The English Court of Appeal allowed the mother's appeal. We note however that there was no evidence as to the circumstances in which the mother became pregnant. More importantly, this was a *non-Convention case* and the *specific welfare of the children* was therefore the overriding factor. However, what is clear is that (as emphasised in the preceding section) the *precise facts* of the case concerned are of the first importance.

The role of undertakings

52 The practice of requiring undertakings was pioneered by the English courts (see *Lowe, Everall & Nicholls* at para 17.123). As Butler-Sloss LJ articulated it in the oft-cited English Court of Appeal decision of *C v C* (at 659–660):

Those [undertakings], as far as they go, are ***very valuable*** – and, if I may say so, for my part, *show the good intent* that [the father] has for the welfare of his child and to return him to the jurisdiction of the Australian court. In my view, those undertakings *should go somewhat further*, and the undertakings that I for my part think should be required of this father, ***as a prerequisite of the return of the child, and without which I consider the child should not be expected to return****, are as follows*. [emphasis added in italics, bold italics, and underlined bold italics]

Indeed, L'Heureux-Dubé J (with whom McLachlin J concurred) in *Thomson* (citing the passage just quoted) also observed thus (at 307):

Undertakings such as those of the respondent in this case are to be commended. They are often made in cases where an applicant seeks the return of a child under the [Hague] Convention.

53 Returning to the observations by Butler-Sloss LJ in *C v C* (as quoted in the preceding paragraph), we agree that not only are undertakings by the parent seeking the return of the child a sign of good faith on his or her part, they are also important in ensuring that the return of the child will not (as far as possible) adversely impact the child and/or the

abducting parent. They are in fact often spoken of with regard to *the protective measures* which exist to ensure the justice and fairness just mentioned (see also generally *In re E*). That is why Butler-Sloss LJ spoke of *undertakings* being even "a *prerequisite*" to the return of the child. As we shall see, this is also the approach we adopted with regard to the present proceedings.

54 However, whilst it has been observed that such undertakings "can alleviate what might otherwise be regarded as an intolerable situation", "[t]hey are intended … to have a short life, ie until the court of the child's habitual residence becomes seized of the proceedings" and that "[a]ccordingly, the court should be careful not in any way to usurp or be thought to usurp the functions of the court of habitual residence" (see *Bromley* at p 659); the learned authors of *Bromley* further state that "undertakings must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations" (see *ibid*; reference might also be made, in a similar vein, to *Lowe, Everall & Nicholls* at para 17.124 as well as to *McClean* at p 12). Indeed, this was also the very point which was made – in a judicial context – in *Re M*, where Butler-Sloss LJ observed thus (at 1025):

This court must be careful not in any way to usurp or to be thought to usurp the functions of the court of habitual residence. Equally, the requirements made in this country must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations, as was suggested by Sir Thomas Bingham MR in *Re M (A Minor) (Child Abduction)* (above) at p 397. Undertakings have their place in the arrangements designed to smooth the return of and to protect the child for the limited period before the foreign court takes over, but they must not be used by the parties to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child.

55 However, one difficulty with respect to undertakings is the need to ensure that they are complied with as well as enforceable in the State seeking the return of the child ("the requesting State"). This might be why Kay J did not appear very enthusiastic about undertakings in the Family Court of Australia decision of *In the Marriage of McOwan* (1993) 17 Fam LR 377 ("*In the Marriage of McOwan*"); as the learned judge observed (at 383) (see also, in a similar vein, *per* Gaudron, Gummow and Hayne JJ in *DP* at 425):

If undertakings are to be given it is important to make sure they can be enforced. There does not appear to be any existing mechanism by which the court that extracts the undertaking can ensure that it is complied with. There does not appear to be any legal basis upon which the court of the State in which the child has been returned, can require compliance with an undertaking given to another court.

56 This is a fair point and one that we had to consider in the context of the present appeal. However, as the proceedings in this appeal demonstrate, this potential difficulty is not, with respect, an insuperable one. For example, this court required the Respondent to undertake that he would, prior to the Appellant returning to Germany with the children, apply to the German court seized of the matter to incorporate all the relevant undertakings given by the parties as an order of that court. Indeed, on a more general level, practical solutions in this particular regard are imperative. As Kay J aptly observed in *In the Marriage of McOwan* (at 385):

Unless contracting States can feel reasonably assured that when children are returned under the Hague Convention, their welfare will be protected, ***there is a serious risk that contracting States and courts will become reluctant to order the return of children.***

In *Foxman* (Case Number: MA 2898/92 Nov 1992 available through the reporting service of William Hilton, California) Justice Hayim Porat of the Tel Aviv District Court said:

"Responsibility for the child's welfare in the usual meaning of the word is mainly the responsibility of the legal court cases in the country to which the child will be returned, and we must assume that there, the court will do its utmost to minimize harm to the child."

A more liberal view of the exceptions to mandatory return as set out in Article 13 may become common. This outcome would seem unfortunate given the successful operation of the Convention to date.

