CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 150/22

In the matter between:

THE AD HOC CENTRAL AUTHORITY FOR THE REPUBLIC OF SOUTH AFRICA First Applicant

PB Second Applicant

And

HK N.O. First Respondent

HK Second Respondent

Neutral citation:	*The Ad Hoc Central Authority for the Republic of SA and Another v Koch N.O. and Another* [2023] ZACC 37
Coram:	Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Potterill AJ, Rogers J, Theron J and Van Zyl AJ
Judgments:	Van Zyl AJ (dissenting): [1] to [145] Majiedt J (majority): [146] to [220]
Heard on:	09 May 2023
Decided on:	27 November 2023
Summary:	Hague Convention on the Civil Aspects of International Child Abduction — interpretation of Article 13(b) — determination of the threshold for "grave risk" of psychological harm or an intolerable situation

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division):

1. Leave to appeal is granted.

2. The appeal is upheld.

3. The orders of the Supreme Court of Appeal and the High Court are set aside.

4. E (the minor child) shall be returned to the jurisdiction of the Central Authority for England and Wales (CAEW) in the United Kingdom (UK) by the end of February 2024.

5. Pending the return of E to the UK as provided in this order, the second respondent (the aunt) shall not, without the prior written consent of the Central Authority for the RSA (CASA), remove E from the province of the Western Cape in the Republic of South Africa (RSA) and shall keep CASA informed of her and E's physical address and contact details.

6. In the event of the second respondent intending to accompany E on her return to the UK, she shall notify CASA and the second applicant (the father) in writing, within one week of the date of issue of this order, and in that event she is granted leave and authorisation, insofar as it may be necessary, to remove E from the RSA and accompany E on her return to the UK.

7. In the event of the second respondent failing to notify CASA in terms of para 6 and the second applicant intending to accompany E on her return to the UK, he shall notify CASA and the second respondent in writing, within one week of such failure, and he is granted leave and authorisation,

insofar as it may be necessary, to remove E from the RSA and accompany E on her return to the UK

8. In the event of the second respondent and the second applicant failing to notify CASA in terms of paras 6 and 7, CASA is authorised to make such arrangements as may be necessary to ensure that E is safely returned to the custody of the CAEW and to take such steps as are necessary to ensure that such arrangements are complied with.

9. Pending the return of E to the UK and for as long as the second applicant is in the UK, contact between E and the second applicant shall take place in accordance with the High Court's Order of 10 September 2020.

10. In the event of the second applicant being present in the RSA for the purpose provided in para 7, CASA shall liaise with the respondents' legal representatives to establish a schedule for contact between E and the second applicant. Such schedule shall provide for the second applicant's enjoyment of contact with E on a daily basis, taking into account E's daily activities and any other factors relevant to E's well-being at the time.

11. Upon E's arrival in the UK, the second applicant must procure all appropriate social and medical services to ameliorate E's return to the UK and cooperate with any assessment that the Department of Health and Social Care in the UK may wish to undertake in relation to him and the welfare of E.

12. Proceedings regarding the determination of parental rights are stayed pending E's return to the UK.

13. In the event of either the second respondent or second applicant notifying CASA, in terms of para 6 or para 7, CASA shall forthwith give notice thereof to the Registrar of this Court, to the CAEW and to the second respondent and the second applicant. In the event of either the second respondent or the second applicant making the election provided for in para 6 or 7 of this order respectively, then the second respondent or the

second applicant, as the case may be, shall provide the Central Authority with regular information in writing of all logistical and other arrangements made for the return of E to the UK. This information shall include, but not be limited, to information regarding flight dates and times, and compliance with any passport, visa or health requirements, if applicable. CASA shall also be entitled to request from either the second respondent or the second applicant, as the case may be, details of the arrangements made for the return of E to the UK. Any such request shall promptly be responded to.

14. A copy of this order shall be transmitted forthwith by the first applicant to the CAEW.

15. Each party is to bear their own costs in this Court, the Supreme Court of Appeal and the High Court.

JUDGMENT

VAN ZYL AJ (Madlanga J, Rogers J and Theron J concurring):

Introduction

[1] This is an application for leave to appeal the judgment of the Supreme Court of Appeal. If we grant leave, the case is concerned with Article 13(b)[1] of the Hague Convention on the Civil Aspects of International Child Abduction (Convention).[2] The Convention provides for an internationally agreed mechanism for dealing with the global phenomenon of child abduction. With limited exceptions, it provides for the prompt return of an abducted child to their home country.

[1] Article 13(b) is comprehensively dealt with in paras [40] to [65] of the first judgment.

[2] The Convention was created by the Fourteenth Session of The Hague Conference on Private International Law and was adopted at The Hague on 25 October 1980.

[2] One of the exceptions is found in Article 13(b). It provides that the judicial or administrative authority in the state which is hearing the application for the return of the abducted child may refuse to order the child's return if it finds that there is a grave risk that their return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation.

[3] In *Danaipour v McLarey*[3] the Court accurately described its task of deciding whether to return an abducted child to his or her home country under the Convention as one of the "most difficult and heart-rending tasks" when a party to the Convention proceedings raises an Article 13(b) defence. The task of the court is rendered difficult due to the fact that Article 13(b) requires the court to make a decision about the interests of a particular child in a specific case in the context of, on the one hand, a factual situation that is more often than not charged with emotion and expectation, and on the other, the very limited determination of what constitutes an exception to the duty of the court to order the immediate return of the child. The present matter has proven not to be an exception.

Background

[4] The facts concern a little girl who is six years old and who lives with her maternal aunt in SA (SA). To protect the child's anonymity, I shall call her E. She was born in the United Kingdom (UK) to parents who were both British nationals. Her parents were not married. E's mother, who died after the commencement of the proceedings for E's return to the UK, was originally from SA.

[5] E travelled from the UK to SA with her parents in September 2019. At the time, E was two years and two months old. Her mother was diagnosed with cancer in April of that year. The family came to SA in order for her mother to consult with doctors regarding the possibility of further medical treatment for her cancer. If there were no

[3] *Danaipour v McLarey* 286 F. 3d 1 (1st Cir. 2002) at para 4.

treatment options for the mother in SA, E and her parents were to return to the UK in October 2019. They made their travel arrangements accordingly. Upon their arrival in SA, E and her parents stayed with E's maternal aunt and her grandmother. E's mother consulted with a medical practitioner and she was scheduled to undergo surgery during the latter part of September. After she had undergone surgery, she was unable to return to the UK with E and her father as they intended. E's father left as planned in October 2019, leaving E behind with her mother.

[6] By the time of the father's return to the UK, the relationship between him and E's mother had deteriorated and was strained. This is evidenced by the fact that the father moved to alternative accommodation before his return to the UK, and the reasons advanced by E's mother for her subsequent decision not to return with E to the UK. Her evidence was that she came to the realisation that her health would not allow her to return to the UK, and that she should make arrangements for E's care after her death. She did not believe that E's father would be in a position to raise E and provide her with the necessary stability and security. She informed the father that she was going to remain in SA with E, and that her sister must raise E after her death. The father was opposed to the mother's unilateral decision and he insisted that E must be returned to the UK.

[7] In February 2020, the father approached the UK Central Authority (UKCA)[4] under the Convention and sought their assistance in securing the immediate return of E to the UK. His request was on the basis that he had not given consent for E to remain indefinitely in SA. At the direction of the UKCA, the appointee of the Ad Hoc Central Authority in SA (AHCA)[5] asked the mother to agree to the return of E to the UK, failing

[4] Article 6 of the Convention requires the appointment of a "Central Authority" as the relevant official to ensure that the provisions of the Convention are implemented. The United Kingdom's Central Authority is called the International Child Abduction and Contact Unit.

[5] Section 276(1) of the Children's Act 38 of 2005 states that the "'**Central Authority**'–

> (a) in relation to the Republic, means the Chief Family Advocate appointed by the Minister of Justice and Constitutional Development in terms of the Mediation in Certain Divorce Matters Act; or

which it intended to approach the court for appropriate relief. E's mother, through her attorneys, refused the request. She instead proposed that an assessment be made regarding E's best interests after her death. The proposal was rejected by the AHCA on the basis that the purpose of the Convention is to secure the return of a child to their country of habitual residence, and that it was for the courts of that country, in this case the UK, to decide any questions regarding the custody of E.

Litigation history

High Court

[8] On 25 June 2020, before the AHCA could commence proceedings under the Convention, E's mother and aunt brought an application in the High Court of South Africa, Western Cape Division (High Court) wherein they asked that certain parental rights and responsibilities in respect of E be conferred upon the aunt, and that E be raised in SA. The father opposed the application, and with the assistance of the AHCA launched proceedings under the Convention on 20 July 2020 by way of a counter-application. At that stage E was just over three years old. The first applicant in the Convention proceedings in the High Court was the AHCA. E's father was the second applicant. As in this matter, his participation in the proceedings as a cited party was unnecessary.[6] The procedural aspects of the Convention are regulated by the

(b) in relation to a convention country, means a person or office designated for such convention country under Article 6 of the Hague Convention on International Child Abduction."

[6] Unlike in some other jurisdictions such as New Zealand, where the Central Authority performs a facilitative role rather than initiating proceedings as a party, the AHCA is obliged to initiate proceedings for the return of a child under the Convention. Regulation 17 of the regulations issued under sections 75 and 280 of the Children's Act provides:

"(1) If a child has been wrongfully removed to the Republic or retained in the Republic, the Central Authority of the Republic must—

(a) upon receipt of the documents from the other country's Central Authority, study the application; and

(b) within 10 days after the child has been located, bring an application to the High Court on behalf of the parent or person with parental rights and responsibilities from whom the child has been wrongfully removed, to have the child returned to his or her place of habitual residence.

Regulations issued in terms of the Children's Act 38 of 2005 (Children's Act).[7] In terms thereof, proceedings under the Convention are initiated by the Central Authority.[8]

[9] The respondents in the High Court were initially E's mother and the maternal aunt. After the death of the mother, which occurred shortly before the High Court delivered its judgment, the aunt was substituted for the mother as the executor in the latter's deceased estate, and so featured as a respondent in the High Court in both her personal and nominal capacity.

[10] Article 16 of the Convention dictates that a judicial authority of the state to which a child was removed to or in which they are retained, shall not decide the merits of a custody dispute until such time it has determined that the child is not to be returned under the Convention[9]. The parties accordingly agreed that the application for parental rights be stayed pending the outcome of the Convention proceedings. This agreement and the agreement that E would in the interim continue to reside with her aunt was embodied in an order of the Court on 21 July 2020. At the same time, the Convention application was postponed to 7 September 2020.

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(2) An application for assistance made by an applicant to the Chief Family Advocate must, unless the contrary is proved, be deemed to constitute authorisation by the applicant for the Chief Family Advocate or a Family Advocate to exercise any power and perform any duty conferred or imposed on him or her under the Hague Convention, and to appear on the applicant's behalf in any proceedings that may be necessary under the Hague Convention."

[7] Regulations relating to Children's Courts and International Child Abduction, GN R250 *GG* 33067, 31 March 2010 (International Child Abduction Regulations).

[8] *Pennello v Pennello* [2003] ZASCA 147; [2004] 1 All 32 (SCA) (*Pennello*) at para 5 and *Central Authority v H* [2007] ZASCA 88; 2008 (1) SA 49 (SCA) (*Central Authority v H*) at para 22.

[9] Article 16 of the Convention reads:

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

[11] At the adjourned hearing the High Court raised a number of concerns with regard to the sufficiency of the information placed before it, and allowed the parties to file further affidavits to address those concerns. On 10 September the Court adjourned the proceedings for argument to 20 October 2020. The High Court delivered its judgment on 11 December 2020, ordering the return of E to the UK. E was now three years and five months old.

[12] The aunt applied for leave to appeal and filed a notice of appeal in January 2021. On 11 February 2021, the aunt was granted leave to appeal to the Supreme Court of Appeal. A notice of appeal was filed with that Court on 4 March 2021. Following the application for leave to appeal the AHCA and the father launched an urgent application in terms of section 18 of the Superior Courts' Act[10] for E to be returned to the UK. The application was dismissed on 21 March 2021 by reason of the existence of the agreed terms of the 21 July 2020 order. On 23 April 2021 the aunt filed an application with the Supreme Court of Appeal to admit an expert report by Ms Leigh-Anne Pettigrew (Ms Pettigrew), an educational psychologist as further evidence in the appeal. That report was yet to be compiled at the time and only became available nine months later in January 2022. It was not clear when the report was ultimately filed with the registrar of the Supreme Court of Appeal.

[13] The appeal was heard on 28 February 2022, some fourteen months after the High Court had ordered E to be returned to the UK. The judgment of the Supreme Court of Appeal was delivered two months later on 26 April 2022. At that time E was four years and seven months old. The Supreme Court of Appeal upheld the appeal. Dissatisfied with the outcome of the appeal, the AHCA and E's father then applied for leave to appeal the order of the Supreme Court of Appeal. The application for leave to appeal was opposed. The appeal was heard by this Court on 9 May 2023, at which time E was five years and ten months old.

[10] 10 of 2011.

[14] For convenience I shall continue to refer to the two applicants in the present proceedings as the "AHCA" and the "father" respectively, and to the two respondents as the "aunt". Any reference to the AHCA will include the father unless the context indicates otherwise.

[15] In her opposition to the Convention application, E's mother raised three defences. She firstly contended that E was not wrongfully detained in SA in breach of the applicant's rights of custody as defined in Article 3[11] read with Article 5 of the Convention.[12] Article 3 provides that the removal or retention of a child away from their country of habitual residence is to be considered wrongful. When in breach of custody rights attributed to anyone, either jointly or alone, and when those rights were actually exercised either jointly or alone, or would have been so exercised, but for the removal or retention of the child. The High Court rightfully found no merit in this argument. As the natural father, E's father's rights of custody arose by operation of law.

[11] Article 3 of the Convention reads:

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

[12] Article 5 of the Convention reads:

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

[16] The second defence raised was, with reliance on Article 20 of the Convention,[13] that the Court should construe the father's consent for E to remain in SA with her mother in such a manner so as not to limit it to the period during which the mother was receiving treatment for cancer. By the time of the hearing of the application by the High Court this argument appears to have morphed into one that any order for the return of E to the UK would be contrary to the fundamental principles under our law relating to human rights and fundamental freedoms. These arguments were not pursued with any vigour in the High Court. Their rejection by that Court was not pursued in the Supreme Court of Appeal, or in this Court, and nothing further needs to be said about them.

[17] The third and primary defence raised was that E's return to the UK should be refused as there was a grave risk that she would be exposed to psychological harm or be placed in an otherwise intolerable situation as envisaged in Article 13(b) of the Convention. This contention was, to paraphrase, based on the following allegations that—

(a) her father was not capable of providing her with the necessary care in the UK;

(b) E had developed a bond with her aunt who was willing and financially able to raise her;

(c) E was on a positive developmental trajectory;

(d) her return to the UK would cause her to be dislodged from her secure environment;

(e) the lack of continuity of everyday life would be detrimental to her having to deal with the loss of her mother; and

[13] Article 20 of the Convention provides:

> "The return of a child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

(f) there existed the possibility of E developing a complicated grief disorder of early childhood, due to the combined loss of her mother and an attachment figure in the person of the aunt, with possible adverse psychological consequences in the long-term.

[18] On the evidence placed before it, the High Court found that there was no substance in the objections raised as to the ability of the father to take care of E upon her return to the UK. The Court was further satisfied that the father would have the support of family members and friends in the UK in taking care of E. In this regard the Court acknowledged the fact that a family friend, and a mother of five children, who knew E from birth, had given an undertaking to accompany the applicant to SA, and to assist with the transition and adjustment of E should she be returned to the UK. The Court found that it was satisfactorily demonstrated that the social services available in the UK would be able to provide the necessary assistance to E, for example bereavement counselling, so as to mitigate the risk of any harm. It was further found that E's young age presented her with the advantage of being able to form a relationship and an attachment to a person who has physical contact with her and is able to provide her with daily care. This made it possible for E to form (or re-establish) a bond with her father should she be returned to the UK.

[19] The High Court ordered the return of E to the UK, and in addition made appropriate orders aimed at ensuring E's transition into the care of her father. It ordered the parties to bear their own costs.

[20] In dealing with the aunt's subsequent application for leave to appeal, the Court considered that she had failed to demonstrate that there were reasonable prospects of another court coming to a different conclusion or that there were compelling reasons to grant leave to appeal. Nevertheless, and because the High Court was concerned that protracted appeal processes in Hague Convention matters could defeat the purpose and objective of the Convention, the High Court granted leave to appeal to the Supreme Court of Appeal. The High Court was presumably worried that, if it refused

leave to appeal, there would be a delay while the aunt petitioned the Supreme Court of Appeal for leave to appeal. In retrospect, the wisdom of this decision by the High Court may be doubted.

Supreme Court of Appeal

[21] As I have already mentioned, in the Supreme Court of Appeal the aunt applied for leave to introduce further evidence. This application was premised on the psychological wellbeing of E following the death of her mother. The Supreme Court of Appeal granted the aunt leave to introduce Ms Pettigrew's report into evidence. It did so essentially based on a finding of exceptional circumstances, namely that the report dealt with E's position following her mother's death, and the likely impact of that event on E, should her return to the UK be ordered. Such an assessment, the Court found, could only have been made after the death of E's mother.

[22] The application to introduce the further evidence of Ms Pettigrew was initially opposed by the AHCA and the father. However, at the hearing of the appeal they undertook to abide by the decision of the court. They were given an opportunity to place further evidence of its own before the Supreme Court of Appeal, but elected not to do so. The reasoning was that the evidence of Ms Pettigrew could not assist the aunt in her opposition to the application for E's return and that obtaining further evidence would only serve to delay the finalisation of the proceedings.

