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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

IN THE MATTER OF KK (A CHILD)

Between

VK AND AK

Plaintiffs

and

KK

Defendant

MAGUIRE J

Background

[1] The court has before it a Notice of Motion in the case of VK and AK v KK which it last dealt with on 10 June 2013. As explained in the court's original judgment of the above date VK and AK are the grandparents of a male child hereinafter known as Karl. The mother of Karl is KK. In the original proceedings the grandparents sought an order of the court requiring Karl's return to Lithuania from Northern Ireland where he is currently living. Karl is now 9 years old. His father and mother separated before he was born and his father has played no part in his life. Following his birth, he lived with and was cared for by his maternal grandparents in Lithuania. Shortly after his birth Karl's mother returned to her work in the Lithuania Army leaving Karl with his grandparents. Having left the army, Karl's mother moved to Northern Ireland in 2006 where she has lived since. Karl continued to live with his grandparents.

[2] As indicated by Lady Hale when this case reached the Supreme Court there is an unresolved dispute about the level of interest which the mother showed in Karl over the years.

> "Between 2006 and October 2011, she sent 28 payments to the grandmother totalling some £2,590. She was in contact with her family by telephone and by SKYPE but we do not know how often. The grandmother came to visit her once in Northern Ireland in 2006 but did not bring Karl with her. The mother visited the family once in Lithuania in November 2006 for 5 days or a week when Karl was 20 months old.
>
> Otherwise Karl has not seen her until she returned to Lithuania in February 2012 shortly before his seventh birthday. According to the solicitor working with the Official Solicitor in Northern Ireland, who interviewed Karl a year later, it was his firm belief that his grandmother was his mother. He was confused as to who the woman he spoke to on the computer (via SKYPE) was. His grandmother's evidence is that he referred to the mother as his "mother from afar".

[3] In November 2010 the mother had a child together with a new partner. This child is called M. That partner and the mother, however, separated. The mother has now a different partner with whom she lives. She travelled with him to Lithuania in February 2012. Her object in doing so was to take Karl with her to Northern Ireland as she was now in a stable relationship and had suitable accommodation and employment. Lady Hale recounted what occurred as follows:

> "Her own evidence is that she knew that her parents would not agree to Karl moving to living with her. A friend had told her that her mother was taking preliminary steps to obtain legal custody of the child. A lawyer advised that legal proceedings between her and her mother would be 'very protracted and costly'. So she decided to take matters in her own hands. On 12 March 2012, as the grandmother was walking Karl home from school, the mother and her partner drew up beside them in a van and there was a tug of war which resulted in Karl being removed from the grandmother and taken away in the van. Again, there was a dispute of fact. The grandmother says that she heard the mother shouting 'pull him, pull him', a man jumped out of the van and grabbed the child. When she would not let him go, the van door was shut on her hand, injuring her. The mother says that her partner was driving the van and it was she who had the tug of war to remove Karl from the grandmother's grip. Either way, it was a shocking

> episode of which any mother should be deeply ashamed. Thereafter, they travelled by car and ferry through Slovakia, Germany, France and England arriving in Northern Ireland around 17 March 2012. Karl had to leave behind his country, his home, his toys and his clothes, his school and many other activities and the grandparents with whom he had lived all his life. He was taken to a country he did not know, with a language he did not know, by a mother he scarcely knew, to live with her and a half-sister and step-father whom he had never met".

[4] After arriving in Northern Ireland it appears that Karl had some contact with his grandparents by telephone and by SKYPE but this was terminated in 2012 and there has been no contact since. Lady Hale recounts a summary of what then occurred (at paragraphs [99] and [100] of her judgment):

> "Shortly after the removal, the grandmother contacted the Childrens' Rights Division in her home city in Lithuania and a referral was made via Children and Families Across Borders to the local authority in Northern Ireland. A social worker undertook an assessment using the 'Understanding the Needs of Children' (UNOCINI) framework, which was completed on 24 May 2012. Karl had been in school in April, after the Easter break. His behaviour during his first week was very disturbed and the school had requested specialist support for this. Otherwise, the assessment was that the mother appeared to have good insights into the needs of her children, but that Karl had experienced a major change in his life, and would benefit from support in relation to the current language barrier and emotional support which would enable him to process his thoughts and feelings about the move. Nevertheless, it was agreed that the case should be closed as the school had involved behavioural support. A letter from the Head Teacher in February 2013 reported that his behaviour since returning to school in September 2012 had been exemplary. He had quickly mastered English and was making excellent academic and social progress. When the solicitor for the Official Solicitor interviewed Karl at his mother's home in April 2013 she found a little boy who presented as very young. He expressed a desire to stay with his mother in Northern Ireland. The solicitor concluded:

> "[Karl] has experienced a situation where he was cared for by a grandmother, whom he believed was his mother and had irregular contact with a woman with whom his relationship was unclear. He was subsequently abducted from his grandmother in an extremely frightening manner by a person whom he believed at the time was a stranger. He was removed from the country of his upbringing to a country where he struggled initially with the language. Contact with his grandparents, who had been his primary carers, and the significant adults in his life, was brought to an abrupt end by his mother and he was informed that his grandparents had lied to him throughout his entire life. In the light of the above despite [Karl's] assertion that he wanted to remain with his mother, I have concerns about the emotional well-being of this young boy and the impact of the traumatic events on his ability to formulate his wishes and feelings freely and without influence. It is entirely possible that [Karl] has suffered emotional harm and I would consider that it might be in his best interests for an expert assessment to be carried out in order to identify appropriate support for him.""