[emphasis added in italics and bold italics]

57 The following observations (at 447) by Kirby J in *DP* are apposite, whilst we emphasise that the court should nevertheless (as just indicated) always strive for a practical, balanced solution in the case at hand:

Too much should not, in my view, be made of the difficulty of enforcing such undertakings. Such problems are ***inherent*** *in cases involving foreign jurisdictions* ***but they cannot be allowed to undo the strong initiatives of the international community reflected in the achievement of the [Hague] Convention. Undertakings are now a common feature of such cases****.* There is no mention in the casebooks that I could find of practical difficulties that have arisen in conforming to such undertakings. This Court need not be concerned about such problems where they are not shown to exist. At least we should not pass upon them in the absence of a clear challenge on the record either to the power to exact undertakings generally or to obtain them in the form required. [emphasis added in italics and bold italics]

Where the abducting parent has medical (especially psychological) problems which are alleged to prevent him or her from returning to the requesting State with the child concerned

58 A preliminary note of sorts is apposite. Looked at from a more general perspective, it might be cogently argued that this is not a separate category of legal principle in and of itself, but an aspect or sub-set of a more general principle, *viz*, the overriding importance of the relevant facts (see above at [47]; reference may also be made to *Lowe, Everall & Nicholls* at paras 17.117–17.119 (which, whilst commencing with the proposition (at para 17.117) that "[i]t would appear … that mental illness suffered by the wronged parent is unlikely to constitute sufficient reason to find the requisite grave risk of harm", in our view focuses more on the *facts* of relevant decisions which (not surprisingly) did not always give rise to the same result)). This is because each individual and each medical (in particular, psychological) problem is invariably different. Most importantly, however, it must always be borne in mind that the present category is relevant only in so far as it impacts *the child concerned*.

59 That having been said, given the close biological and emotional bonds between mother and child, especially in the situation where the abducting parent is the mother and the child is very young (which is precisely the situation faced by this court in the present appeal), the situation of the mother is often critical. Put simply, the relationship between mother and child is not only fluid but also organic and symbiotic in nature (reference may also be made to *El Sayed* at 361; *C v C* (where the child concerned was also very young); as well as *In re E*). In this regard, an essential point ought to be emphasised right at the outset. It is often the case that the abducting parent's (usually, the mother's) medical situation is – in the nature of things – *involuntary* in nature and *beyond her control.* For example, in *DP*, Gaudron, Gummow and Hayne J observed (at 427 with regard to the mother's illness) that:

> To say that she is the originator of the source of the risk of harm appears to take no account of the fact that the mother is *not* in command of her situation and it betrays a complete lack of any understanding of the major depressive illness from which she suffers. [emphasis in original]

60 However, if the abducting parent can in fact be *treated* for his or her medical condition *but refuses* to be so treated, then (particularly if the prognosis is that treatment might lead to a cure or an improvement such that the parent is no longer a danger or threat to the child concerned) it could be persuasively argued that the abducting parent is *attempting to take advantage of his or her own wrong*. As noted above, this is of course impermissible as a matter of general logic, commonsense and fairness (see above at [49] and [50]).

61 Nevertheless, we note that the issue of *treatment*, whilst of potential importance (as the facts of this very appeal demonstrate), appears to be a factor that has seldom been considered in detail in the relevant case law.

62 In the English High Court decision of *Re G (Abduction: Psychological Harm)* [1995] 1 FLR 64 ("*Re G*"), for example, the father's application for the return of the children concerned (from England back to Texas) was dismissed as it was held that the relevant medical evidence demonstrated that the children would be exposed to a risk of physical or psychological harm or otherwise be placed in an intolerable situation owing to the mother's depression, which would become exacerbated if she were to return with the children to Texas (and there was also a considerable danger that she might become psychotic). It should be noted, in this regard, that the mother was in fact *willing* to return with the children to Texas. It should also be noted that the relevant point was the effect which the mother's mental condition would have *on the children.* However, what was not explored by the court in *Re G* was whether or not the mother's mental condition was *treatable*; indeed, there was no suggestion that she should undergo treatment. It might well have been the case that the medical prognosis might have shown that treatment would be futile. However, what remains clear is that the possibility of treatment does not appear to have been explored in *Re G*. We also note that *Re G* was described in a leading treatise as "an extreme case [which] represents very much the exception to the rule" (see *Beaumont & McEleavy* at p 147); it was also described (in a similar vein) in yet another textbook as "[a] rather controversial case" (see Jonathan Herring, *Family Law* (5th ed, Pearson Education Limited, 2011) at p 569).

63 In the New Zealand District Court decision of *Armstrong v Evans* [2000] NZFLR 984 ("*Armstrong*"), the court did consider the fact that the abducting mother had received treatment for post-traumatic stress disorder relating to her history of post-natal depression as well as her relationship with the husband, by whom she had been violently abused. Her mental condition had apparently stabilised but the court was of the view that, if she were to return from New Zealand to Australia, she was likely to suffer a rapid and severe deterioration in her mental well-being and that there was also a prospect of suicide. In the circumstances, the court declined to allow the husband's application for the return of the child as such deterioration in the wife's mental well-being posed a grave risk in so far as the child was concerned. Indeed, the court emphasised (at [38(1)]) that:

The focus is on the child's situation not that of the [mother]. The issue is not whether the mother would be exposed to physical or psychological harm but whether the child would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation.

64 However, as alluded to above (at [59]), the situation is often an organic and symbiotic one in so far as mother and child are concerned. Returning to the facts of *Armstrong*, it is significant in our view that Doogue J observed (at [57]):

It cannot be said that the [mother] has created a situation of potential psychological harm and now seeks to rely on it to prevent the return of the child. The evidence of [the registered psychologist] is unequivocal that the impairment to the psychological wellbeing of the mother was occasioned by the experience of being in an abusive relationship. The risk of psychological harm is beyond the control of the [mother]. She is not the architect – she is the victim – by that I am referring to the potential of suicidality.

The learned judge also observed at the end of his judgment (at [72]) that "[t]he prospect of one parent suiciding and being thereby permanently out of the child's life weighs far more heavily with me" (reference may also be made to the Full Court of the Family Court of Australia decision of *Director-General, Department of Families v RSP* [2003] FamCA 623 ("*RSP*")).