[23] Having admitted Ms Pettigrew's report into evidence, the Supreme Court of Appeal conducted what was effectively a rehearing of the matter. It considered and dealt with two issues. The first was the mother's defence that the retention of E in SA was not wrongful as the father had consented thereto or acquiesced to her retention. Proceeding from the premise that on the undisputed evidence the father's consent for E to remain in SA was for as long as her mother was undergoing treatment, the Court found that the mother had failed to establish on the evidence that the applicant consented to E's continued retention beyond the period of her treatment. The father's consent, the Court found, was not unequivocal, and the mother

unequivocally signified her intention to no longer be bound to the agreed conditions for E to remain in SA. It also rejected the defence of acquiescence as not having been established on the evidence.

[24] The Court concluded, that this meant that the High Court was bound to order the return of E to the UK unless the mother could establish the existence of the circumstances envisaged in Article 13(b). Finding that the burden to prove the factual existence of the defence in the Article rests on the party raising it, and that factual disputes which may arise must be resolved through the application of the *Plascon-Evans* rule,[14] the Supreme Court of Appeal considered whether the defence in Article 13(b) was proved. The Supreme Court of Appeal found that on the evidence of Ms Pettigrew, Professor Astrid Berg (Professor Berg) who is a child and adolescent psychiatrist, and E's mother, the High Court was not obliged to order the return of E to the UK, as the mother and E's aunt had successfully established that her return would expose her to the risk of psychological harm, or otherwise place her in an intolerable situation as contemplated in Article 13(b) of the Convention.

[25] This finding was made on two bases. The first was that the return of E to the UK would expose her to a grave risk of psychological harm or place her in an intolerable situation assessed on the basis of the evidence of Professor Berg and Ms Pettigrew. The second was the existence of that risk on the basis of the evidence of the mother that, by reason of the personal circumstances of E's father, he was not capable of raising E and providing her with the necessary care in the UK.

[26] The Supreme Court of Appeal then next considered whether it was established that the authorities in the UK would not be able to mitigate the risks raised in the evidence of the aunt. It found that there was compelling evidence that the measures in place in the UK would not be sufficient to ameliorate the psychological and emotional

[14] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) (*Plascon-Evans*) at paras 634E-635C. In summary, the rule is that, where there are material and bona fide disputes of fact in motion proceedings, the case must be decided on the respondent's version of the disputed facts.

harm to which E would be exposed to on her return to the UK. This finding was based on Professor Berg's evidence in her initial report that E would be entering a completely new environment upon her return to the UK, and what is said to be "much uncertainty about the quality of the care that E will receive in the UK".[15]

[27] With regard to the availability of bereavement counselling for E on her return to the UK, the Court again relied on the evidence of Professor Berg that counselling cannot counter the trauma induced by the loss of two attachment figures. This finding does not account for Professor Berg's evidence in her supplementary report to the High Court that E could benefit from bereavement counselling if returned to the UK, and that it may be possible for her to transition into the care of the applicant in a relatively short period of time. I deal more fully with the evidence later in this judgment.

[28] Based on these findings, the Supreme Court of Appeal granted the application to admit Ms Pettigrew's report with costs, it upheld the appeal with costs, and it set the decision of the High Court aside. The order of the High Court was replaced with an order dismissing the Convention application with costs. It is this order that is the subject matter of the proceedings before us. Importantly, there is no appeal against the order pertaining to the admission of Ms Pettigrew's evidence.

In this Court

The submissions of the AHCA

[29] The AHCA submits that this Court has jurisdiction as the matter raises a constitutional issue and arguable points of law of general public importance. The constitutional issue is said to be the fact that the issues raised implicate the best interests of the child in section 28(2) of the Constitution. The arguable points of law deal with the manner in which a court must conduct an enquiry as envisaged in Article 13(b) of the Convention and what the relevant considerations are when making

[15] *Koch N.O. v Ad Hoc Central Authority for the Republic of South Africa* [2022] ZASCA 60; 2022 (6) SA 323 (SCA) at para 50.

an order in terms thereof. These include the nature of the test that must be applied in deciding whether a grave risk of harm or an intolerable situation exists as envisaged in Article 13(b), how to find a balance between the short and long-term interests of a child in the enquiry envisaged by the Article, and the weight to be accorded in this determination to the fact that the party who seeks to resist the return of the child to their country of habitual residence with reliance on Article 13(b) does not hold any existing rights of custody or access to the child concerned.

[30] With regard to the findings made by the Supreme Court of Appeal, the AHCA submits that in her two reports submitted to the High Court Professor Berg does not express the opinion that the risk to E's mental health would be grave in the event of her return to the UK. The AHCA argues that the consequences of E's return outlined by Professor Berg are the inevitable disruption that is inherent in a court-ordered and unwelcome return of an abducted child to their country of habitual residence. Further, with reliance on Professor Berg's opinion, AHCA submits that the cognitive capacity of a child under the age of ten to comprehend the concept of death has the benefit that it serves to postpone the initial psychological impact that would typically arise from an immediate and complete understanding of the death of a primary caregiver.

[31] Based on Professor Berg's evidence that a young child tends to bond with the person who is responsible for their daily needs and care, the AHCA argues that there was no evidence to substantiate why E would not or should not re-establish a bond with her father upon her return to the UK. The AHCA contends further that the Supreme Court of Appeal failed to give adequate consideration to the evidence regarding the social services available to E in the UK, which may provide E with the necessary support should she be returned to that country. Furthermore, that the expert opinions relied on by the Supreme Court of Appeal for its findings failed to adequately consider, in E's best interests, the importance of a continued relationship with her only biological parent. The emphasis placed by the experts on the bond that E had with her aunt would result in her being deprived of the care and affection of her father who is by

law her custodian. It follows, so the argument goes, given all the circumstances of the matter and the facts placed before the High Court, that the High Court was correct in finding that it was not demonstrated that, if E's return to the UK were ordered, she would not be protected from the potential consequences arising from her court-ordered return.

The submissions of E's aunt

[32] The aunt's submission is that this Court's constitutional jurisdiction is not engaged. The best interests of the child are paramount in every matter involving a child and any consideration of section 28(2) in this matter could only have limited application to other Convention applications.

[33] The aunt argues that this matter does not raise any new principle in respect of the Convention that this Court has not previously ruled on or that warrants a ruling from this Court. It is disputed that what the AHCA contends are legal questions or that any arguable points of law of general public importance are raised thereby. The submission is that these questions have previously been determined by this Court in *Sonderup*,[16] that those determinations have consistently been applied by the lower courts, and are consistent with that of courts in the majority of foreign jurisdictions.

[34] With regard to the merits of the matter, the aunt submits, firstly, that there is no evidence that E would be able to establish a bond with her father if she were to be returned to the UK. Based on the evidence of Professor Berg and Ms Pettigrew, it is submitted that the Supreme Court of Appeal correctly found that E's return to the UK would expose her to a grave risk of psychological harm and an intolerable situation as envisaged in Article 13(b). The second submission is that the Supreme Court of Appeal correctly concluded that the social and other services available to E in the UK would not be sufficient to mitigate the grave risk E would face upon a return to that country. The third submission is that although Article 13(b) is forward looking, that is, it looks

[16] *Sonderup v Tondelli* [2000] ZACC 26; 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC) (*Sonderup*).

at what the position would be if a child were to be returned to their home country, this does not mean that a court should not pay attention to the past. Accordingly, so it is submitted, the Supreme Court of Appeal correctly relied on the evidence of E's mother with regard to the past conduct of her father in support of the submission that he would not be fit to care for her, should she be returned to the UK.

The jurisdiction of this Court and leave to appeal

[35] This matter deals with the interpretation of Article 13(b) of the Convention. The Convention implicates the rights of a child in section 28(2) of the Constitution by mandating contracting states to return a child to the country of habitual residence when the child was removed in the circumstances postulated by the Convention. The return of the child takes place without any comprehensive determination of what the best interests of the child may demand. In the scheme of the Convention, that is the function of the state where the child is habitually resident.

[36] The court's usual investigatory powers are as a result inevitably constrained. The defence in Article 13(b) provides an exception to the court's otherwise limited function. However, the courts in various jurisdictions have consistently held that Article 13(b) should be narrowly interpreted. This approach is based on the purpose and the text of the Convention. It is further given effect to in some jurisdictions by a heightened burden of proof by requiring the party opposing the return of the child to establish by clear and convincing evidence that a grave risk of harm exists in the return of the child.

[37] This approach places a limitation on the usual authority of the court to investigate and determine what would be in the best interest of a child. The interpretation of Article 13(b) therefore raises a constitutional matter. It raises the question whether Article 13(b) is capable of an interpretation that strikes a fair balance between the competing interests and constitutional rights at stake in Convention proceedings. These aspects serve to place a limitation on the rights of the child in section 28(2) of the Constitution, and their consideration raises a constitutional matter.

[38] There are also two important arguable points of law of general public importance which ought to be considered by this Court. Those issues arise in the context of the application of the exception in Article 13(b) and from the issues raised by the AHCA in the appeal. They are the legal principles which find application in the determination of factual disputes in deciding whether a defence raised in terms of Article 13(b) has been established, and the nature and the content of the discretion which a court is required to exercise following a finding that the defence in Article 13(b) has been proved. Neither of these matters were dealt with by this Court in *Sonderup*, and their determination involves the interpretation of Article 13(b) in the wider scheme of the Convention. The general public importance of these issues is emphasised by the fact that the Convention is, as a whole, designed to protect the interests of children generally,[17] and its current application implicates the duty of the state, of which the judiciary is the third arm, to comply with its international obligations.[18] The exercise of the discretion envisaged in Article 13(b) does not arise very often, in that the defences raised in terms thereof often fail.

[39] In the circumstances, the AHCA must be granted leave to appeal. The matter raises issues of general public importance, it has reasonable prospects of success and a decision thereon will be in the interests of justice in that it goes beyond the narrow interests of the parties in this matter. The applicants must accordingly be granted leave to appeal.

The Convention

Introduction

[40] The return of children who have been wrongfully abducted from their place of habitual residence is governed by the Convention. It is an international agreement to

[17] An entrenched right in section 28(2) of the Constitution.

[18] Section 231 of the Constitution.

which SA acceded on 8 July 1997. The Convention was first incorporated into our domestic law by way of the Hague Convention of Civil Aspects of Intentional Child Abduction Act (Hague Convention Act).[19] This Act was later repealed, and the Convention was thereafter incorporated into the Children's Act.[20] The objective and the purpose of the Convention are found in its preamble and in Article 1.[21] The purpose of the Convention is to protect children from the harmful effects of their wrongful removal or retention, to ensure their prompt return to their state of habitual residence; and to secure protection for rights of access. Its stated objective is to give effect to the paramount importance of the interests of children in matters relating to their custody. As will be demonstrated, the provisions of the Convention seek to achieve its stated purpose in a manner that promotes its overarching objective of protecting the interest of children.

[41] To give effect to the objectives of the Convention, Article 1 requires contracting states to promptly return a child who has been wrongfully removed or retained, and to ensure that rights of custody and of access under the law of one contracting state are effectively respected in other contracting states. The purpose of return is to enable the courts of the country of habitual residence, rather than the courts of the country to which the child has been wrongfully removed to, to decide matters of custody and other rights. A removal or retention will be wrongful where it is in "breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone."[22] The wrongfulness of the removal or retention of a child is accordingly determined with

[19] 72 of 1996.

[20] In terms of section 275 of the Children's Act the provisions of the Convention are law in the Republic "subject to the provisions of this Act".

[21] Article 1 of the Convention provides:

> "The objects of the present Convention are –
>
> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

[22] Article 3(a) of the Convention.

reference to the applicable custody laws. The rights of custody with which the Convention is concerned are defined to include rights to the care of the child and the right to determine the child's place of residence.[23] A child that is wrongfully removed or retained is considered to be an abducted child, who is subject to the provisions of the Convention.

[42] The core provision in the Convention to give effect to its stated objectives is found in Article 12(1). It reads as follows:

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

[43] Article 12(1) thus requires contracting states to provide a process which will result in the mandatory return of an abducted child to their country of habitual residence whenever an application is made within a period of less than one year following the removal of a child. The primary rule is therefore that if, following the wrongful removal of a child, the application for return is made within twelve months, an order for return must forthwith be made.

[44] The drafters of the Convention realised, however, that the best interests of a particular child may not always be best served by their speedy and compulsory return to their home country. It accordingly provides for exceptions to the mandatory return of a child. An exception to the mandatory return of an abducted child is found in Article 12(2). In terms thereof, if the return proceedings are commenced a year or more after the removal of the child, the court or other administrative authority of the contracting state remains obligated to order the return of the child, unless it is demonstrated that the child is settled in their new environment. It reads:

[23] Article 5(a) of the Convention.

> "The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

[45] Article 12(2) thus recognises that where a lengthy period has passed (twelve months) and the child has settled in their new environment, the return of the child to their country of habitual residence may no longer be in their best interest. The objectives of the Convention of securing a speedy return of the child can no longer be met and the return of the child might cause further disruption and distress to the child. This exception calls for an assessment of whether a wrongfully removed child has become integrated in their new environment. Not unlike the other exceptions to Article 12(1), it serves the overall purpose of giving effect to the declared aim of the Convention in its Preamble of protecting the best interests of affected children.

[46] Further exceptions to Article 12(1) are found in Article 13. It reads as follows:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social

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

[47] What Article 13 does is recognise that in some circumstances it might not be appropriate to order the return of a child. It gives the court of the requested state the power not to return an abducted child if the person opposing the return establishes one of the grounds which Article 13 specifies. In summary, those grounds are: the non-exercise of custody rights, consent or acquiescence in removal, the existence of a grave risk of harm to the child or an intolerable situation if the return of the child is ordered, or the child, being of sufficient age and maturity, objects to being returned.

[48] There are two important aspects to Article 13 that have significance in the context of the issues raised in this matter that must be highlighted. The one is that, notwithstanding that the party opposing the return of a child establishes one of the grounds in Article 13, the court retains a general discretion to order the return of the child. The existence of one of the grounds in Article 13 means only that the Court is not obliged ("bound") to order the return of the child, but it may still do so. The other is that Article 13 provides that, in considering the specified exceptions, the relevant authority in the requested state must take into account the information relating to the social background of the child provided by the Central Authority of the requesting state.

[49] The Convention facilitates the return of the abducted child by requiring contracting states to designate a Central Authority, that is, a specific government office, to perform the task of receiving applications for assistance in securing the return of a child and for that authority to take or cause to take all appropriate measures to obtain the voluntary return of the child. It is important to point out that the Convention does not seek to determine who should have custody of a child.[24] It rests implicitly on the

[24] Article 16 of the Convention provides that:

> "the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained ***shall not*** decide on the merits of rights of custody until it has been determined that the child is not to be returned under the Convention." (Emphasis added.)

principle that any dispute with regard to rights of custody or access must be determined by the competent authorities or the courts in the state where the child has their habitual residence prior to their removal. The purpose of the return is to enable the courts of the country of the child's habitual residence, rather than the courts of the country to which the child was wrongfully removed, to decide matters of custody and access.

[50] The underlying premise of the Convention is therefore that the best interests of abducted children generally are best served by their prompt return to their country of habitual residence. This is based on a number of assumptions that—

(a) the wrongful removal of children from their country of habitual residence is not in their best interests;

(b) the prompt return of children to their state of habitual residence will normally serve their best interests and facilitate the resolution of custody disputes by avoiding delays;

(c) the courts of the country of habitual residence are in a position to protect the child upon their return; and

(d) the expeditious and summary return of a child protects children generally by acting as a deterrent to their abduction.

[51] The exceptions in Article 13 therefore serve to recognise this fact by enabling the court hearing a Convention matter to make a determination with regard to the welfare and best interests of a particular child in their own circumstances. As I proceed it will be pointed out, the determination is not made in isolation, but within the context of the objectives of the Convention.

The Convention and the paramountcy of the child's best interest in section 28(2) of the Constitution

[52] Section 28(2) of our Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child". In *Sonderup*[25] this Court considered the fact that the duty placed by the Convention on the court of the state where the child is located, to return the child to their home country, may place a limitation on what is, in the short-term, in the best interests of the child. This Court accordingly proceeded to determine whether that limitation is inconsistent with section 28(2). In conducting the proportionality analysis as envisaged in section 36 of the Constitution,[26] this Court concluded that the Convention goes no further than is necessary to achieve its objective, and that the means employed by it to achieve that objective are proportional to the end it seeks to attain.[27]

[53] In arriving at this conclusion, this Court considered the purpose of the Convention, its overriding aim of protecting the best interests of children in general by the prevention of their abduction and its negative impact, as well as the fact that the scheme of the Convention is carefully crafted to mitigate the extent of the limitation by providing for exceptions to the mandatory return of a child.[28] The exceptions in

[25] *Sonderup* above n 16 at para 28.

[26] Section 36 of the Constitution provides —

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[27] *Sonderup* above n 16 at para 35.

[28] Id at para 32.

Article 13, and what was referred to as the appropriate application of the Convention and the ability of the court to shape an order ensuring that any limitation that the Convention may place on the entrenched rights in section 28(2) "[i]s narrowly tailored to achieve the important purposes of the Convention", led to the finding that the Convention, and the Hague Convention Act, which incorporated its provisions into our domestic law, are consistent with the Constitution.[29]

The interpretation of Article 13(b)

Sonderup and Article 13(b)

[54] In addition to the constitutionality of the Convention, this Court in *Sonderup* also dealt with the exception in Article 13(b) on the facts before it. In the context of the issues raised in the present matter, the following aspects in the judgement are worth mentioning:

(a) The interrelated nature of the provisions of the Convention in serving its main purpose of protecting the interests of children was recognised. This is best achieved by: the hearing of custody disputes by the appropriate courts; preventing that hearing being delayed by turning Convention proceedings into a custody determination; preventing the wrongful circumvention of that forum by the unilateral actions of one parent; and recognising that there may be specific circumstances of a particular child that may dictate that it is not in the interest of that child to be returned to their country of habitual residence by the provision of the exemptions of Article 13.[30] The limited nature of these exemptions was emphasised by the statement quoted earlier, namely that they are intended to provide exceptions, in certain circumstances, to protect the welfare and best interests of the child.[31]

[29] Id at para 37.

[30] Id at paras 29 and 31.