[5] When the proceedings were last before this court there was an extensive legal argument over whether the grandparents in Lithuania had, for the purpose of the Hague Convention/Brussels II Regulation "rights of custody" so that the child's removal from them by the mother and her partner was "wrongful". This court and later the Northern Ireland Court of Appeal held that the grandparents did not have rights of custody. The consequence, in law, was that the removal of Karl from them was not "wrongful" for the purpose above and the grandparents' application for an order returning Karl to Lithuania therefore failed. On appeal to the Supreme Court a different view was taken with the majority on the Supreme Court (Lady Hale, Lords Kerr, Clarke and Hughes) holding that rights of custody had been breached:

> "Thus to take [Karl] out of the country without [the grandmother's consent was in breach of those rights and wrongful in terms both of the Convention and the Regulation". (Per Lady Hale at paragraph [62])

Lord Wilson dissented and would have dismissed the appeal.

[6] The rights of custody issue has therefore been decided and it is no part of this court's consideration of the matters now before it to in any way seek to "re-open" it. What then is the issue now before the court?

[7] In order to answer the question the court returns to the judgment of the majority in the Supreme Court. Lady Hale at paragraph [63] having indicated that the appeal had been allowed and that the court was obliged to order that Karl be returned to Lithuania went on:

> "The mother has not yet sought to raise any of the exceptions to that obligation contained in Article 13 of the Convention."

[8] Lady Hale then records a submission made by the Official Solicitor in the Supreme Court to the following effect:

> "Whilst strongly arguing that this was indeed a wrongful removal, which should be recognised as such by this court, she (ie the Official Solicitor) submits that there should be a reconsideration of the child's position and the effect of another move upon him after two years living with his mother and her family."

Lady Hale then notes:

> "This submission, with all respect to her, is trying to have it both ways and ignores the binding effect of Article 12 of the Convention and Article 11 of the Regulation. This court cannot allow the inevitable effects of the passage of time involved in the appellate process (however expedited) to affect its decision."

[9] At paragraph [66], however, Lady Hale went on to say:

> "… the only conceivable way of getting this case back before the High Court in Northern Ireland would be if the mother were to seek permission, even at this late stage, to raise one of the exceptions in Article 13 to the court's obligation to order the return of the child. We have not heard argument upon whether this is even possible, given the stage which the proceedings have reached. But were the mother to make such an application, and were the High Court to grant her such permission it would be necessary to stay this court's order until the case could be

> heard. All these matters would be better dealt with by the High Court in Northern Ireland. Accordingly, I would direct that if within 21 days the mother applies to the High Court for permission to apply for the child not to be returned, pursuant to Article 13 of the Convention, the order of this court is to be stayed until the matter is mentioned, on the first available date, before the Family Division Judge in the High Court in Northern Ireland. Should he permit the mother to make the application, and I am very far from suggesting that he should, he should also have power to stay the order of this court until the matter is determined."

[10] Within 21 days of the Supreme Court's Order this court received the Notice of Motion issued on behalf of the mother referred to at paragraph [1] above. This seeks that:

> "Leave be granted to the defendant to apply for the child not to be returned to Lithuania by raising a defence pursuant to Article 13 of the Hague Convention on the Civil Aspects of Child Abduction that:
>
> (i) There is a grave risk that the child's return to Lithuania would expose him to psychological harm or otherwise place him in an intolerable situation.
>
> (ii) The child objects to return to Lithuania and he has attained an age and degree of maturity where is it is appropriate to take account of his views."

[11] The court arranged to hear the above Notice of Motion and heard argument about the grant of permission on 26 June and a substantive argument relating to the merits of the proposed defences on 2 July 2014. At both hearings the mother was represented by Mr Toner QC and Ms Lindsay BL; the grandparents were represented by Ms McBride QC and Ms Connolly BL; and the Official Solicitor was represented by Mrs Keegan QC and Ms Murphy BL. The court is more than usually grateful to counsel for their focussed and cogent submissions and their willingness to assist the court given the very tight timescale in which the court was working.

Should the court give permission for the Article 13 issues to be raised?

[12] Logically the above is the first issue which arises. It was the subject of contention and dispute as between the mother and the grandparents. The Official Solicitor adopted a neutral position on this issue.

[13] The Notice of Motion was grounded on two affidavits, one from the mother and one from the mother's sister, DK.

