EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 17
P825/22

Lord Malcolm
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LADY WISE

in Petition of

AD

Petitioner and Respondent

against

SD

Respondent and Reclaimer

Petitioner and respondent: Malcolm KC, Laing; SKO Family Ltd
Respondent and reclaimer: Scott KC, McAlpine; Morton Fraser LLP

17 March 2023

[1] This reclaiming motion (appeal) concerns a defence under Article 13(b) of the 1980 Hague Convention on Child Abduction, incorporated into domestic law by the Child Abduction and Custody Act 1985. Its main focus is on the effectiveness of proposed protective measures on the proposed return of two children to the USA. The reclaiming motion was allowed at the conclusion of the oral hearing and this opinion is now provided to explain the reasons behind that decision.

Background and the procedure in the court below

[2] AD and SD married in 2014 and have two children, to whom we shall refer as Rachel and Abby, consistent with the Lord Ordinary's opinion. Rachel has just attained the age of 7 years and Abbey is 4. Both girls were born in Illinois and lived there from birth until 8 June 2022. AD, the girls' father, is a US citizen, while SD, their mother, was born and brought up in Scotland. She now holds UK, US and Irish passports. AD and SD agreed in writing that SD would travel to Scotland with the children on 8 June 2022 for a holiday in this jurisdiction until 14 August 2022. Return flights were booked, but ultimately SD did not return to the US with the children on the agreed date.

[3] Rachel and Abby were habitually resident in Illinois, USA when they were retained in Scotland by their mother. The parties agree that there was a wrongful retention within the meaning of Article 3 of the Hague Convention. AD was, or would have been, exercising rights of custody in respect of Rachel and Abby but for that wrongful retention.

[4] Having learned that the children would not be returning, AD flew to Edinburgh on 14 August and remained in Scotland with SD and the children until 19 August. On his return to the USA he raised proceedings for dissolution of marriage in the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois. He sought a number of orders, including that the majority of parenting time of the children be allocated to him and requested that SD be barred from receiving temporary or permanent maintenance.

[5] On 2 September 2022 AD sought an emergency order in the Illinois court for the return of the children. Following a hearing, which SD attended remotely, the court found that SD abducted the children and ordered her to return them. On 19 September, SD having failed to return the children in compliance with the court's order, AD enrolled a motion seeking a finding that SD was in indirect civil and criminal contempt. He sought penalties

including incarceration in respect of the latter. After a hearing on 29 September, which SD did not attend, the court issued an interlocutor to the effect that AD had withdrawn the motion for criminal contempt and gave SD 28 days to respond to the motion for civil contempt. A hearing proceeded on 31 October. SD did not attend.

[6] AD raised the present petition in October 2022. At a first hearing on 14 October the parties were appointed to lodge affidavits and documentary evidence upon which they intended to rely. A second hearing took place on 16 January at which SD advanced defences based on consent/acquiescence in terms of Article 13(a) and on the basis that there was a grave risk to the children should they return to the US in terms of Article 13(b). The consent/acquiescence defence failed and was not insisted in at the appellate stage.

[7] SD relied on voluminous text communications she had received from AD dating back to the summer of 2021 and continuing until early January 2023. These were said to support the psychological, physical, sexual and financial abuse to which she alleged she had been subjected by her husband. Further allegations were contained in SD's affidavit and in an electronic diary containing contemporaneous entries which were produced. AD accepted that he had sent the text messages but disputed the allegations of physical and sexual abuse. Both parties lodged affidavits, primarily from family members and some from expert witnesses. The written submissions lodged on behalf of AD proposed various undertakings by him that would, it was contended, meet any concerns of the mother about the circumstances to which she and the girls would return. However, these were undeveloped and did not address how such undertakings might be enforced in the US. Having heard the parties, the Lord Ordinary reserved judgment (in our parlance, made *avizandum*).

[8] On 26 January 2023, the Lord Ordinary took the unusual step of deciding to "continue" the second hearing at her own instance (*ex proprio motu).* In a note appended to

her interlocutor, she explained that she was not satisfied that she had sufficient information as to the parties' positions on protective measures. She drew on the approach taken by Charles J in *In re S* (see para [23]) and considered it necessary that the court be as fully informed as possible as to the availability of protective measures at the point of return in order to determine SD's defence under Article 13(b). In so doing, she rejected the contention that this amounted to affording the petitioner a further bite at the cherry. A distinction fell to be drawn between the procedure at a second hearing under chapter 70 RCS and that which would be followed at a proof. Litigation in Hague Convention proceedings was not purely adversarial. It was competent for the court to step in and make its own inquiries regarding protective measures. The step she had taken was not equivalent to reopening the proof.