[31] Id at para 32.

(b) The psychological harm relied upon in *Sonderup* was the compromising effect on the healthy psychological development of the child by being exposed, upon her return to her home country (British Columbia in Canada), to the relationship of her parents that was characterised by domestic abuse. The harm contemplated was found not to be harm of a serious nature as contemplated by Article 13(b): "[i]t is in the main harm which is the natural consequence of the child's removal from the jurisdiction of the courts of British Columbia, a Court ordered return, and a contested custody dispute in which the temperature has been raised by the mother's unlawful action".[32]

(c) This Court left the question open as to whether our courts should follow a strict approach to the interpretation and application of Article 13(b) set by courts in other jurisdictions.[33]

(d) The existence and the nature and incidence of any burden of proof which may arise in those instances where a party to Convention proceedings seeks to rely on the exception in Article 13(b) was not addressed.

(e) Because of the finding that the Article 13(b) defence was not proved, this Court did not need to consider the nature of, and the considerations relevant to the exercise of the discretion implicit in the terms of the Article.

(f) Another aspect not addressed was the approach to be adopted to the resolution of factual disputes where the parties have elected to place evidence on affidavit and other documentary evidence before the court hearing the return application.

[32] Id at para 46.

[33] Id at para 44.

The scope of Article 13(b)

[55] Recognising that the interests of the child are of fundamental importance, the Convention acknowledges, through the exceptions to the duty to secure the prompt return of a child, that there may be factual situations which have to do either with the person of a particular child or with the environment with which that child is most likely connected or to which the child is requested to be returned, where the return would be detrimental to the interests of the child and contrary to the objectives of the Convention. The Convention accordingly makes it possible for a departure from the assumption that a prompt return is generally in the best interests of a child. In this manner the Convention serves to protect the short-term best interests of a particular child by authorising the court seized with an application under the Convention to have regard to the welfare and best interests of that child in specified circumstances, and to refuse, in limited circumstances, to order the return of that child. The focus is on the child and the issue is the risk of harm to that child in the event of their return.[34]

[56] The words "grave risk" in Article 13(b) indicate that the exception is "forward looking", in that it requires the court to look at the future by focusing on the circumstances of the child upon their return, and on whether those circumstances would expose the child to a grave risk as envisaged in Article 13(b). The focus, in determining what constitutes a "grave risk" of "psychological harm" as contemplated by Article 13(b), is on the harm that is likely to eventuate should the child be returned. The evidence must therefore be limited to the psychological and emotional impact of returning a child to their habitual residence.

[57] The enquiry is, as a result, of a limited nature. It does not allow the court to otherwise turn the proceedings into an adversarial contest on the merits of the dispute

[34] *Re IG* [2021] EWCA Civ 1123 (*Re IG*) at para 47 and *Z v Z* [2023] EWHC 1673 (Fam) (*Z v Z*) at para 28.

with regard to rights of custody and access, which underlie the removal of the child from their home country. This Court in *Sonderup* held:

> "It would be quite contrary to the intention and terms of the Convention were a court hearing an application under the Convention to allow the proceedings to be converted into a custody application. . . . Rather, the Convention seeks to ensure that custody issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child. That court will have access to the facts relevant to the determination of custody."[35]

[58] The long-term best interests of a child are usually reserved for custody proceedings on the merits. Article 13(b) is concerned with the short-term interests of the child if returned to the country where the custody proceedings are to be determined. It follows that it is important to distinguish between those issues and evidence which are relevant to a determination of the merits of a custody question, and those which are relevant within the much narrower scope of determining whether a return order would create the risks envisaged in Article 13(b). It would not be proper for the court, in the case of an Article 13(b) determination, to consider issues and information pertaining to custody beyond what is necessary to determine the existence of an exemption.

[59] Accordingly, aspects such as the psychological profiles of the parents, detailed evaluations of parental fitness, evidence concerning lifestyles, and the nature and quality of relationships, all bear upon the issues that will ultimately be determined by the appropriate tribunal in the child's home country. To this may be added the projected long-term psychological consequences of the return of the child in the nature of that which was considered in *Sonderup*.[36]

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[35] *Sonderup* above n 16 at para 30.

[36] Id.

[60] The terms "grave risk" and "intolerable situation" are not defined by the Convention. In some jurisdictions, Article 13(b) is construed narrowly.[37] In the United States of America, for example, this is achieved by the imposition of a higher standard of proof: a party raising an Article 13(b) defence in Convention proceedings must prove the defence by "clear and convincing evidence".[38] The reasoning behind the narrow interpretation of the exception appears to be the fear that an Article 13(b) determination might otherwise morph into a best interests determination, and that it may be exploited by parties attempting to forum shop by substituting the forum chosen by the abductor for that of the child's habitual residence. That would defeat the objectives of the Convention and may render it ineffective. This is a valid consideration. That it is an aim of the Convention to prevent forum shopping was recognised by this Court in *Sonderup*:

> "Given the inappropriateness of a specific forum, the Convention also aims to prevent the wrongful circumvention of that forum by the unilateral action of one parent. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help".[39]

[61] It is in my view unnecessary to resort to an attempt to give Article 13(b) a meaning that is any more restrictive than what is not already clearly conveyed by the plain meaning of its wording. In *KG v CB*[40] our Supreme Court of Appeal approved the approach adopted by the United Kingdom's Supreme Court in *Re E (Children)*.[41] In that case the Court held:

> "[T]here is no need for the Article to be narrowly construed. By its very terms, it is of restricted application. The words of Article 13 are quite plain and need no further elaboration or gloss.

[37] See the cases referred to in para 44 in *Sonderup* above n 16.

[38] *Friedrich v Friedrich* 78 F 3d 1060 (6th Cir. 1996) (*Friedrich*).

[39] *Sonderup* above n 16 at paras 31 and 43.

[40] *KG v CB* [2012] ZASCA 17; 2012 (4) SA 136 (SCA) (*KG v CB*) at para 50.

[41] *Re E (Children) (Wrongful Removal: Exceptions to Return)* [2011] UKSC 27 (*Re E*) at para 31.

> First, it is clear that the burden of proof lies with the person, institution or other body, which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities . . .
>
> Second, the risk to the child must be 'grave'. It is not enough, as it is in other contexts such as asylum, that the risk must be 'real'. It must have reached such a standard of seriousness as to be classified as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.
>
> Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or *otherwise*' placed 'in an intolerable situation' (emphasis supplied). As was said in *Re D*[42] at para 52, '"Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate"'. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate."[43]

[62] The approach that Article 13(b) does not require elaboration beyond its terms must be endorsed. It is implied in the plain meaning of the words used in Article 13(b) that it sets a high threshold, and any other approach will be inconsistent with the language used and the objectives of the Convention. The level of the risk must be of a serious nature, and the words "otherwise place the child in an intolerable position" throw considerable light not only on the degree of seriousness of the risk of the harm, but also the harm itself, that the Convention has in mind.[44] The word "otherwise" is indicative of a conclusion that the physical and emotional harm contemplated is harm to the degree that also amounts to an intolerable situation.

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[42] *Re D (a child)* [2006] UKHL 51.

[43] Id at paras 31-4.

[44] *Sonderup* above n 16 at para 44.

[63] The risk of harm that will meet the threshold in Article 13(b) will inevitably be determined by the facts of any particular case. As a general proposition, it may be said that the risk of harm must be of a severity which is more than is inherent in the inevitable disruption, uncertainty and anxiety which follows on an unwelcome return to the jurisdiction of the child's home country. It is important to make the observation that Article 13(b) does not require there to be a certainty that harm will occur. What is required is persuasion by applying the legal standard of proof that there is a risk which warrants the qualitative description of a "grave risk" that the return will "expose" the child to harm. Whether the risk reaches that threshold must inevitably be determined on the facts of the case and by the nature of the projected harm.

[64] It is further necessary to place a caveat on the words in the last paragraph of the above quoted passage from the judgment in *Re E (Children)*. It was certainly not intended to convey that any type of harm that is more than the ordinary "rough and tumble" of growing up will constitute harm or an intolerable situation as envisaged in Article 13(b).[45] Such a suggestion is contrary to the exceptional nature of the exemptions in the Article, which exemptions, as stated in *Sonderup*, were "intended to provide exceptions, in extreme circumstances, to protect the welfare of children".[46]

[65] The answer to the concerns which underlie the notion that the exceptions must be given a restrictive interpretation must rather be found, as envisaged in *Sonderup*, in a balanced approach to the determination made in Article 13(b), and the correct application of the Convention.[47] This requires the court to approach the enquiry in a manner that will give effect to the meaning of the language of the Article, the objectives of the Convention, the limited nature of the assessment the court is required to make with regard to what the short-term best interests of a particular child are, the location of the burden of proof, and the summary nature of the proceedings.

[45] *Re E* above n 41 at para 34.

[46] *Sonderup* above n 16 at para 32.

[47] Id at para 35.

[66] An integral part of the scope of the enquiry the court is required to conduct, in determining whether there is a grave risk of harm or an intolerable situation as contemplated in Article 13(b), is the presence or absence of ameliorative measures to ensure the child's safety upon return to their home country.[48] Simply put, if the child can be sufficiently protected from grave harm when returned, then the child does not in fact face a "grave risk" of serious harm as contemplated by Article 13(b). This is consistent with the underlying premise of the Convention that the judicial and social authorities of the home country are in a position to provide the necessary protection and support in dealing with any eventuality that may arise from the return of the child.

[67] There must as a result be cogent evidence placed before the court by the person raising an Article 13(b) defence that establishes the absence of adequate or effective measures which may either reduce the risk of the harm from occurring or the seriousness of the projected harm itself. What the nature of such measures are, must inevitably be dictated by the nature of the harm and its accompanying risk that is established on the evidence in any particular case.

The burden of proof and summary nature of Convention proceedings

[68] What is evident from the foregoing is the exceptional nature of Article 13(b). It serves to moderate the obligation of the court to return an abducted child to their home country. It follows that the duty rests on the person who invokes the exception in defence to an application for the return of the child to show that the factual situation contemplated therein exists. I am in agreement with the conclusion in *KG v CB*[49] that the duty placed on the person raising a defence in Article 13 is no higher than the ordinary standard of proof applicable in civil proceedings, namely a balance of probabilities.[50] What is not required is a standard of proof informed by the existence or otherwise of "clear and convincing" evidence found in the American legal system,

[48] *Re IG* above n 34 at para 49 and *Z v Z* above n 34 at para 28.

[49] *KG v CB* above n 40.

[50] *Re E* above n 41 at para 38.

which is a standard somewhere between the ordinary civil standard and the criminal standard of beyond a reasonable doubt found in the American legal system.[51]

[69] An aspect that must be emphasised, as made clear in *Re E*, is that, in examining whether the exemption in Article 13(b) has been established, the court is required to evaluate the evidence against the ordinary civil standard of proof whilst being mindful of the limitations involved in the summary nature of Convention proceedings. Flowing from this is that the evaluation by a trial court of the evidence must be treated with the necessary deference in any subsequent appeal proceedings.

[70] Further, the nature of the postulated harm will inform the degree of persuasion that may be enough to conclude that the burden of proof has been discharged.[52] What the Court must be persuaded of is the existence of a grave risk. A grave risk within the meaning of Article 13(b) may be shown to exist even though the court cannot say that the risk is more likely than not to eventuate. As was made clear in *Re E*, in determining whether a particular risk is "grave", there is an inter-relationship between the feared harm and the likelihood of it occurring. A risk with a modest likelihood of occurring may be a grave risk if the feared harm is very serious. Conversely, if the feared harm is more mundane, a greater likelihood of it occurring may be required in order to describe the risk as grave.[53]

[71] A determination of the existence of a grave risk or an intolerable situation as contemplated in Article 13(b) raises a factual question that requires the party raising the defence, in the discharge of the burden of proof, to place evidence of a factual nature before the court. This creates the obvious potential for factual disputes. Following its earlier decision in *Pennello*[54] the Supreme Court of Appeal dealt with the factual

[51] *Addington v Texas* 441 US 418 (1979).

[52] *Re E* above n 41 at para 33.

[53] Id.

[54] *Pennello* above n 8 at paras 39-41.

disputes which arose in the present matter by applying the principles articulated in *Plascon-Evans*.[55] Namely, that where disputes of fact have arisen in application proceedings, a final order may be granted only if the facts alleged in the respondent's affidavits, together with those facts alleged in the applicant's affidavits that have been admitted by the respondent or which the respondent cannot dispute, justify such an order.

[72] I am unable to agree with this approach to evidence in Convention proceedings. Convention proceedings are designed to provide a speedy resolution of disputes over abducted children. As proclaimed in Article 1, the aim of the Convention is to secure the prompt return of children removed from the country of habitual residence, and to restore the *status quo ante* (the situation that prevailed before [the abduction]) so that the custody and other issues that underlie the removal of a child can be decided by the courts of that country. Article 11 further expressly directs the relevant authorities to act expeditiously.[56] Regulation 23 of the Regulations relating to Children's Courts and International Child Abduction (International Child Abduction Regulations) stipulates that "[p]roceedings for the return of a child under the Hague Convention must be completed within six weeks from the date on which judicial proceedings were instituted in a High Court, except where exceptional circumstances make this impossible".[57]

[73] The nature of the proceedings under the Convention, and the manner in which the court hearing the matter decides to receive and assess the evidence placed before it,

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[55] *Plascon-Evans* above n 14 at 634E-635C.

[56] Article 11 of the Convention provides:

> "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
>
> If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested state, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be."

[57] International Child Abduction Regulations above n 7.

must inevitably be dictated by the aforementioned objectives of the Convention and the legislation that incorporates it into our domestic law. Proceedings under the Convention are clearly designed with the objective of providing an expeditious outcome. The compulsory procedure for initiating proceedings is by way of an application to the High Court.[58] It is not open to SA's Central Authority to choose the procedural form of the proceedings under the Convention. Also, neither the Children's Act[59] nor the Regulations[60] are prescriptive as to how the court should receive evidence.

[74] The Hague Regulations do not prescribe that an application in Convention proceedings must conform to rule 6 of the Uniform Rules. The Regulations simply provide for the filing of:

(a) an "application";[61]

(b) a "response" to the application within five days from the date of its service;[62] and

(c) a "statement" in reply within a further five days.[63]

[58] Regulation 17(1) of the Hague Regulations provides:

> "If a child has been wrongfully removed to the Republic or retained in the Republic, the Central Authority of the Republic must:
>
> (a) upon receipt of the documents from the other country's Central Authority, study the application; and
>
> (b) within 10 days after the child has been located, bring an application to the High Court on behalf of the parent or person with parental rights and responsibilities from whom the child has been wrongfully removed, to have the child returned to his or her place of habitual residence."

[59] 38 of 2005.

[60] International Child Abduction Regulations above n 7.

[61] Regulation 17(1) id.

[62] Regulation 29(1) id.

[63] Regulation 29(3) id.

[75] Ordinarily, no doubt, the application, response and reply will be in the form of affidavits but this is not made mandatory.[64] Regulation 33 in turn obliges the court to record the proceedings before it, of which record must, amongst others, include "all *viva voce* evidence given in court". These provisions are consistent with proceedings which are intended to be of summary nature, and the vesting of a discretion in the court to allow evidence to be placed before it of a nature enabling it to arrive at an informed decision with the speed that the Convention dictates. It is not necessary to say anything with regard to how the discretion of the court to admit evidence must be exercised. It is a matter that will be dictated by the circumstances of the particular case, the nature of the proposed evidence, as well as the contested issues which that evidence seeks to deal with.

[76] The body of evidence placed before the court in Convention proceedings may thus include evidence other than evidence on affidavit. The present matter serves to confirm this. The information received from the UKCA was not under oath. Neither were the reports of Professor Berg, Ms Anne Cawood (a social worker), Ms Pettigrew or that of Ms Carstens, the Legal Aid practitioner who provided this Court with a report at its request. In addition to the prompt response required by the Convention and the Regulations, the AHCA, as the applicant in proceedings under the Convention in this country, is likely to find itself at an evidential disadvantage, since the person from whom the child was taken will be resident in another country, often on a different continent. These considerations militate against strict rules on the adducing of evidence. The body of evidence placed before the court in proceedings under the Convention may accordingly consist of a hotchpotch of different types of material. This is not conducive to a determination of factual disputes by applying the *Plascon-Evans* rule.

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[64] A court hearing a Hague application is given wide procedural powers in terms of regulation 24 id:

> "Where an application has been made to a High Court by the Central Authority of the Republic under the Hague Convention, that Court may, at any time before the application is determined, give any interim direction that it deems fit in order to regulate any aspect of the progress of an application under the Hague Convention and to ensure the welfare of the child in question and to prevent any changes in the circumstances relevant to the determination of the application."

[77] On the contrary, Article 13 itself makes the application of the *Plascon-Evans* principle inimical to a determination of a defence raised in terms thereof. The use of the word "shall" in the Article obliges the court tasked with making such a determination, to "take into account the information relating to the social background of the child provided by the Central Authority, or other competent authority of the child's habitual residence". Such evidence is bound to be factual in nature, and the obligation placed on the court to take it into account in making a decision is inconsistent with the process of fact selection that is inherent to the *Plascon-Evans* rule.

[78] There are two further considerations that militate against applying ordinary motion principles to Convention proceedings. The first is that, as a general rule, competing factual versions on affidavit cannot, in ordinary motion proceedings for final relief, properly be determined on a consideration of the probabilities.[65] The second is that, otherwise than with applications under the Uniform Rules, it is not open to an applicant in Convention proceedings to choose the procedural form of the proceedings. By applying *Plascon-Evans*, the applicant, that is, the AHCA and by extension the person from whose custody the child has been taken, will accordingly find themselves at "peril" not by reason of their own choice, as in the case of elective application proceedings under the Rules. The Court in *Ngqumba v State President* held:

> "A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the claim will probably be disputed he chooses that procedural form at his peril for the Court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence be placed before it, but to dismiss the application."[66]

[65] *Administrator Transvaal v Theletsane* 1991 (2) SA 192 (A) at 197A-C.