[14] By way of summary, the main points made by Karl's mother were:

- Karl had resided with her and his younger half-sister since March 2012.
- Karl and M are very close and get on well together.
- She has a sister, DK, who lives close to her. She has a daughter aged 5 who resides with her. She maintains frequent contact with her sister and her sister's child is close to Karl. Karl enjoys having sleepovers at DK's house.
- There is also a cousin of the mother who lives nearby and this cousin also has a child. Her family sees them regularly.
- Karl is now in P5 and is making excellent progress at school. Feedback from the school is positive. Karl speaks English almost fluently.
- Karl is on the school hockey team.
- There are no difficulties in regard to Karl's behaviour at school or at home.
- Karl has made friends in his home neighbourhood both Northern Irish and Lithuanian.
- She is concerned about the effect on Karl of a return to Lithuania. In particular he will be devastated to be uprooted from his home of the last two years, from his school and extended friends and family. She believes that the upheaval which Karl will undergo will have a grave impact on his psychological well-being.
- She opposes the return of Karl to Lithuania.
- She says Karl will not enjoy the same standard of living her family enjoys in Northern Ireland. She has no family support in Lithuania as her only sibling resides in Northern Ireland and she is estranged from her parents. If she is forced to return to Lithuania she will have no home, no job prospects and no money.
- A return to Lithuania, she thinks, would place Karl in an intolerable situation.
- When asked, Karl says he wants to continue living in Northern Ireland and does not wish to return to Lithuania. His views are clearer now than when he spoke the previous year to the Official Solicitor.

- She is always worried about the effects of a return to Lithuania on M. She will be uprooted from all that she knows and will miss out on contact with her father who lives in Northern Ireland.

- She believes her mother had a recent operation on her knee and is currently awaiting an operation on her other knee. Her father is in the Merchant Navy and spends months at sea. In these circumstances she questions whether her parents are in a position to look after Karl.

- She says she is open to Karl having indirect contact with her parents. This could later be extended to direct contact.

[15] By way of summary, the mother's sister DK in her affidavit made the following points:

- She has resided in Northern Ireland for 3 years with her daughter who is aged 5. She regards Northern Ireland as her permanent home.

- She resides close to the mother and her family and is in regular contact with them.

- In particular, her daughter sees Karl as her big brother. Karl stays overnight at her home.

- She is not convinced of her parents' ability to resume care of Karl.

[16] While both affidavits made reference to various views allegedly expressed to them by the grandparents in recent times the court does not set these out as it seems plain that the stance of the grandparents in these proceedings is that they wish to have the return of Karl to them in Lithuania and the court sees no basis upon which to go behind this.

[17] Mr Toner QC, for the mother, argued that the court should allow the Article 13 issues contained in the Notice of Motion to be heard. In his argument he placed emphasis on the passages in Lady Hale's judgment which have been set out above. The Supreme Court had not closed the door to the Article 13 matters being heard but had arranged for this court to consider whether permission should be given for them to be heard. The case was not closed and it was, he argued, not a situation where the court was being asked to re-open a conclusive order. Rather the correct analysis was that what the court had before it was effectively a late application to raise an Article 13 defence because of the effect on Karl of sending him back so long after he had been removed from Lithuania. There was a case to be heard. Return to Lithuania would cause psychological harm to Karl and would place him in an intolerable position. Karl also objected to return and he was at an age where he had attained such a degree of maturity that the court should take account of his views. The

lateness of the application arose because of the time spent in dealing with the litigation to date. In support of his application Mr Toner drew the court's attention to the sentiments expressed in the House of Lords by Lady Hale in Re D (A Child) [2007] AC 619. This was also a case where there were disputed "rights of custody". Ultimately, the House of Lords held that as the father (who lived in Romania) did not have rights of custody, the removal of the child by the mother to the United Kingdom was not wrongful. However, the period of time between the allegedly wrongful removal and the decision of the House of Lords had been over three years, a matter which gave rise to comment by Lady Hale. As she noted as paragraph [48] "the whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their "home", but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed".

[18] At paragraph [50] Lady Hale referred to Article 13 which, as she put it, "provides that there are circumstances in which the authorities of the requested state are not bound to order the return of the child". These limitations on the duty of return, she observed, must be restrictively applied if the object of the Convention is not to be defeated. In particular, the authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child albeit that "there must be circumstances in which a summary return would be so inimical to the interests of a particular child that it would be contrary to the object of the Convention to require it" (paragraph [51]). In this context Lady Hale went on to note that the word "intolerable" found in Article 13(b) is a strong word. When applied to a child it must, she said, mean "a situation which this particular child in these particular circumstances should not be expected to tolerate" (paragraph [52]). In the same paragraph Lady Hale made the important point that "no one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm". At paragraph [55] she went on to endorse an observation made in the course of argument by Lord Brown of Eaton-under-Heywood that:

> "It is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate."

[19] Mr Toner in his skeleton argument also set out paragraphs [53] and [57] of Lady Hale's judgment in Re D in full to show that the delay which had arisen in that case was a factor which could be legitimately considered as a reason which is relevant to a child's non-return on Article 13(b) grounds. In that case the passage of time had contributed to a situation in which the boy at the centre of the proceedings

had become adamantly opposed to a return to Romania. It was not a case of a child merely being settled in the United Kingdom. Rather he had spent nearly half his life in the United Kingdom and had no life he could recall in Romania. In that case, no defence based on the child's objection to return had been raised initially but this does not appear to have inhibited the court from commenting on the issue, even though, due to the House's conclusion on other points, such comment was unnecessary for the purpose of its decision.

