Articles

Article 13 (b) of the 1980 Hague Convention – where are we now?

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Mani has a broad practice covering all areas of family law, particularly in cases which have an international element pursuant to both the 1980 Hague Convention and the Inherent Jurisdiction.

This aim of this article is to explore the recent High Court authorities in respect of the defence which arises from Art 13(b) of 1980 Hague Convention.

In cases concerning child abduction under the 1980 Hague Convention, the starting point is Art 1:

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.

From the outset, Art 12(1) provides that:

> 'Where a child has been wrongfully removed or retained in terms of Article 32 and, at the date of 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 must, subject to the exceptions in Article 13,3 order the return of the child forthwith.'

Accordingly, Art 12 of the Hague Convention requires a requested state to return a child forthwith to her country of habitual residence if she has been wrongfully removed in breach of rights of custody. There are a number of limited exceptions/defences and in particular, Art 13 provides three exceptions and this article is concerned with the second:

> '. . . 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) . . . ; 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 . . . 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.'

This article is going to focus on the recent High Court authorities in respect of the Art 13b defence.

Article 13b defence

As stated above, Art 13 sets out:

> '. . . that 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:
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> …

> (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.'

It is often argued[1] that within England and Wales, Art 13(b) is the most litigated of all the exceptions but also a defence that is difficult to establish. The leading authority on Art 13(b) defence is that from the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2011] 2 FLR 758. This case reaffirmed the position 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 on the ordinary balance of probabilities. However, in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under Art 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination.[2]

The defence is described as 'forward-looking'[3] [4] and Lord Wilson said in *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442 (at [32]) the 'critical question is what will happen *if*, with the mother, the child is returned' (emphasis added).

In terms of the defence, it was set out in *Re E*, paras [33]–[35]:

> '33. . . . the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be 'real'. It must have reached such a level of seriousness as to be characterised 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 really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.
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> 34. 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". As was said in *Re D*, 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. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.
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> 35. Fourth, article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person,

1 Statistical analysis has been undertaken in respect of the 1980 Hague Convention, for example: N Lowe and V Stephens, 'A Statistical Analysis of Applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction', Preliminary Document No 8A-C (Revised Version, November 2011) and N Lowe, E Atkinson and K Horosova, 'A Statistical Analysis of Applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction', Prel Doc No 3 (Revised Version, 2007)

2 *Re E* Para [32]

3 C (A Child) (Abduction: Article 13(b)) [2021] EWCA Civ 1354 (10 September 2021), para 47 and Lord Wilson commented in Re E the phrase : 'looking to the future'

4 Lord Wilson commented in Re E

> institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within Article 13b the court is not only concerned with the child's immediate future, because the need for effective protection may persist.'

Further, the *Guide to Good Practice: Part VI, Art 13(1)(b)*, published in 2020 by the Hague Conference on Private International Law ('the *Guide to Good Practice*'):[5]

> '[35] The wording of Article 13(1)(b) also indicates that the exception is "forward-looking" in that it focuses on the circumstances of the child *upon return* and on whether those circumstances would expose the child to a grave risk. (emphasis in original)
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> [36] Therefore, whilst the examination of the grave risk exception will usually require an analysis of the information/evidence relied upon by the person, institution or other body which opposes the child's return (in most cases, the taking parent), it should not be confined to an analysis of the circumstances that existed prior to or at the time of the wrongful removal or retention. It instead requires a look to the future, i.e., at the circumstances as they would be if the child were to be returned forthwith. The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence.
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> [37] However, forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That said, past behaviours and incidents are not per se determinative of the fact that effective protective measures are not available to protect the child from the grave risk.'

That this is the effect of Art 13(b) was rightly accepted by Mr Setright who submitted that the court's 'essential task' is to address the issue of *risk*, in the event of the child's return.

In terms of providing a summary of the approach in this matter, *Re IG (a child) (child abduction: habitual residence: Article 13(b)) KG v JH* [2021] EWCA Civ 1123 where Baker LJ stated at paras [46]–[48]:

> '46.The leading authorities remain the decisions of the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257. The principles set out in those decisions have been considered by this Court in a number of authorities, notably *Re P (A Child) (Abduction: Consideration of Evidence)* [2017] EWCA 1677, [2018] 4 WLR 16 and *Re C (Children) (Abduction: Article 13(b))* [2018] EWCA Civ 2834, [2019] 1 FLR 1045. Since the hearing of the present appeal, this Court has handed down judgments in another appeal involving Article 13(b), *Re A (A Child) Article 13(b))* [2021] EWCA Civ 939 in which Moylan LJ carried out a further analysis of the case law. I do not intend to add to the extensive jurisprudence on this topic in this judgment, but merely seek to identify the principles derived from the case law which are relevant to the present appeal.
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> 47. The relevant principles are, in summary, as follows.