[9] The Lord Ordinary appointed AD, within a short timeframe, to lodge evidence relative to the particular protective measurers relied upon, as well as a full draft of any proposed consent order to be agreed between the parties, and allowed SD an equally short period to respond and to explain why any measures proposed were insufficient.

[10] At a further hearing on 9 February 2023 the Lord Ordinary indicated that her decision was to order return of the children to Illinois USA, but this was subject to confirmation that AD had withdrawn the indirect civil contempt application against SD which remained extant in Illinois. A further hearing was fixed for 24 February for the court to be informed about the necessary practical arrangements for return of the children. That hearing was further continued until 28 February as the civil contempt application had been withdrawn without prejudice thus leaving it open to AD to re-raise such proceedings. The Lord Ordinary accepted that this raised a question of substance as to the sufficiency of this protective measure.

[11] On 28 February, an application to continue the matter until the Illinois Court made an order on AD's motion to withdraw the contempt proceedings with prejudice was refused on the basis that it was sufficient that AD had made the appropriate motion. An order was made for return of the children within 14 days.

The Lord Ordinary's decision

[12] The Lord Ordinary's analysis and findings relative to the grave risk defence separated the issue of the vast number of text communications between the parties dating back to the summer of 2021 from the disputed allegations. The messages spoke for themselves. They demonstrated an intention to humiliate, degrade and in some circumstances frighten SD. Some of the messages suggested he believed he was entitled to expect SD to provide him with sexual gratification at his request. He expressed misogynistic views. The nature, number and frequency of the messages, viewed objectively, could be regarded as unrelenting harassment of SD. However, it was not established that if these messages continued beyond SD's return to the US, the children would be exposed to a grave risk. Although expert evidence was produced (namely a report by a psychologist, Professor Gary Macpherson, number 7/27 of process) indicating that the messages had contributed to SD's mental health issues, it did not address the impact this might have on her ability to parent the children, particularly were her mental health issues to deteriorate as claimed. AD's misogynistic views were a matter for the Illinois court to consider when determining the best interests of the children. Very little weight could be attributed to the report of an independent social worker who had not interviewed AD and had proceeded on the basis that no protective measures would be sufficient to ameliorate risk.

[13] While there was substance to the allegations of financial abuse, it was unclear to what extent AD's actions were aimed at controlling or coercing SD rather than being prompted by legitimate disagreements about money. In any event, the children were not impacted. In terms of the allegations of physical and sexual abuse, these could not be fully resolved. The text communications lent support to the allegations, but the serious physical and sexual abuse allegations were disputed by AD. There was no evidence to vouch the date of electronic diary entries which on their face appeared to be contemporaneous with the abuse. Affidavits by AD and SD's family members were of little assistance and the affidavit of their former neighbour supported only verbal abuse. The Lord Ordinary accepted, however, that SD had raised a strong prima facie case such that there was a clear need for protective measures (*In re E*, paras [36], [48] and [52]). There was no evidence that the children were at risk of direct physical harm if left in the care of AD; however, should they be physically present, or within earshot, of AD's abuse of SD, that would expose them to a grave risk.

[14] The Lord Ordinary addressed the availability of protective measures. She had evidence before her from Illinois-based attorneys, family law experts and attorneys with expertise in Hague Convention proceedings. Professor Bruce Boyer noted the difficulties SD would face in accessing legal assistance in order that she could effectively participate in proceedings in Illinois. In order to obtain protective orders against an alleged perpetrator of domestic abuse, an evidential hearing was required involving the parties to the allegations. Stephen Cullen, Attorney, addressed the use of undertakings in Hague Convention cases and explained that, where the court was considering making a return order in the face of a grave risk finding, a "safe harbour" order should be entered by the court in the country of habitual residence before the return order was entered. Marcy Cott, AD's legal adviser,

explained that such orders were entered at Federal level. That said, a proposed agreed order between the parties of a similar nature, dealing with issues such as interim custody, could be entered at state level. Meighan A Harmon, Attorney, described measures available under the law of Illinois to protect persons who alleged they were victims of domestic abuse, as well as children found to be at grave risk. She referred in particular to the Illinois Marriage and Dissolution of Marriage Act, whereby the filing of an action triggered the coming into effect of an order which was the equivalent of an automatic restraining order prohibiting either party from engaging in abusive behaviour towards the other. Further orders could be sought under the Illinois Domestic Violence Act 1986. She also outlined orders available to the Illinois courts to, among other things, provide parties to proceedings with access to funds to pay attorneys' fees.