[20] In the light of all of this, Mr Toner argues that this court should, given that a potential defence has now been raised by the mother in a credible way, be prepared to rule upon the issues which have now been raised in the Notice of Motion. The reality, he says, is that the majority in the Supreme Court could see that Article 13(b) might possibly have application in this case. But the issue was not before them. Hence they were content, while not dictating that this court should deal with it, to create circumstances in which this court could decide whether it should address these issues or not. For this reason the Supreme Court stayed its judgment. In Mr Toner's submission, it would be inconceivable that this court would not deal with the issues now raised if the consequence of not doing so would be to expose Karl to harm.

[21] For the grandparents, Ms McBride QC in a detailed skeleton argument, reinforced by oral submissions, sought to counter the submission that the court should give permission for the Article 13(b) issues to be raised. She advanced the following points (which are elucidated at greater length in her skeleton argument). First, she says that the Supreme Court had made a final order and specifically had not remitted the case, or any part of it, to this court. In support of this submission she relies on the terms of the court order made by the Supreme Court and on the comments of Lady Hale contained in paragraphs [63]-[66] of her judgment. The former is an order containing five paragraphs. Paragraphs 1 and 2 need only be referred to. These read:

> "THE COURT ORDERED that:
>
> (1) The appeal be allowed and the child be returned to Lithuania forthwith.
>
> (2) If, by 5 June 2014, the mother applies to the High Court for permission to apply for the child not to be returned, the order for return of the child shall be stayed until the matter is mentioned before the High Court or, if so ordered by the High Court, until the matter is determined."

[22] The salient parts of Lady Hale's judgment have already been set out above. The emphasis, in Ms McBride's submission, should be placed on the words found in paragraph [66] which indicated that no argument had been heard by the Supreme

Court upon whether the course of granting permission to raise the Article 13 issues was "even possible". Lady Hale, counsel argued, stressed that she had not formed a view on whether leave could or should be given as illustrated by her comments that:

> "Should the [Family Division Judge in the High Court of Northern Ireland] permit the mother to make her application and I am very far from saying that he should …".

[23] Ms McBride also relied on certain remarks made by Lord Wilson in the Supreme Court who dissented from the conclusions of the majority. In particular, she referred to paragraphs [80]-[83] of his judgment. At paragraph [80] Lord Wilson referred to the "unusual" order which Lady Hale proposed. Such an order Lord Wilson thought (see paragraph [81]) turned elementary rules on their head. He went on:

> "Were the possible defence apt, I would have expected this court to decline to make a substantive order for Karl's return and to remit the grandparents application for determination in the light of the court's ruling."

In Lord Wilson's view, the possible defence under Article 13 was not, as he put it, "fit for its purpose". At paragraph [83], having noted the length of time taken by the proceedings he gives his opinion that:

> "It would be contrary to principle for the mother to be allowed at this stage to raise a defence which would apparently be based to a substantial extent on the consequences for Karl of the existing delay in determination of the application and which would be productive of significant further delay."

[24] In view of the above points, Ms McBride characterised the situation as one of this court being asked to grant leave to "reopen a final determination" of the Supreme Court.

[25] Secondly, Ms McBride argued that while there is jurisdiction to reopen a final determination of a Court of Appeal such should only occur in the most limited of circumstances which would not cover the circumstances of this case. Hence, she says the court lacks jurisdiction.

[26] In support of this argument counsel relied on a number of general principles. She said that the outcome of the litigation should be final and that the parties who were involved in litigation should put all issues relevant to the litigation before the court. If they did not, they will not normally be permitted to have a second bite of the cherry. Ms McBride invoked a line of authorities beginning with Taylor v

Lawrence [2003] QB 528 governing when the Court of Appeal had power to reopen an appeal after it had given final judgment. What counsel drew from Taylor was that there was a residual discretion vested in the Court of Appeal "to avoid real injustice in exceptional circumstances". For this jurisdiction to be used it had to be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy. To similar effect, Ms McBride quoted the English Civil Procedure Rules at paragraph 52.17 where it is stated that:

> "Once there has been a final determination of any appeal, it is not normally possible to reopen it. There is, however, an exception to this rule. The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy."

Counsel then referred to Re Uddin (A Child) [2005] 1 WLR 2398. In this case Dame Elizabeth Butler-Sloss addressed the Taylor case in the context of family litigation where the applicant attempted to reopen an earlier Court of Appeal decision refusing permission to appeal a High Court determination. In Re Uddin it was argued that fresh evidence and newly published research cast doubt on the expert evidence which had been before the High Court and that therefore the issue of permission should be capable of being reopened and considered. In the court's judgment residual jurisdiction would only be exercised where the process had been corrupted, for example, cases of bias or fraud, though, in addition, it was accepted that the discovery of new evidence could justify the reopening of a concluded appeal. It would have to be shown that not merely did the new evidence demonstrate a real possibility of an erroneous result in the earlier proceedings, it would have to establish a powerful probability that such a result had in fact been perpetrated. The test to reopen a concluded appeal would not be met where "it is shown only that a wrong result may have been arrived at". Counsel also cited Bassi v Ames [2007] EWCA Civ 903; Feakins v DEFRA [2006] EWCA Civ 699; Couwenbergh v Valkova [2004] EWCA Civ 676 and Society of Lloyds v Jaffray [2007] EWCA Civ 586. These authorities have been considered by the court although it is not proposed to set them out here. In Ms McBride's submissions, while there is an exceptional residual jurisdiction to reopen concluded appeals in line with the authorities cited, none of these situations apply in this case. In particular, she argued that this was not a fresh evidence case and there did not exist a powerful probability or a high likelihood that an erroneous result had in fact been perpetrated in the concluded proceedings.

