HCMP1605/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 1605 OF 2011

IN THE MATTER OF DW, male, a child born on 28 May 2007

AND IN THE MATTER OF the Child Abduction and Custody Ordinance, Cap 512

AND IN THE MATTER OF the Hague Convention on the Civil Aspects of International Child Abduction, 1980

BETWEEN

EW	Plaintiff
and	
LP	Defendant

Before : Deputy High Court Judge B Chu in Chambers
(Not open to Public)

Dates of Hearing : 16-18 January 2013

Date of Further Submissions : 24 January 2013

Date of Judgment : 31 January 2013

JUDGMENT

Introduction

1. The present application was initiated by the Hong Kong Secretary of Justice in his capacity as the Central Authority for the return of a 5 year and 8 month old boy D to Slovakia under the Child Abduction and Custody Ordinance Cap 512. The application was made pursuant to a request from the Central Authority in Slovakia on behalf of D's father.

2. In accordance with the procedure adopted in the past, the application commenced with the Hong Kong Central Authority as plaintiff with D's parents as defendants and leave was subsequently given to the Hong Kong Central Authority on 25 July 2012 to be replaced by D's father as the plaintiff ("Father") seeking his return and the mother is now the only defendant ("Mother")[1]. Notwithstanding this replacement, representatives of the Hong Kong Central Authority attended all direction hearings and the substantive hearing to render necessary assistance.

3. One matter which stands out in this application is the delay. The formal application was taken out 11 months after D's removal, and then some 17 months elapsed before the substantive hearing eventually took place. I will go into the reason and effect of this delay later in this judgment.

[1] It is not clear as to how these procedures were initially adopted in Hong Kong. See O.121 r 3 and r.5, RCH; According to para 121/0/3 of the Hong Kong Civil Procedure, Order 121 was largely modeled on the UK Family Proceedings Rules 1991 and r. 8 of the Magistrates Courts (Child Abduction and Custody) Rules 1986. But since then, there are new rules in UK: Family Procedure Rules 2010 and PD12F.

Background

4. The Father and the Mother are citizens of the Slovak Republic. Father is 34 years old and a professional ice hockey player. Mother is 28 years old. She was working as a model but has not been working since about November 2011. They formed a relationship in about 2004/2005 and D was born in Slovakia in May 2007. Father and Mother were/are not married to each other or to anyone else.

5. During their relationship, due to the nature of their respective work, both Father and Mother had to travel and work abroad. Father's job would take him out of Slovakia from about August each year to April following year, being the standard ice hockey season, with a break in December/January. The Mother had also worked abroad and often in Hong Kong in recent years.

6. Apart from short periods during the time when the Father was working in the Czech Republic in 2007 and in Belarus in 2008 and the Mother took D and joined the Father, it was not disputed that D was mainly living in Slovakia during the parties' relationship.

7. The relationship came to an end in about January 2009 when the Mother and D moved out to a rented flat and later moved to the maternal grandmother's home. When the Mother was travelling/working abroad, D would be under the care of his maternal grandmother. Father had said he would keep in contact with D via skype or telephone when he was working abroad, and when he was back in Slovakia between work, he would spend time with D.

8. In the year of 2009, after the separation, the Mother came to Hong Kong in April to work for about 6 days and then returned to Slovakia. She then came to Hong Kong to work again between end of July 2009 and November 2009. She said she met a man T in October 2009 but they were not having a physical relationship at that time[2]. Thereafter, the Mother travelled to Hong Kong again to work for about 3 months in February and later about 2 months in July 2010. According to her, T had also visited her in Slovakia about three times between November 2009 and summer 2010. The Mother said D has known T since about December 2009[3].

9. During the summer of 2010, with the consent of the Mother, the Father took D for a 2 week holiday in Turkey. After their return, Father signed up to play in Moscow, and went there to work on about 7 August 2010.

10. Father then said he failed to contact D for nearly 3 weeks in September 2010 and later learnt from his own mother that Mother had gone to Hong Kong with D, who was about 3 years and 4 months old at that time.

11. It appears from the Mother's passport that she returned to Slovakia from Hong Kong on about 12 September 2010, and then took D and left Slovakia on 19 September 2010, arriving in Hong Kong on 20 September 2010. They have not returned to Slovakia since.

[2] Para 13, B:178
[3] Para 47, B:146

12. After the Father learnt that Mother had gone to Hong Kong with D, he contacted the Mother and was apparently told by her that she would return to Slovakia with D after one month which was later changed to some time around Christmas 2010. They did not return. According to the Father, the Mother told him that she had had some problems and could not travel to Slovakia with D at that time.

13. The Mother's explanation was that when she left Slovakia in September 2010, she had tried in vain before and after to communicate with Father, but was unable to get a response. She, however, said in a conversation which she had with Father after her arrival in Hong Kong, it became quite clear to her that Father was agreeable to D being in Hong Kong[4].

14. Mother admitted that she had planned to take D back to Slovakia for Christmas in 2010. She had produced copies of E tickets issued on 11 September 2010 showing that the return flight date was originally 20 December 2010[5]. She then produced a medical report dated 17 December 2010 advising her not to travel, as she was at that time suffering from anemia and extreme tiredness in early pregnancy[6]. According to the Mother, complications with her pregnancy caused her to be admitted to hospital in January 2011 as a result of internal bleeding. The original tickets later expired[7].

15. The Father then apparently engaged a lawyer and tried to reach an agreement with Mother, but no agreement was reached.

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[4] Para 14, B: 100
[5] C:231, 231(a)
[6] C:229
[7] C:222

In July 2011, Father travelled to Hong Kong to visit D but again no agreement was reached between the parties[8]. Upon the Father's return to Slovakia, Father approached the Central Authority of Slovakia to apply for the return of D on 27 July 2011, and the application in Hong Kong was issued about a month later on 22 August 2011, 11 months after the removal.

16. Since her arrival in Hong Kong, the Mother has been residing with T, with whom she now has a son. D lives with them as a family, and has been attending kindergarten here.

17. D travelled to Hong Kong with the Mother on her passport. It appears that upon arrival, they were granted a 90 day visiting visa, which was later extended to 13 January 2011. Thereafter, it appears the Mother went in and out of Hong Kong, often, to Macau which was about one hour away by jetfoil, to renew her visitor's visa, and also seemed to have obtained a work visa sometime in about April 2011, which expired in November 2011.