[15] The Lord Ordinary concluded that there were sufficient legal remedies available to SD in the Illinois courts. The requested court ought to assume that the requesting court can protect children in its jurisdiction unless there is compelling evidence to the contrary. Temporary measures prohibiting domestic abuse could be obtained without the need for an evidentiary hearing. While it was no more than a possibility that SD could achieve legal representation from an organisation offering free services, the Illinois courts had the power to make orders for her to access funds for attorneys' fees. A purpose of the law was to achieve parity of access to funds for pre-judgment litigation costs in actions for dissolution of marriage. The proposition that the Illinois courts would act arbitrarily or unfairly towards a party litigant was rejected. The sum that SD would require to pay to enter the process, USD 209, was not prohibitive, following which she could seek the orders described.

[16] It was noted that AD had already acted in breach of orders made by the Illinois court, by continuing to sending abusive text messages in violation of the automatic

restraining order. However, the Lord Ordinary was not satisfied that it followed from this that he would fail to comply with future prohibitive orders in his home country where he would have a significant motive so to comply while the parenting of his children was being litigated. The difficulties that SD might face in enforcing the consent order in Illinois were reduced by the availability of applications to the court for access to funds to instruct an attorney. It mattered not that the consent order was temporary. The focus of Hague Convention proceedings was to have the children brought back before the courts of their habitual residence swiftly. The consent order was designed to regulate matters until the Illinois courts have the opportunity to do so. So far as AD's undertaking to provide SD with access to funds was concerned, there was no evidence he had ever restricted her access to funds in a manner that would harm the children. The consent order also prohibited any behaviour constituting harassment or stalking, which in turn prohibited any attempt to misuse records of SD's spending. While unfortunate that it had come so late on in these proceedings, AD had instructed his representative in Illinois to withdraw the civil contempt application. There was nothing in the medical evidence to support the proposition that the indirect contact proposed would cause such a deterioration in SD's mental health as to place the children at grave risk.

[17] The Lord Ordinary concluded that the legal remedies available, the undertakings given in the draft consent order and the withdrawal of the civil contempt application, were sufficient protective measures to ameliorate any grave risk. The Illinois courts had the power to protect the children. SD could not subvert the operation of the Convention by refusing to agree to the consent order before the children were returned (cf *C* v *C* [1989] 1 WLR 654).

Submissions in the reclaiming motion

SD

[18] The Lord Ordinary concluded that SD had raised a strong *prima facie* risk of physical and sexual abuse. Allegations made by SD against AD included attempted strangulation, a threat involving a firearm and the use of a knife in a threatening manner, all of which indicated the potential for very serious harm. Some of the abuse was said to have taken place in the presence of the children. There was indisputable evidence of threatening and intimidating text messages, as well as medical evidence that the result of these messages, as well as the court proceedings raised by AD, had contributed to the mental health conditions with which SD now suffers. In addressing risk, the Lord Ordinary did not assess, first, the risk of impulsive physical or sexual behaviour by AD and, secondly, the impact of SD being in a location where she was exposed to the potential for AD to breach court orders. The Lord Ordinary accepted AD had breached court orders prohibiting harassment, but she ought to have considered the aforementioned matters when addressing whether AD would obey future orders. Impulsive behaviour by its very nature can be beyond the reach of protective court orders. There was no assessment of the impact on the children where their primary carer believed herself to be under threat of impulsive domestic abuse. The specific risks that were present ought to have been identified before considering the availability of protective measures. The risk, at its highest, might be a threat to life. There was a risk of serious injury to SD or the children. Even if a low risk, it was a serious one. Leaving aside any direct risk to the children, it is well settled that domestic abuse of a mother who is the primary carer can constitute a grave risk or intolerable situation for children, even if not directly experienced or witnessed by them (*In re E*, para [52]). The sending of abusive messages to SD while she was isolated, living nearby to AD, was of a very different nature

to the sending of such messages where SD resided in a different country with the support of her family.