[66] *Ngqumba v Staatspresident; Damons NO v Staatspresident* 1988 (4) SA 224 (A) at 261C-D. See also *Tamarillo v BN Aitken* 1982 (4) SA 398 (A) at 430G and *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1168.

[79] Proceedings under Article 13(b) are therefore summary in nature, and a determination made in terms thereof must be based on an overall assessment of all the evidential material placed before the court.[67] This is consistent with the approach to Convention proceedings in other jurisdictions. In *Re CC (A Child)* the Court held:

> "As Dame Elizabeth Butler-Sloss P (as she then was) observed in *Re U (L) (A Child)* (2) B (L) (*A Child) (Service Injury: Standard of Proof)* [2004] EWCA Civ 567, the court 'invariably surveys a wide canvas'. I take this precept to be no less applicable in Hague Convention cases. It is a fundamental tool and technique of proper evidential analysis.
>
> In *Re T (Children)* 2004 EWCA Civ 558, her Ladyship added:
>
> > '. . . evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to the other evidence and to exercise an overview of the totality of the evidence.'"[68]

[80] In evaluating the oral evidence that has been tested under cross-examination should not present any difficulty. The determination of disputes arising from contested affidavits and other documentary evidence must be approached by making an overall assessment based on the common facts, those parts of the evidence which are unchallenged or not challenged in any seriousness, the parts which are corroborated by other cogent independent evidence, as well as the probabilities as they arise from that evidence. In the absence of the court being able to arrive at a decision, the result would be that the party who bears the burden of proof will have failed to establish the defence in Article 13(b).

The judicial discretion in Article 13(b)

[81] The words "is not bound to order the return" in the introductory part of Article 13(1) makes it clear that the court, upon it being established that one of the exceptions in the Article exists, is required to consider whether, notwithstanding the

[67] *Z v Z* above n 34 at para 5.

[68] *Re CC (A Child: Article 13(b), Hague Convention 1908)* [2022] EWHC 743 (Fam) at para 79.

availability of the defence, the child must nevertheless be returned. Its effect is simply that the court is no longer forced to order the return, as Article 12 would oblige it to do, but has a judicial discretion not to do so.[69] In *Smith v Smith*[70] it was said without elaboration that this discretion is exercised in the context of the approach to the Convention. As already indicated, the interpretation of Article 13(b) takes place in the wider context of the objectives and purpose of the Convention. The discretion in Article 13 is approached no differently. Whilst the Article seeks to protect the short-term best interests of a particular child by providing for limited exceptions, it does not displace the other policies of the Convention. To hold otherwise, would place an undue limitation on the exercise of the court's discretion. Like any other discretion in similar terms, it must be exercised judicially, having regard to the subject matter, scope and purpose of the Convention.

[82] The exercise of the discretion takes place in the context of the interrelated nature of the provisions of the Convention that has as its primary aim the best interests of the child. It requires the balancing of those considerations which inform the application of the Convention. The Convention has two sides to it. The one side is its general purpose to prevent child abductions and of one parent gaining an unfair advantage over the other by forum shopping in the hope of securing a favourable outcome to a custody dispute. This is achieved by ensuring the prompt return of the child as mandated by Article 12(2) and operates in the interests of children generally.

[83] The other side of the Convention is its recognition that it may not always be in the interests of a particular child to be returned to their home country. This is consistent with its overall purpose to protect the interests of all children. It gives effect to this purpose by recognising in Article 12(2) that the interests of a child who has become settled in their new environment may not be best served by their return to the country

[69] *Smith v Smith* [2001] ZASCA 19; [2001] 3 All SA 146 (A); 2001 (3) SA 845 (SCA) at 853B.

[70] Id.

from which the child was removed and by providing in Article 13 for grounds to refuse the return of a child.

[84] Accordingly, in the shared context of the objectives of the Convention, the exercise of the discretion requires the court to weigh and strike a balance between two considerations: the one is the welfare and the best interests of the child in the case under consideration, and the other is the significance of the deterrent policy and the general purpose of the Convention in the circumstances of the case. This is consistent with the approach adopted by the House of Lords in *Re M*, where Baroness Hale said:

> "In cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted at para 32 above, save for the word 'overriding' if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not."[71]

The correctness of the findings of the Supreme Court of Appeal

[85] I next proceed to consider the correctness of the findings of the Supreme Court of Appeal in the context of the principles underlying Article 13(b). The jurisdictional facts necessary for the operation of the obligatory provisions of Article 12 to find application were all present. It was not in dispute that E was habitually resident in the UK as contemplated by the Convention. Her retention in SA by her mother beyond the agreed time was found to be unlawful, and less than a year had elapsed between E's retention and the date when the AHCA launched the Convention proceedings in the High Court. This meant that the Supreme Court of Appeal was bound to confirm the High Court's order for E's return to the UK unless it was found that the aunt had established, in the language of

[71] *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55 (*Re M*) at para 43.

Article 13(b), the existence of a grave risk that E's return would expose her to physical or psychological harm or place her otherwise in an intolerable situation.

[86] Applying the principles discussed above to the present case, the Supreme Court of Appeal erred in its approach to the application of Article 13(b). The first and more obvious error was the manner in which it dealt with the evidence. Its application of the principles in *Plascon-Evans* meant that it effectively decided the matter solely on the evidence of the aunt, and disregarded the evidence of the AHCA on matters such as the social services and other levels of support available in the UK to mitigate the projected harm.

[87] Flowing therefrom, the second error relates to its finding, based on the evidence of E's mother, that the father would not be able to raise E and provide her with the necessary emotional and financial security. Contrary to the High Court, which correctly did not attach any weight to that evidence, the Supreme Court of Appeal accepted that evidence when dealing with the contention that matters such as the applicant's history of mental health issues, abuse of alcohol and other substances, and his unstable employment history created the risk of exposing E to psychological harm and an intolerable situation envisaged in Article 13(b).

[88] As explained earlier, it is important to bear in mind that the Convention is concerned with the return of a child to the jurisdiction of their country of habitual residence to enable the appropriate authorities and the courts of that country to decide issues relating to custody.[72] Issues about who would be the more suitable person to be given rights of custody or access to the child are to be determined by the appropriate judicial or other authorities that will eventually be asked to determine the long-term best interests of the child. Matters such as lifestyle and parental fitness bear upon the ultimate issues to be determined in a full hearing by the appropriate forum. At the stage of Hague proceedings for the return of an abducted child, the enquiry should rather be

[72] See [33] of first judgment.

focused on a consideration of the availability of adequate and effective measures of protection in the state of habitual residence pending the final determination of care proceedings.

[89] The AHCA is correct that, unlike the High Court, the Supreme Court of Appeal effectively embarked on deciding issues outside the scope of Article 13(b). In any event, the High Court comprehensively dealt with the evidence of E's mother in support of her contention that the return of E into the care of her father posed a risk of harm as contemplated by Article 13(b). On the evidence placed before it, the High Court correctly, in my view, found that such a risk did not exist, and that E could be adequately protected from the projected harm arising from her father's personal circumstances in the UK by the administrative, judicial, and social services of that country.

[90] The third error relates to the discretion that follows upon the finding that the exception in Article 13(b) was established. The Supreme Court of Appeal failed to address the question whether the High Court, in the exercise of its discretion, or more correctly, its own discretion following its decision to admit the evidence of Ms Pettigrew, E should be returned to the UK. It is not clear from the judgment of the Supreme Court of Appeal that it made any attempt to exercise such a discretion. It certainly does not say that it did, and even if it did do so, it quite clearly failed to make any attempt to balance both the interests of the child and the general purposes of the Convention.

[91] It follows that the Supreme Court of Appeal erred in its application of Article 13(b). That being so, it is the task of this Court to reconsider the matter. How Article 13(b) should be applied in the case will require an examination of the evidence, to which I now turn.

The evidence

[92] The evidence of Professor Berg was, without the addition of the later evidence of Ms Pettigrew, insufficient to establish the likelihood of a grave risk of psychological harm as envisaged in Article 13(b), and the High Court correctly found that it did not meet the threshold set by the Article. Like Ms Pettigrew, Professor Berg's evidence was based on what was referred to as the "child attachment theory". This is a theory that seeks to describe the cognitive and psychological development of children generally during their age related phases of development, and their ability to form relationships with those around them. The central position taken by Professor Berg was that E, whose mother was still alive at the time, had formed a bond with her aunt, who was providing her with the necessary care during her mother's illness. E was provided with a safe and secure environment where she was receiving the necessary care and support that was conducive to her having to deal with her mother's anticipated death.

[93] In dealing with the short-term consequences of E's return to the UK, Professor Berg could not place it any higher than that E "could develop a Complicated Grief Disorder of Early Childhood – that the loss of her mother as well as her aunt could result in persistent crying, and searching for the lost person". Long-term, Professor Berg's opinion was that there is "some" indication that young children that have lost an attachment figure may develop depression and suicidal thoughts later in life. In a supplementary report which Professor Berg provided in response to questions which the Judge in the High Court posed to her, Professor Berg acknowledged that E would benefit from bereavement counselling if she was returned to the UK. She qualified this by stating that bereavement counselling in and of itself could not make up for the loss of E's mother and other relationships she had formed, and that "a once a week hourly session cannot counter the trauma induced by the losses".

[94] Professor Berg's evidence does not raise the predicted harm above the inevitable disruption, uncertainty and anxiety that would follow a court ordered return. The wording of Article 13(b) requires evidence of the existence of a grave risk of harm. Professor Berg's evidence does not address the seriousness of the anticipated harm, the

occurrence of which she sets no higher than a possibility. Further, the question is not whether bereavement counselling may serve to counter the predicted harm, but rather whether it can serve to reduce the risk of the harm occurring or the seriousness thereof. It further begs the question whether, if one session of therapy a week is insufficient, how many sessions would be sufficient?

[95] Professor Berg also did not address the question whether there are any other measures available that may reduce the risk of harm or the seriousness thereof if it does occur. On the contrary, her evidence in her supplementary report to the High Court – that E could, if managed correctly, transition into the care of her father within two to three months – points to the prospect of E forming a relationship with her father, which would in turn give her the coping mechanisms to deal with the loss of her mother and the disruption of having to return to the UK.

[96] That brings me to the evidence of Ms Pettigrew. The declared focus of her assessment was the impact on E's psychological functioning at her stage of development at that time, in the context of the childhood attachment theory, should she be taken away from the aunt and from her known environment. In summary, she expressed the following view:

(a) A child in E's position will form an attachment to those who have regularly been available to her both physically and emotionally, and who have responded positively to her needs. Until her death, E's mother was her primary attachment figure. After her mother's death, that role was filled by the aunt.

(b) Children with a secure attachment exhibit a greater capacity for adaptive coping skills. At E's age and her stage of development in terms of the child attachment theory, a child starts to launch herself fully into the world by entering a phase where negotiation and compromise can be successfully applied. The child does so from the physical and psychological security of the primary attachment figure and in the knowledge that the primary attachment figure is ever-present.

(c) From six to seven years of age, the child enters a new phase, in which the child may be able to avoid separation distress if there is a trusted plan for the caregiver's departure and arrival. Attachment is then less focused on the physical presence of the caregiver, and is more of a psychological nature, that is, the awareness of the availability of the caregiver.

[97] Ms Pettigrew expressed the opinion that the aunt had become E's primary caregiver to whom she has securely attached. She then proceeded to consider the potential impact on E's psychological well-being should she be removed from the care of the aunt. It would, said Ms Pettigrew, in effect result in a second maternal death for E. In the context of the stage of her development, E's perception of death is limited to an understanding that her mother disappeared altogether and she has very little ability to fully understand her apparent "disappearance" for some time. Developing an emotional understanding of her mother's death will continue through E's different stages of development with the assistance of an emotionally available and trusted carer who can guide her through these phases. The absence of a carer will likely in moments of need lead to a high level of distress and emotional trauma.

[98] Dealing with the impact on E should she return to the UK, Ms Pettigrew was of the opinion that, although E may have had an attachment with her father when she came with him and her mother to SA in September 2019, it was not a secure bond, and that it is unlikely that she would form a secure bond with him if she were to be returned to the UK. She reasoned that, because E is no longer in the attachment formation phases of the attachment theory, there would be no transition for her from her aunt's care into that of her father, and that she would not form an attachment with him if placed in his care. Her return to the UK would mean that E would be placed with a person who is a stranger to her. In addition to coming to terms with this, she will be grieving the loss of her two attachment figures, namely her mother and the aunt, in addition to the loss of the safe and predictable structures of her life in SA.

[99] Faced with these losses, Ms Pettigrew was of the opinion that E's coping resources would in all likelihood be overwhelmed, and that there was a significant risk of a complete breakdown with psychosis and psychological damage to her, in the short and long-term. Therapy, said Ms Pettigrew, would not ameliorate the sense of loss that E would experience nor the emotional damage to her, and it would be challenging for her to develop a trust relationship with a therapist in the UK in the absence of her also having established a bond with the applicant.

[100] The main thrust of Ms Pettigrew's evidence may be summarised thus. There is a likelihood that E will suffer serious psychological harm by being removed from the aunt who has become her primary attachment figure. The basis of this evidence is that E will not have the capacity to deal with the trauma of being removed from the aunt who has become her primary attachment figure. Her ability to cope with stresses of this nature is grounded in the psychological and physical security, safety and the predictability that is currently provided by the aunt. E is, according to Ms Pettigrew, no longer in a stage of developing primary attachments. If placed with a person who is effectively a stranger to her, and faced with the loss of her mother, of her aunt and of her safe environment, her coping resources would in all probability be overwhelmed. Ms Pettigrew expressed the opinion that "[f]aced with all these losses and adjustments, [E's] coping resources will with high probability be completely overwhelmed and there is a significant risk for a psychosis and emotional and psychological damage to her in the short, medium, and long-term".

[101] Ms Pettigrew was further of the opinion that therapeutic intervention would not serve to ameliorate the significant losses E would experience and the emotional damage she was likely to suffer. This is similarly attributed by Ms Pettigrew to the fact that her return to the UK would leave her without a primary attachment figure. In the absence of a primary attachment figure who can provide the necessary care and a secure environment, therapy would have little benefit, and E would be unable to develop a trust relationship with a therapist. In short, nothing would serve to mitigate the harm to E in the absence of the support of a primary attachment figure.

[102] In deciding whether the evidence of Ms Pettigrew is sufficient to establish the threshold for the risk of harm as contemplated in Article 13(b) on the required standard of proof, and that there are insufficient measures that would reduce the risk of the harm eventuating or the harm itself, it is important to recognise that her evidence goes beyond that of Professor Berg and the other evidence that was placed before the High Court. Ms Pettigrew dealt with the position of E more than a year after the death of her mother. Her evidence was premised on the fact that E was now older; that she had moved into a new age related phase in terms of the child attachment theory; and that following the death of her mother E had formed a secure bond with her aunt and had become settled in a stable and secure environment that is assisting her to deal with the loss of her mother who was previously her primary carer.

[103] Ms Pettigrew's evidence stands uncontroverted. That being so, the question that must then be asked is whether there is anything in the evidence that the AHCA placed before the High Court with regard to the probability of the predicted risk of harm materialising, or which otherwise points to the availability in the UK of measures that may ameliorate the probability of the harm predicted by Ms Pettigrew from materialising or reducing the impact thereof.

[104] The decision of the AHCA not to respond to Ms Pettigrew's evidence in the Supreme Court of Appeal meant that there was no evidence to contradict her evidence on these aspects. Ms Pettigrew's evidence was that there is a significant risk for a complete breakdown and a psychosis should E be returned to the UK and that there are no measures that would serve to mitigate the anticipated harm. Any weight that is to be attached to the evidence of the AHCA that initially served before the High Court must be assessed in light of the absence of evidence contradicting this new evidence.

[105] In addition, it is important to recognise what the focus was of the evidence placed by the AHCA before the High Court. It was meant to deal with the evidence of E's mother and her aunt and the issues raised thereby. The focus was consequently on

dealing with matters such as the anticipated death of E's mother, the availability of bereavement counselling in the UK should E's mother pass away, the structures and services in the UK which might serve to allay the fear expressed with regard to the ability of E's father to care for her should she be returned to the UK, and dealing with Professor Berg's postulated possibility of psychological harm arising from E having to deal with the loss of her mother upon her return to the UK. These considerations have all effectively been overtaken by Ms Pettigrew's evidence that deals with the changed circumstances following the death of E's mother, and in particular her evidence that there is nothing that will serve to prevent or reduce the harm that she says E will in all probability suffer if she is returned to the UK at this time.

[106] I am satisfied that the evidence established the primary facts on which Ms Pettigrew based her opinion. It was not in dispute that a child of E's age and her stage of development forms an attachment to the person who, in the words of Professor Berg, takes care of the child the best and whom the child gets to know, rely on, and feel safe with. A primary attachment figure may be someone other than a biological parent. It is the person who is the most consistently and predictably prominent in the child's day-to-day life.

[107] E was two years and two months old when she came to SA with her parents. It is uncontentious that the parent's relationship was not stable and marred by conflict. The result was that E's contact with her father was not consistent and she was mostly in the care of her mother. There was a time in the UK when her parents were living apart and E would only see her father during weekends. After their arrival in SA, the relationship of the parents again reached a stage where the father had to move to alternative accommodation.

[108] Since then E has lived with her mother (until her death) and her aunt. E was three years and five months old at the time of her mother's death. Her father only saw E once since his departure in 2019 when he came to SA in December 2020 following the mother's death and the High Court's return order. He stayed until March 2021

during which time he had contact with E. His contact with her was otherwise limited to communicating virtually with her. Ms Pettigrew's own observation of E was that her behaviour around her aunt was very typical of a child who seeks out her primary attachment figure. This is consistent with the report submitted to this Court by Ms Carstens, the Legal Aid practitioner appointed for E, that E has formed a bond with the aunt and is well established in her present environment.