18. The Mother's current visa is due to expire on about 25 February 2013. D's visitor visa has expired and the Mother has not been able to take D out of Hong Kong to renew his visa due to the Father's application. Being now over 5, D needs to have an independent passport under Slovak law. Thus, at this moment D is here in Hong Kong with no valid visa and no passport. I understand that the Central Authority has alerted the Immigration Department of Hong Kong of the present proceedings. According to the Mother, as soon as D is able to travel, the

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[8] Para 13, B 90

Czech Consulate here, as agent for the Slovakian Embassy in Beijing, will be able to issue D with a temporary travel document so that D can be taken to Beijing for issue of an individual passport to him.

19. So far neither party has made any application to the court in the Slovak Republic or in Hong Kong for any orders relating to custody, care and control, access, or maintenance in relation to D, notwithstanding that they separated 4 years ago.

Main Issues

20. There are 4 disputed issues listed in the parties' Joint List of Issues but the main issues are in my view the following:

(i) Whether the Father held "rights of custody" before D's removal/retention and whether D's removal from Slovakia and/or his retention in Hong Kong was wrongful;

(ii) whether the Father had consented, or subsequently acquiesced in D's removal and/or retention;

(iii) Whether there is a grave risk that the return of D would expose D to physical or psychological harm or otherwise place D in an intolerable situation,

(iv) If so, whether there will be measures for D's safe return.

Whether the Father held "rights of custody" before D's removal/retention and whether D's removal from Slovakia and/or his retention in Hong Kong was wrongful

21. Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("Convention") defines 'wrongful removal and retention' as follows:

> " The removal or the retention of a child is to be considered wrongful where-
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

22. The meaning of "rights of custody" and "rights of access" under the Convention can be found in article 5:-

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

23. There was no dispute that D was habitually resident in Slovakia prior to 20 September 2010.

24. The Father's case was that he held and was exercising rights of custody to D prior to his removal, and there had been both wrongful removal of D from Slovak Republic by the Mother and since the removal wrongful retention of D in Hong Kong. The wrongful removal took place on 19 September 2010, and the wrongful retention of D took place after his arrival in Hong Kong on 20 September 2010 when the Mother failed to return him to Slovak Republic.

25. The only information this court had on Slovak law at the commencement of this hearing was what was set out and exhibited in the affidavit of Ms Drake of the Central Authority. Ms Drake had produced a copy of the English translation of the relevant sections in the Family Code of Slovakia[9] ("Family Code") and an opinion of one JUDr Marketa Golhova[10], of the Centre for the International Legal Protection of Children and Youth in Bratislava, which is also the Central Authority in the Slovak Republic.

26. It is stated under section 28(2) of the Family Code that "parental rights and obligations" in relation to a child belongs to both parents jointly, irrespective of whether the child was born in or out of wedlock or whether they live together or not. It is also stated that "parental rights and obligations" include the right to determine where a child shall live.

27. Section 28(3) of the Family Code provides 4 exemptions from the principle that parental rights and obligations belong to both parents jointly, but none of the exemptions apply to the Father. According to

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9 C:195
10 C:196

Ms Golhova, the Father had same parental rights and obligations in respect of D as the Mother and where both parents had the parental rights and obligations, one parent without the consent of the other could not change the habitual residence of a minor child. Section 35 of the Family Code states that "if parents fail to agree on substantive matters in the exercise of their parental right and obligations, in particular on moving the minor child abroad...the court shall decide on the motion of some parent".

28. Further, according to Ms Golhova, under article 2(11B) of Council Regulation of EC No 2201/2003, custody shall be considered to be exercised jointly when one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

29. Ms Remedios, Counsel for the Mother, had initially raised a number of queries, including the following:

(i) whether "parental rights and obligations" in Section 28(2) of the Family Code includes a "right of veto" to relocation;

(ii) whether "parental rights and obligations" in fact mean "rights of custody"

(iii) whether where unmarried parents separate and by express or implied agreement the child lived with only one of his parents, and by choice, the Father was living and working outside Slovakia, only having contact with the child during say 3 months of the year, whether the Father was still exercising "rights of custody" before D was removed.

30. First of all, those queries on the effect of the Slovakian Law were raised by Ms Remedios only in her submissions filed less than one week before the substantive hearing and secondly, no leave had ever been sought by the Mother to produce any other expert legal opinion on Slovak law and none was thus available before this court. Further, as these issues were not raised earlier, there was no direction made for the Father to seek a declaration under article 15 of the Convention from the Court in Slovakia on whether or not the removal was wrongful.

31. Ordinarily, in order to be able to determine the position the court would require expert evidence to be given on the issue of foreign law, or for there to be an article 15 determination.

32. Ms Kwok of Hong Kong Central Authority then kindly agreed to clarify the further queries raised by Ms Remedios with the Slovak Central Authority immediately. This resulted in a series of emails after the first day of hearing in which the Slovak Authority clarified and confirmed that if the Mother wanted to change the habitual residence of D (or to remove D abroad), she would need the consent of the Father or court permission (a court order)[11]. The Slovak Central Authority had further confirmed that consent of the Father or the court permission was obligatory and in the absence of such consent or court permission, the removal was considered wrongful[12].

33. An actual right to veto a child's removal to another country will, for the purposes of the Convention, constitute a "right of custody".

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[11] CA-1(a)
[12] CA-1(a)

34. Having considered the information and further clarifications from the Slovak Central Authority, I am satisfied that the Father has discharged the burden of proof on him that he was holding and was actually exercising "rights of custody" jointly with the Mother, prior to D's removal, or would have been so exercised but for the removal of D or D's retention in Hong Kong. Further, the removal of D to Hong Kong by the Mother on 19 September 2010 and the subsequent retention of D in Hong Kong upon arrival was in breach of the Father's rights of custody and there had been wrongful removal and/or wrongful retention by the Mother.

Whether the Father had consented, or subsequently acquiesced in D's removal and/or retention

35. Under article 13 of the Convention, it is stated:-

> "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-
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (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.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child

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> provided by the Central Authority or other competent authority of the child's habitual residence."

36. In the present case, the Mother relied on both the consent and/or acquiescence of the Father.

37. Consent, if it occurs, precedes the wrongful removal or retention; acquiescence, if it occurs, follows it[13]. Consent is not defined in the Convention, but the question whether a wronged parent consented is a question of fact[14]. The issue of consent is a very important matter; the existence of consent needs to be established on the balance of probabilities by clear and cogent evidence[15], although it is possible in an appropriate case to infer consent from conduct[16]. The consent should be to the child's permanent removal or retention.