[27] Thirdly, on behalf of the mother, it was submitted that the case of Re D, relied on by Mr Toner, was distinguishable from the present case.

[28] Fourthly, Ms McBride argued that the court should not allow the mother now to raise a case which she could have raised from the outset and did not raise at any stage before now. In short, she could have avoided any injustice which she says may now arise.

[29] The court has carefully considered the submissions of counsel and has read the authorities referred to. In the very unusual circumstances of this case, which have been set forth above, the court prefers the arguments addressed to it by Mr Toner on behalf of the mother. The court does not accept the characterisation of the situation which is the linchpin of Ms McBride's argument *viz* that this is a case of the mother seeking to reopen a concluded appeal. It seems to the court that the better view is that what the court is being asked to do is to consider the merits of the invocation by the mother of an Article 13(b) defence at a late stage in circumstances where the Supreme Court did not have the issue before them but could see that it was possible that such a defence might be available. In these circumstances the majority considered that the issue was best left to this court. In the court's view, when the relevant passages of Lady Hale's judgment are considered and when the order made is read in its relevant part, it can be seen that this court, in dealing with this issue, is acting consistently with the outlook of the majority in the Supreme Court. It is certainly not seeking to revisit the legal question of the grandparents' rights of custody which has now been conclusively decided. In the court's view, the sentiments expressed in Re D are relevant to the court's decision whether or not to grant permission for the Article 13(b) issues to be raised. Like Re D itself this case is one where the Article 13(b) issue has been raised very late in the day. Like Re D this is a case where there has been delay in the completion of the legal process. In the court's view, consistently with the circumstances in Re D, this delay can give rise to Article 13(b) concerns which are capable of significantly altering the landscape to be considered before return to the requesting state is effected. There is, moreover, sufficient information to support the view that the court should consider the mother's defences for fear that if it failed to do so there may be a situation in which Karl might, in breach of the Convention, be returned and exposed to harm or placed in an intolerable situation. In taking this course of permitting these issues to be raised the court has firmly indicated that it is not going to go down any road which engenders any significant delay, a fear understandably given voice to by Lord Wilson. It has indicated that it will decide on the merits of the Article 13(b) defences speedily.

[30] The court has considered what the situation would be if indeed, contrary to its view, this was a case of reopening a concluded judgment. While this is not a scenario about which it proposes to rule, the court is unconvinced that the approach of the courts as exemplified by the jurisprudence cited by Ms McBride necessarily, if applied to this case, would result in a ruling against hearing the mother's arguments

under Article 13(b). There surely would be a concern that to fail to consider the defences may operate to cause a substantial injustice and that the circumstances in this case are likely to be viewed as falling into an exceptional category. In the court's view, the passage of time in a case of this nature when married with the averments of the mother and her sister, are capable of creating a new situation which the court might be wise not to close its mind to. In reality the case which the mother seeks to make now would have been much more difficult to make earlier. The case, therefore, on analysis, may neither be one of the mother holding back part of her case or one of her seeking to deploy, in the guise of new evidence, evidence which was there all along. The court also finds it difficult to accept that the return of Karl to Lithuania itself could be said to constitute an alternative effective remedy. Finally, unlike the circumstances in Uddin (and several other of the authorities cited to the court) this is not a case where the issue is whether "new" evidence demonstrates that the result on a particular issue decided in earlier proceedings was erroneous. The Article 13(b) issue has not hitherto been raised or determined in the proceedings to date.

[31] The court therefore is content to give permission for the substantive issue to be argued. In order to ensure that the court had an up-to-date objective statement of Karl's position before it, on 26 June it gave leave to the Official Solicitor to report to the court, having interviewed him.

The Official Solicitor's Reports

[32] Ms Coll, a solicitor in the office of the Official Solicitor, provided a report dated 1 May 2013 to this court prior to the earlier hearing of this matter in June 2013. This has already been referred to. At that time Karl had just turned 8 years of age and he had been in Northern Ireland for just over one year. When interviewed on 19 April 2013 Ms Coll found him slightly nervous and found the interview to be of a very superficial nature. The interview was conducted in English but a Lithuanian interpreter was present. Ms Coll noted that Karl spoke English very well. It was clear at that stage that the incident in which Karl had been removed from Lithuania had made him scared and upset. Karl expressed the view that he wished to remain in Northern Ireland with his mother. At this time he was attending primary school and seemed to be getting on well there. When asked if he missed Lithuania, he said no.

[33] In her conclusion, Ms Coll indicated that at that time she found Karl presenting as "very young". She did not think that he was competent. She found it difficult to follow his train of thought and she was not confident that she was able to ascertain his wishes and feelings. She was concerned about his emotional well-being and about the impact which the traumatic events surrounding his removal had on his ability to formulate his wishes and feelings without influence. A particularly striking answer he gave during the interview was that he did not want to go back to his grandparents because they had lied to him by saying they were his mum and dad.