5 https://assets.hcch.net/docs/225b44d3–5c6b-4a14–8f5b-57cb370c497f.pdf

(1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".
(2) The focus is on the child. The issue is the risk to the child in the event of his or her return.
(3) The separation of the child from the abducting parent can establish the required grave risk.
(4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.
(5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.
(6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.
(7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.
(8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.
(9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.
(10) As has been made clear by the Practice Guidance on 'Case Management and Mediation of International Child Abduction Proceedings' issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks.'

In *UHD v McKay (Abduction: Publicity)* [2019] EWHC 1239 (Fam), [2019] 2 FLR 1159 at [70] MacDonald J said:

> '70 . . . the methodology articulated in Re E forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see Re S (A Child) (Abduction: Rights of Custody) [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. *Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court*, albeit an evaluation that is undertaken in a manner consistent with the summary

> nature of proceedings under the 1980 Hague Convention.' (emphasis added)

There have been a number of authorities exploring this defence ranging from a wide-range of issues such as, the separation of a child from a primary carer. For example, when considering this Butler-Sloss LJ in *Re C (A Minor) (Abduction)* [1989] 1 FLR 403, at 661 raised the concern that refusing to make a return order 'because of the refusal of the mother to return for her own reasons, not for the sake of the child . . . would drive a coach and four through the Convention' and as such 'there is a long-standing appreciation of the risk that the effective operation of the 1980 Convention would be undermined if the taking parent was able to establish Article 13(b) by the simple expedient of deciding not to return with the child' as commented by Lord Justice Moylan in *Re A (Children) (Abduction: Article 13(b))* [2021] EWCA Civ 939 [2022], 1 FLR 1, para [89].

There has also been a number of reported cases concerning liability to criminal proceedings of the primary carer upon a return to the requesting state, allegations of serious domestic abuse and generally, the effectiveness of protective measures. As such, in practice before any final hearing where Art 13(b) is pleaded there will be a direction for the applicant to set out the protective measures he would offer together with the respondent filing protective measures sought. The court has to consider the well-established principle that the courts should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting State are equally as adept in protecting children as they are in the requested State.

Further, if during the final hearing the judge concludes that the allegations would potentially establish the existence of a grave risk within the scope of Art 13(b), then, as indicated out in *Re E*, at [36], the court must 'ask how the child can be protected against the risk'. Here is when the focus will shift on the protective measures to determine whether the risk can be addressed or sufficiently ameliorated. This will vary case by case and as stated in *Re E* at para [52]: 'the clearer the need for protection, the more effective the measures will have to be'.

Recent cases

Firstly, *Re C (child) (abduction: Article 13(b) and child's objections) RS v AM* [2022] EWHC 311 (Fam). This case concerned an application seeking the return of a child to Poland and was a rehearing of the father's application, following his successful appeal to the Court of Appeal (*Re C (a child) (abduction: Article 13(b))*) [2021] EWCA Civ 1354). The judgment sets out the lengthy facts of the case in respect of Art 13b, para [22] and [23] sets out the mothers case:

> '22. The mother alleges that there is a grave risk that the return of C to Poland would expose C to physical or psychological harm or otherwise place her in an intolerable situation. She asserts that for most of the parents' adult relationship she has been subjected to serious domestic abuse in multiple ways. More recently, she complains that the father has threatened her (through his conversations with C), and she alleges that he has attempted to blackmail the mother by means of 'revenge porn'. The mother further alleges that C has been witness to many of the incidents of domestic abuse, and has herself been subjected to repeated physical and emotional abuse. She alleges that the father suffers from untreated mental ill-health, and abuses alcohol. The allegations of domestic abuse appear to be supported by others within her family, and to some extent by C herself.
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> 23. It is the mother's case that there are no protective measures – taken individually or cumulatively – which would be *effective* to ameliorate or mitigate the grave risk of harm to C. Specifically, she argues that the father cannot be relied upon to adhere to any strictures placed upon his behaviour, as evidenced by the content of the recorded conversations with his daughter which I have described above.' (emphasis in original)

At para [27], the court sets out a vast range of protective measures that the mother sought and the father had offered and the conclusions can be found at para [37] which Cobb J stated:

> '37. The mother has filed what I regard as powerful substantive evidence in support of her case that she has been subjected to multiple forms of domestic abuse; her evidence is detailed, and is buttressed and corroborated by the evidence of third-party witnesses including the father's older (adult) daughter (with whom the father maintains that he has a "good relationship"), by C herself, and to a lesser extent by the authors of the independent OZSS report.
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> 38. The alleged abuse takes multiple forms; it is said that the father has violated the mother physically, sexually, and emotionally in a relationship characterised by his controlling behaviour. It is the mother's case that C has been exposed to this domestic abuse, and adversely affected by it. If the allegations of abuse are true, or even largely true, I am satisfied that there would be a grave risk that C would be exposed to physical or psychological harm or otherwise placed in an intolerable situation in the event of her return to Poland. To be clear, in this regard, I have drawn particularly on the evidence (albeit unproven) that C has been directly involved in incidents of domestic abuse (as she herself has alleged), and has further allegedly been the victim of direct harm herself; a photograph has been produced of an injury to C's head (said to be dated April 2020), allegedly caused by the father, although I know he maintains that this was accidentally caused by his granddaughter. In light of this, I have asked myself how C could be protected against that assessed risk, and have accordingly reviewed with care the proposed protective measures in para 27 above.
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> 39. I can derive little comfort from the evidence of the lawyer instructed by the parties to advise on the effectiveness of the proposed protective measures. While I recognise that ordinarily Polish authorities should be regarded as capable of protecting victims of domestic abuse, the unchallenged evidence in this case is somewhat at variance, as follows:
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> "… although the court ruling on the basis of the Hague Convention on the return of the minor [C] to Poland may apply the protective measures proposed by the defendant, not all of them in the event of a hypothetical breach by the applicant will result in a particular reaction from Polish courts or other authorities".
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> ". . . the restraining order against the applicant prohibiting from approaching the defendant and keeping her address confidential from him should be considered impossible to enforce in the light of the Polish law"…
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> "the prohibition of the applicant from contacting the defendant and the prohibition of approaching her at a certain distance could not result in sanctions against the applicant in the event of failure to comply with them by the applicant, because according to Polish regulations they may only be imposed by a prosecutor or a criminal court on the basis of a criminal procedure and not a civil matter".
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> 40. I am no more reassured by the actions of the prosecuting authorities in Poland who are said to be investigating the allegations of abuse; progress of the investigation is slow. For a period of time, indeed, it was suspended. The prosecutor's investigation is still ongoing some two years after the initial complaint
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> 41. More significant than both these concerns, I am extremely disturbed by the threats made by the father to his daughter C (directly to her and indirectly to the mother) during his telephone conversations with her last year; the extracts quoted above will be sufficient to illustrate the menacing tone and nature of his warnings directed to the mother (including but not limited to:

> "she will end up where she ought to, I promised myself, she will end up there where she should end up . . . for that, she is trying to make a fool of you and me"). These threats were of a piece with text messages sent to the mother in which he expressly declares his intention to track her down and "destroy" her. It is revealing that even after those threats were exposed during the first hearing of this application in April 2021, the father continued to present to the OZSS assessors (whom he saw in early May 2021) as gripped by the need for revenge. While I am conscious of the shortcomings of the OZSS report (as previously acknowledged: see para 36 above), the authors' expert assessment of the father himself, based on direct interviews with him, remains of some evidential value to me. This evidence, taken as a whole, and seen in the context of his own evidence which in some respects left me questioning his emotional stability, leaves me unable to repose any trust in the father to comply with restrictions placed on his behaviour.
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> 42. In conclusion, I have been left far from satisfied that the protective measures proposed by the father would be sufficient to protect C *effectively* or *adequately* from the grave risk of psychological or physical harm were she to return to Poland with her mother, pending the engagement of the Polish court and/or further active steps taken by the police. It follows that, unusually, I find the article 13(b) exception has been made out in this case.' (emphasis in original)

This judgment therefore demonstrates the significance of the court examining the protective measures in the case in order to determine whether they are sufficient and protective in nature.

Further in Judd J's judgment UG v NN [2022] EWHC 8 (Fam) (04 January 2022) explores further the evaluation required to be undertaken by the Court. The father's case (who was the respondent) was summarised at para 23:

> '. . . the father's case is there is a grave risk that the children would suffer harm and/or be placed in an intolerable situation if they were to return because the mother has never focussed on the children's needs. She has failed to see them regularly and neglects them emotionally. He says that she has an alcohol problem and that she has got drunk when she has had them in her care. In support of his case he produced two photographs of her lying on the floor, one of them showing that she had been sick. He produced a message in which the mother admitted having thrown a glass. He said that she lacks mental stability and lies to the court. She has problems with anger and aggression, and he pointed out that the Austrian court had followed the recommendation of the expert appointed in their case and concluded that the children should primarily live with the father.'