38. The Mother herself had said that she did not get any response from the Father when she was trying to communicate with him prior to her removing D from Slovakia[17]. I find her evidence on seeking the Father's consent rather confusing, in that at one stage she seemed to be saying the Father had agreed earlier for her to take D on a holiday as he himself had taken D to Turkey[18], and she also seemed to have told the psychologist Dr Levy that under Slovakian law, parents would be permitted to take children away on holiday for up to one month[19]. The Father denied all

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[13] Para 45.62 , Rayden & Jackson on Divorce and Family Matters, 18 Ed, Volume 1 (2) ("Rayden"); see also cases set out in footnote note there under

[14] Para 45.62, Rayden, see also *P v P* (abduction: consent or acquiescence) [1998] 3 FCR 550,[1998] 2 FLR 835, CA; affirming [1998] 1 FLR 630, Hale J

[15] Para 45.63, Rayden, See also *Re C* (abduction: consent) [1996] 3 FCR 222; [1996] 1 FLR 414, Holman J

[16] Para 45.63, Rayden

[17] Para 14, B:100

[18] Para 19, B:134

[19] A:72

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this. Anyway, there was no evidence to support what the Mother had said about the Slovak law on holidays.

39. I am of the view that the Mother has failed to provide any clear and cogent evidence that the Father had given his consent to D's permanent removal to Hong Kong or permanent retention here, prior to 19 September 2010.

40. The question then is has there been "subsequent acquiescence" on the part of the Father?

41. In *Re H (minors) (abduction: acquiescence)*[20], the House of Lords has authoritatively stated the principles to be applied in determining whether the wronged parent has acquiesced under article 13(a). In particular, Lord Brown-Wilkinson has summarized the applicable principles as follows:

> "…
>
> (1) For the purposes of article 13 of the Convention, the question whether the wronged parent has 'acquiesced' in the removal of retention of the child depends upon his actual state of mind. As Neill LJ said in *In re S. (Minors (Abduction: Acquiescence)* [1994] 1 FLR 819, 838: 'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact.'
>
> (2) The subjection intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

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[20] [1998] AC72; [1997] 2 All ER 225, HL

> (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.
>
> (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

42. The above principles in *Re H* have been followed by Hartmann J (as he then was) in the Hong Kong case of *Re L*[21].

43. The Mother's case is that there has been acquiescence on the part of the Father to D living in Hong Kong and this is based on the following:

(i) A conversation she had with the Father after she arrived in Hong Kong when it became clear to her that the Father was agreeable to D being in Hong Kong[22];

(ii) A chat on skype for about 2 hours on 17 November 2011 between her and the Father, an English translation of which was produced by the Mother ("Skype Chat Record");

(iii) The delay caused by the Father's inaction.

44. The Father did not deal with the alleged conversation in (i) above. There were no details given by the Mother regarding this

[21] [2004] 1 HKLRD 856, HCMP 1824 of 2002
[22] Para 14, B:100

conversation either. The Father's case was that about two weeks after the Mother took D to Hong Kong in September 2010, she sent a message via skype to the Father's mother to inform her. It was only when his mother telephoned him that the Father then found out[23]. Thereafter, the Father said he tried to contact the Mother via telephone and via skype but in vain. After some time, the Mother replied via skype to tell him that she would return with D to Slovakia after one month, but then she later told him that the return schedule was changed to sometime in December 2010[24]. He said he then waited for D's return, but in December 2010, the Mother told him again that she and D were unable to return due to some problems, and since then she did not give him any concrete answer as to when D would return[25].

45. The Father said after he learned that D would not return D to Slovakia for more than several months, he became worried and asked for her address in Hong Kong numerous times, but she refused to disclose the same to him[26]. As the Mother did not give him any concrete answer as to when D would return, and where they lived in Hong Kong, he came to Hong Kong in July 2011 to locate the Mother and D[27]. Upon arrival, he told the Mother and D via skype that he had arrived. According to him, the Mother insisted that he handed over his passport and 2,000 EUR before she would allow him to see D. Further, it was only after access when he

[23] Para 18, B:157
[24] Para 20, B:158
[25] Para 21, B:158
[26] Para 22, B:158
[27] Para 23, B:158

was returning D to the Mother that he got to know their residential address in Hong Kong[28].

46. The Mother on the other hand said she did notify the Father their address when they moved from Wanchai to their present address. She admitted that when the Father turned up in Hong Kong in July 2011, she requested the Father to hand over his passport as security, before she agreed to access as she was concerned that the Father might take D away. She also admitting having a conversation with the Father over child support as he had not paid any support for D since they had been in Hong Kong, but she said she did not mention any specific sum.

47. Going back to the Father's evidence, he clearly knew the Mother and D were in Hong Kong about 3 weeks after D's removal. This would be sometime in early October 2010. He had been in contact with them, at least on skype. There was no sufficient evidence that the Mother was deliberately hiding her whereabouts from the Father. In any event, whether he knew the Mother's exact address or not, there were clearly other ways of contacting the Mother, such as by skype and according to him, his lawyer had also contacted her to try to reach agreement. By the time after Christmas 2010, in January 2011, he knew that there was no return date for D.

48. According to the Father, the step he took afterwards was to hire a lawyer to fight to have D back in Slovakia.

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[28] Para 25, B:159

49. Although the Father came to Hong Kong in July 2011, no step was taken by the Father while he was here. He had said that there was no Slovakian Embassy/Consulate in Hong Kong, he was not familiar with Hong Kong, and that he was unable to find any assistance in Hong Kong[29]. According to the Mother, the Czech Consulate in Hong Kong acts as an agent for the Slovakian Embassy in Beijing[30]. The Father should be able to find this out before he came to Hong Kong. He had given no details at all as to what efforts had been made by him to try to seek help while he was in Hong Kong.

50. In fact, it can be seen from the subsequent Skype Chat Record that while the Father was in Hong Kong, the Mother had offered him several chances to sit down and discuss and also to meet with T, but the Father had "brushed her off"[31].

51. As mentioned earlier, it was only after the Father went back to Slovakia after his visit that he contacted the Slovak Central Authority and his application was eventually issued about one month before the expiration of one year period mentioned in article 12 of the Convention.

52. Article 12 of the Convention states:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even

[29] Para 27, B:159
[30] Para 24, B:182
[31] Para 27, B:159

> where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested state has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child. "

53. Even where the proceedings have been commenced after expiration of one year under Article 12, the court shall still order a return unless the child becomes settled in the new environment. In any event, in the present case, the Father's application was brought "within time" albeit in the 11th month.

54. Ms Remedios has submitted that the Father's 11 months of unexplained inaction and delay ("Pre-Proceedings Delay") amount to acquiescence by the Father to D being retained in Hong Kong, the Father has been using his Hague application only as a leverage in relation to access, and that the Father has no intention of having D returned to Slovakia.