[109] It can accordingly safely be accepted, on the undisputed evidence and the probabilities as they arise therefrom, that E's mother was her primary attachment figure until her death, and that she was subsequently replaced by E's aunt in whose care she has remained since. Ms Pettigrew's evidence, based on the attachment theory, that E has moved through the window period for developing primary attachments, and that her return to the UK would result in a second maternal death, which, in addition to the loss of her known environment, is likely to lead to a complete breakdown and a child presenting with psychosis, is opinion evidence.

[110] As stated, Ms Pettigrew's evidence stands uncontroverted. That does not mean that it must simply be adopted. As in the case of any expert opinion evidence, it remains the task of a court to examine the evidence in order to determine whether it should be accepted.[73] Whilst the court would not subject an uncontroverted expert report to the same kind of scrutiny as when evaluating a contested report, the opinion must be reasoned and be supported by the evidence on which it is based.[74] If the unchallenged opinion is on the face of it based on sound logical reasoning, the expert has reached a defensible position supported by the basic facts and the probabilities, and there is no other reason not to accept the evidence, ". . . it is difficult to envisage a situation in which it would be appropriate to decide that it is wrong".[75]

[73] *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616H.

[74] *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH* 1976 (3) SA 362 (A) (*Coopers*) at 371G-H and *Griffiths v Tiu (UK) Ltd* [2021] EWCA Civ 1442 (*Griffiths*) at paras 42 and 83.

[75] *Griffiths* id at para 50.

[111] In this case Ms Pettigrew's report represents a reasoned conclusion based on the facts set out in her report. That does not mean that there are no shortcomings in her evidence. It is so that her opinion is predicated on human behaviour in response to a certain set of circumstances, which as a matter of logic must have an inherent uncertainty to it. Further, Ms Pettigrew did not pertinently address the impact, if any, of the natural relationship of father and daughter that exists between them, and the father's familial support system in the UK on the likelihood of the postulated poor outcome of E's return to the UK.

[112] However, the election of the AHCA not to place expert evidence of their own before the court left the evidence of Ms Pettigrew uncontradicted and consequently without the need for her to expand upon her reasoning.[76] The aforementioned aspects cannot as a result detract from the reasoned evidence of Ms Pettigrew, at least not to the extent where it must be found that her expressed opinion is wrong, or that it is unreliable and lacking in probative value that justify its rejection without more.

[113] The evidence of Ms Pettigrew is directly relevant to the issue which the High Court and the Supreme Court of Appeal were asked to decide by the raising of the defence in Article 13(b). The question is then whether her evidence is sufficient to establish the existence of a "grave risk" of harm or intolerable situation as contemplated in Article 13(b):

(a) Other than Professor Berg, Ms Pettigrew raised the postulated harm occurring to the level of a probability that is high.

(b) The nature of that harm is also of a much more serious nature. The likelihood of E experiencing a psychosis and "significant" short to long-term psychological damage and harm constitutes a grave risk of psychological harm as contemplated in Article 13(b). It is more than the uncertainty, disruption or anxiety which could naturally be expected to

[76] Id at para 88.

follow on the forced return of any child to the country of their habitual residence.

(c) Rather, it arises from a consideration of external factors which are inter alia comprised of E's age and the dynamics created thereby; the loss of her mother; her attachment to a person who has become her primary attachment figure; the fact that she had become settled in a safe and secure environment; and that her return to the UK would be to a person and environment she has very little connection with.

(d) The probability of the risk of harm occurring is supported by the fact of E's young age; the circumstances in which she came to be in the care of the aunt; the length of time she has been in the care of the aunt, who has now become her primary attachment figure; the absence of the formation of any significant bond with her father; and the fact that her return to the UK will take her away from her primary attachment figure and out of her known family and social environment to a country of which she is unlikely to have much recollection, and to family members with whom she has not as yet formed any relationships.

(e) The extent of the risk of the projected harm and the seriousness of the harm itself must be assessed against Ms Pettigrew's uncontroverted evidence that therapy will not ameliorate the projected harm.

[114] I, accordingly, conclude that by the time of the hearing in the Supreme Court of Appeal the aunt established on a balance of probability that which she and E's mother had failed to establish in the High Court, namely the existence of a grave risk of psychological harm as contemplated in Article 13(b). As discussed earlier, this finding establishes a ground for the refusal of an order for the return of a child to their home country.

[115] Before I proceed to consider whether, despite this finding, E must nevertheless be returned to the UK, it may be convenient to deal with the main reasons advanced in

the judgment by my Colleague Majiedt J (second judgment) for his disagreement with the finding. The first matter of disagreement is in relation to the evidence of Ms Pettigrew. It is whether it meets the threshold of the risk of harm in Article 13(b) or whether it is not simply a risk of harm that may typically be expected to follow from E's return to the UK following her wrongful retention in SA.

[116] For the reasons mentioned earlier, Ms Pettigrew's expert opinion in my view meets the requirements for evidence of this nature. It presents a reasoned conclusion that is supported by the facts and the probabilities. Her evidence went beyond that of Professor Berg, and the AHCA elected not to put up anything in answer thereto. In the absence of evidence to the contrary, there is simply no reason to question the reliability or the correctness of Ms Pettigrew's evidence, which raises the projected harm, other than that of Professor Berg, to that of a probability that is said to be high.

[117] I am unable to agree that the harm postulated by Ms Pettigrew is the risk of harm that will arise ordinarily from a court ordered return of a child who was wrongfully retained. The evidence of Ms Pettigrew that E is likely to suffer a complete breakdown and a psychosis is based on E's age-related inability to deal with the trauma of being removed from a second primary attachment figure and to cope with the stresses of such a removal. It is grounded in the physical and psychological security, safety and predictability that is provided by her aunt. This opinion of Ms Pettigrew is informed by external features such as E's age, the death of her mother, her inability to form an attachment with her father should she be returned to the UK, and the absence of, in Ms Pettigrew's opinion, any measures that may serve to mitigate the projected risk of harm.

[118] The first step in an Article 13(b) enquiry is whether the evidence of the person who invokes the Article in defence establishes the risk of harm or an otherwise intolerable situation. The exception in Article 13(b) is often raised in the context of an attempt to avoid the return of an abducted child to an environment where the child might face sexual or physical abuse, domestic violence, disease or regional conflict.

In the present matter the harm does not lie in circumstances of this kind but rather in her being taken away from the person to whom she had become attached and who has filled the void left by the death of her mother, and from a secure and safe environment in which she has become settled.

[119] Ultimately the question is the existence of harm of the kind contemplated by Article 13(b). It does not matter where that harm is coming from. It may be harm arising from removing the child from the country where the child was retained or harm that is awaiting the child upon return to the requesting state:

> "The focus of Article 13(b) is on the risk to the child: if there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, then the source of the risk and how it arises is irrelevant."[77]

[120] That the separation of a child from her primary attachment figure can establish the required grave risk is consistent with the position in other jurisdictions:

> "It is also clear that the effect of the separation of a child from the taking parent can establish the required grave risk. This situation is one of those listed as potentially falling within the scope of this provision, at [36], in the *Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part VI Article 13(1)(b)* published in 2020 by the Permanent Bureau of the Hague Conference on Private International Law . . . . This was the basis on which a return order was set aside by the Court of Appeal in *Re W and another (Children)* [2019] Fam 125."[78]

[121] The second judgment proposes that a finding that E should not be returned to the UK will have the effect of giving insufficient weight to the evidence of the support systems in the UK. I don't agree. I have dealt with this aspect in sufficient detail earlier

[77] *G v G* [2020] EWCA Civ 1185 at para 61. See also *Re E* above n 41 at para 34 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10; [2012] 2 FLR 442 at para 34.

[78] *Re A (Children) (Abduction: Article 13(b))* [2021] EWCA Civ 939 at para 88. See also *Re IG* above n 34 at para 47 and *Re W (Children)* [2018] EWCA Civ 664 at para 57.

in this judgment.[79] Ms Pettigrew's uncontradicted evidence was that there are no measures that would serve to mitigate the anticipated harm. Any weight that is or can be attached to the evidence which the AHCA initially placed before the High Court was intended to deal with the evidence of E's mother with regard to the father's supposed inability to provide for E should she be returned to the UK, and Professor Berg's evidence about the effect that her mother's anticipated death would have on E. Accordingly, the evidence was never meant to deal with Ms Pettigrew's evidence that the proposed harm is incapable of being prevented.

[122] With regard to the criticism that the evidence of Ms Pettigrew does not give consideration to the harm that E is likely to suffer from her father's absence and that the father's position should receive more attention in the determination of the issue raised by the Article 13(b) defence, the answer in my view is twofold. It is so that Ms Pettigrew does not deal with the need for the continuation of a relationship by E with her father. I have raised that as a possible criticism of her report. The question however is whether it means that her evidence regarding the nature of the anticipated harm and the absence of any measures to prevent it materialising must be rejected. I do not think so. As stated, the focus of Ms Pettigrew's assessment was the impact on E's psychological functioning at her stage of development at the time of the report, should E be taken away from her aunt. There is no evidence that a failure to return E to the UK will cause her to suffer harm. There was therefore strictly no need for Ms Pettigrew to elaborate beyond the focus of her report, as she was not called upon to do so.

[123] It is important to keep in mind that the focus of Article 13(b) is on the abducted child. It deals with the risk of harm to the child in the short-term. Any harm that is of a long-term nature or matters relating to the interests of a left-behind parent are, in the scheme of the Convention, to be dealt with by the court that will eventually be asked to determine issues relating to custody and other rights to the child. A final

[79] See [102]to [103] above.

observation is to emphasise that ultimately each case must be decided on its own facts and circumstances. Findings and statements in other judgments are of limited use, as they are made in their own context and with reference to the particular evidence placed before the court. Each matter is bound to have its own features and the court's findings are bound to be informed by those features.

Should E be returned to the UK?

[124] The decision whether or not to return E to the UK requires the court, as the next step, to exercise a discretion by having due regard to the objectives of the Convention and those considerations which represent what is the best short-term interests and welfare of E. As discussed earlier, an important policy consideration of the Convention is that it serves: to discourage one parent from taking the law into his or her own hands; to prevent one parent from gaining an unfair advantage, by his or her own unlawful conduct, over the other parent by placing that parent in a position where it is impossible or difficult to either establish or to maintain a relationship with the child; and to prevent a parent from establishing, through his or her own unlawful conduct, the factual situation for one of the exceptions in Article 13(b). What the Convention envisages is an enquiry into whether its deterrent purpose should, in the circumstances of the case, outweigh the interests of the child in question.

[125] In this matter, the decision of E's mother to retain her in SA beyond the agreed time meant that during the relevant phases of her development E did not establish a secure bond with her father. Instead, she bonded with her aunt who has become her primary attachment figure. It is among other factors the "loss" of her aunt as the primary caregiver and the safe and secure environment that was established by her continuous stay in SA, that will be the cause of the predicted harm should she be returned to the UK. It is thus apparent that it was primarily on account of the mother's actions that the aunt has established the ground in Article 13(b).

[126] It may therefore be argued, as the AHCA did in this matter, that to refuse an order for the return of E to the UK would reward unlawful conduct, and act as an

incentive that is inherent in such an order in the present circumstances, and that this outweighs the interests of E. This is undoubtedly a relevant consideration. However, the weight to be given to any relevant consideration will be dictated by the facts and circumstances of the case. Put differently, the significance of the general purpose of the Convention must be determined in the circumstances of the case.

[127] E's mother did not abduct her from the UK. E came to SA with her parents to seek treatment for her mother's illness. The decision of E's mother to retain her in SA was made in circumstances which point to an acknowledgement that her relationship with the father had broken down, and the fact that she was terminally ill. It can safely be accepted that the aunt had no role to play in the decision of the mother to retain E in SA in the circumstances, and that she is simply carrying out the wish of her late sister that she must raise her child. Considering the circumstances in which E was retained in SA, I do not believe that an order refusing her return to the UK will send the wrong message or undermine the integrity of the Convention, particularly when weighed against the lack of culpability on the part of the aunt and what are the best interests of E in the circumstances.

[128] With regard to what represents the best interests of E, there are three considerations that must be given due weight. The first is the length of time that has elapsed since E's initial retention in SA:

(a) The scheme of the Convention is one of hot pursuit and the restoration of the *status quo ante*. This policy consideration can carry little weight in this matter, in that the primary objective can no longer be fulfilled. It can no longer be assumed that the country of origin is the better forum for the resolution of the dispute over parental rights.

(b) The Convention acknowledges in Article 12 that, if no timeous steps were taken following the removal or retention of a child, eventually a point may be reached when the child becomes settled in their environment and that

the return of the child might well cause further distress and a disruption.[80] This emphasises the importance of the expeditious finalisation of proceedings under the Convention, an aspect I will next address.

(c) In the absence of evidence of a manipulative delay caused by the conduct of a party opposing an order for the return of a child, the fact that E has become settled in a new environment where she has stability is a relevant factor as to what is in her best interests. Her return to the UK will mean that she will leave the place where she has been living for the past nearly four years, away from her primary carer, her school and her friends.

(d) In the circumstances, the assumed interests which could otherwise have been expected to be served by the prompt return of the abducted child were no longer able to be fulfilled by the time the matter was heard in the Supreme Court of Appeal.

[129] The second consideration is the fact that E was only two years and two months old when she came to SA with her parents. She has since spent nearly two thirds of her life in SA. By reason of her age at the time, it is unlikely that she had formed any meaningful relationships with anyone in the UK before her departure, or that she would have any recollection of that country. Any assumption that her removal from the UK would per se have had a harmful effect on her therefore similarly does not exist. The only consideration is the harm which the absence of a relationship with her father may cause in the long-term, in respect of which no evidence was placed before the courts by any of the parties. It is however an aspect that would most certainly be addressed by the court tasked with determining the aunt's application for parental rights.

[130] The third and important consideration that relates to the welfare of E is the finding of the likelihood of a grave risk of psychological harm should she be returned to the UK. The implication of this finding, the nature of the anticipated harm, and the

[80] *Z v Z* above n 34 at para 32.

absence of there being any protective measures to reduce the risk or the seriousness thereof, mean that an order for the return to the UK is likely not to be in her best interests. This conclusion is strengthened by the absence of any evidence of meaningful undertakings by the authorities in the UK to provide reasonable protection against the harm postulated by Ms Pettigrew in her evidence. I hasten to add that there is no indication that the authorities in the UK were invited by the AHCA to consider Ms Pettigrew's report and to set out the undertakings they could give in that regard.

[131] Accordingly, on balance, I do not consider that the exercise of the discretion in Article 13 in the circumstances of this case favours the return of E to the UK. At this point, the policy of the Convention is probably best served by allowing her to remain in SA, and for an appropriate forum in this country to consider and decide what would be in her long-term best interests. I accordingly disagree with the suggestion in the second judgment that a refusal to return E to the UK will undermine the objective of the Convention to ensure an expeditious restoration of the *status quo ante*. Expeditious return as envisaged by the Convention is no longer possible. As correctly stated in *Re M*:

> "[T]he policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of a particular child. The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction."[81]

The obligation to ensure the expeditious return of children under the Convention

[132] The proceedings in this matter were not dealt with the urgency which the Convention demands. From the time the application was launched in the High Court, it took nearly three years before the matter was heard by this Court. It is undeniably so that the passing of time that had elapsed since the proceedings were instituted

[81] *Re M* above n 70 at para 48.

contributed to E having become settled in SA following the death of her mother, a consideration that has played a significant role in my decision to refuse her return to the UK.

[133] The prompt return of children wrongfully removed or retained is one of the primary objectives of the Convention.[82] Several provisions of the Convention are intended to reinforce the Article 1 mandate of prompt action. Article 2 requires that "Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available". Article 7 mandates that "Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children". Article 11 provides that "[t]he judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children". In addition, in terms of Article 11 "[i]f the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings", the applicant can request a statement of the reasons for the delay. The Convention therefore envisages the determination of a Convention application within six weeks. This requirement is embodied in regulation 23(1) of the International Child Abduction Regulations issued in terms of the Children's Act. It reads:

> "Proceedings for the return of a child under the Hague Convention must be completed within six weeks from the date on which judicial proceedings were instituted in a High Court, except where exceptional circumstances make this impossible."

[134] The obligation to act expeditiously in Convention proceedings means, according to the 1980 Explanatory Report[83] by Professor Elisa Perez-Vera, the Rapporteur to the 1980 sessions of the Hague Conference that produced the Convention, that contracting states must use the most expeditious procedures available, and that applications are as

[82] See the Preamble and Article 1(a) of the Convention.

[83] Pérez-Vera "*Explanatory Report on the 1980 Hague Child Abduction Convention*" (1982) at paras 63 and 104.

far as possible to be granted priority treatment. This would include any appeal process. The Guide to Good Practice under the 1980 Convention, drafted by the Permanent Bureau of the Hague Conference on Private International Law, states as one of its "key operating principles" that "expeditiousness is essential at all stages of the Convention process including appeals".[84]

[135] At the fifth meeting of the Special Commission of the Convention held in 2006, the Commission reaffirmed the following recommendations made at the 2001 meeting:

> "3.3 The Special Commission underscores the obligation (Article 11) of Contracting States to process return applications expeditiously, and that this obligation extends also to appeal procedures.
>
> 3.4 The Special Commission calls upon trial and appellate courts to set and adhere to timetables that ensure the speedy determinations of return applications.
>
> 3.5 The Special Commission calls for firm management by judges, both at trial and appellate levels, of the process of return proceedings."[85]

[136] It therefore rests with each contracting state to ensure that Convention proceedings proceed with the necessary speed at all levels. To achieve the objective of the prompt return of children, the obligation to proceed with expedition cannot only extend to the courts. It must necessarily include all those who are directly or indirectly included in Convention proceedings. In regulation 23(2) referred to earlier, a number of procedural steps are listed, the stated purpose of which is "to ensure that applications under the Hague Convention are handled expeditiously". These steps are the following:

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[84] Quoted in *Central Authority v H* above n 8 at para 29.

[85] Hague Conference on Private International Law – Special Commission "Conclusions and Recommendations of the fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006)" at para 1.4.1. See also Chapter 1.5 of the Guide to Good Practice on Implementing Measures; *Central Authority v H* above n 8 at para 29.