The court accepted the mother's undertakings and decided:

> '28. Having considered all the material before me, I accept Mr. Perkins's submission that the assertions made by the father here, even if they are true, are not of a nature, or of sufficient detail or substance that they could constitute a grave risk of physical or psychological harm, or place the children in an intolerable situation. I can confidently discount this. This is a mother with whom the children regularly spend time with no recent examples of problems given (for example of drinking when she has the care of the children) or evidence of them coming to any harm at all when they have been with her. The photos the father produces of drinking predate the Austrian proceedings and indeed their separation. At their height the father's allegations of emotional neglect and instability or aggression on the mother's part would demonstrate that the children are better cared for by him in the long term, but that is something for the Austrian court to consider. I do not accept the submission made on his behalf that whilst the mother could be

> trusted to care for the children for a few days or three weeks at a time, once it was longer than this the mother's care for them would become so deficient as to meet the test set out in Article 13b. Nor do I accept that the children would be placed at risk because the mother does not have enough money to keep or feed them. She may have accrued arrears with respect to maintenance to the father but this is a different matter. She and her partner are both working and have their own home where the children have stayed regularly.
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> 29. The effect upon the children of a separation from their primary carer cannot be said to be so serious as to cause them psychological harm. Nor could it be intolerable for them.'

The next case to consider is *NP v DP (Hague Convention; abducting parent refusing to return)* [2021] EWHC 3626 (Fam). This case concerned a return application relating to a boy, aged nearly 4½, to the United States of America and the judge described the circumstances of the abduction as 'grave' (para 1). It also needs pointing out that the judge described this case as a 'unusual' with 'very specific facts' (para [45]).

In this case, there was expert evidence as well as oral evidence, which the judge described as:

> '. . . have heard targeted oral evidence from the mother, not once but twice. On the first day of the hearing, Mr James Turner QC, on behalf of the mother, asked me to hear short oral evidence from her on the issue of her intentions. For reasons which I gave in a short ruling that day, I agreed to do so. Although the welfare of the child is not the paramount consideration in proceedings under the Hague Convention, it is still the focus of such proceedings. When Dr Sales had predicted so "disastrous" a consequence for the child if he was separated from his mother, it seemed to me that I should permit the mother to give her evidence and that it should be tested on the anvil of cross-examination by Mr Hames. Further, notwithstanding the observations of the Court of Appeal in paras [59]–[61] of the judgment in *Re C*, I personally consider that it is potentially unfair and unjust to make a finding against a parent on an issue such as this without, if she wishes, permitting her orally to explain her state of mind and intentions in her own way and for herself.' (para [21]).

As Holman J described

> '40. . . . in the present case, Dr Sales predicts, and I accept, that if the mother and the child are separated, the consequences for the child would be very grave. The gravity of the psychological harm cannot be disputed, and has not been disputed by Mr Hames. The question is, therefore, the gravity of the risk of that harm occurring because the mother did not, in fact, return with him. In my view, this is not simply an issue on the balance of probability. Before the defence under Article 13(b) is established, there must be a grave risk or high degree of likelihood that the mother would do as she says and would not, in fact, return even if the child is required to return.
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> 41. This is not an easy decision for me, but having now seen and heard the mother give sworn evidence, not once but twice, I have concluded, and I so find, that there is, indeed, a high likelihood that the mother would do as she has said and not return, even if the child is ordered to be returned.'

Further:

> '51: Accordingly, the reason why I do not order a summary return in the present case is squarely that I accept the evidence of the mother that she herself would not return, and that that would be 'disastrous' or 'catastrophic' for this child. That is a conclusion reached on very limited and partial evidence in summary proceedings.'

Conclusion

The aim of this article has been to set out some recent High Court decisions where the

Art 13b defence has been considered. Case law has demonstrated when considering Art 13b that there is a balance to be taken when considering he summary nature of these proceedings as well as the courts duty to assess the evidence in the case and the effectiveness of protective measures (when relevant). Notwithstanding this, trial judges are required to work with the aims of the Convention in mind and given the summary nature of these proceedings, there are limitations in existence. As Baroness Hale and Lord Wilson explained in *Re E*, at [32]:

> '. . . in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination.'

Notwithstanding the above, there are limited cases where expert evidence can be deemed necessary as well as Holman J's case highlights, the necessity of oral evidence. The case law and the stages the court has to go through is clear through the amount of authorities that have actively considered the defence, albeit cases and the severity of the circumstances relating to the defence will vary on a case by case basis.