55. The Mother relies in particular on *Re L*[32] to support her case on Pre-Proceedings Delay amounting to acquiescence. In *Re L*, the father, a Belgian citizen, and the mother, a Hong Kong citizen, married in Belgium and lived there with their son L. Difficulties arose in the marriage and in March 2001, the mother returned to Hong Kong with L, without informing the father (the 1st removal). Shortly thereafter, the father obtained an order from a Belgian Justice of the Peace granting him exclusive custody over L, but he did not notify the mother. He then wrote

[32] [2004] 1 HKLRD 655

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to the Immigration Department in Hong Kong advising that he intended to take proceedings for L's return to Belgium, and obtained the support of a relative in Hong Kong who wrote a similar letter in April 2001, but in the 7 months between April and November 2001, the father took no formal steps to secure L's return. He alleged that this was due to on-going negotiations to secure L's return with a view to resolve the matter amicably. The mother denied this[33].

56. In December 2001, the mother and L visited the father in Belgium. The father said this was pursuant to an agreement by the mother to return L permanently, but the mother said it was only a Christmas holiday visit only. No action was taken by the Belgian authorities or by the father when L arrived, nor did the father mention the Belgian order to the mother. The mother and L then left Belgium after the holiday without telling the father (the 2nd removal). The next day, the father made a report to the Belgian police and 3 weeks later, completed the formal steps to initiate proceedings under the Convention for L's return.

57. Hartmann NPJ dismissed the Father's application and held that the Mother had proved acquiescence on the part of the Father, and it was sufficient for the Mother to have shown that between April and November 2001 that the Father came to accept the wrongful removal.

58. Hartmann NPJ held, among other things, that[34]:

> "(4) …The duration of any delay, while a factor in determining whether there was acquiescence, could not, except in rare cases, be determinative. There must always be time for consideration,

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[33] See Headnote, *Re L*

[34] Para (3), Headnote, at pg. 657

> which might be for quite a long time if it was thought that some conciliation might be achieve. However, here F gave no description of the nature and course of the negotiations with M concerning L's return to Belgium and on the evidence, it was not accepted that these endured on an ongoing bases for seven months as alleged.
>
> (5) Even if this was accepted, a time would have been reached when F must have known that the discussions were going nowhere and he had no other option than to seek a remedy under the Convention. Although he had taken steps to protect his rights as a father in the immediate aftermath of the removal, the single, compelling inference to be drawn from his subsequent inactivity, was that while initially he might have been determined to seek the return of L, over a period of time he came to accept the status quo and made a choice not to assert his rights seeking a prompt return."

59. As I have mentioned earlier, in the present case, on the Father's own evidence, by October 2010, he knew that D was in Hong Kong and D did not return after one month[35]. By January 2011, on his own evidence, there was no definite return date for D[36].

60. The Father's evidence on what happened between January and July 2011 was rather confusing. In his 1st affidavit, he said he contacted a lawyer and "started to fight" to have D back in Slovakia[37]. He mentioned he had documentation with the Mother's replies to prove it, but these had not been produced. In his 2nd affidavit, he then said since the kidnapping of D by the Mother, he had tried to agree with her on the care and upbringing of D and was willing to accede to the compromise that D would stay with him in Slovakia for 2-3 months in the summer holidays. In this 2nd affidavit, he mentioned some emails being enclosed[38], but again these had not been produced to this court. No letters from his lawyer

[35] Para 21, B: 158
[36] Para 21, B: 158
[37] Para 12, B: 116
[38] Para 4, B: 124

were produced to show what exchanges there were between him and the Mother between January and July 2011. The Mother said simply there was no action taken by the Father for D's return until end of July 2011 when he contacted the Slovak Central Authority. There was reference in Ms Drake's affidavit that in July 2011 when the Father was in Hong Kong he tried to reach an amicable solution with the Mother on the return of D to Slovakia[39]. But according to the Father, he was here to visit D and there was no reference in his own affidavits on what negotiations he had with the Mother during this visit. As I have mentioned earlier the Mother had said he gave no heed to her suggestion that he should discuss with her and T about D's future plans.

61. As in the case of *Re L,* there have been no details provided by the Father on the course of the negotiations which the Father said he had with the Mother.

62. In the case of *Re L*, there was a lapse of some 7 months during which the father in that case was found to have taken no formal steps to secure the return of his child, and Hague proceedings were only issued about 13 months after the removal. Hartmann NPJ held that the father did acquiesce in that his inaction over such a lengthy period led the mother to believe that he was not seeking and would not seek the summary return of the child.

63. What is clear in the present case is the Father had gone to a lawyer sometime after December 2010 and yet no application was instituted by him. The Father might be justified in not taking any

[39] Para 13, B: 90

immediate action and waiting for D to return between October and Christmas but there was yet another lapse of about 7 months from January to July 2011, before Father took his first formal step to contact the Slovak Central Authority, and there were no details as what steps he had taken during that period of about 7 months.

64. The delay was already commented on by the then judge dealing with this application during the first ex parte hearing on 22 August 2011. Then came the delay after the issue of the application ("Post-Proceedings Delay") which the Mother relies on as further evidence of the Father's acquiescence.

65. Delay is obviously contrary to the spirit of Convention, and indeed in the preamble of the Convention states that one of the objects of the Convention is to secure the prompt (*emphasis added*) return of children wrongfully removed to or retained in any Contracting State.

66. Article 9 obliges a Central Authority which has received an application to transmit an application without delay. Article 11 of the Convention further provides, among other things, that the judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children, and the Central Authority shall have the right to request a statement of the reasons for the delay if the judicial or administrative authority concerned has not reached a decision within six weeks (*emphasis added*) from the date of commencement of the proceedings.

67. For European countries, there is the additional burden under Brussels IIR which positively requires Member States to complete the first instance proceedings within six weeks unless exceptional circumstances make this impossible[40]. This obligation is reinforced by Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Whether Brussels IIR applies or not, I understand all child abduction cases take priority in the court listing in England & Wales, and the aim is for all such cases to be dealt with within 6 weeks, and the average case time is in fact 6-10 weeks in England & Wales[41].

68. The 1st inter-parties hearing on 12 September 2011 was adjourned for the Father to make an application for legal aid. His application seemed to have been processed quickly, but he was apparently required to pay a contribution of HK$40,000 before the grant of the legal aid. The court was then told at the next directions hearing that he was not happy with this condition, and the hearing for directions was adjourned again, for the Father to consider whether to appeal against the legal aid decision on contribution or to accept it or whether he would be acting in person.

69. It seems after the adjournment, the Mother's solicitors received a communication from the Father's Slovak lawyer proposing the Father to have access for 3 or 4 months in the summer in Slovakia. The Mother did not agree to the Father's proposal but made a counter proposal to him having access in Hong Kong but nothing came further out of that.