65 *Armstrong* is therefore an illustration of a situation (referred to above at [59]) where the mother's condition was *involuntary* in nature and *beyond her control*. However, we also note that there is nothing in the judgment in that particular decision which indicates what the options for *treatment* of the mother were and, in particular, what the prognosis for recovery was with treatment (including *continued treatment* if she and the child were returned from New Zealand to Australia) (and *cf* the Family Court of Australia decision of *Director-General, Department of Families, Youth and Community Care v Bennett* [2000] FamCA 253).

66 As always, however (and bearing in mind the need for a nuanced consideration of the relevant fact situation), a *balanced* approach is required. For example, as Kirby J observed in *DP* (at 449):

Obviously, as Rose J recognised, courts of law must be particularly cautious before permitting parents, in the highly charged circumstances of international child removal or retention, to attempt to dictate the outcome of proceedings by threatening that if a court decision goes against them, they will commit suicide to the great risk of harm to the child concerned. In many cases of this type, the very circumstances that have driven a party, typically a parent, to cross, or refuse to cross, the world with a child will be such as to engender the deepest of feelings. If such threats were easily upheld as attracting the exception [in Art 13(*b*)] in a particular case, it might be expected that like claims would multiply enormously. These are the practicalities of cases of this kind which the Full Court can be taken to know only too well. Such threats would themselves add to the disruption occasioned to children by such international abduction or retention. I do not say that the threat of suicide by an abducting or retaining parent could never be established to occasion the type of "grave risk" of which para (b) speaks. But it would be a case different from the present where a number of events had to occur and then coincide and where the assertions of the necessary circumstances of suicide did not bear out the reasoning of the primary judge.

Our decision

67 As already noted above (at [21]–[23]), we confirmed the order for the return of [B] to Germany, albeit together with a different set of undertakings to take into account the Appellant's psychological condition as well as to ensure that the substantive proceedings in the German court with regard to the custody and/or care and control of [B] proceeded on a level playing field in all (including legal) respects (as noted above at [23], these undertakings are to be found in the Annex). We will now elaborate on our reasons for arriving at our decision, applying the legal principles just enumerated.

68 It is, in our view, imperative to commence this section with the reminder (already flagged above at [47]) that *the precise facts* are not only the first port of call but are also of the first importance. Indeed, as we have seen, the relevant principles are but guidelines at best. This is especially so because of the very nature of this particular sphere of the law.

Our decision in the light of the Appellant's psychological condition

69 Bearing in mind the stringent burden which lay on the Appellant (see above at [43]), we noted, first, the fact that she had significant psychological problems. Indeed, that was the crux of her argument in the appeals before us and the Judge. In particular, counsel for the Appellant, Ms Poonam Mirchandani, relied heavily upon the psychiatric evidence by Dr Lim, in particular Dr Lim's Further Report (summarised above at [15]), which stated that the Appellant could not, owing to her psychological condition (in particular, her fragile state of mind), return to Germany. Dr Lim further opined that it was undesirable, in the circumstances, to separate [B] from his mother who was his primary caregiver. It should be noted, however, that Dr Lim's Further Report came into being only *after* the Appellant had been unsuccessful in the proceedings in the District Court, a point also noted by the Judge (see the Judgment at [105] and above at [16(c)]).

70 As the Judge observed, the DJ was of the view that Dr Lim's First Report should be accorded little weight as it was based solely on information provided by the Appellant and three sessions of observation of interaction between only the Appellant and [B] (see the Judgment at [48]) and [96]). Before the Judge, the Appellant had submitted that "she [could not] return to Germany due to her fragile state of mind and the real risk that [existed] that she might either end her life or become psychologically impaired or further depressed" (see the Judgment at [52]). After considering the Appellant's first affidavit as well as Dr Lim's Further Report (together with the Respondent's version of events) in some detail, the Judge decided in favour of the Respondent. In particular, the Judge agreed with the DJ that the

Appellant's allegations of violence having been inflicted on her by the Respondent had *not* been made out (see the Judgment at [93]–[95] as well as above at [16(a)]).

71 In so far as the alleged risk of harm to [B] was concerned (see also generally above at [16(b)] and [16(c)]), the Judge noted, *inter alia*, that it appeared that the risk of separation of [B] from his mother arose mainly from the possibility that the Appellant would not return to Germany with him (see the Judgment at [97] and above at [16(b)]). Indeed, despite noting that the Appellant had maintained that she *could not* (as opposed to *would not*) return to Germany, the Judge was of the further view that the Appellant "[seemed] adamant in her refusal to return" (see the Judgment at [97] and [104]). Distinguishing the cases cited by the Appellant, the Judge was primarily of the view that she could not overturn the findings of the DJ unless they were against the weight of evidence (see the Judgment at [100] and [103]). This is, of course, entirely consistent with the general principle set out above (at [48]). Indeed, it is apposite to note, in this regard, that the present court is now faced with *two concurrent sets of findings* (by both the DJ *and* the Judge).

72 One other point noted by the Judge is also of relevance to the present appeal; as she observed (see the Judgment at [106]):

It remains a concern that the mother has expressed suicidal thoughts. Dr Lim noted that at first she had not done so but that as she observed and tried to understand the proceedings of the court over the preceding two months, her depressive symptoms had been accentuated. It is not surprising that the mother would have had an adverse reaction to the outcome of the proceedings below. The notion of wanting to end it all became, apparently, more entrenched in her psyche. ***However, Dr Lim did opine that the mother's mental state could be improved if she went on a course of antidepressant medication.*** So far the mother has refused this treatment because she is breastfeeding. The younger child was about six months old at the time of Dr Lim's second report and whilst the mother might have wanted to continue to breastfeed him, other suitable methods of feeding him would have been available had she gone on medication. ***The mother has not helped herself very much.*** [emphasis added in bold italics]

73 In fact, the Appellant's psychological state was a factor that weighed heavily in our decision. This was due – in the main – to the precise facts before us. In particular, we noted the very young age of [B] and the fact that the Appellant was his primary caregiver. Looked at in this light, any physical separation of [B] from his mother at this particular stage of his life would not have been in the best interests of [B].