[19] In terms of protective measures, the Lord Ordinary erroneously confined her assessment to the measures which were available at the point of return (*In re E*, para [35]). It was not disputed that the Illinois courts can make orders with the aim of protecting SD and the children. The issue was whether such measures would be effective. The greater the harm involved, the more effective the measures must be. Punishment after the event was of limited relevance where there was a risk of death or serious injury. Effectiveness was dependent upon the perpetrator. The evidence demonstrated that AD had the propensity to act irrationally and without self-control. Professor Macpherson considered he might benefit from mental health support. The institution of court proceedings, both in Scotland and Illinois, had not deterred AD from sending abusive messages. His affidavits demonstrated a failure to appreciate the nature and impact of his behaviour. He lacked insight and showed no motivation to change his behaviour. AD had engaged in a long-term course of persistent abusive behaviour dating back to at least 2020. That indicated a need for ongoing protective measures not restricted to measures that could be put in place at the point of return. The medical evidence indicated that SD's mental health would deteriorate if forced to return. She would be without family support and likely required to represent herself in the US proceedings, with the inevitable consequence that her mental health and parenting capacity would be affected. If the protective measures did not alleviate her condition, there being nothing to indicate that they would do so, it followed that they must be regarded as ineffective to protect the children.

[20] In any event, the procedural step taken by the Lord Ordinary in purporting to continue the second hearing was incompetent and unjust. At the 16 January hearing, AD

had no case on protective court orders. The undertakings he gave were unenforceable by the Scottish Court and undermined by his past actions. The procedure adopted by Charles J in *In re S* was distinguishable. He had not taken the case to a reserved judgment and he also provided parties with reasonable time (1 month as opposed to 3 working days as afforded by the Lord Ordinary) to deal with the issues raised. SD did not have sufficient time to obtain evidence to rebut the protective measures, for example, by reverting to Professor Macpherson regarding further medical evidence. The procedure adopted by the Lord Ordinary was akin to the reopening of a proof. A proof cannot be opened up and additional evidence led unless on very strong grounds (*Court of Session Practice,* Maclaren, p 562). The court will not open up a proof to hear evidence about a part of the case that was forgotten (*Rankin* v *Jack* 2010 SC 642). By telling the petitioner how to remedy the defects in his case the Lord Ordinary breached her neutral role in the process.

[21] Nor was the Lord Ordinary's approach consistent with international jurisprudence. The New Zealand Court of Appeal has rejected the proposition that the court is required to make inquiries to fill "gaps in the evidence" (*LLR* v *COL* [2020] NZCA 209). Neither was it likely that an American court would give a party a post-hearing opportunity to provide evidence of potential protective measures (*Baran* v *Beaty* (2008) 526 F 3d 1340 (11th Cir Alabama)). SD and the children suffered substantive injustice as a result of the Lord Ordinary's approach. There was a case for restoring matters to the position as it was when she made avizandum, that is, that a grave risk had been established and the undertakings provided by AD could not be regarded as effective. If the court did not consider it appropriate to proceed in this way, it should carry out an assessment of SD's Article 13(b) defence of new. Certain matters remained unresolved notwithstanding the opportunity provided to AD. For example, even if an Illinois court made an order for SD to

be able to access funds, those funds would have to come from AD, who had stated in his affidavits that he was in debt with his outgoings exceeding his income. The Lord Ordinary did not consider the impact on SD should she have to represent herself, nor the question of any other support where her family does not live in close proximity.

AD

[22] When the case was taken to a reserved judgment, the Lord Ordinary had not made a finding that grave risk had been established. At its highest, there was a strong *prima facie* case. She adopted the approach commended in *In re E* (para [36]), proceeding as if the allegations were true and thereafter assessing the availability of protective measures. She carried out a comprehensive assessment of the potential risks to the children and the protective measures that could be put in place to ameliorate those risks. She was entitled to conclude as she did. Notwithstanding her detailed analysis of the evidence that might indicate abusive behaviour towards SD, she was not satisfied that this created a grave risk for the children. In terms of protective measures, she had regard to the legal remedies described by Ms Harmon and Professor Boyer and the practical measures, such as the undertakings provided by AD in his affidavit, further set out in writing in the draft consent order, and his withdrawal of the civil contempt proceedings. The material indicated that there were both short-term and long-term protections available. The consent order protected SD and the children's position on an interim basis. As to effectiveness, the Lord Ordinary quite properly proceeded on the presumption that the requesting court can protect against any risk, where there was an absence of compelling evidence to the contrary (*C* v *C*, p 664C-D). The onus of proving that the requesting court would be unwilling or unable to protect the children rested upon SD (see *In re C (A Child)* [2021] 4 WLR 118,

paras [58]-[60]). The respondent produced no evidence to support that this was the case, despite having the opportunity to do so.