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[40] Under Articles 9 and 11, see also pages 8-9, Anne-Marie Hutchison OBE, Seminar Paper on "International Movement of Children", Hong Kong, 21.01.13

[41] Per Anne-Marie Hutchison under "Time and Length of Case", page 3, "International Child Abduction".

70. Then came another direction hearing on 17 October 2011 when the then judge made a comment that one of the options would be to dismiss the Father's application for want of prosecution. This was probably because there had been no progress in the application. The Hong Kong Central Authority proposed another alternative, which was that the Request for Return be treated as the Father's evidence and to proceed to allow the Mother to file her affidavit evidence. Directions for filing of affidavits were eventually given, and another hearing was fixed on 28 November 2011. It can be seen from the transcript subsequently obtained that the judge was intending the hearing on 28 November 2011 to be the substantive hearing and it seems to be in this connection that the judge was suggesting the Father to appear to prosecute his application. Mr Clough has pointed out quite correctly that there is no requirement under the Convention for an applicant to appear personally in order to pursue his application, unless there is an order for cross-examination. Both the Mother's solicitor and representative of the Central Authority were present at this hearing and they did not seem to have queried about this suggestion for the Father to attend personally. Anyway the judge did not eventually make any direction or order for the Father's attendance although everyone seemed to assume he did.

71. The skype messaging between the Father and the Mother took place on 17 November 2011. To support her case, the Mother relies on the Skype Chat Record as evidence of the Father's acquiescence. To put it in context, this was a messaging which took place about 3 months after the Father had launched his application, and after 3 direction hearings, with another hearing coming up in 11 days time.

72. The following extracts from the Skype Chat Record[42] were relied on particularly by the Mother:

> "Mother: Can you please finally decide whether you want D returned to Slovakia , as you applied, or do you want to have a judge decide when and for how long you can see D. I think it is about time since (the Hague application) has been going on since August and we haven't made any progress since then.
>
> Father : I've told you already a million times, you can't hear or ready over the last 2 years I want him minimum 3 months I can also pay for his flight tickets.
>
> Mother : But you sent me papers for D to be returned back to Slovakia, not that you only want him for 3 months.
>
> Father : Yes because you didn't agree to my terms and didn't listen to me.
>
> …
>
> Mother : Look, D is home here. He has his friends, family, school, and daily routine. There is no reason why he should be returned back to Slovakia, especially when neither of us two want that, as you have finally told me that now. So we can agree on some terms here as well. The next hearing is on 24 November.
>
> Father : I never said that I want him returned for good, I only want him for 2 to 4 months when I have a break in the season."

73. Bearing in mind the Father would normally be out of Slovakia for 8 months a year, it seems what he was saying was that it was not necessary for D to be in Slovakia all the time but only during the time when he was having a break, namely sometime between April and August every year.

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[42] C-217-218

74. Mr Clough has submitted that what was in the Skype Chat Record could not mount to acquiescence on the part of the Father, and that the Father was trying to discuss with the Mother in relation to a "voluntary return", and he should be given credit for it. For this, Mr Clough has relied on a passage in *Rayden*, where it is stated that the court should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect any reconciliation or to reach an agreed voluntary return of the abducted child[43].

75. The Father was, however, clearly not effecting any reconciliation with the Mother and any "voluntary return" seemed to be only temporary during his break season.

76. The Father did not appear on 28 November 2011. This was understandable as he was presumably in the middle of his contract season. He tried to send an affidavit dated 18 November 2011 but unfortunately, the copy received was with missing pages and was not complete. I note that the Father had complained that the 21 days given to him to file a reply affidavit in English was not sufficient, as he needed to have the Mother's affidavit translated first before preparing his own affidavit and it would take time to send it to Hong Kong. He also complained about the English translation of the Skype Chat Record submitted by the Mother and asked to have it translated by an independent translator. No application for extension of time was made for or by him, nor was any application made for an independent translation to be prepared. It further appears at this hearing that the judge mentioned again about dismissing the Father's

[43] Para 45.66, Rayden, and see cases listed in footnote 4 thereunder.

application but the Central Authority asked for another chance. The hearing on 28 November was adjourned again.

77. The Father's affidavit was later properly filed and on 23 December 2011 directions were given for fixing of a date for the substantive hearing. It was also at this hearing leave was given to the Mother to file a psychological report on D.

78. It is not clear as to what happened thereafter since it seems no date for the substantive hearing was fixed by the Father or by anyone else notwithstanding the directions given in December. Then, there was a further hearing in February 2012 when the Mother make an application for extension for time to file her reply affidavit and the psychological report. Again at this hearing, no one mentioned anything about fixing dates for the substantive hearing. There seemed to be inaction on the Father's side since December 2011. When I sought clarification during the hearing, some email communications with the Slovak Central Authority were produced by the Hong Kong Central Authority. These were emails from 24 February 2012–April 2012[44]. From these it can be seen that on 24 February 2012, the Slovak Central Authority had written to seek clarification before taking any further steps as to whether the Father should contact the Mother or her solicitor to discuss the terms and conditions of withdrawal of the return proceedings, stating that the Father would like to withdraw the return proceedings, but only in case of Mother's interest to make an agreement in relation to access. A series of emails then ensued between the two Central Authorities and finally on 17 April 2012, the Mother made her position clear that she would not agree to the Father's

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[44] CA-2

proposal of having access in Slovakia at that time but would not preclude the possibility of such arrangements in future.

79. Thereafter, no further steps were taken, The Hong Kong Central Authority was eventually informed by the Slovak Central Authority on 11 May 2012 that the Father had contacted a lawyer, but thereafter again there was inaction until June 2012.

80. The Father came to Hong Kong in June 2012 for access, but the access arrangements did not go well. This seemed to have prompted him to take some action. He applied for legal aid again. This time, it seems the contribution was only HK$2,000, which was presumably paid, as legal aid was granted to him almost immediately. His solicitors then issued an application for leave to file a further affidavit, but in the meantime, again no step was taken by the Father's side or anyone to proceed to fix a date for a substantive hearing. Eventually, there was another directions hearing on 25 July 2012, when the then judge was going to fix 10 September 2012 for a substantive hearing, but the Mother sought further directions for filing of an affidavit and an updated psychological report.

81. Although the Father was legally represented at the hearing on 25 July 2012, there was no objection from his side to the further delay caused by the Mother's application which was duly granted. At this hearing, for some reasons, there was then a direction for the date of the substantive hearing to be fixed in <u>consultation with Counsel's diary</u> *(emphasis added)*. There was no objection from the Father's side. Thereafter again no further steps were taken by the Father's side to fix a

date for the substantive hearing for another 4 or 5 month, until 7 November 2012. The hearing was later fixed for 3 days in June 2013 with the agreement of the Father's solicitors.