74 It will be noted, at this juncture, that, whilst we were dealing with the Appellant's psychological state, the focus must be (as noted above at [58]) on its effect or impact on *the child*, *viz*, [B]. That having been said, a closely related issue also required us to focus on *the Appellant*. In particular, as alluded to above (at [72]), there appeared to be more than a hint by the Judge that this psychological state might possibly have been self-induced. Given the importance of this particular factor, we ordered an independent assessment by a court-appointed psychiatrist, Dr Mahendran. Indeed, given the almost inevitable leaning of a particular expert towards his or her client, it might be preferable in cases such as the present appeal to request an *independent* assessment.

75 We found Dr Mahendran's Report (summarised above at [20]) to be extremely helpful in the resolution of this appeal. Whilst it was similar to Dr Lim's evidence (especially Dr Lim's Further Report) in so far as it indicated that the Appellant was indeed suffering from psychological problems, it *differed* in its *diagnosis*. In particular, Dr Mahendran did not find that the Appellant's psychological difficulties were as severe as Dr Lim had thought, finding that the Appellant was suffering from "*Delusion Disorder*". Crucially, Dr Mahendran demonstrated, in our view, great professional and practical insight by not only proposing an appropriate course of treatment but also (recognising the precise factual context) recommending continued treatment in Germany.

76 Indeed, as we alluded to above (at [60]), an abducting parent's reluctance or refusal to undergo a course of recommended (and appropriate) treatment would be tantamount to that parent taking advantage of his or her own wrong, which would have been wholly unacceptable from the perspectives of logic and fairness. Given the close dependence by [B] on the Appellant in the context of the precise facts, an extremely difficult situation would have been posed to this court had the Appellant refused to undergo the appropriate treatment. However, if that had been the case, we would have been prepared to assume that (unlike many of the other seemingly relevant precedents) [B] would nevertheless have received adequate care by the Respondent and his parents were he to return to Germany. Such care would, of course, not have been ideal without the presence of the Appellant. However, we reiterate that it would have been wholly unacceptable to have permitted the Appellant to take advantage of her own wrong by refusing the appropriate treatment and then relying upon such wrong to create the very separation used to challenge the return order in respect of [B].

77 Fortunately, the Appellant adopted a sensible and appropriate approach in undertaking to undergo the appropriate treatment not only in Singapore but also in Germany. The latter point is, in our view, very significant simply because it would have been self-defeating for the Appellant to have begun her treatment in Singapore only to discontinue it when she returned to Germany – which discontinuation would inexorably have led to a deterioration in her psychological condition which could (in turn) lead to a grave risk of the very harm contemplated in Art 13(*b*).

Our decision on the relevant undertakings to be provided by the parties

78 In our view, the issue of undertakings was a very important one in the context of the present case. On the facts of this case at least, it seemed to us that, whilst the issue of *treatment* of the Appellant's psychological condition (elaborated upon in the previous section) represented the Appellant's perspective and responsibility, the issue of *undertakings* by the Respondent represented the Respondent's perspective and corresponding responsibility. Both these perspectives are complementary in nature. That is why we were very concerned about the precise content of the undertakings. That having been said, although the issue of undertakings was primarily the Respondent's responsibility, we could not ignore the necessity of ensuring that the Appellant also entered into some undertakings in order to ensure that the performance of the Respondent's undertakings were not undermined.

79 Before we turn specifically to the very important role which the various undertakings played in the resolution of the present appeal, we refer to the UK Supreme Court decision of *In re E*, which involved rather similar circumstances. There, the abducting mother was suffering from an adjustment disorder and the undertakings furnished by the father played a very important role. In this regard, Baroness Hale of Richmond and Lord Wilson JJSC, who delivered the judgment of the court, observed thus (at [49]):

We have no reason to doubt that the risk to the mother's mental health, whether it be the result of objective reality or of the mother's subjective perception of reality, or a combination of the two, is very real. ***We have also no reason to doubt that if the mother's mental health did deteriorate*** *in the way described by Dr Kolkiewicz*,***there would be a grave risk*** *of psychological harm to the children. But the judge considered very carefully how these risks might be avoided.* The highest the case can be put is that part of her conclusion relies upon undertakings given to the English High Court, which could not be enforced in Norway, rather than upon any orders yet made in the Norwegian courts. But the judge was reassured by the answers given by Judge Selvaag as to the remedies which would be available if need be. *Nor is there anything in the history to suggest that the father is not a man of his word.* The judge trusted him to abide by the solemn promises which he was asked to make to her; he was asked to make them because the judge thought it in the best interests of the children he loves so much for him to do so; however little he understands or accepts the mother's feelings, he must accept what the judge thought best for his children. It is certainly not the task of an appellate court to disagree with the judge's assessment. [emphasis added in italics and bold italics]

It would appear that the court in that case did not think that there would *in fact* be a deterioration in the mother's mental health – which was somewhat different from the prognosis by Dr Mahendran in the present appeal. It should, however, be noted that, like the present appeal, a set of detailed undertakings was put in place. It should also be

noted that one of the undertakings *did*, in fact, involve "on-going psychological interventions, such as counselling or cognitive behavioural therapy" (see *In re E* at [44]). Finally, we note that the court was satisfied with the father's good faith in that particular case.