[23] The fundamental difficulty for SD was that she was inviting the court to determine that the test in Article 13(b) was satisfied without any full or proper consideration of the factual disputes between the parties, many of which were significant. Such matters were better resolved by the courts of the children's habitual residence, where the family had their home (*In re E*, para [8]). It was reasonable for the Lord Ordinary to find that AD would not necessarily breach future court orders, given that doing so would jeopardise his relationship with his children. Contrary to SD's claims that her mental health would deteriorate if returned and without family support, she had lived in Illinois since 2014 without such support. There was no evidence of adverse impact on the children from that period. There was every indication that the children were in a safe and secure environment while in Illinois and this could continue upon return. The protective measures, on which the Lord Ordinary relied, were such that the risk to the children of a return was ameliorated. Any risk which remained could not be characterised as a grave one.

[24] The procedure adopted by the Lord Ordinary was unobjectionable and competent. The petition proceeded under chapter 70 RCS. It varies significantly from petition procedure under chapter 14. A hearing on a petition is not the same as a proof, where parole evidence would be led, after warrant to cite had been granted (*Parliament House Book*, Vol 8, Div C, chapter 14, paragraph 14.8.6). The procedure in Hague Convention cases is informed by the objects of the Convention, that is, the immediate and summary return of an abducted child, subject to the court's satisfaction that no exceptions in Article 13 apply. In terms of RCS 70.6, at the first hearing the court may identify what additional evidence is required and appoint a second hearing to determine the application. The court is expected

to take a proactive approach and an (almost) inquisitorial procedure is acceptable. While the Lord Ordinary may not have proceeded in accordance with the precise timescales set out in chapter 70, she had operated within the spirit of the rules. It was appropriate for her to have the fullest information possible. The analogy drawn with international jurisprudence is inapt. In *LLR* v *COL* there was evidence to indicate that the requesting court would in practice be unable to protect the children (paragraph 113). In *Baran* v *Beaty* the undertakings were not given until the conclusion of the evidence and oral submissions. Contrary to the submission of SD, at the second hearing on 16 January, AD's case was not limited to personal undertakings given. Ms Harmon's report (Number [6/81] of process) had been lodged on 9 January, on the basis of which submissions were advanced on 16 January. SD also had notice of AD's position on protective measures under the law of Illinois from the petition ie that the law of Illinois was capable of protecting the children. The Lord Ordinary also had material indicating that a consent order and other options might be available in the form of Mr Cullen's affidavit.

[25] There was no injustice to SD. She had the same amount of time as AD to produce the evidence sought by the Lord Ordinary. From at least 6 January, when her adjusted answers were lodged, it was part of her case that (a) her mental health would deteriorate if return was ordered; and (b) she would be unable to effectively participate in any litigation in Illinois. It did not follow from her failure to produce substantive evidence to support her position that the Lord Ordinary's approach was unjust.

Decision and reasons

[26] In some 1980 Hague Convention cases where an Article 13 defence such as consent or acquiescence to the removal or retention of children is advanced, the court is required

to reconcile, if it can, competing accounts of events given by the respective parties to the proceedings. Normally those accounts will be contained in affidavit rather than oral, tested evidence. In the absence of extraneous evidence supportive of their position, the party upon whom the onus rests may fail to establish the defence (*D* v *D* 2002 SC 33). In contrast, since the decision of the UK Supreme Court in *In re E* [2012] 1 AC 144, the position where an Article 13(b) "grave risk" defence founding on domestic abuse is pled, the court's approach is more nuanced. A staged approach is required, with the court first asking itself of the disputed allegations whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If it concludes that there would be such a grave risk,

> "the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country…". *(In re E*, paragraph 36).