"(a) A High Court file must be clearly marked and must –

(i) draw attention to the nature of the application; and

(ii) state the date on which the six week period will expire;

(b) priority must, where necessary, be given to these applications;

(c) the transcript of the judgment and its approval must be expedited; and

(d) the transcript of the judgment and its approval must be sent to the Central Authority of the Republic without delay."

[137] These steps, in the absence of court rules to support the obligation to determine Convention proceedings expeditiously, do not seem to be very effective.[86] The delay in dealing with Conventions proceedings is not a problem unique to SA. In several decisions of the Supreme Court of the United States of America similar delays were lamented.[87] In *Chafin v Chafin* Chief Justice Roberts, writing for the Court, noted that Convention cases in American courts "often take two years from filing to resolution".[88] In her judgment Justice Ginsburg noted the absence of rules for expedited Convention proceedings and referred with apparent approval to the procedural limitations imposed in England and Wales on the filing of appeals in such proceedings.

[138] A measure that may assist in expediting the finalisation of Convention applications and give effect to the call by the Special Commission of the Convention for "firm management by judges", is found in regulation 24. It provides:

> "Where an application has been made to a High Court by the Central Authority of the Republic under the Hague Convention, that Court may, at any time before the application is determined, give any interim direction that it deems fit in order to regulate any aspect of the process if an application under the Hague Convention and to ensure

[86] *Central Authority v H* above n 8 at para 40.

[87] See *Taglieri v Monsky* 589 US (2020) and *Chafin v Chafin* 568 US 165 (2013) (*Chafin).*

[88] *Chafin* id at 179.

> the welfare of the child in question and to prevent any changes in the circumstances relevant to the determination of the application."[89]

[139] This provision enables a High Court seized with a Convention application to case manage the matter by the issuing of directions. It is a very useful measure, the use of which must be strongly encouraged. Judicial case management would allow the court to determine strict time frames for the filing of reports and other evidence, and putting measures in place that will not only facilitate the expeditious hearing of the matter, but could also prevent one parent from obtaining an advantage over the other by making appropriate orders aimed at ensuring effective contact between a parent and the child pending the resolution of the case.

[140] A step towards expeditious hearings of these matters can be achieved by practice directives. The Western Cape Division, the Gauteng Local Division and the North West Division of the High Court have issued practice directives dealing with Convention matters. These directives, however promising, do not negate the delay that arises when these cases are taken on appeal and result in further delays.

[141] If the hearing of Convention matters are not properly managed, it not only defeats the objectives of the Convention, it harms both parents and the child. It may result in the child being deprived of the consortium of one of their parents. The child will be acclimated in their new environment and will find it difficult to reintegrate once returned. In addition to the emotional toll of delay on the child and on each party to the proceedings, it will inevitably also lead to a delay in finalising the custody proceedings.

[142] To conclude, it is necessary that the court rules must give priority to Convention matters and facilitate its expeditious finalisation. This must include court rules to fast-track the hearing of appeals such as limiting the time for the filing of appeals and prioritising its enrolment for hearing in the courts of appeal.

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[89] International Child Abduction Regulations above n 7.

Costs

[143] There is in my view no justification for the costs order made by the Supreme Court of Appeal. For the reasons stated, it erred in relying on the evidence of E's mother and Professor Berg for its finding that the Article 13(b) defence was proved and that the order of the High Court had to be set aside. In the final analysis, the defence was proven by the evidence by Ms Pettigrew, whose evidence was not before the High Court and was considered for the first time in the appeal. A more appropriate order in the circumstances would have been one ordering the parties to bear their own costs.

[144] With regard to the costs of the hearing of the appeal in this Court, counsel for the aunt quite fairly indicated during argument that the aunt does not press for a costs order against the AHCA or the father. As pointed out in *Sonderup*,[90] the Chief Family Advocate is the official charged with the duty of securing the return of an abducted child. In terms of section 276 read with section 277 of the Children's Act, the Chief Family Advocate or their delegate will represent an applicant in any court proceedings necessary to give effect to the provisions of the Convention in those cases where the applicant does not qualify for legal aid or does not wish to appoint their own legal representative. In light of these provisions, and in the absence of conduct that is deserving of censure, the most equitable outcome is that each party should pay their own costs.

The Order

[145] Accordingly, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld in part.

[90] *Sonderup* above n 16 at para 55.

3. Paragraphs 2 and 3 of the Supreme Court of Appeal's order are set aside and replaced with the following:

"2. The appeal succeeds.

3. The order of the High Court of South Africa, Western Cape Division, Cape Town is set aside and replaced with the following:

(a) The application is dismissed.

(b) The parties are to pay their own costs.

4. There is no order as to costs."

4. The parties are to pay their own costs in this Court.

MAJIEDT J (Zondo CJ, Kollapen J, Makgoka AJ and Potterill AJ concurring):

[146] I have read the judgment prepared by my colleague, Van Zyl AJ (first judgment). I agree with the first judgment that this Court has general jurisdiction in this case, for the reasons articulated. There is a need, transcending the narrow interests of the parties here, for finality in terms of what constitutes harm as contemplated in Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Convention), discussed but not finally resolved by this Court in *Sonderup*.[91] But I take a different view in respect of the outcome regarding the merits of the appeal. In my view, leave to appeal ought to be granted and the appeal against the order of the Supreme Court of Appeal ought to be upheld.

[147] I gratefully adopt the detailed narration of the background facts of the first judgment and will amplify them only insofar as it may be necessary for context or emphasis. At the heart of the case, as the first judgment makes plain, is the Article 13(b) defence advanced by the aunt. Given its importance, I quote Article 13 again:

[91] *Sonderup* above n 16.

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> (c) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of
>
> (d) removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (e) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

[148] In the High Court, the aunt[92] had raised both Article 13(a) and (b) defences in response to the Ad Hoc Central Authority (AHCA)'s[93] Article 3 application.[94] That Court rejected both defences and held that no consent or acquiescence had been proved, nor was there proof of a grave risk of physical harm to E in the event of her return to the United Kingdom (UK). The High Court consequently ordered that E be returned to the UK.

[149] The aunt persisted with both the Article 13(a) and (b) defences in the Supreme Court of Appeal, which upheld only the Article 13(b) defence. The Court

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[92] I adopt the language of the first judgment, which simply refers to the respondent as "the aunt".

[93] This acronym is used in the first judgment and for ease of reference I do the same.

[94] A defence in terms of Article 20 was not pursued at the hearing there. That Article provides: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

granted leave for further evidence to be adduced, that of Ms Leigh Pettigrew, an educational psychologist. As will appear, the approach to her evidence is one of the primary areas of difference between this and the first judgment. A further point of divergence is the lapse of time since E arrived in SA. This judgment disagrees with the first, inasmuch as this judgment holds that the factor of delay cannot redound to the detriment of E's father and the AHCA, the statutory applicant. As I will demonstrate, that would subvert the objectives of the Hague Convention.

[150] It is necessary to repeat in brief some of the salient background facts as to how E ended up remaining in SA with the maternal aunt. It is imperative that the narration recount the perspective of both parents. After E's mother had been diagnosed with colorectal cancer and had undergone treatment in the UK, a joint decision was taken by E's parents that they and E ought to travel to SA to investigate alternate treatment options. That was because all treatment options in the UK had been exhausted. The family travelled to this country on 5 September 2019 and, as agreed between the parents, they were scheduled to return to the UK on 2 October 2019.

[151] E's mother underwent surgery on 26 September 2019 in SA after which she was unable to return to the UK. During their time in SA, the relationship between E's parents deteriorated. As planned, E's father returned to the UK on 2 October 2019. E remained in SA with her ill mother, the aunt and her maternal grandmother. The father's understanding was that E would remain with her mother while she underwent treatment, after which both of them would return to the UK. This agreement was confirmed by E's mother in an email addressed to the father on 14 October 2019, which stated that E would remain in SA until her mother was well enough for both of them to return to the UK.

[152] It was after this email that E's mother informed the father that E would remain in SA permanently. The reason given was that the mother had decided that, in the event of her death, her sister, the aunt, should care for the child. This was, in all probability, at the time that E's mother became aware that the treatment in SA was not having the

desired result and that she was terminally ill. It is also common cause that the father agreed, on compassionate grounds, that E could remain in SA for as long as her mother was undergoing medical treatment. He later agreed, after active treatment for the mother had ceased to be feasible, that E could remain in SA for as long as the mother was alive, even though she was by then only receiving palliative care. The father's consent did not extend any further. The mother's changed outlook and her wish that after her death E should live with the aunt did not accord with the earlier agreement and did not find favour with the father. The terms of the parents' agreement have always been, and remain, undisputed.

[153] When it became known to E's father that the mother wished for E to stay in SA permanently, he approached the Central Authority for England and Wales (UKCA) and submitted a request for E's return from SA to the UK on the grounds that E's retention in SA by her mother without his consent was in breach of the Convention's terms.

[154] This brief outline makes plain that this is an allegedly unlawful retention case and not one of alleged unlawful removal/abduction. This case is unusual inasmuch as the mother who retained the child here has subsequently passed away and, as a consequence, the child remained in SA, separated from her surviving father, instead of returning to the UK with her mother as the agreement had been all along. Furthermore, this case presents unique challenges which include what weight to afford to the impact, in the short-term, of the result of the mother's death on the child, juxtaposed to the weight to be given to the impact, in the long-term, of the child having been removed from her state of habitual residence with the resultant estrangement from her only living parent, her father.

[155] A further unusual dimension is that the father has, under the Convention, rights of custody and access to the child and has parental rights and responsibilities to her in the UK. The aunt, who seeks to assert parental rights, has neither rights of custody nor

access under the Convention, nor does she have parental rights and responsibilities in terms of the Children's Act.[95]

[156] I must emphasise right at the outset that I accept that the Supreme Court of Appeal was correct in admitting the further evidence of Ms Pettigrew. That evidence unquestionably meets the requirements laid down in *Lawrence*[96] and *Rail Commuters*.[97] Undoubtedly, E's status and circumstances after the death of her mother were of the exceptional kind envisaged by this Court in those cases. Its previous exclusion in the High Court was not due to remissness or negligence on the part of the then respondents, the late mother and aunt. The evidence is material in this case as it speaks to the psychological state of the child. The factual scenario and circumstances of the child have changed drastically and should be taken into account.

[157] The first judgment provides an extensive explication of the Convention's material provisions. Article 12 of the Convention provides:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

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[95] 38 of 2005.

[96] *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 24.

[97] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 40-3.

[158] The Article 13(b) defence plainly lies at the heart of this case. The aunt had to prove on a balance of probabilities that there is a grave risk that E's return to the UK would expose her to physical or psychological harm or otherwise place the child in an intolerable situation.[98] In *G v D*,[99] the Court cited *Re E*, where the UK Supreme Court set out the principles applicable in Article 13(b) defences.[100] These are (with my emphasis):

(a) There is no need for Article 13(b) to be narrowly construed. By its very terms, its application is restricted. The words of Article 13(b) are quite plain and need no further elaboration or gloss.

(b) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but, in evaluating the evidence, the court will be mindful of the limitations involved in the summary nature of the Convention process.

(c) The risk to the child must be "grave". It is not enough for the risk to be "real". It must have reached such a level of seriousness that it can be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two.

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

(e) Article 13(b) looks to the future: the situation as it would be *if the child were returned forthwith to his or her home country. The situation which*

[98] *Pennello* above n 8 at para 38.

[99] *G v D (Article 13b: Absence of Protective Measures)* [2020] EWHC 1476 (Fam) at para 35.

[100] *Re E* above n 41. That approach was endorsed by the Supreme Court of Appeal in *KG v CB* above n 40 at para 50.

the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough, the court will be concerned not only with the child's immediate future because the need for protection may persist.

(f) Where the defence under Article 13(b) is said to be based on the anxieties of a respondent mother about a return with the child, which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Article 13(b).

[159] The harm that the aunt must prove extends beyond the harm that flows naturally from a court-ordered return.[101] In *Sonderup*, this Court pointed out that parental disputes almost always have an adverse effect on children of the relationship, more so where there is a custody dispute. This Court said:

> "The law seeks to provide a means of resolving such disputes through decisions premised on the best interests of the child. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help. Any attempt to do that inevitably increases the tension between the parents and that ordinarily adds to the suffering of the children. The Convention recognises this. It proceeds on the basis that the best interests of a child who has been removed from the jurisdiction of a court in the circumstances contemplated by the

[101] *Sonderup* above n 16 at para 46. See also: *LD v Central Authority (RSA) and Another* [2022] ZASCA 6; [2022] 1 All SA 658 at para 29:

> "[A] certain degree of harm is inherent in the court-ordered return of a child to their habitual residence, but that is not harm or intolerability envisaged by Article 13(b); . . . that harm or intolerability extends beyond the inherent harm referred to above and is required to be both substantial and severe".

> Convention are ordinarily served by requiring the child to be returned to that jurisdiction so that the law can take its course."[102]

[160] Citing the dictum of L'Heureux-Dubé J in the Canadian case *W(V) v S(D),*[103] this Court in *Sonderup* held:

> "In applying the Convention 'rights of custody' must be determined according to this definition independent of the meaning given to the concept of 'custody' by the domestic law of any state party. Whether a person, an institution or any other body has the right to determine a child's habitual residence must, however, be established by the domestic law of the child's habitual residence."[104]

[161] Article 13(b) sets a high threshold. In *Re C (Abduction: Grave Risk of Psychological Harm),* Ward LJ held:

> "There is . . . an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence".[105]

[162] The harm must be grave. In *Sonderup*, this Court held that the words "otherwise place the child in an intolerable situation" is indicative of the harm contemplated in Article 13(b) being of a serious nature. The Court refrained, however, from defining that concept or considering "whether in the light of the provisions of our Constitution, our courts should follow the stringent tests set by courts in other countries".[106]

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[102] *Sonderup* above n 16 at para 43.

[103] *W(V) v S(D)* 134 DLR (4th Cir 1996) 481 at 496.

[104] *Sonderup* above n 16 at para 11.

[105] *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 at 1154A-B.

[106] *Sonderup* above n 16 at para 44.

[163] As the first judgment indicates, in other jurisdictions the threshold is set very high and Article 13(b) is construed narrowly.[107] Apart from the United States of America, other countries like England, Canada, Australia also set a high threshold.[108] Nonetheless, I accept the approach adopted in the first judgment that it is not necessary to afford Article 13(b) a more restrictive meaning than that conveyed by its plain meaning.[109]

[164] Courts vigilantly ensure that the parent who has removed the child should not be able to rely on the consequences of that removal to create a risk of harm or an intolerable situation on return. An example is *Re C (A Minor) Abduction*,[110] where the Court of Appeal in England had to determine whether an Article 13(b) defence was proved by the mother who had left Australia for England with the child without informing the father or obtaining his consent. The mother raised as defences in Hague Convention proceedings that neither the removal nor the retention were wrongful and, in any event, if they were, there was grave risk that the return of the child would expose him to psychological harm. In rejecting the Article 13(b) defence, Butler-Sloss LJ stated:

> "The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation, if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the

[107] See the first judgment at [58]. The first judgment refers to *Friedrich* above n 38 where clear and convincing evidence is required to prove an Article 13(b) defence.

[108] In the USA, clear and convincing evidence, rather than merely a preponderance of the evidence, is required; see: *ICARA*, 22 U.S.C.A. § 9003(e)(2)(A) (1994); *Friedrich* id. Australia: *Director-General, Department of Families, Youth and Community Care v Bennett* [2000] Fam CA 253 (16 March 2000) (Full Court of the Family Court of Australia); England: *Re H (Children)* [2003] EWCA Civ 355 (20 March 2003) (CA). Canada: *Thomson v Thomson* (1994) 119 DLR (4th Cir) 253 at 296. Further examples can be found in footnote 41 of *Sonderup* above n 16 .

[109] See the first judgment at [59].

[110] *Re C (A Minor) Abduction* [1989] 1 FLR 403, CA.

> application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent."[111]

[165] The Convention envisages a two-part process that has to balance the long- and short-term interests of the child.[112] The long-term interests of the child include the determination of custody matters. The short-term interests of the child centre around jurisdictional matters. The interplay between these two goals is the crucial inquiry that goes to the very purpose of the Convention, namely that "the Convention seeks to ensure that custody issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child. That Court will have access to the facts relevant to the determination of custody".[113]

[166] In *Re C (A Minor) Abduction*, Lord Donaldson MR set out this dual approach:

> "We have also had to consider article 13, with its reference to 'psychological harm'. I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words 'or otherwise place the child in an intolerable situation' which cast considerable light on

[111] Id at 410. See also: *Re E (A Minor) (Abduction)* [1989] 1 FLR 135 at 142, per Balcombe LJ:

> "[T]he whole purpose of this Convention is . . . to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence, or having taken the child, with the agreement of any other party who has custodial rights, to another jurisdiction, then wrongfully to retain that child".

[112] *Sonderup* above n 16 above at para 28.

[113] Id at para 30.

> the severe degree of psychological harm which the Convention has in mind. *It will be the concern of the court of the State to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, i.e. the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country, Australia in this case, can resume their normal role in relation to the child*."[114] (Emphasis added.)

[167] The respondent's Article 13(b) defence places primary reliance on the two expert reports of essor Astrid Berg dated 1 September 2020 and 8 October 2020 and that of Ms Pettigrew. I commence with a discussion of the reports of Professor Berg. She did not express the opinion that the risk to E's mental health would be grave in the event of her return to the UK. The high water mark of Professor Berg's concern in her second report was that for E to lose the relationships she has formed with her aunt and grandmother, in addition to losing her mother, could have serious consequences for her mental well-being. In her first report, Professor Berg furnished the High Court with her opinion regarding the potential consequences for E in the event of her return to the UK. That is, as at the time of the first report, 1 September 2020. Professor Berg alluded there to the fact that E was on a positive developmental trajectory in SA as she had settled into playschool, has friends and a primary caregiver (her aunt) and a grandmother whom she has come to know. According to Professor Berg, E's return to the UK would significantly disrupt her positive development, inasmuch as she would lose her aunt as well as her nurturing and stimulating environment.