80 Although the undertakings entered into by the parties in the present case appear fairly substantive, they were, in our view, wholly *necessary*. It seems to us that, in the oft emotionally charged atmosphere in cases of this kind, something akin to what this court ordered might (without casting any aspersions on the parent entering into the undertakings concerned) be advisable, even if they might appear to be effected *ex abudanti cautela*. More importantly, we were mindful of the need not to usurp (and, indeed, not even hint at usurping) the functions of the German court.

81 That is why we were glad that the Respondent undertook that, prior to the Appellant returning to Germany with the children, he would apply to the German court seized of the matter to incorporate all his undertakings as an order of that court. Indeed, unless this particular undertaking was fulfilled, the Appellant and [B] were not obliged to embark on the journey back to Germany. For good order, his undertakings were to subsist until the final disposal of the proceedings before the German court seized of the matter with regard to the custody and/or care and control of [B]. Likewise (and in fairness to the Respondent), the Appellant agreed that she would consent to the Respondent applying (on her behalf) to the German court seized of the matter to incorporate all *her* undertakings as an order of that court.

82 Indeed, we would also note that, in addition to ensuring that we did not usurp (or be perceived to be usurping) the function of the German court, the undertakings referred to in the preceding two paragraphs also ensured that any potential problems of *enforcement* (see above at [55]–[57]) would in all likelihood be taken care of. What this further provides by way of normative guidance in future cases is this: undertakings are not only important; it is also imperative that they be carefully tailored in order to ensure that the appropriate safeguards are in place so that they are not only enforceable by the court of habitual residence but also that they furnish the abducting parent and child with adequate protection so that the intent and spirit of the Hague Convention are achieved in their fullest measure.

83 All this must also be viewed in light of this court ensuring (by way of the relevant undertakings by the Respondent) that the Appellant would be provided the appropriate legal representation in Germany before the German court. Put simply, it is imperative that the abducting parent have his or her day in the court of habitual residence, consistently with all the requirements of due process as well as justice and fairness (which are foundational and common to all jurisdictions). Looked at in this light, undertakings are (in most, if not virtually all,

cases) of the first importance. However, we reiterate that it is vital that the court overseeing the formulation of the relevant undertakings is constantly alert to the precise facts so that the undertakings complement the Hague Convention (as well as its underlying purpose and spirit) to the fullest extent possible. Indeed, this is a paradigm instance of how the universal and the particular can be integrated holistically to ensure justice and fairness to both parties.

84 Returning to the precise facts and context of the present case, we were conscious of the need to ensure that, whilst a sufficient period of time would be furnished to the Appellant to embark upon treatment and hopefully experience a reasonable amount of recovery, there would nevertheless be a timely return of [B] to Germany together with the Appellant (who would thereafter *continue* with her treatment in Germany). To this end, the Appellant had to enter into the necessary undertakings to, *inter alia*, undergo such treatment.

85 It seemed to us that, on the Respondent's part, he had to undertake to ensure that the Appellant's return to Germany with [B] was one that – in all justice and fairness – would see her being placed on a level playing field with him, especially with respect to access to legal advice and representation. In order to ensure that this was the case, we required that he give the necessary undertakings with regard to, *inter alia*, the Appellant and the children's travel to Germany, reasonable accommodation, maintenance and health care, as well as the Appellant's legal representation in Germany. In our view, far from usurping the function of the German court, these undertakings would clear away unnecessary logistical and other obstacles and set the legal stage for the more efficient resolution by the German court of the substantive issues of custody and/or care and control of [B].

Conclusion

86 For the reasons set out above, we arrived at the decision to confirm the order to return [B] to Germany, albeit together with the undertakings annexed to this judgment. We should add – for the avoidance of doubt – that there will be no order as to the costs of the present appeal, whilst the costs orders in the courts below are to stand. The usual consequential orders will apply.

87 Before concluding the present judgment, a few seemingly disparate but nevertheless crucial observations are in order.

88 The first is that proceedings under the Hague Convention have always been intended to be dealt with as expeditiously as possible. That having been said, we note that there has been a rather lengthy period of delay in the context of the present proceedings. Indeed, the Judge herself recognised this, observing that "[u]nfortunately … the

appeal [before her] took a rather long time to come on for hearing" (see the Judgment at [49]). However, there was a reason for such delay. As the Judge further elaborated (see *ibid*):

This was partly because the mother's lawyers discharged themselves as the mother was unable to afford private representation and the mother then had to apply to the Legal Aid Bureau for legal assistance. An emergency legal aid certificate was issued to the mother on 2 November 2012 but then some further time was taken to obtain an opinion from the solicitors on the legal position of the mother in relation to the appeal.

Notwithstanding these reasons for the relatively lengthy period of delay, it is hoped that all future proceedings involving the Hague Convention will be dealt with expeditiously. In this regard, a system of monitoring the progress of such proceedings by way of tracking and co-ordination ought to be implemented by the Subordinate Courts and the Supreme Court.

89 On this point, the following observations by Lord Hope of Craighead in the House of Lords decision of *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 (at [5]) might also be usefully noted:

Delay does not, in itself, excuse compliance with the [Hague] Convention. Courts must do the best they can to give effect to it, so long as its provisions have not become completely unworkable. *The lesson of this case is that every effort must be made to avoid such delays. If there is a dispute as to whether the removal was wrongful it should be dealt with summarily. A balance must, of course, be struck between acting on too little information and the search for too much. A court cannot make a finding that the child's removal was wrongful unless it is provided with a basis for doing so. But if it is to deal with the case summarily the court must not seek perfection. It has to do the best it can on the information that has been made available* … [emphasis added]