[34] Ms Coll further interviewed Karl on 30 June 2014. On this occasion she was struck by the fact that he appeared more at ease and relaxed and more confident and self-assured. His English was described by Ms Coll as excellent and she felt that he understood the matters discussed.

[35] Karl is now at a new primary school. He expressed to Ms Coll his liking for the school and the teachers. Since the previous meeting Karl had moved house. It seems clear that he enjoyed contact with M and has friends living around him. At home he said he got on okay with his "dad" and he is aware that he is not his real father. At school he enjoys maths and does very well in this subject.

[36] When asked about what he remembers about his past life in Lithuania he referred to bouncy castles, bowling and cherries. When asked about his grandparents he said they were fun. He said he would prefer, however, to stay where he lives now as he had lots of friends there. It was clear that he knew why Ms Coll had come to see him *viz* his grandparents wanted him back. If he had to go back to Lithuania his view appears to be that it would not be fun there and there would be nothing to do.

[37] Ms Coll was able to establish that in general Karl was doing well at school and he had made progress there. She had also established that Karl speaks Lithuanian at home.

[38] Overall, Ms Coll viewed him as "a much more confident and amiable young man". He appeared much happier in himself. Karl no longer seemed as angry with the grandparents as he did before and Ms Coll notes that Karl "is now open to have a relationship with them". However, he wishes to remain in Northern Ireland and does not want any more upheaval in his life.

The Article 13(b) Defences

[39] There are two Article 13(b) defences which fall to be considered in this case. Each is freestanding of the other. There is no dispute that by its very terms Article 13(b) is of restricted application and that the burden of proof is upon the person who opposes the return, here the mother. The standard of proof is the ordinary balance of probabilities. On these matters; see Re E *supra* at paragraphs [32]-[35].

[40] The first defence is that there should not be a return, here to Lithuania, where it is established that there is a grave risk that Karl's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

[41] It is plain from the case law that the words "grave risk" set a high threshold for engagement of this defence. Likewise, as already noted above, placing the child in an "intolerable situation" requires, according to Lady Hale in Re D (at paragraph [34]):

> "a situation in which this particular child in these particular circumstances should not be expected to tolerate."

Exposing the child to physical or psychological harm no doubt is to be viewed in the same way with the court looking at the particular child in the particular circumstances before deciding whether or not the child in fact has been exposed to physical or psychological harm.

[42] In this case the facts are that Karl was looked after by his grandparents for the greater part of his life. There is no evidence which would support the contention that either during these years he was not properly cared for or that the parenting he received from them was in any way inadequate or sub-standard. Ms Coll has now noted on the basis of her recent interview with Karl that he is no longer angry with the grandparents. The court is not aware of any objective reason why Karl should harbour any grudge against them. If at one stage he felt they lied to him this probably was put into his mind by his mother. Certainly the court doubts if this allegation is soundly based. In the court's view, there is no or no sufficient evidential basis, particularly in view of Ms Coll's recent report, for the view that there is a risk, never mind a grave risk, that Karl's return to Lithuania to be with the grandparents would expose him to any physical or psychological harm or otherwise place him in an intolerable situation. The threshold requirements in respect of this limb of Article 13(b) have not been proved by the mother. It is, moreover, right to record that at the substantive hearing, having had the chance to read Ms Coll's report of the day before, Mr Toner on behalf of the mother, with characteristic candour conceded that this limb of Article 13(b) could not be established on the evidence. In these circumstances reliance on this limb must fail and the court so holds.

[43] The second defence relied on within Article 13(b) is that the court may refuse to order return 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 his views.

[44] As noted above, Karl is 9 years of age. In his recent interview with Ms Coll he was described as "engaging well" and being "attentive and focussed" throughout. He expressed the view he would rather live with his mum than his grandmother and would prefer to stay in Northern Ireland than Lithuania. At one stage he said, "I don't want to go back to Lithuania". However, he said that if he went back with his mum he would be happier about this. At another point in the interview he repeated the preference to remain with his mum in Northern Ireland.

[45] There was some argument at the hearing as to whether Karl had expressed an "objection" to being returned but, in the court's view, very sensibly, Ms McBride did not press this point and was prepared to concede that when read as a whole Karl's interview constituted an objection to return. As Ms McBride put it, the threshold for

what constitutes an objection is probably not set at a high level. The court endorses this view.

[46] A similar debate ensued on the question of whether Karl had attained an age and degree of maturity at which it was appropriate to take account of his views. It was submitted that the Convention does not lay down any minimum age before a child's objection should be taken into account and that each case must be looked at on its merits. The court accepts this. Ms McBride saw this issue as also one in which the threshold which had to be surmounted was not a high one. In her submission, she was prepared to regard Karl, by a small margin, as having attained the requisite age and degree of maturity for his views to be taken into account. In her view what was more important was the weight which the court should give to Karl's views. She reminded the court that the expression "take into account" denotes that the child's view should be considered by the court not that the child's view will necessarily be upheld or be determinative. The court is content to endorse the approach of Ms McBride and concludes that Karl at 9 is sufficiently mature for the court to take his views into account. In this regard the court keeps in mind the Official Solicitor's view that Karl "was well able to understand all of the matters discussed". It is right, however, that the court acknowledges that 9 years is still a very young age and that Karl has only just attained an age and degree of maturity at which it is appropriate to take account of his views. At the date of his earlier interview with Ms Coll – just over a year ago – the court would not have been disposed to conclude that the age and maturity test, reading the interview as a whole, had been passed.