[27] Within the first stage of the assessment, unless there is no *prima facie* case made out at all, it is necessary to evaluate the available material and analyse the nature and severity of the risk to the children. The allegations are assumed to be truthful for the purpose of that exercise. It is that analysis that puts the court in a position then to make a proper assessment of whether the proposed protective measures will be sufficient to address or ameliorate that risk (*In re C (A Child)* [2021] 4 WLR 118, paragraphs 55-59*)*. The importance of that analysis lies in the relationship between the level of risk and the need for protection; a particularly high risk of the most severe harm will require to be balanced by more effective protection than a lower risk of either that or of less severe harm *(In re E,* paragraph 52). So the exercise involves a delicate slide rule type balance to be struck between the assessed risk and the protective measures offered.

[28] It is also important to note that, in principle, where a party's subjective perception of events leads to a risk to her mental health, this can found an Article 13(b) defence. If there is a grave risk that the children would be placed in an intolerable situation as a result of the mother's suffering that may be sufficient (*In re E,* paragraph 34). The crucial question is not whether the parent's anxieties are reasonable, but what will happen if the children are returned with her. If she will suffer such anxieties that the effect on her mental health will create an intolerable situation for the children they should not be returned (*In re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257. Finally, and of some significance in the present case, Article 13(b) requires the court to look prospectively. The protective measures may require to cover more than the immediate future because the need for effective protection may persist (*In re E,* paragraph 35). There is support elsewhere for the now established approach in this jurisdiction: *LLR* v *COL* [2020] NZCA *209* at paragraphs 106-110.

[29] In the present case, a number of risks were identified within the allegations, including that of the most severe type, namely physical injury to SD who had described an assault involving strangulation by AD in the autumn of 2020 in the presence of the children. On that occasion after AD had gone to retrieve his gun from the basement of the house SD managed to remove the children from the situation. On an earlier occasion, AD had, in the presence of the children, threatened to kill himself. SD described a number of sexual assaults by AD including attempted rapes. Numerous verbal assaults in the presence of the children were also alleged. Having described SD's allegations as amounting to a strong *prima facie* case, what is absent from the Lord Ordinary's analysis is the necessary assessment of the severity of that risk. SD's allegations required to be viewed against a backdrop of the objective assessment of her distress and the undisputed material in the

voluminous text messages. All of that material required to be fed into the risk assessment at stage one of the exercise. Had a conclusion on the severity of the risk been reached, that would have informed the assessment of the effectiveness of the proposed protective measures at the second stage. The issue in this case was whether and to what extent AD could be deterred from treatment of SD that would expose the children to harm or place them in an intolerable situation. Absent a clear assessment of the nature and gravity of the risk, the proposed protective measures were being assessed at face value, rather than being tested against a particular risk at a particular level.

[30] The dispute in this case does not relate to the existence in Illinois of legal remedies designed to protect those who may have suffered domestic abuse and their children. As one would expect of any US state, there is a myriad of orders and measures available to courts in that jurisdiction in cases involving both domestic abuse and the protection of children. Rather the issues primarily concern SD's access to legal representation and the related and fundamental point about whether AD can be trusted to comply with orders made by the Illinois court.

[31] On the first of those the Lord Ordinary acknowledged (at paragraphs 86-88) that legal aid is not available in Illinois and that other free legal services are a scarce resource there. SD would be prejudiced in the relevant court proceedings without the services of an attorney which would require a substantial advance payment. However, she concluded that there was no reason to think that the courts in Illinois would deal unfairly with a self-represented party in family proceedings. The low cost to SD for entering proceedings to represent herself was affordable.

[32] On the second matter there was indisputable evidence that AD had on numerous occasions breached a protective order granted by his local court (the dissolution stay) and

in force since 31 August 2022, by subjecting his wife to unrelenting harassment through abusive text messages. At paragraph 91 of the Opinion, the Lord Ordinary acknowledges that state of affairs, but states that she is

> "not prepared to conclude that he would fail to comply with a prohibition imposed by the courts of his home country, in a situation where he would be subject, potentially, to enforcement measures if he were to breach that prohibition."

[33] It is difficult to understand that conclusion against the background of AD's numerous breaches of an order of his home state, where the proceedings in which it had been granted related to the parties' marriage and the parenting of their children. It is this issue that required to be tested fully and balanced against the severity of the risk posed by the disputed allegations if true. Self-evidently, orders prohibiting AD from further harassing his wife would be effective only if it was likely that he could be trusted to comply with them and/or SD would have immediate recourse to effective court enforcement in Illinois if he did not.