90 Secondly, we are of the view that the present proceedings highlight the need to further develop and refine collaboration with respect to, *inter alia*, the smooth and effective implementation of the Hague Convention across jurisdictions – particularly pursuant to *Art 7* of the Hague Convention (see also *McClean* at p 12). Indeed, the following observations by Singer J in the English High Court decision of *Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349 (at 372–373) are worth noting (reference may also be made to the English High Court decision of *Re M and J (Abduction: International Judicial Collaboration)* [2000] 1 FLR 803, where several instructive observations with respect to *judicial* collaboration were made (*cf* also the English Court of Appeal decision of *S v C* [2011] EWCA Civ 1385 at [42] and the UK Supreme Court decision of *In re E* at [45])):

Article 7 [of the Hague Convention] requires Central Authorities to co-operate with each other and to promote co-operation amongst the competent authorities in the Contracting States. … *These provisions prompt me to volunteer* ***the suggestion that there may be some scope for developing, probably on a bilateral basis at least to start with, communication and discussion between Central Authorities so that each may have the opportunity of explaining and, it may be, justifying the approach their domestic courts take to issues which commonly arise in Convention cases****. Such an issue may well be* ***these courts' use of undertakings*** *designed to smooth the speedy passage home and to the door of the proper court of children who should never have been taken from its jurisdiction.* ***By such discussions and the exchange of views and information it may be that comity would be strengthened, and an understanding achieved that neither country wishes to cause any offence to the courts of the other, nor to seek to interfere with or to influence what that court then does.***

Moreover, it may well be that if such opportunity for the exchange of views does assist to promote co-operation, it should be possible in an appropriate case for the Central Authority of the requested State to liaise with its counterpart in the requesting State to put in place measures agreed by the parties or reasonably required as a proper precondition of return.

[emphasis added in italics and bold italics]

91 Thirdly, as noted in the UK Supreme Court decision of *In re E* (at [53]), the potential reference to *mediation* ought always be borne in mind, although that same court quite correctly observed (*ibid*) that "[m]ediation will not work if one party is allowed to dominate or bully the other" and "[t]hat is why it is usually thought unsuitable in cases of alleged domestic violence or abuse".

92 Finally, it is of the first importance to emphasise once again the vital role that the precise facts play in the ultimate decision by the court concerned (see above at [47]). We hope that these proceedings, including the decision of this court in this very appeal, illustrate this in no uncertain fashion.

ANNEX

ORDER OF COURT

Before: The Honourable Chief Justice Sundaresh Menon, the Honourable Judge of Appeal Chao Hick Tin and the Honourable Judge of Appeal Andrew Phang Boon Leong in Open Court

Date of Order: 3 December 2013

Hearing Dates: 22 July 2013, 18 October 2013, 28 November 2013, 29 November 2013 and 3 December 2013

Upon the application of [the Appellant] in this action coming on for hearing this day and upon hearing counsel for the Appellant and counsel for the Respondent. It is ordered that: Upon the undertakings given by the Respondent ("the Husband") in Part I below and the undertakings given by the Appellant ("the Wife") in Part II below, and subject to the aforementioned undertakings being carried out by both parties according to their terms, and upon hearing Counsel for the parties, the Court orders the return of the child, [B], to Germany pursuant to s 8 of the International Child Abduction Act (Cap 143C, 2011 Rev Ed) before the expiry of two and a half (2.5) months from 1 December 2013 (*ie*, 15 February 2014).

PART I: UNDERTAKINGS AND CONSEQUENTIAL ORDERS WITH REGARD TO THE HUSBAND

(1) The family's travel to Germany

The Wife shall travel to [M], Germany with [B] and [J] before the expiry of two and a half (2.5) months from 1 December 2013 (*ie*, 15 February 2014). The Husband undertakes to source for reasonable airfares for the Wife, [B] and [J]'s return journey to Germany and will purchase air tickets for the Wife, [B] and [J]'s direct flights from Singapore to Frankfurt, Germany in the week immediately after the expiry of one (1) month from 1 December 2013. The Husband shall arrange and pay for inter-city flights from Frankfurt Airport, Germany to [M], Germany for the Wife, [J] and [B] upon their arrival in Germany. However, the Wife will bear the cost of transport from [M] Airport to [M]. If the Wife and [J] do not wish to return to Germany with [B], she shall notify the Husband of the same at any time before the expiry of one (1) month from 1 December 2013. If the Wife notifies the Husband of her intention not to return to Germany with [J] after the expiry of one (1) month after the date of 1 December 2013 and if the Husband has already purchased air tickets for the Wife, [B] and/or [J] as provided in paragraph 2 above, the Wife shall bear the costs of the cancellation of [J] and her air tickets and any costs related to any changes that may need to be made to [B]'s air ticket solely. If the Wife notifies the Husband of her intention not to return to Germany with [J], the Husband shall give the Wife at least seven (7) days' advance notice of his arrival in Singapore and the appointed day and time of [B]'s return journey to Germany with the Husband. Upon the Husband's arrival in Singapore, parties shall mutually

agree on the appointed day and time for [B] to be handed over to the Husband at the Husband's solicitors' office with [B]'s passport and other relevant travel documents. For the avoidance of doubt this shall not amount to a surrender of the Wife's rights of custody, care and control over [B], which rights shall then be a matter for the German court seized of the issue.