82. It was only then that the matter was brought to my attention, not by the Father's solicitors, but by the Central Authority. I directed the substantive hearing be fast forwarded but even so, there was a period of almost 1½ years between the issue of the application and the substantive hearing.

83. Delay can result in an application being struck out, as in the case of *Re G*[45]. In that case, the Hague proceedings were issued in England by the father some 18 months after the removal of 4 children by the mother from Florida to England, although other proceedings were issued by the father earlier in Florida. Then no steps were taken by the father to forward those proceedings. By the time of the hearing of the mother's striking out application, the children had been in England for some 2½ years. The father's Hague proceedings were struck out in light of what the judge said was the manifest failure of the father to conduct his Hague proceedings with proper diligence and speed.

84. Ms Remedios has submitted that all the Post-Proceedings Delay was due to the Father's inaction. I accept that there must always be time for consideration, but it seems that the Father was taking a long time even though he must have known that discussions were going nowhere. Firstly, he took a long time in instituting the proceedings. Secondly, it seems he did little to ensure that his request for D's return was

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[45] [1995] 2 FLR 410, [1995] Fam Law 116

conducted with speed. He seemed to have done nothing after he decided not to accept the 1st legal aid offer. After filing his 1st and 2nd affidavits, the matter went into a standstill again for about 3 months when through the Slovak Central Authority he indicated intention to withdraw if the Mother was interested in making an agreement on access terms. All along his proposals seemed to be access in Slovakia starting with about 4 months reducing to about 6 weeks.

85. Anyway, by 17 April 2012, the Father must know again the proposals/discussions were going nowhere, but it was not until November 2012 that his solicitors proceeded to fix a date for the substantive hearing for June this year. There was no explanation from the Father as to all this delay.

86. As Hartmann NPJ has said in the case of *Re L*, it was not necessary to point to a specific date when acquiescence took place and a state of acceptance might emerge over a period of time. From what the Father had said in the Skype Chat Record together with the unexplained delay in instituting and later in prosecuting this application, the only inference to be drawn by this court from such delay is that over a period of time the Father has come to accept the *status quo* and has made a choice not to assert his rights seeking D's prompt (*emphasis added*) return, but has been using his application as a leverage for his access proposals.

87. Even if I were wrong in finding that the Father did acquiesce, I find that the exception in the principles in *Re H* would apply, in that the Father's words and inaction over such a lengthy period clearly and unequivocally show or have led the Mother to believe he would not be

seeking a summary return of D to Slovakia and further his words and inaction were inconsistent with such summary return, and that justice requires that the Father be held to have acquiesced. As such, the Father's words and inaction in this matter are inconsistent with the fundamental objective of the Convention; namely, the securing of a prompt return, and justice requires that the Father be held to have acquiesced[46].

Whether there is a grave risk that the return of D would expose him to physical or psychological harm or otherwise place D in an intolerable situation

88. The Mother has also relied on article 13(b). There is no evidence of any risk of physical harm. The Mother's case is that there is a grave risk that the return of D would expose him to psychological harm or otherwise place D in an intolerable situation. She has submitted two psychological reports from a psychologist Dr Levy.

89. Article 13(b) is an exceptional provision intended to deal with unusual issues of welfare which take the case outside the normal provisions of the Convention[47]. As has been said, it is often invoked but difficult to make out. Any guidance in those authorities submitted by Ms Remedios on article 13(b) have by now been superseded by the two recent decisions from the Supreme Court of England & Wales, namely *In re E (Children)(Abduction: Custody Appeal)* [48] and *In re S (A Child) Abduction: Rights of Custody)*[49].

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[46] Line G, pg. 90, *Re H*, supra
[47] Para 45.68, Rayden
[48] [2012] 1 AC 144
[49] [2012] 2 AC 257

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90. In the case of *In re E*, the mother removed the children to England from Norway, and resisted the father's application for return and relied on article 13(b) on the grounds that the father had subjected her to psychological abuse and that to order the immediate return of the children would put them at a grave risk of being exposed to physical or psychological harm or otherwise placed in an intolerable situation. The mother's mental state having deteriorated due to the strain of the legal proceedings leave was given for a psychiatrist to evaluate her mental state. The psychiatrist considered that there was a high risk of the mother's condition deteriorating if she were forced to return. The father denied the mother's allegations but gave undertakings. A return order was subsequently ordered which was upheld by the Court of Appeal, and the decision was subsequently affirmed by the Supreme Court.

91. The Supreme Court in *In Re E*, after considering the impact of recent jurisprudence from the European Court of Human Rights, held that the terms of article 13 were plain; that they needed neither elaboration nor gloss; and that, by themselves, they demonstrated the restricted availability of the defence[50]. The principles set out by the Supreme Court in relation to article 13(b), briefly, are as follows[51]:

(i) The burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate the standard of proof is other than the ordinary balance of probabilities;

[50] Para 31, and para 52, *In re E*
[51] Paras 32-36 , *In re E*

(ii) The risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real";

(iii) The words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or *otherwise*" places "in an intolerable situation" (*emphasis supplied*). "Intolerable" is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate;

(iv) Article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to the child's home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when the child gets home.

92. In the case of *In re S,* the child was removed by the mother from Australia to England. The mother resisted the return application in reliance on article 13(b). She made serious allegations against the father which she linked with medical evidence about the state of her psychological health while she had been in Australia. The father put forward undertakings for protective measures. The judge refused to order return, which was overturned by the Court of Appeal. The Supreme Court allowed the mother's appeal and held there was to be no return.

93. The Supreme Court in its judgment in *In re S* considered the proper approach when a respondent relied upon her subjective perceptions

to make out an article 13(b) defence. It commented that their earlier decision in *In re E* was primarily an exercise in the removal from [article 13(b)] of disfiguring excrescence[52], but the court recognized the possibility that a respondent's merely subjective perception of risks could, as a matter of logic, found the defence.

94. The present application is not based on the Mother's own mental or psychological state. The Mother and T took D to consult Dr Levy in November 2010, some 8 months before the Father started his application. This was due to their then concern over D's behaviour at that time. D was described to be insecure and very clingy towards his mother at that time. They expressed concerns about D's high levels of activity. D was noted to be a bright and articulate child, although he spoke no English at the time. It was then recommended by Dr Levy that D be given a stable routine with firm boundaries to promote emotional safety and security. This was Dr Levy's first contact with D, and Mr Clough had raised a query as having seen the Mother, T and D, whether this would disqualify Dr Levy from being an independent expert and whether the Father should be given leave to provide his own expert evidence. These queries were not pursued.