[168] It seems to me that the disruptive consequences described by Professor Berg are of the kind that naturally flow from a court-ordered return to the jurisdiction of the court of an abducted child's habitual residence. As I will show presently, that approach, also adopted by the Supreme Court of Appeal, fails to take into account, either adequately or at all, the extensive support services available in the UK to mitigate the effects of this

[114] *Re C (A Minor) Abduction* above n 110 at 413.

disruption. Thus, this disruption on its own does not meet the stringent test for a grave risk of harm or other intolerability required by Article 13(b).

[169] In her first report, Professor Berg laid much emphasis on the effect that her mother's death would have on E.[115] But, as Professor Berg's report itself acknowledged, in this regard, E's pre-school age, to some extent, redounds to her advantage. Professor Berg stated that at E's age, she does not yet possess the capacity to fully appreciate the fact of her mother's passing and instead, because of her age, holds the belief that her mother has gone away temporarily, to return later. This has the effect of delaying the immediate psychological insult to E that would ordinarily follow from an immediate and full appreciation of not only the fact of her mother's passing, but also its irreversibility and permanence. So, it seems to me that this position will prevail for some time if E is to be returned to the UK.

[170] In this regard, there is also the bereavement counselling that E will receive when she returns to the UK. Professor Berg alluded to this aspect in her second report.[116] Bereavement counselling, according to Professor Berg, would entail support to E's father in respect of assistance he may require when the time comes for him, in response to E's needs, to give her simple and repeated explanations about her mother's death, its permanence and irreversibility, and to do so in the sensitive manner that is required.

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[115] She stated:

> "The explanation of death to a child needs to take into account that the child's concepts of death are immature. That is, the universality, irreversibility and permanence of death is only gradually acquired by the age of about 10 years . . . For the pre-school child death is regarded as concretely having 'gone away' and the fantasy of return of the deceased or of revival of the deceased may persist for some time. It would require repeated, sensitive and simple explanations of the permanence and irreversibility of death."

[116] She said:

> "Bereavement counselling, if undertaken regularly and for an extended period, would help [E] – it would give her the opportunity to express, verbally and in play, what she might be feeling. It could also offer father guidance on how to respond to [E]'s questions and deal with any possible behaviour difficulties."

[171] Professor Berg pointed out in her second report that "it is the immediacy of the physical contact and care – such as feeding, putting to bed, bathing, taking to and fetching from preschool – that matter to a young child". She pointed out that all these things had been done by E's aunt, maternal grandmother, and the aunt's house help, over the year preceding her second report. This has forged strong relationships between E and these persons, as she is still a very young child, "whose experiences are tied to currently lived physical realities." According to Professor Berg, "[l]osing these relationships, in addition to losing her mother, could have serious consequences for [E's] mental well-being".

[172] But all of this does not detract from the fact that a bond of the nature described can also be established between E and her father, if he were to be afforded the opportunity to extend the same care to her. E's father has in the papers expressed his intention to routinely perform for E these same tasks upon her return to the UK. He is prepared to attend to her physical care and to the contact tasks of feeding, putting to bed, bathing, taking to and fetching her from pre-school. This is the care that has enabled the aunt, grandmother and their helper to forge bonds with E. Professor Berg does not express the opinion in her second report that such a relationship between E and her father cannot be established.

[173] In sum, there is nothing in Professor Berg's two reports that established a grave risk that the return of E to the UK will expose her to physical or psychological harm, or otherwise place her in an intolerable situation. That brings me to Ms Pettigrew's report.

[174] Ms Pettigrew's evidence is comprehensively detailed in the first judgment. I confine this judgment to a recapitulation of its salient features. Her declared mandate was to assess the impact on E's psychological functioning in the context of the childhood attachment theory, should she be taken away from the aunt and from her known environment. After her death, E's mother's primary attachment role was taken over by the aunt. Removing E from the aunt's care would effectively result in a second maternal death for E. Developing an emotional understanding of her mother's death

will continue through E's different stages of development with the assistance of an emotionally available and trusted carer who can guide her through these phases. Absent that carer in times of need, there will likely be a significant level of distress and emotional trauma for E.

[175] Ms Pettigrew expressed the view that there is no secure bond between E and her father and it is unlikely that a secure bond would be established with him if E were to be returned to the UK. According to Ms Pettigrew, because E is no longer in the attachment formation phases of the attachment theory, there would be no transition for her from the aunt's care into that of her father, and that she would not form an attachment with him if placed in his care. In effect, her return to the UK would mean that E would be placed with a person who is a stranger to her. Moreover, E will be grieving the loss of her two attachment figures, namely her mother and the aunt, in addition to the loss of the safe and predictable structures of her life in SA.

[176] Ms Pettigrew was of the opinion that, faced with these losses, E's coping resources would in all likelihood be overwhelmed, and that there was a significant risk of a complete breakdown with psychosis and psychological damage to her, in the short- and long-term. Therapeutic intervention would not ameliorate the sense of loss that E would experience nor the emotional damage to her, and it would be challenging for her to develop a trust relationship with a therapist in the UK in the absence of her also having an established a bond with her father.

[177] Based on this assessment, Ms Pettigrew concludes that there is a likelihood of E suffering serious psychological harm if she is removed from the aunt. That is because E will not have the capacity to deal with the trauma of being removed from her primary attachment figure.

[178] The first judgment holds that Ms Pettigrew's report "represents a reasoned conclusion based on the facts set out in her report". I disagree. As I see it, the first judgment and the Supreme Court of Appeal's place too much emphasis on

Ms Pettigrew's report and fail to consider (in the case of the Supreme Court of Appeal) or place inadequate weight on (in the case of the first judgment) the evidence of the support systems available in the UK. While Ms Pettigrew's evidence may be uncontroverted, as the first judgment holds, it only tells one side of the story. When all the evidence, including the evidence concerning the UK support systems, is placed on the scale, as it should be, the alleged grave risk of harm or intolerable situation averred by Ms Pettigrew does not meet the threshold of Article 13(b).

[179] The first judgment attributes the risk of the harm to: E's young age; the circumstances in which she came to be in the care of the aunt; the length of time that she has been in the care of the aunt, who has now become her primary attachment figure; the absence of the formation of any significant bond with the applicant; and the fact that her return to the UK will take her away from her primary attachment figure and out of her known family and social environment to a country of which she is unlikely to have much recollection, and to family members with whom she has not as yet formed any relationships.[117]

[180] This summation graphically demonstrates the unbalanced nature of the approach adopted by the first judgment. It fails to recognise that these factors do not redound negatively on E's father's position – on the contrary these are factors over which he had and still does not have any control. This recognition is not a misdirected focus on the father's interests, but in fact has a direct bearing on E's best interests. Most of these factors (save for E's young age and the circumstances in which she came to be in the aunt's care) are the result of the inordinate delay in finalising this case, primarily in the Supreme Court of Appeal, an aspect to which I will revert presently.

[181] E's grief, although deeply tragic, is not uniquely UK specific. She will experience this grief even if she were to remain in SA. It is not harm of sufficient

[117] See the first judgment at [110(d)].

severity so as to require E to avoid returning to the UK.[118] The risk of harm in separating E from her aunt, to be returned to the UK and placed with her father, results solely from the wrongful retention and the unfortunate delay in finalising this litigation, particularly in the Supreme Court of Appeal. Absent the wrongful retention, there would be no need for E to evade this harm. This is precisely the harm that is expected to follow E's return following a court order. It is also the harm that can be created by anyone that wrongfully retains a child in another country, a scenario that the Convention serves to discourage. Furthermore, it is not harm that is serious enough that "is not reasonable to expect a child to tolerate".[119]

[182] The collective harm of E's mother's death and a separation from the aunt pursuant to a court-ordered return to the UK does not to my mind meet the high Article 13(b) threshold. I say this based on my findings here, but also, accepting that no two cases are identical, considering that the potential harm facing the children in *Sonderup*[120] and *KG v CB*[121] was of a more serious nature than the potential harm facing E. Nevertheless, this Court and the Supreme Court of Appeal both ordered the return of the children to their countries of habitual residence. It bears emphasis that the correct approach to determining a dispute of this nature is that:

> "A South African court seized with an application under the Convention is obliged to place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court."[122]

[183] A striking lacuna in the reasoning of the Supreme Court of Appeal and the first judgment is that there is no consideration at all of the harm that E would likely suffer from her father's absence, including having an estranged parent and a sense of

[118] *Re E* above n 41 at para 33.

[119] Id at para 34.

[120] *Sonderup* above n 16 at para 39.

[121] *KG v CB* above n 40 at para 44.

[122] *Sonderup* above n 16 at para 35.

abandonment and trauma similar to that experienced by some adopted children. This harm could conceivably be worse than the harm that Ms Pettigrew envisions E would suffer if she were to be returned to the UK. No evidence was placed before the courts in relation to the harm E would likely suffer from the absence of her father. The first judgment places undue emphasis on the time that E has been away from her father, ignoring the fact that this is exactly the unenviable position the father finds himself in due to the failure to return E to the UK after her mother's death.

[184] The aunt bears the burden of proof to demonstrate the grave risk of harm. It would then be for the father to refute this. The objective of the Convention enunciated in Article 1 is to secure the prompt return of a child removed from the country of habitual residence, and to restore the previous prevailing situation before the unlawful removal or retention, in order to have issues like custody and others that may underlie the removal of a child, decided by the courts of the country of habitual residence. The rationale behind this is to preserve whatever custody arrangement existed immediately before an alleged wrongful removal or retention, thereby deterring a parent from crossing international borders in search of a more sympathetic court.

[185] That brings me to the evidence adduced concerning the structures and systems available for E's support in the UK upon her return. This evidence was completely disregarded by the Supreme Court of Appeal and is trivialised by the first judgment. It is necessary that I set out that evidence in some detail, for a more balanced perspective. It is of some significance that E's mother's own case notes, which form part of the record, testify to the elaborate support systems available to E in the UK. In those notes, the social workers assigned to E's mother, Ms Anna Phillips and Ms Giorgia Chatwin, meticulously recorded her own treatment and the support services she had received in Herefordshire.

[186] There is a report by Mr Samuel Njini, a qualified social worker registered with Social Care Wales and the Health Professionals Council of England, employed as a social worker at Herefordshire Children's Services. He had consulted with the father

and had conducted an inspection of his living quarters. Mr Njini reported that the father lives in a two-bedroom house and that E's room has been prepared for her. He described E's room as beautifully decorated. According to the report, the father is employed by a local company, Hut Builders, which builds wooden play huts for children. He earns £10 an hour and he works 20 to 30 hours a week. The father is entitled to universal benefits, and will be able to care for E upon her return. He lives in a community with a network of support from friends who live in the same village and have children the same age as E.

[187] In addition to these observations, Mr Njini also recorded that Social Services are able and will continue to provide support to E and her father. A referral would be made to the bereavement counselling service to support E. The father had confirmed to him that E is still registered with a local general practitioner and the National Health Service will continue to meet her health needs as and when required. E will be allocated to a health visitor who will visit her at home to ensure that her health needs are met and that she meets all her developmental milestones. In terms of further checks and balances, Social Services, the health visitor, the nursery school and the bereavement counselling service will ensure that E's safety and emotional wellbeing are fully safeguarded.

[188] All this evidence indicates that E would be provided with suitable accommodation were she to return to the UK; that her father is committed to and has the ability to take care of her; that he has a network to support him with E's care and that the social and medical services under the local authority would be involved in attending to her needs.

[189] Mr Njini's report was confirmed by Mr James Twist, who is employed at the International Child Abduction and Contact Unit (ICACU). He performs the functions assigned to the UKCA under the Hague Convention. Mr. Twist is the case worker at ICACU responsible for South African matters. He was contacted by Ms Shirin Ebrahim, a Family Advocate who deposed to an affidavit in the High Court in response to questions from that Court during the hearing. Mr Twist confirmed that

there were social services available for E in Herefordshire, where she would live with her father, if she were to return to the UK.

[190] There is also a report by Dr Onyoja Momah, a barrister in the UK and an expert in family law and cross-jurisdictional cases. According to his report, due to the unique nature of this case, even if a return order was made, the hearing to determine parental rights and responsibilities would likely be held in SA due to *forum conveniens* (the most convenient forum to hear the matter). A report from Dr Ester Scotland, a medical doctor in Herefordshire, stated that the father had undergone a health assessment in 2019 and was prescribed medication which he at that stage had continued to take.

[191] The record of a meeting held on 12 June 2019 between the family (E, her father and mother) and members of the social services professional team in the UK is instructive. The team included Ms Georgia Chatwin described as Care Coordinator/CPN Recovery Mental Health Nurse, Ms Sally Hampton described as Support Worker Recovery, Mr Tim Williams from the Early Help Team and Ms Jennie Swain, a Health Visitor. The record states:

> "Each member of the family got a chance to express their feelings and needs in a safe space and as health professionals we agreed our roles in supporting each person ensuring that each person within the unit receives support going forward. . . . *P and E will receive ongoing support from Jennie and Tim moving forward.*" (Emphasis added.)

[192] These reports and the case notes referred to earlier demonstrate that the social and medical services available in the UK can and will respond to the needs of E and her father. There are not only strong medical, but also strong social support systems available. Her father has accommodation available for her and he appears to have gone to some lengths to create a happy living space for her, according to Mr Njini's report.

[193] The father's position as the only surviving parent receives very little attention in the judgment of the Supreme Court of Appeal and the first judgment. There is no recognition of him having been involved in E's life right from the outset. He is no stranger to E. Their relationship was established before E travelled to SA. What underpins the attachment theory advanced by both Professor Berg and Ms Pettigrew, and relied upon by the aunt, amounts to a dismissal of the father's existence and his role in E's life. It fails to acknowledge and give due weight to the relationship between father and child. On this approach, E's attachment to the aunt effectively discourages all involvement of the father. There is a diminution of the presence of the father, resulting in E being deprived of the love, affection and care of her father, to which she is entitled. This deprivation is exacerbated by the tragic loss of her mother.

[194] There is some passing acknowledgment in the first judgment of some shortcomings in Ms Pettigrew's evidence. It says that she "did not pertinently address the impact, if any, of the natural relationship of father and daughter that exists between E and the applicant, and the father's familial support system in the UK on the likelihood of the postulated poor outcome of E's return to the UK materialising".[123] But it then immediately criticises the AHCA and the father for not placing expert evidence of their own before the Supreme Court of Appeal, thus leaving Ms Pettigrew's evidence uncontroverted. As the first judgment itself accepts, even if uncontradicted, expert evidence remains opinion that must be scrutinised by a court to determine its value. For the reasons enunciated, I do not accept that Ms Pettigrew's evidence establishes an Article 13(b) defence.

[195] I must not be misunderstood. I do not take the view that Ms Pettigrew's evidence is unreliable or that it should be disputed or rejected as the first judgment appears to interpret my approach.[124] The point is rather that, even though her evidence is accurate,

[123] See the first judgment at [111].

[124] See the first judgment at [112] and [116].

the harm Ms Pettigrew describes is not grave enough to meet the Article 13(b) threshold. The first judgment holds that it is grave enough I hold the contrary view that it is not. The situation that E finds herself in naturally evokes much empathy, but it is not grave enough to warrant E staying in SA. As stated, the harm that will arise is of the exact nature associated with an order of return contemplated by the Convention.

[196] To illustrate, if E had stayed in the UK with her father while her mother came to SA for treatment, she would not face the harm of separating from her aunt or returning to her father, now a "stranger". She would face the grief of losing her mother only and, as I have attempted to explain, this harm is not one that E faces all of a sudden by returning to the UK.

[197] Every child that is removed from their country of habitual residence and left-behind parent, and instead stays in another country for some time with only one attachment figure would face the dual harm of separating from the sole attachment figure, and returning to their now left-behind parent, a "stranger".

[198] The first judgment points out that E's return to her father is effectively her being "placed with a person who is a stranger to her".[125] This is problematic, as it completely discounts the father's parental rights and, again, is a consequence arising solely from the retention (as would be the case for any left-behind parent from whom there has been some distance). E's attachment to her aunt effectively discourages all involvement of the second applicant as the father. This latter relationship is being totally obliterated by the attachment to her aunt. Ms Pettigrew alludes to the fact that E's aunt made links between herself and E, her mother and the domestic helper during the time spent together from the time of their arrival in SA until the mother's death. The presence of the father hardly gets any mention and is being diminished. The result is that for E, the unfortunate loss of her mother in the circumstances in which she lost her – after her

[125] See the first judgment at [98].

mother wrongfully retained E in SA – means that she is being deprived of the love, affection and care of her father, to which she is entitled.

[199] It bears emphasis that the need to afford a balanced assessment in this enquiry to the father's position is not merely out of maudlin sympathy. His situation bears directly on E's well-being, as she is being deprived of her only surviving parent's care and affection, through the improper and unbalanced approach to the matter advanced by the first judgment.

[200] Reliance is placed in the first judgment on Ms Pettigrew's view that therapy would not ameliorate E's harm.[126] But, to my understanding, effective therapy is not what is required to mitigate potential harm. The requirement of effective therapy sets a higher standard than what is actually required. Instead, what is required is a court system in the country of habitual residence that can deal with the harm.[127] The Convention's purpose is to determine which jurisdiction is effectively responsible for the child, and this includes addressing the harm the child would face. In other words, if a child was returning to a jurisdiction with a failed court system or no child protection laws or enforcement of such laws, then there is no way of mitigating the harm.

[201] The first judgment relies on the evidence that "there are no measures that would serve to mitigate the anticipated harm".[128] As I have attempted to show, this is not the case.

[202] The absence of culpability on the part of E's aunt alluded to in the first judgment bears no relevance to this enquiry.[129] It loses sight of the requirements of

[126] See the first judgment at [94].

[127] *TMS v AMS* [2023] EWFC 1620 (*TMS v AMS*) at para 21.

[128] See the first judgment at [121].