(2) The Husband's access to [B]

If the Wife agrees to accompany [B] back to Germany with [J], [B] shall reside with the Wife and [J] at her rented accommodation in [M], Germany. For the first two months following the arrival of the Wife, [J] and [B] in Germany, the Husband shall have access to [B] twice a week for four (4) hours per access session. Thereafter, the Husband shall have access to [B] three (3) times a week for four (4) hours per access session. The Wife accepts that the Husband should be entitled to access [J] at the same times and durations as he accesses [B]. However, both parties recognise and accept that this may not be achievable initially because of the lack of contact hitherto between the Husband and [J]. The parties therefore agree to step up the Husband's access to [J] over time in a manner that is conducive to [J]'s well-being and the desirability of his achieving a healthy relationship with his father. The Husband and no other person shall pick [B] up from the Wife's rented accommodation and shall return [B] to the Wife's rented accommodation at the end of each access session. Such access shall not extend to a time later than 6.00 p.m. unless mutually agreed between parties. The Wife shall provide the Husband with her e-mail address prior to her departure from Singapore, and the Husband shall provide the Wife with a pre-paid mobile phone number upon her arrival in Germany but he shall not be liable to pay for the cost of the Wife's pre-paid mobile line thereafter. The Wife shall not change the said mobile number without first notifying the Husband of her new mobile number. The Husband shall notify the Wife weekly by e-mail to the said e-mail address provided by the Wife or by SMS to the said pre-paid mobile number of his intended access to [B] at least one (1) week in advance. Such access as the Husband is able to have to [J] will initially take place at the Wife's option either at the rented accommodation itself or within 100 metres of the rented accommodation until it is reasonably possible for the parties to agree to other more suitable arrangements.

(3) Accommodation in Germany

The Husband undertakes (not less than two (2) weeks before their arrival in Germany) to provide (at his expense) the Wife, [B] and [J] with rented accommodation at an affordable and reasonable rental rate (and with proper lightings, utilities, heating and ventilation). Such accommodation to be ready for immediate occupation on arrival of the Wife, [B] and [J] in Germany pursuant to the timeline stated at paragraph 1 above. The rented accommodation shall be located either in a safe and suitable part of [M], Germany or in [W], Germany. The Wife shall inform the Husband which location she prefers by 6 December 2013 (subject to the respective amounts of maintenance to be provided to

the Wife as specified at paragraph 14 below). The Husband undertakes to provide the Wife with basic furniture, including a stove, a refrigerator, a wardrobe, two beds with mattresses, as well as a sofa set, dining table, chairs and television and Internet facilities in the said rented accommodation. The Husband shall return to the Wife all her belongings which were left behind by her in the parties' [S] home including the Wife's bicycle, her personal belongings, all her and [B]'s winter wear etc. The Husband shall also purchase winter clothes and shoes for [B] and [J]. For so long as the Wife and the children are in Germany, the Husband shall hand over for the Wife's use the bicycle trailer which she used to move around in [S] with [B]. If the Wife notifies the Husband of her refusal to return to Germany with [J] after the Husband has already procured the rented accommodation, all monies that the Husband may already have expended in procuring the said rented accommodation and on the said furniture for the Wife shall be borne solely by the Wife. Further, if the Wife returns to Singapore before the contract for Internet facilities at the rented accommodation and the custody and/or care proceedings before the German court are concluded, she will be solely liable for the balance fees due and owing for the said Internet facilities.

(4) Maintenance for the Wife and [J] in Germany

The Husband undertakes to assist the Wife to apply for social security benefits from the government of Germany (such as Arbeitslosengeld II (basic social security) and/or Kindergeld (children's benefits) and/or Wohngeld (housing benefits)) which the Wife is entitled to receive under German law. If there is any shortfall between the monthly payments from the government of Germany and the rent payable for the said rented accommodation inclusive of the cost of the Wife's energy, utilities and Internet bills, the Husband undertakes to pay the difference. In addition, the Husband shall pay €800.00 per month for the Wife's maintenance while she resides in [W], Germany, pending any government grant for her maintenance and if the Wife does not have any income in Germany. If, however, the Wife chooses instead to reside in [M], Germany, the amount payable shall be €700. The Husband further undertakes to provide the Wife with maintenance of €200.00 per month for each child while [B] and [J] reside in Germany, pending any government grant for their maintenance. If the amount of the government grants paid exceeds the amount of the rent, service and utility charges payable by the Husband for the rented accommodation together with the total sum of maintenance payable by the Husband under paragraphs 14 and 15 above, the difference shall be paid by the Husband to the Wife. In this regard, the Husband undertakes to disclose the full amount of the government grants received. If there is a shortfall between the monthly payments of social security benefits from the Government of Germany and the monthly maintenance amount of €1,200.00 or €1,100.00 as the case may be for the Wife and children which is payable by the Husband, the Husband shall pay the difference to the Wife. The Husband also undertakes that he will pay the rent, service and utility charges for the rented accommodation as well as the total monthly maintenance for the Wife and the two children in advance. These sums shall be paid by the Husband at the

end of the calendar month preceding (and for) the next calendar month. The Husband shall pay half a month's maintenance for the Wife and two children for the month of February 2014 prior to the departure of the Wife and two children for Germany pursuant to paragraph 1 above. The Husband also undertakes to pay for the Wife's German language course, provided that the Wife undertakes to attend and complete the said German language course and attain the standard required to communicate in the German language on a basic level, failing which the Wife shall bear the costs of the said German language course solely.

(5) Health insurance

The Wife shall provide the Husband with a copy of [J]'s birth certificate in order for the Husband to apply for [J] to be covered under the Husband's family health insurance in Germany. The Husband undertakes not to use this for any other purpose. The Husband undertakes to continue to pay for German family health insurance for the Wife, [J] and [B] for as long as the Wife, [J] and/or [B] remain in Germany. In addition, the Husband undertakes to pay for the Wife's medical (including psychiatric) expenses if or to the extent that they are not covered by German family health insurance. The Husband also undertakes to arrange for a psychiatrist to attend to the Wife upon her arrival in Germany (with notice of details of the same to be given to the Wife at least two weeks prior to her departure for Germany). The Wife is at liberty to choose her attending psychiatrist as recommended by the Women's Shelter which she had previously attended for counselling. However, before confirming the appointment of such psychiatrist, the Wife's Singapore solicitors shall consult with the Husband's Singapore solicitors prior to her departure with the children to Germany pursuant to paragraph 1 above. The Husband shall not unreasonably refuse to appoint the psychiatrist selected by the Wife. If, however, there is one or more psychiatrists recommended by the Women's Shelter who is or are also on the list of psychiatrists under the Husband's German family health insurance, the Wife must choose a psychiatrist from this list.