95. When Dr Levy first met D in November 2010, D had only just arrived in Hong Kong. I understand Hong Kong is quite a different place from Bratislava, or indeed the rest of Slovakia, being much more densely populated and the majority of the population here is Chinese. D was only 3 years old at that time, with no knowledge of English or Chinese and he was placed in, what must have seemed to him, a completely strange

[52] Para 31, A-B, *In re S*

environment surrounded by foreigners speaking an unfamiliar language. Given the background he came from, it would not seem to be unusual that he would feel insecure and very clingy to his mother as reported by the Mother during that visit.

96. Since November 2010, D has not been taken to see any psychologist or undergone any therapy consultation with any psychologist, whether with Dr Levy or with anyone else.

97. For the purposes of preparing her 1st Report, Dr Levy saw D on 2 occasions, and on the 1st occasion D was not well and his behaviour on that day was regarded as might not have been a true representation of his usual demeanour and a 2nd observation took place in February 2012. This was about a year ago, and about 1½ years after D's arrival in Hong Kong. He was then 4 years and 9 months old and attending kindergarten in Hong Kong for about a year.

98. During these visits, Dr Levy observed D to be a child who was uncomfortable and emotional in unfamiliar situations, and exhibited symptoms characteristic of a sensory integration difficulty (such as sensitivity to loud noises, touch, crowded places, particularly when he was irritable). Dr Levy opined D would be most likely to function best in a stable and routine environment with as little disruption or transition as possible, and he would need the comfort of adults with whom he was familiar and to whom he was bonded. Dr Levy reported that D had bonded with T and his new baby brother, and her opinion was regardless of the circumstances by which D arrived in Hong Kong, Hong Kong had been his home for the past year and a half and he had developed strong bonds

with the people who lived here, and that even if the Mother were to return with D to Slovakia, there would be likely a grave risk of psychological and emotional harm to D.

99. Dr Levy saw D again in August/September 2012 to prepare her 2nd Report. This would be about 6 months after the 1st Report, and D was by then 5 years and about 3 months. He was studying in the same kindergarten. This was also about 2 or 3 months after the Father's visit in June earlier.

100. As observed by Dr Levy, D separated from the Mother eagerly and with enthusiasm, and was talkative and friendly, engaging Dr Levy in spontaneous conversation about various aspects of his daily life. He was calling T "daddy". When asked about the Father, D immediately responded in a negative way and said he did not want to see him because he was happy here.

101. The visit by the Father in June 2012 was described by Dr Levy to be "largely unsuccessful, as he was only able to see D on 5 occasions, with the longest lasting 45 minutes[53]. The Father himself provided a much more detailed account of those access occasions and blamed the Mother for being uncooperative[54]. He was legally represented by then, and it is not clear why there was no immediate application to the court for at least some interim access arrangements.

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[53] A:81

[54] Paras 29-35, B:160-162

102. The Mother claimed that the Father was expecting too much from D after a gap in seeing each other, and that it should be a gradual process for D and the Father "getting to know each other again".

103. When Dr Levy saw D in about August/September for the purposes of the 2nd Report, D was observed to have evidenced significant development in various areas over the past few months. His English proficiency is now strong, and he has presented to Dr Levy as a verbal and articulate child who can express himself effectively. He was keen to explore his surroundings, evidencing little anxiety with the relatively unfamiliar environment of Dr Levy's clinic.

104. It seems from Dr Levy's 2nd report, her concerns now are firstly T's history of substance abuse speaks to the stability of the household and secondly results of her evaluation suggest that D's current perception of the Father may have developed through coaching and adult input, and this will undermine his future relationship with the Father.

105. Dr Levy has further said that given that D believes that the Father wishes to take him from his mother and family here in Hong Kong, it is unsurprising that he is resistant to access. Dr Levy was of the view that it would be detrimental to his well-being to uproot him and to return him to Slovakia.

106. It has been said the in determination of application under the Convention for a summary return order it is entirely inappropriate for this court to conduct any in-depth examination of the entire family situation

and of factors of a factual, emotional, psychological, material and medical nature[55].

107. The Father provided undertakings to this court in the event of an order for return but these undertakings were offered only after the 1st day of hearing. The Father was not at the hearing personally to give those undertakings to this court, nor were those undertakings signed by him or contained in any affidavit. These include not making any further reference to the police or other prosecuting authorities in Slovakia over the police report he had made against the Mother, and not supporting any criminal prosecution or other civil proceedings against the Mother. Other undertakings include, among other things, to commence proceedings in the appropriate court in Slovakia immediately upon notification of the return order, agreeing for D to be in the custody, care and control of the Mother if she were to return with him, and personally caring for the child if the Mother does not return and to arrange for psychological support or counselling for D if in need. What he has not undertaken is to meet the reasonable travel costs of the return of the Mother, to provide maintenance and/or accommodation for the Mother and D, or to provide the Mother with any litigation fund. His case is that such undertakings are not appropriate, but he has given no reasons as to why they are not appropriate. The Mother's case is however that she has not been working since November 2011 when her work visa expired and that those undertakings would be reasonable for her to require. I note that both parties are receiving legal aid in Hong Kong. All those undertakings were given through his Counsel. Mr Clough handed to the court a "record" of his instructions on the 2nd day of the hearing as he was only

[55] Paras 37, 38, *In Re S*, at pg 271

able to obtain instructions from the Father the evening of the 1st day of the hearing. Shortly after a further hearing for submissions, Mr Clough arranged for a list of the Father's undertakings to be sent to the court. The Father is now in Italy. None of the undertakings were signed by the Father. From the emails from the Slovak Central Authority, it is not clear whether undertakings will be recognized by Slovak court.

108. The Father's undertakings or proposed measures which normally should be put forwarded at the earliest opportunity were put together right at very last minute, during the hearing to be exact, and I am not satisfied that these are adequate. I am aware that if I am minded to order a return, then the order could be made conditional upon any satisfactory undertakings or clarifications being provided by the Father.

109. Although the Mother had indicated to this court previously that she would return with D to Slovakia if an order were indeed made for his return, Ms Remedios has, however, submitted that the Mother would be placed in an impossible position having to choose between returning with D or remaining in Hong Kong with her other child whom she could not remove without T's consent[56]. There was no evidence from T as to whether he would give his consent or not to the Mother going with their son to Slovakia with D. The return could result in the separation of the siblings.