[34] The combination of the disadvantages SD would face without legal representation and AD's continued behaviour between September 2022 and January 2023 in the face of court orders ought to have been considered in the context of the potentially devastating consequences for SD, and in turn the children, should the measures prove ineffective. In failing to conduct the risk assessment in that way, the Lord Ordinary erred. The matter is accordingly open for this court to consider of new.

[35] Before setting out our decision on the effectiveness of the proposed protective measures to address the level of risk posed in this case, we will address the reclaimer's second ground of appeal, namely that the procedure adopted by the Lord Ordinary in this case was incompetent, which failing unfair. The difficulty faced by the Lord Ordinary after the second hearing was that, while AD had offered various undertakings with a view to

addressing the risks faced by SD and the children's on a return to Illinois, the undisputed evidence of Stephen Cullen, Attorney, was that the undertakings were not directly enforceable in the USA. In Mr Cullen's opinion, the safest course would be for a consent order to be entered into the court process in Illinois before any return of the SD and the children to that state. Then the package of measures, including SD and the children being able to live in the family home without AD, financial support being provided and only indirect contact by AD with the children being permitted, would all be in place before SD and the children set foot in Illinois. The procedure that followed the second hearing was all designed to try to achieve that outcome. As the second hearing had concluded and the Lord Ordinary had reserved her judgment, it was not appropriate to express the further hearings as continuations of that hearing. However, it would have been perfectly competent for the Lord Ordinary to have the case brought out for a procedural or "By Order" hearing to discuss the mechanics of what would require to be in place in terms of enforceable orders before a return could occur. It seems to us that in substance that is what the Lord Ordinary sought to do and we would not have interfered with the substantive decision on the basis that the nomenclature in the interlocutor was inapposite.

[36] We acknowledge that petition proceedings under the 1980 Convention are adversarial and that all of the usual rules of fair notice and fair hearing apply. It is important that each side knows the case against them and has a reasonable opportunity to respond to it, although there is the additional imperative of seeking to comply with the obligation to reach a decision in these cases swiftly, normally within 6 weeks: 1980 Convention, Article 11. By the time the Lord Ordinary was dealing with the second hearing, that timeframe had already been exceeded. A judge in this situation is entitled to reach a decision on whether or not the grave risk defence has been established and then

continue matters until protective orders are in place. An example of that can be seen in the Lord Ordinary's later decision in this case (on 24 February 2023) to refrain from signing an order for return until there was evidence of the petitioner having applied to abandon the civil contempt proceedings with prejudice. We would discourage any procedural route that appears to disadvantage one side by detailing how the other party can make their case stronger. In this particular case, however, for the reasons we have outlined above, the central difficulty arose at the later stage of analysis of the final material submitted. Accordingly, it was not the unusual procedure that resulted in the problem with the substantive decision.

[37] Looking at the issue of grave risk of new, we consider that the combination of factors on which SD relied were sufficient to establish a grave risk that harm to her of the most severe kind (physical injury or worse) would occur in the event that she and the children were returned to Illinois. That would place the children, who would be in her sole care, in an intolerable situation, as would repetition of the unrelenting harassment and intimidation already established. Contrary to the approach of the Lord Ordinary, the described background of physical and sexual assaults, including incidents in the presence of the children, has to be considered together with the undisputed text messages and not as a discrete or separate issue. The volume of messages and their sexual, misogynistic, intimidating and controlling content provide compelling objectively verified evidence of AD's lack of self-control. Professor Gary Macpherson, the psychologist, was provided with 1187 pages of text and picture messages to examine. In his opinion, common themes were established by these messages including, amongst others, belittling and emotional abuse, economic abuse and restriction of freedom of action, misogyny, suspicion paranoia, emotional dysregulation and threats of suicide, and threats of violence including extreme

sexual violence. The text messages are so voluminous and offensive that there is little point in quoting from them. It is sufficient to acknowledge the detrimental impact they have had on the respondent. Having met with SD, Professor Macpherson concluded that she presents with symptoms of anxiety, stress, tension and excessive worry consistent with an adjustment disorder. She also had post traumatic symptoms which appeared to be related to her being the victim of abuse by her husband. So there is objective evidence of the high risk posed by AD coupled with a lack of insight on his part, demonstrated by his refusal to concede that the text messages constituted abuse.