(6) The Wife's German residence permit

At all times (including prior to the departure from Singapore of the Wife, [B] and [J]), the Husband undertakes to assist the Wife in her application for new residence permits for herself and [J] with relevant authority in Germany, in order that she may remain in Germany until the determination of the proceedings with regard to the custody and/or care and control of [B] by the German court. The Wife, on her part, will take the necessary steps forthwith to make the necessary application for such permits on behalf of herself and [J] including by seeking the assistance of the German Embassy in Singapore.

(7) Legal Assistance

The Husband undertakes to arrange for and obtain legal representation in Germany for the Wife prior to her departure from Singapore (with notice of the details of the same to be given to the Wife at least two weeks prior to her departure for Germany). Before confirming the appointment of a lawyer, the Husband's Singapore solicitors shall consult with the Wife's Singapore solicitors. The Husband shall not unreasonably refuse to appoint the lawyer selected by the Wife. The Husband further undertakes to ensure that the Wife obtains the requisite financial assistance with regard to legal representation and further undertakes that he will pay for all the Wife's reasonable legal expenses should she be unable to obtain free legal representation. Any translation costs not covered by legal aid in Germany for necessary documents shall be paid by or be recoverable from the Husband.

(8) Other undertakings and consequential orders

In order to avoid incurring unnecessary legal costs, the Husband undertakes that he will not pursue child abduction proceedings or such similar criminal or civil prosecution against the Wife in Germany. The Husband:- undertakes that he accepts that [J]'s habitual residence continues to be Singapore (regardless of [J]'s length(s) of stay in Germany occasioned by the Wife's presence in Germany for the purpose of the proceedings before the German Court to determine the custody, care and control of [B]); undertakes not to pursue any proceedings or take any other action or step in Germany in respect of [J], including (but not confined to) proceedings relating to the residence, custody and/or care and control of [J]; and agrees that any issues concerning the custody, care and control of [J] are already before and shall therefore be determined solely by the Singapore court. The Husband undertakes that he will not seek to make any application to any authorities for a change in the nationality of either [B] or [J] without the consent of the Wife. The Husband further undertakes that he shall not apply for German citizenship for [J] without the consent of the wife. The Husband undertakes that he will: not make or renew any application to the German court for custody and/or care and control of [B] until at least two (2) months have elapsed after the return to Germany of [B] and the Wife in order that [B] would have a proper opportunity to acclimatise himself to his new environment (and provided that the Wife has already had a sufficient opportunity to receive legal representation by that particular point in time); prior to the Wife's departure from Singapore, apply for and obtain a discharge of all existing German orders for custody and/or care and control of [B] without prejudice to his legal position with regard to the custody and/or care and control of [B]. In the event that the Husband breaches any of the above undertakings or in the event that the Wife is not able under German law to remain in Germany at any time prior to the completion of proceedings to determine the custody and care and control of [B], the Husband undertakes to consent to an application brought by the Wife to the German court for an order to permit her to return to Singapore with [B] and [J]. For avoidance of doubt, the Wife shall be at liberty at her own expense to leave Germany with [J] at any time she so desires which the Husband shall not object to. Should the Wife decide to leave Germany, the Wife undertakes to leave [B] in the care of the Husband for the

duration(s) of the Wife's absence(s) from Germany. The Wife shall inform the Husband no less than one (1) week prior to any intended departure(s) from Germany of her intended travel plans and hand over [B] to the Husband's care at least one (1) day before her departure. Upon the Wife's return to Germany, the Husband will hand over [B] to her care within one (1) day of the Wife's arrival in Germany. The Wife shall inform the Husband at least one (1) week in advance of any intended return to Germany. The Husband undertakes, that, prior to the Wife returning to Germany with [B] and [J] pursuant to paragraph 1 above, he will apply to the German court seized of the matter to incorporate all the above undertakings as an order of that court. Unless this undertaking is fulfilled, the Wife and [B] shall not be obliged to embark on the said journey to return to Germany. These undertakings shall subsist until the final disposal of the proceedings before the German Court seized of the matter with regard to the custody and/or care and control of [B].

PART II: UNDERTAKINGS AND CONSEQUENTIAL ORDERS WITH REGARD TO THE WIFE

(1) Undertaking to Undergo the Appropriate Medical (including Psychiatric) Treatment

The Wife undertakes that she will undergo the appropriate medical (including psychiatric) treatment with immediate effect in Singapore and that she will continue such treatment in Germany.

(2) Undertakings in relation to the Husband's Undertakings

The Wife undertakes: to perform her obligations pursuant to paragraphs 3, 4, 5, 7, 8, 9, 10, 11, 18, 19, 22, 23 and 31 of the Husband's Undertakings, to place [B]'s passport with her solicitors in Germany for the duration of her stay in Germany in accordance with the terms of these undertakings and not to apply for a new passport for [B] without the Husband's consent. In the event that the Wife breaches any of the undertakings referred to at paragraphs 33 and 34 above, the Wife undertakes to consent to an application brought by the Husband to the German court for an order to enforce compliance with the said undertakings. The Wife agrees that, prior to her returning to Germany with [B] and [J] pursuant to paragraph 1 above, she will consent to the Husband applying (on her behalf) to the German court seized of the matter to incorporate all the undertakings in paragraphs 33, 34 and 35 above as an order of that court.