110. In the case of *In re D (Abduction: Rights of Custody)*[57] the then House of Lords allowed the appeal by the mother and refused to order a return of the child to Romania. The main issue in that case was whether

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[56] Para 18, Submissions of Ms Remedios, 10.01.13
[57] [2007] 1 AC619

the father in that case held rights of custody and it was held he did not. The child was separately represented. The child had objected to the return. His Counsel had also relied on article 13(b) submitting that the inordinate delay in the proceedings meant the return would place the child in an intolerable situation. By the time of the hearing before the House of Lords, the child had left Romania for some 3 years and 10 months. It was said by Baroness Hale of Richmond in that case that a delay of that magnitude in securing the return of the child must be one of the factors in deciding whether his summary return, without any investigation of the facts would place him in a situation which he should not be expected to have to tolerate[58].

111. As has been said in *In Re E*, "intolerable" is a strong word but when applied to a child means a situation which this particular child in these particular circumstances should not be expected to tolerate.

112. Although I am not satisfied that the risk of psychological harm is grave, D has come from a background marked by instability, including frequent parental travel and being left in the care of his maternal grandmother who apparently had been gravely ill in May 2010[59]. He has now been in Hong Kong for 2 years and 4 months. Although this is not as long a period as in the case of *In re D,* the reports show that D is a fragile and insecure child exhibiting heightened separation anxiety and clinginess and bearing in mind his background and that he has led a settled life since his arrival and has a young brother here, I find that there is a grave risk that D will be placed in an intolerable situation if an order for

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[58] Para 53, D-E, *In re D*
[59] A:72, Dr Levy's 1st Report

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summary return is now made. I find that the Mother has made out her case in this respect under article 13(b).

The Court's Discretion

113. Article 13(a) or 13(b) is not an absolute bar to the return of a child as there is a discretion vested in the court under article 13. In *In re M and another (Children) (Abduction: Rights of Custody)*[60], the House of Lords has given detailed and authoritative guidance on how the court should approach the 'discretion' stage.

114. In *In re M,* the parents and their 2 daughters were Zimbabwean. The mother brought the daughters secretly to England where the mother then claimed asylum. Since then the girls had been living in England with their mother and her partner, who arrived in England shortly after they did. From about 6 months after they left, their father had known where they were, but did not notify the Zimbabwean Central Authority of his claim until about a year later, and the English Central Authority did not receive notification from Zimbabwe until about 5 months later. All this resulted in the return proceedings issued more than 2 years after the removal. The mother's asylum claim was refused by that time although she was advised to make a fresh one. She and the daughters were then remaining in England because of a moratorium on the return of failed asylum seekers to Zimbabwe. The judge found, among other things, that the girls were settled in England and he was under no duty to order their return under Article 12 of the Convention, but he decided that the case was not exceptional and he declined to exercise his discretion to refuse return, and made an order to return. The Court of

[60] [2007] UKHL 55, [2008] 1 AC 1288, [2008] 1 FLR 251

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Appeal upheld his decision, but this was overturned by a majority decision of the House of Lords, and return was declined.

115. Baroness Hale of Richmond has held in that case that it is wrong to import any test of exceptionality into the exercise of discretion under the Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention[61]. She has pointed out that in Convention cases there are, however, general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes[62].

116. Baroness Hale has also emphasized that the underlying purpose of the Convention is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained, but then went on to say that "the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be[63]."

117. The mother's appeal in *In re M* was allowed by a majority decision by the House of Lords, having considered the facts and that the children felt settled in England and wanted to stay, the policy of the Convention could carry little weight. In that case, the children had been

[61] Para 40, pg 1306 *In re M*
[62] Para 42, pg 1306, *In re M*
[63] Para 44, pg 1306, *In re M*

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in England at least about 2 years and 9 months by the time the House of Lords heard the appeal. The two girls, 13 and 10 years old, felt settled in their new home and had objected to return.

118. *In Re M* is a case which was primarily concerned with article 12 but it seems to this court some of the comments made by Baroness Hale could also apply in the present case. Whatever disputes there may be over D's care arrangements before his removal, after his arrival in Hong Kong, there is no doubt that the Mother has been D's primary and sole carer.

119. D has now been out of Slovakia for some 2 years and 4 months. He will be 6 years old in May this year. By now he has spent almost 40% of his life outside Slovakia. D has been attending an international English speaking kindergarten in Hong Kong for two years now and has made new friends. When D first joined, he did not speak or understand any English, but the kindergarten report of 18 January 2012 indicated that he was happy and settled very well at school by the end of term. By the date of the report, his English had improved considerably and he was going to school smiling and confidently participates in classroom activities[64].

120. I am aware that D was here on a visitor's visa or as a dependent of the Mother who was here on a work visa. D's visa has expired for some time, and the Mother is now here on a visitor's visa. The Mother says when these proceedings are over, she will apply for a work visa and she has produced an employment contract dated

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[64] C:233-234

10 August 2012 which was conditional on her obtaining a work permit. Although it is not certain that this employment offer is still open, it seems in the past 4 years, the Mother had no problems in obtaining a working visa/visitor visa in Hong Kong. The Mother has also said she will be getting married to T[65].

121. I understand that T has a history of substance abuse. He was admitted to the Betty Ford Clinic in the Eisenhower Medical Centre in the United States in July 2012. His medical report indicated that he was due back in the first week of September 2012[66]. Notwithstanding T's problems, which may affect the stability of the household, it seems D has made a life here in Hong Kong with his mother, T and half-brother in that he has developed a bond with a new parental figure, sibling and extended family[67].

122. On the day of further submissions, Ms Remedios has submitted a "Summary of Access Proposals" on behalf of the Mother. The Mother has now given an undertaking to this court to issue a summons within 14 days of this court's decision under the Guardianship of Minors Ordinance, in the event of the court declining to order a return, to seek an order for, among other things, defined access to the Father in the terms set out by her. The first direction hearing for her application should be fixed before me upon issue.

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[65] Para 31 (iii), B:185
[66] C:245
[67] A:83

Conclusion

123. This has not been an easy decision in view of the obligations under the Convention, but having regard to all the circumstances of this case, I have come to the conclusion that D's summary return to Slovakia at this time could not advance the objective of the Convention or be in his best interest.

124. The application made under the Convention for the summary return of the child is hereby dismissed. I make no order as to costs. This is an order *nisi*, which will be made absolute within 21 days.

125. Finally, I would like to express my gratitude to both Counsel, and also representatives of the Central Authority for their assistance in this matter.

126. I intend to release a copy of this judgment for the Judiciary website and also the Hague INCADAT website unless there is any objection from the parties within 14 days.

(Bebe Pui Ying Chu)
Deputy High Court Judge of the First Instance
High Court

Mr Neal Clough, instructed by Lam, Lee & Lai, for the plaintiff

Ms Corinne Remedios, instructed by Haldanes, for the defendant

Ms Kwok Hin, Government Counsel and Ms Szeto, Government Counsel, for Hong Kong Central Authority, as observers