[129] See the first judgment at [127]:

> "I do not believe that an order refusing her return to the UK will send the wrong message or undermine the integrity of the Convention, particularly when weighed against the lack of culpability on the part of the aunt and what are the best interests of E in the circumstances."

the Convention. The question is simply whether, on a balance of probabilities, in the event that E is ordered to be returned to her state of habitual residence, she would be faced with the risk of grave psychological and physical harm or that she may otherwise be placed in an intolerable situation.

[203] A recent judgment of the Family Division of the High Court in England provides insight into how an Article 13(b) defence is to be approached in these circumstances. *TMS v AMS*[130] concerned an application under the Convention in respect of two children, AS and VS. Their parents were Russian and the mother lived in Moscow and the father in London.[131] AS and VS went to London for a two-week holiday with the father, as agreed between the parents. At the end of the two weeks, the father did not reunite them with the mother as planned and emailed the mother saying that he had decided that AS and VS will remain with him in London.

[204] The mother instituted Hague Convention proceedings in London within a few days of the children's retention. The father conceded that the children were habitually resident in Russia up until that point and that his retaining them in London constituted a wrongful retention within the meaning of the Convention. He also conceded that there was no question of an exception being raised under either acquiescence or consent. Thus, the issues for determination by the Family Court were whether a return of the children, or either of them, would give rise to a grave risk of physical or psychological harm or place them in an intolerable situation if they were to be returned to Russia.

[205] The father's defence in terms of Article 13(b) of grave risk of harm included allegations that a return against AS' wishes would expose him to a deterioration in his

[130] *TMS v AMS* above n 127.

[131] The father was born in the Russia Federation (Russia) and holds Russian citizenship. He acquired UK citizenship after working in London in the early 2000s before he then returned to Russia, where he was the chief executive of a business dealing with senior care. The mother also was born in Russia. She holds Russian and Canadian citizenship, arising from a period when she and her parents lived in Canada. She returned to Russia many years ago and the parties met and married in Russia in April 2008, following which they made their lives in Moscow.

psychiatric state such that he may become suicidal again. The father contended that this would meet the Article 13(b) threshold. He also alleged that there was a real risk of the children being exposed to physical and emotional harm from their mother, both in terms of physical beatings and threats from her to kill herself or to kill AS, and that the maternal grandfather posed a physical risk of abuse to them as well. The impact on AS of returning to Russia to his school was also relied upon, he having been unhappy at that school. Furthermore, the father relied upon the risk of the Ukraine/Russia war extending into Russia with the attendant risks of harm, and also, in particular, an alleged risk to the children of dissidents being targeted by the State and either removed from their family's care or being subjected to other forms of physical abuse at the hands of the State.

[206] In following *Re E*, Williams J approached the enquiry as follows:

> "[T]he court takes the allegations at the highest and asks the question: would, taken at their highest, the allegation or the allegations cross the Article 13(b) threshold. If the answer to that is no, taken at their highest they would not, then the Article 13(b) exception cannot be established. If the allegations taken at their highest would cross the Article 13(b) threshold, then the second stage is to ask whether the protective measures could be effective rather than theoretically reduce a risk but could be effective, in practice, to reduce the risk to the children to a level below the Article 13(b) threshold."[132]

[207] The Court summarised the present approach of the UK courts as being an emerging difference in the cases in the Court of Appeal and the Family Court since *Re E* from the relatively straightforward approach that the UK Supreme Court adopted in the latter case. According to Williams J, the courts now consider, based on the Good Practice Guide,[133] whether the allegations made by the respondent are of such a nature and of sufficient detail and substance, in terms of evidence, that

[132] *TMS v AMS* above n 127 at para 22.

[133] The Hague Conference on Private International Law *Part VI of the Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Article 13(1)(b)* (2020).

they could constitute a grave risk. In addition, the question is asked whether the maximum level of risk is supported by "reasoned and reasonable assumptions". This, said Williams J, is a rather more nuanced and detailed exercise than the pragmatic solution suggested in *Re E.*

[208] The Court noted that, in addressing the question whether a respondent has established that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, the range of approaches and outcomes include the following:

(a) The evidence on the papers satisfies the judge on a balance of probabilities that the grave risk exists. The court then determines, in the light of its findings on the level and nature of risk, what protective measures are available and whether or not they would be effective to ameliorate that determined risk.

(b) The evidence on the papers satisfies the judge on a balance of probabilities that there is no grave risk. This may be because the nature of the allegation taken at its highest simply could not establish a grave risk of harm or other intolerable situation or because the evidence in relation to the alleged risk is sufficiently clear on paper that a clear adverse conclusion can be reached. No Article 13(b) protective measures are then required.

(c) The judge can on the papers confidently discount the allegation that there is a grave risk of harm. Forensically this would suggest that the evidence is insufficient to determine on balance that the grave risk does not in fact exist but is sufficiently weak (lacking in substance and detail, based on unreasoned and unreasonable assumptions perhaps) that it is not established. No Article 13(b) protective measures are then required.

(d) The court cannot confidently discount the allegations, as the evidence is of such substance and detail, or the allegations are based on reasoned or reasonable assumptions such that it should take the allegations at their

> highest and determine that the grave risk of harm threshold is passed. This approach is consistent with the legal burden which lies on a respondent to establish the defence. In these cases, the court's evaluation of the protective measures will encompass more flexibility in terms of the range of protective measures required and the way in which the court approaches how effective they need to be.[134]

[209] According to Williams J, in the event that an exception is established, the approach to the exercise of the resulting discretion is set out in *Re M (Abduction: Zimbabwe)*,[135] where the House of Lords confirmed that the discretion is at large. In that case, policy considerations which accompany the Convention will be weighed in the balance, along with any factors relating to the exception which has been established, and any welfare considerations which go to support either a non-return or a return. It has been recognised that in cases where the grave risk of harm exception has been established, it is quite difficult to envisage a situation where the court would in the exercise of its discretion order a return, nonetheless. So, the discretion on an Article 13(b) defence of this sort is more notional or more theoretical than real.

[210] Ultimately, the Court held that the risk to the child, AS, was limited and there were advantages to AS in welfare terms in being reunited with his family unit and extended family. Taking those factors into account and the weight to be given to the Convention considerations in the case, the Court held that AS had to be returned to Russia to allow the Russian courts to determine his future in a considered and holistic fashion.

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[134] Id at para 30.

[135] *Re M (Abduction: Zimbabwe)* [2007] UKHL 55.

[211] In *Friedrich*, the mother made no allegations of abuse, but instead raised concerns that the child would have adjustment problems if forced to return to Germany. The Sixth Circuit held that this was not enough to invoke the grave risk exception because grave risk implies much more than "serious risk".[136]

[212] The first judgment lists three primary considerations in respect of E's best interests that lead it to the conclusion that it is best for her to remain in SA and for a court here to decide what would be in her best long-term interests. These considerations are:

(a) the length of time that has elapsed since E's initial retention in this country;

(b) the fact that E was only two years and two months old when she came to SA with her parents and that it is therefore unlikely that she had formed any meaningful relationships with anyone in the UK or that she would have any recollection of that country; and

(c) the finding of the likelihood of a grave risk of psychological harm should E be returned to the UK. The first judgment holds that "[t]he implication of this finding, the nature of the anticipated harm, and the absence of there being any protective measures to reduce the risk or the seriousness thereof, mean that an order for the return to the UK is likely not to be in her best interests."[137] It adds: "[t]his conclusion is strengthened by the absence of any evidence of meaningful undertakings by the authorities in

[136] Id at para 15:

> "[A] grave risk of harm for purposes of the Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute– e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."

[137] See the first judgment at para [130].

> the UK to provide reasonable protection against the harm postulated by Ms Pettigrew in her evidence."[138]

[213] I have already advanced reasons why I disagree with the consideration in (c). It is necessary to observe, though, that the last sentence quoted, vividly illustrates why I say that the first judgment largely ignores the evidence adduced relating to the support services available to E in the UK (and, of course, the Supreme Court of Appeal ignored that evidence altogether). This is not a balanced approach and it improperly elevates Ms Pettigrew's expert opinion.

[214] The first judgment impermissibly overemphasises E's attachment to the aunt, as outlined in Ms Pettigrew's report. This factor has a double dimension, according to Ms Pettigrew. First, there is the fact that E's mother's primary attachment role has been taken over by the aunt. And, secondly, Ms Pettigrew alludes to the fact that, since E is no longer in the attachment formation phase, there would be no transition for her from the aunt's care into that of her father, and that she would not form an attachment with him if placed in his care. This attachment factor appears to me to be the overriding consideration advanced as motivation for Ms Pettigrew's conclusions and recommendations. It also seems to hold great sway with the first judgment. But that misapplies the test in Hague Convention proceedings. As stated, the test is whether there is grave harm of the nature envisaged in Article 13(b) by the words "place the child in an intolerable situation".[139] The attachment factor does not belong in that enquiry; it is a test utilised for custody and care proceedings.[140] In the course of discussing the constitutionality of the Hague Convention Act, this Court in *Sonderup* held:

> "A South African court seized with an application under the Convention is obliged to place in the balance the desirability, in the interests of the child, of the appropriate court

[138] Id.

[139] *Sonderup* above n 16 at para 44.

[140] Davel "General principles" in Davel and Skelton *Commentary on the Children's Act* (Juta & Co Ltd, 2022) at 9.

> retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court. *As appears below, the court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court ordered return. The ameliorative effect of Article 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention*. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain."[141] (Emphasis added and footnotes omitted.)

[215] It is convenient to address considerations (a) and (b) together. This approach seriously undermines the primary objective of the Convention, to ensure an expeditious restoration of the status quo ante in cases of unlawful retention or removal. To hold the inordinate delay in this case against the AHCA and the father is to subvert the Convention's aims. The first judgment invokes Article 12 for its stance. But that Article envisages that the child be returned forthwith. The prompt return of the child lies at the heart of the Convention's entire scheme. The history of this case is that it proceeded fairly rapidly to and through the High Court.[142] Not so in the Supreme Court of Appeal.[143] In this Court too, it has taken some time for the matter to be finalised. But, by the time the matter arrived in this Court, the damage was done insofar as inordinate delay is concerned, primarily in the Supreme Court of Appeal.

[216] Accepting this delay as a valid cause of E becoming settled in SA, as the first judgment holds, would mean that anyone with an interest in wrongfully retaining a child in another country can draw out litigation proceedings to enable the child to settle and so escape the reach of the Convention. Delay would become a strategic tool to evade the Convention's objectives, not only to protect children from the harmful effects of

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[141] *Sonderup* above n 16 at para 35.

[142] In the High Court, the Convention proceedings were instituted on 21 July 2020, the matter was heard on 28 October 2020 and judgment was delivered on 11 December 2020. The High Court granted leave to appeal to the Supreme Court of Appeal on 9 February 2021.

[143] In the Supreme Court of Appeal, the appeal was instituted on 4 March 2021, the matter was only heard on 28 February 2022 and judgment was delivered on 26 April 2022.

international child abduction and retention by a parent, but importantly also to secure the *prompt return* of the abducted or retained children to their state of habitual residence. Promptitude is an indispensable part of the process. Article 12 requires that where a child has been wrongfully removed or retained, and a period of less than a year after the wrongful removal or retention has elapsed, the judicial or administrative authorities of the requested state "shall order the return of the child *forthwith*." That is precisely what the High Court did – order E's return to the UK within a year of her retention in SA. The subsequent delays of the appeal in the Supreme Court of Appeal and application for leave to appeal in this Court cannot subvert the Convention's aims and the provisions of Article 12.

[217] The first judgment correctly enumerates the flaws in the judgment of the Supreme Court of Appeal. To recap, they are:

(a) First, that Court erred in its approach to the correct application of Article 13(b) by applying the principles in *Plascon-Evans* to its evaluation of the evidence.[144] In doing so, the Court impermissibly decided the matter solely on the evidence adduced by the aunt. It completely disregarded the evidence of the applicant on crucial matters. That aspect has been addressed in some detail in this judgment.

(b) Secondly, as a corollary of the first mistake, the Supreme Court of Appeal decided, solely on the evidence of E's mother, that the father would not be able to raise E and provide her with the necessary emotional and financial security. That evidence was premised on factors like the father's history of mental health issues, abuse of alcohol and other substances, and his unstable employment history. These factors were claimed to create the risk of exposing E to harm and an intolerable situation envisaged in Article 13(b), a claim which the Supreme Court of Appeal accepted in applying *Plascon-Evans*.

[144] As to the assessment of evidence on the papers in Hague Convention matters, see: *Re C (Children) (Abduction Article 13(b))* [2018] EWCA Civ 2834 and *Re A (Children) (Abduction: Article 13(b) Court of Appeal* [2021]; EWCA Civ 939 [2021] 4 WLR 99.

(c) And, thirdly, the Supreme Court of Appeal, once it found that the Article 13(b) defence was established, had to exercise its discretion and was duty bound to consider whether E should be returned to the UK. This it did not do. As is correctly pointed out by the first judgment, that Court's judgment has no reference at all to it exercising such a discretion. Absent any statement to that effect, one must accept that if failed to exercise that discretion. But, even if it did, the Supreme Court of Appeal plainly failed to balance both the interests of the child and the general purposes of the Convention, as it must do.[145]

[218] To these I would add that the Supreme Court of Appeal appears to have erred in its conflation of the two inquiries of what was referred to in *Sonderup* as the long-term interests of the child, including the determination of custody matters, and the short-term interests of the child, which concern jurisdictional matters. That Court seems to me to have conflated the assessment of the short-term jurisdictional question of which court is best placed to deliberate on issues of care, custody and guardianship and the longer-term question that concerns an assessment of the best custodial arrangement for the child. That is why it regarded Ms Pettigrew's report as determinative and held that E's father's care would be unsuitable. That was not an assessment for the Supreme Court of Appeal to make, or, for that matter, for this Court to make now. What is required is a determination of whether the Article 13(b) defence holds good in the face of an Article 12 mandatory return. Once E has been returned to the UK under the auspices of the UKCA, a full enquiry into her father's competency as a carer will follow by way of a custody hearing. This is precisely what the Convention envisages.

[219] In conclusion, I hold that, on a consideration of the totality of the evidence, including the evidence adduced by the father and the AHCA, the aunt has not proved the Article 13(b) defence. I am not satisfied on a balance of probabilities that, in the event that E is ordered to be returned to her state of habitual residence, she would be

[145] *Sonderup* above n 16 at para 28.

faced with the risk of grave psychological and physical harm or that she may otherwise be placed in an intolerable situation. Moreover, the aunt failed to establish that the UK is not able to mitigate any of the risks that she has raised or alluded to by Professor Berg and Ms Pettigrew should E be returned to the UK. On the evidence, there are adequate support services and systems in place in the UK. These would mitigate the impact of E's return to the UK. The delay occasioned by the litigation cannot be permitted to impede the objectives of the Convention.

The Order

[220] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Supreme Court of Appeal and the High Court are set aside.
4. E (the minor child) shall be returned to the jurisdiction of the Central Authority for England and Wales (CAEW) in the United Kingdom (UK) by the end of February 2024.
5. Pending the return of E to the UK as provided in this order, the second respondent (the aunt) shall not, without the prior written consent of the Central Authority for the RSA (CASA), remove E from the province of the Western Cape in the Republic of South Africa (RSA) and shall keep CASA informed of her and E's physical address and contact details.
6. In the event of the second respondent intending to accompany E on her return to the UK, she shall notify CASA and the second applicant (the father) in writing, within one week of the date of issue of this order, and in that event she is granted leave and authorisation, insofar as it may be necessary, to remove E from the RSA and accompany E on her return to the UK.

7. In the event of the second respondent failing to notify CASA in terms of para 6 and the second applicant intending to accompany E on her return to the UK, he shall notify CASA and the second respondent in writing, within one week of such failure, and he is granted leave and authorisation, insofar as it may be necessary, to remove E from the RSA and accompany E on her return to the UK.

8. In the event of the second respondent and the second applicant failing to notify CASA in terms of paras 6 and 7, CASA is authorised to make such arrangements as may be necessary to ensure that E is safely returned to the custody of the CAEW and to take such steps as are necessary to ensure that such arrangements are complied with.

9. Pending the return of E to the UK and for as long as the second applicant is in the UK, contact between E and the second applicant shall take place in accordance with the High Court's Order of 10 September 2020.

10. In the event of the second applicant being present in the RSA for the purpose provided in para 7, CASA shall liaise with the respondents' legal representatives to establish a schedule for contact between E and the second applicant. Such schedule shall provide for the second applicant's enjoyment of contact with E on a daily basis, taking into account E's daily activities and any other factors relevant to E's well-being at the time.

11. Upon E's arrival in the UK, the second applicant must procure all appropriate social and medical services to ameliorate E's return to the UK and cooperate with any assessment that the Department of Health and Social Care in the UK may wish to undertake in relation to him and the welfare of E.

12. Proceedings regarding the determination of parental rights are stayed pending E's return to the UK.

13. In the event of either the second respondent or second applicant notifying CASA, in terms of para 6 or para 7, CASA shall forthwith give notice

thereof to the Registrar of this Court, to the CAEW and to the second respondent and the second applicant. In the event of either the second respondent or the second applicant making the election provided for in para 6 or 7 of this order respectively, then the second respondent or the second applicant, as the case may be, shall provide the Central Authority with regular information in writing of all logistical and other arrangements made for the return of E to the UK. This information shall include, but not be limited, to information regarding flight dates and times, and compliance with any passport, visa or health requirements, if applicable. CASA shall also be entitled to request from either the second respondent or the second applicant, as the case may be, details of the arrangements made for the return of E to the UK. Any such request shall promptly be responded to.

14. A copy of this order shall be transmitted forthwith by the first applicant to the CAEW.

15. Each party is to bear their own costs in this Court, the Supreme Court of Appeal and the High Court.

For the First and Second Applicants	Ncumisa Mayosi and Khanyisa Ngqata Instructed by State Attorney, Cape Town
For the First Respondent	Janet L McCurdie SC and Lana C Bezuidenhout Instructed by Ross McGarrick Attorneys, Cape Town