[47] In accordance with the scheme contained in Article 13 the court will now consider whether it should refuse a return order in Karl's case. The court reminds itself of the opening words of the second limb of Article 13(b):

> "The judicial … authority may also refuse to order the return of the child if it finds …".

The use of the word "may", it is common case, indicates that the making of a return order is discretionary. At this point Karl has succeeded in meeting what might be described as the gateway requirements but the enquiry now moves to a judicial assessment of whether a return order should or should not be made.

[48] The inquiry at this stage is bounded only by the concept of relevance. While the court must take the child's objection into account, and, of course, will do so, it can take into account a wide range of other matters, provided they are relevant. In the legal authorities, a range of formulations about how the court may go about performing its task can be found and the court has considered these. But in the end the court's view is that the exercise should be tailored to the particular circumstances of the case before it. The court agrees with Mr Toner's submission on behalf of the mother that the exercise is not one of box ticking or running through a checklist. What the court proposes to do is to refer below to the four main elements of

importance on the facts of this case. However, for the avoidance of doubt the court indicates that it has considered the totality of the information before it.

Karl's Objection

[49] In assessing the weight to be given to Karl's objection there are a number of factors which emerge. Firstly, the court takes note of the way the objection has been phrased. The language used is moderate and is mostly the language of preference rather than adamant opposition. This is perfectly appropriate but distinguishes this case from other cases where the child is irreconcilably opposed to return. Secondly, the court reads Karl's objection against the overall context of the case. That context includes basic facts of which sight should not be lost. Lithuania is Karl's homeland. He was born there. He has spent seven ninths of his life there. He speaks Lithuanian and Lithuanian is his native tongue. His upbringing prior to being removed to the United Kingdom – with his carers being his grandparents – appears unexceptional. He attended school in Lithuanian. He will have had school mates and friends there. In his interview with Ms Coll he says relatively little about any of these matters, though in what he did say there were some positive notes. At the least, he appears to associate his memories of Lithuanian with positives rather than negatives ("bouncy castle, bowling and cherries"). In his recall now his grandparents were "fun". While he did refer later in the interview to Lithuania "not being fun" and that there is "nothing to do", these are far from evidence based statements. Thirdly, the court has been told that there is no question that if the court removed the stay on the Supreme Court's order, Karl would return to Lithuania alone. Mr Toner on behalf of the mother volunteered the information that in the event of return the mother would go back to Lithuania with Karl. When asked by Ms Coll about this scenario, Karl's response was that he would be happier about that. Fourthly, in reading Karl's statement, the court is struck by the absence of reference to the events of the first 7 years of his life. The court has asked itself why so little has been said by him about this. No certain answer to this question can be given. Inevitably, the operation of memory may play a part. He might also be shy. But even allowing for these, one might have expected a greater recall of Karl's years in Lithuania than appears from what he has said at interview. Another possibility is that Karl has blanked out that phase of his life due to the trauma involved in his removal. Another possibility still is that he has been influenced by the mother to disregard that phase in his life. Whatever be the reason, the effect is that his approach to the issue of return appears to lack balance. Fifthly, understandably, there is little or no comprehension of saving factors in Karl's account. As regards schooling he has just changed school but even if he stays in Northern Ireland he will very soon change school again. Changing school, no matter what happens, will involve some degree of upheaval. New friendships may have to be developed come what may. While the court accepts that there will be a greater upheaval for Karl now if he has to return to Lithuania and enrol at a school there, this is offset to a degree by the reality that for a boy of his age, the school environment will undergo change as a matter of course. Pets of course can be replaced. New sports can take over from old ones. Sixthly, the court notes that Karl appears to be close to his half-

sister M. M is unlikely to go to Lithuania with him if return to Lithuania is required. Undoubtedly, there will be an element of loss engendered by this situation, though this may be tempered by the putting into place of appropriate contact arrangements. The same can be said of the loss of day to day contact with his stepfather. Seventhly, the court in assessing Karl's statement must keep in mind that the object of return to Lithuania is so that the issue of what should happen to Karl in terms of his future upbringing can be determined there rather than here. It would, in the event of return, be for the Lithuanian court to decide upon this, assuming that no agreed way forward can be found as between the mother and the grandparents. Karl, the court suspects, may not appreciate that this court is dealing only with an issue of venue or forum.

Mother's Influence

[50] The court has given careful consideration to the issue of whether in this case the mother has influenced Karl's views as reported to the court and whether it can be said that his views are authentically his own. This is not an easy issue to determine. The starting point must be that in the aftermath of the removal of Karl to Northern Ireland the mother clearly will have sought to shape Karl's view of the new situation and what had occurred. Notably in Lady Hale's judgment in the Supreme Court at paragraph [65] she said of the mother's relationship with the grandparents:

> "She had cut off all contact between them and appears to have poisoned his (ie Karl's) mind against them by suggesting that they lied to him."