[38] Once the threatening content of AD's messages are considered in the context of the physical and sexual abuse allegations the level of risk is heightened. SD's affidavit contains graphic accounts of brutal physical assaults inflicted on her in the presence of the children. These included hitting her on the face while she was sitting in the bathroom of the family home with the children, and threatening and intimidating her physically and psychologically when she was trying to sleep on the floor of her daughter's bedroom to maintain a distance from her husband (affidavit of respondent dated 9 January 2023, paragraphs 112-114). SD's extensive and powerful evidence that she has been subjected to physical, sexual and financial abuse is fortified by the content of some of the petitioner's messages to her. On 11 December 2022 AD sent a message to SD stating that she should be extradited back to the USA and have her passport and citizenship revoked and then she should be deported back to the UK. He has said that he finds the dispute with her sexually arousing, he has threatened to sue her family for their support of her in this dispute and he has threatened to cut off her financial support. These are just a few examples of the established text exchanges including topics covered by the more serious allegations.

[39] There is ample material from which it can be concluded that there is a grave risk to SD and the children that they will be exposed to uncontrolled and irrational behaviour if they are returned to within close proximity of AD. The risk of consequent harm, both psychological and physical, is extremely serious. Accordingly, the children can be returned only if there is confidence that measures designed to protect SD and them from that harm will be sufficiently effective to deter AD from behaviour that could have irreparable consequences. As indicated, the Illinois court has power to impose a range of protective measures and we accept that it would approach this case appropriately in due course. However, it is noteworthy that AD has sought to minimise the duration of the proposed consent order to 30 days. Given the lengthy period covered by SD's allegations and the nature of the physical and sexual violence described, we do not accept that this is a case where it is sufficient to consider only short term protection on immediate return.

[40] We find ourselves unable to conclude that it is likely that AD will comply with any such orders. His persistent breaches of an order in his own jurisdiction's proceedings that is clearly designed to avoid either party being subjected to harassment, coupled with his reluctance until a very late stage in these proceedings to agree to protective orders on the children's return, militate in favour of the conclusion that the established grave risk will not be mitigated by orders of court. The drawn out process in these proceedings, with the court requiring to suggest to the petitioner the nature and extent of protective measures he could offer, is further illustrative of his approach of refusing to make concessions until absolutely necessary. The terms of the revisals to the draft consent order suggest that the petitioner remains keen to limit the period before which he can seek to alter the promised arrangements. Two additional hearings were required before he was prepared to countenance withdrawing his application to have SD found in civil contempt on a with

prejudice basis. The circumstances of this case necessitate the most effective protective measures to alleviate the identified grave risk of severe physical and psychological harm to SD that would result in an intolerable situation for the children. The nature of the harm, coupled with AD's seeming inability to modify his behaviour even when subject to court order leads us to conclude that the proposed short term court orders to which AD has rather belatedly accepted should be in place are insufficient to provide adequate protection. We accept the submission by senior counsel for SD that there is little point in relying on a panoply of measures available in Illinois if there is no confidence that they will be complied with and where it may be too late after the event to protect SD and the children.

[41] In all the circumstances and having regard to the extensive material available, we are satisfied that SD has established a grave risk defence under Article 13(b) of the 1980 Hague Convention. Despite being so satisfied, we have a discretion to decide to return the children. However, it would be inconceivable that a return would be ordered given the material before us and we shall refuse so to order. Cases of this sort are inevitably very fact specific and this court is conscious, as was the Lord Ordinary, that the primary obligation where children have been retained outside their habitual residence in breach of the other parent's rights of custody is to return them swiftly. In the particularly unusual circumstances of this case, we have concluded that to do so would give rise to an unacceptable risk.

[42] For completeness we should record that during the reclaiming motion the respondent lodged a third report from Professor Macpherson expressing the view that the impact of a return to the matrimonial home in Illinois would be significant and detrimental to SD's mental health. In the event it was unnecessary for our conclusion to rely on this additional material. The ineffectiveness of the proposed protective measures arises primarily from our being unable to trust that the petitioner will comply with court orders,

leaving the respondent and the children in a physical, psychological and financially intolerable position. The impact that would have is in our view self-evident.

[43] The order for return of the children to Illinois, USA has been refused. We are grateful to all counsel involved for their careful presentation of this sensitive and difficult case.