[51] The court suspects that the mother in the aftermath of the removal will have set out to demonise the grandparents and to influence Karl against any return to them or Lithuania. This would very likely have remained the court's view were it not for some of the content of Karl's recent interview with Ms Coll which tends to show that Karl has been able, at least to a degree, to shake off the mother's influence. The court, for example, notes that Karl has referred to his grandparents as 'fun'. He appears to be open to a continuing relationship with them. In particular, he was warm to suggestions advanced by Ms Coll of scenarios where there would be contact between his grandparents and himself, whether by them coming to Northern Ireland to visit or him going to Lithuania to visit them or contact by the use of modern technology. These responses suggest that Karl has assessed the situation for himself. In this area of the case, while the court suspects that the mother has influenced Karl against return to Lithuania, her influence has diminished over time as Karl has matured and is probably no longer a dominant influence on him.

Welfare

[52] Karl's welfare is also a matter which the court considers relevant. There can be little doubt that the cruel way in which Karl was removed from his settled existence in Lithuania will have been damaging for him. In the immediate aftermath of this there is evidence from the principal of Karl's school of a measure of disturbed behaviour on Karl's part. This was hardly surprising. Thankfully there has been significant progress since then and this is evidenced both in the affidavit recently filed by the mother and in Ms Coll's latest report which includes information gleaned from staff at Karl's new school. The court does not doubt that if Karl is to return to Lithuania now this will involve a degree of upheaval which in an ideal world would not arise. However, the degree of upheaval may not be as great as at first sight might appear for the reasons already discussed above. In particular, as he will be accompanied by his mother, this should have a moderating effect. While recognising this last point, Mrs Keegan QC for the Official Solicitor submitted that from a relatively settled position Karl's life will be disrupted if the stay on the Supreme Court's judgment is lifted. The court is inclined to accept this submission as a general proposition but this is far from saying that the degree of disruption should necessarily be great – the court thinks not – or that this factor should be determinative of the issue now under consideration.

The Policy of the Convention

[53] Finally, the court has taken into account what are described in the case law as "the general Convention considerations". These have been described in various ways in the case law. The court will confine itself to two citations from the same judge in different cases which encapsulate the general significance of the Convention, firstly, and the particular significance of it to this type of case, secondly. In Re M and Another [2008] 1 AC 1288 Lady Hale at paragraph [48] stated that:

> "The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interest of children by deterring and where appropriate remedying international child abduction."

In Re E [2012] 1 AC 144 at paragraph [8] she said:

> "The first objective of the Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there. The left behind parent should not be put to the

> trouble and expense of coming to the requested state in order for factual disputes to be resolved there. The abducting parent should not have an unfair advantage by having that dispute determined in the place to which she has come."

[54] It seems to the court that this last quotation is not far from the circumstances of this case, albeit that those left behind were grandparents. Convention considerations, the court reminds itself, are not trump cards but considerations which are to be taken into account when weighed in the balance with other relevant considerations. In this particular case, there has been significant delay since the date of the abduction. The goal of speedy return has already not been achieved. In these circumstances, Mr Toner (for the mother) relied on Lady Hale's comment in Re M at paragraph [44] that "the further away one gets from the speedy return envisaged by the Convention, the less weighty these general Convention considerations must be". The court will take this also into account but does not accept that the effect of doing so is to negate the importance to be given to Convention considerations.

[55] In the court's estimation, Convention considerations, particularly that of deterrence, are important in this case, notwithstanding the passage of time. The manner of removal in this case was particularly heinous, as has been recognised at all levels within the judicial hierarchy in the United Kingdom, and this court will have regard to the fact that the abduction was planned to give effect to the very type of thinking referred to by Lady Hale in Re E.

Conclusion

[56] The court has decided that it should remove the stay on giving effect to the Supreme Court's Order with the consequence that Karl should be returned to Lithuania. This conclusion is the product of careful deliberation in the light of all of the evidence before the court and, in particular, consideration of the four main factors which have been discussed above. The court is not of the opinion that a return to Lithuania in Karl's case for Convention purposes in the company of his mother is a calamity or will involve or engender insuperable difficulties or is one which will come at an unacceptable cost to Karl's welfare. On the contrary, the court believes it can be managed in a way which ought to be able to minimise potential negative effects upon Karl. If the move takes place now, there is no reason to suppose that the courts in Lithuania should be unable to deal with the issues they need to decide speedily. The return of Karl now is in line with Convention considerations notwithstanding the delay which has occurred.

[57] The court is of the opinion that Karl himself has shown an openness to finding a way forward which has been largely absent from the position of the adults in the case. The court wishes to encourage the adults to seek to find an accommodation which best serves Karl's interests, instead of apparently putting their interests above his.

[58] Finally, the court records that it is satisfied that in the proceedings before it Karl's voice has been heard in full accord with the terms of Article 11(2) of the Council Regulation. Karl's reported views have been conveyed to the court by Ms Coll and the Official Solicitor has been represented throughout in these proceedings. When the court broached this issue with the parties at the end of the hearing, all were agreed that the requirements of Article 11(2) had been met.