Setting aside 1980 Hague Convention return orders: where are we now?

Mani Singh Basi, *Barrister, 4PB*
Alex Halliday, *Pupil Barrister, 4PB*

Mani Singh Basi is a barrister at 4PB. He works across all areas of family law relating to children, particularly in cases with an international dispute. In 2023, he published a book titled 'a practical guide to stranded spouses in family law'.

Alex Halliday is currently a pupil at 4PB and due to commence tenancy in October 2023. She works across all areas of family law.

This article will explore the circumstances when a party to proceedings may apply to set aside a final order in the context of 1980 Hague Convention proceedings.

Family Procedure Rules 2010

In terms of the legal framework for setting aside a Hague final order, an application is brought under the Family Procedure Rules 2010 ('FPR') r 12.52A(2), which stipulates 'A party may apply under this rule to set aside a return order where no error of the court is alleged'.

The above is important to acknowledge. This is because in the context of proceedings being contested re a final hearing, the court will have to deliver a judgment. If proceedings are contested that means the respondent is pursuing the limited exceptions to a summary return. If the court finds that these exceptions do not apply, then a final order is made. Upon a final order being made, a respondent may appeal. An appeal has to be distinguished from a set aside order; it will 'attack' the judges reasoning on the basis of an error. A set aside envisages different circumstances that arise post-final order and the original order / reasoning is therefore not challenged.

FPR 2010, PD 12F, para 4.1(a) (which became effective as of 6 April 2020) sets out some guidance in relation to when that rule may be implemented. That guidance states:

> 'In rare circumstances, the court might also "set aside" its own order where it has not made an error but where new information comes to light which fundamentally changes the basis on which the order was made. The threshold for the court to set aside its decision is high, and evidence will be required – not just assertions or allegations.'

The more 'typical' set aside reasons also apply, set out in the subsequent paragraph of PD 12F, para 4.1(a):

> 'If the return order or non-return order was made under the 1980 Hague Convention, the court might set aside its decision where there has been fraud, material non-disclosure or mistake (which all essentially mean that there was information that the court needed to know in order to make its decision, but was not told), or where there has

been a fundamental change in circumstances which undermines the basis on which the order was made.'

Case law since April 2020

Since FPR 2010, PD 12F, para 4 came into effect in April 2020, there have been two leading authorities on the application of the new rule: *Re B (A Child: Abduction: Art 13(b))* [2020] EWCA Civ 1057, [2021] 1 FLR 721 and *Re A (A Child) (1980 Hague Convention: Set Aside)* [2021] EWCA Civ 194, [2021] 2 FLR 1249. Both were considered and applied in the recent case of *C v M and another* [2023] EWHC 1482 (Fam).

Re B concerned an application by a father for a return order to Bosnia following the mother's abduction of the child ('B') to England. The mother had serious mental health problems, stemming in part from her experiences during the Bosnian conflict. She made allegations of violence against the father and sought to argue grave risk of harm under Art 13(b).

At the final hearing, the judge considered that undertakings given by the father were sufficient to protect the mother and B from risk and ordered their return to Bosnia. Immediately following this order, in September 2019, the mother self-harmed, and permission to appeal was lodged on her behalf, which was refused. The mother then applied under FPR, Part 18 to set aside the return order (on the basis of change of circumstances) and under Part 25 for psychological assessment of herself. The matter was set down for a hearing in which the judge dismissed the mother's application to set aside. The mother appealed.

At the hearing of her appeal, Moylan LJ built on his comments in *Re W (Abduction: Setting Aside Return Order)* [2018] EWCA Civ 1904, [2019] 1 FLR 400 just a year prior. In *Re W*, Moylan LJ had made the following conclusions (quoted at para [81] of *Re B*):

> '[66] In conclusion, my provisional view is that the High Court has power under the inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention. This power can be exercised when there has been a fundamental change of circumstances which undermines the basis on which the original order was made. I set the bar this high because, otherwise, as Mr Devereux QC observed, there would clearly be a risk of a party seeking to take advantage of any change of circumstances such as a simple change of mind.
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> [67] I would add that the re-opening of a final Hague order (whether for return or non-return) is likely to be a rare event indeed and that, as the process is a summary one, any application for such an order will necessarily have had to be filed without delay. Further, where an application for rehearing has been issued, the court will case-manage it tightly so that only those applications that have a sufficient prospect of success are allowed to proceed and then only within parameters determined by the court.'

This approach by Moylan LJ was adopted as part of the changes to FPR 2010, PD 12F, para 4. Notably, *Re W* concerned only the application to set aside, and did not deal with the approach the court should take on any rehearing. As such, in *Re B*, Moylan LJ set out a structured, staged approach to applications to set aside final 1980 Hague Convention orders as follows:

> '[89] I suggest the process, referred to above and adapted as follows, should be applied when the court is dealing with an application to set aside 1980 Convention orders:
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> (a) the court will first decide whether to permit any reconsideration;
> (b) if it does, it will decide the extent of any further evidence;
> (c) the court will next decide whether to set aside the existing order;
> (d) if the order is set aside, the court will redetermine the substantive application
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> [90] Having regard to the need for applications under the 1980 Convention

> to be determined expeditiously, it is clearly important that the fact that there are a number of distinct issues which the court must resolve does not unduly prolong the process. Indeed, it may be possible, when the developments or changes relied upon are clear and already evidenced, for all four stages to be addressed at one hearing. More typically, I would expect there to be a preliminary hearing when the court decides the issues under (a) and (b), followed by a hearing at which it determines the issues under (c) and (d). These will, inevitably, be case management decisions tailored to the circumstances of the specific case.
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> [91] I would further emphasise that, because of the high threshold, the number of cases which merit any application to set aside are likely to be few in number. The court will clearly be astute to prevent what, in essence, are attempts to re-argue a case which has already been determined or attempts to frustrate the court's previous determination by taking steps designed to support or create an alleged change of circumstances.'

On appeal, Moylan LJ criticised the first instance judge for conflating (c) and (d), and therefore applying the 'fundamental change of circumstances' test not only for set aside (rightly), but also at the re-determination stage (wrongly).

Moylan LJ also warned against considering each 'change of circumstance' relied upon in isolation, rather than in conjunction with one another – indeed, the changes the mother relied upon were connected, and should have been viewed as such.

The mother's appeal was allowed. The court set aside the existing order, as change of circumstances was established, on the basis of the assessment of the mother's mental health, and the father's breach of undertakings on return to Bosnia taken together. On re-determining the substantive application, the return order application was dismissed on the basis that Art 13(b) was clearly established, demonstrating the two distinct exercises the court undertakes in determination of these applications.

In *Re A*, the facts were very different: the mother (a British national) and father (an Italian national) shared one child, A. Paternity was not in dispute, but the father was not named on the birth certificate. On moving to Italy as a family shortly after A's birth, the parents signed a declaration recognising the father's paternity. The mother made frequent trips to England with A to visit the maternal family, and on one of those trips, enrolled A in a school and decided to remain in England. The father issued his application for A's return. The mother resisted on the basis that the father did not have rights of custody and/or he had acquiesced, such that Art 13(a) was engaged. In the alternative, the mother pleaded an intolerable situation if A were to be returned, under Art 13(b).

The father's application for summary return was granted in September 2020. Following that order, the mother said that A was shocked by the order, such that his objections constituted a fundamental change of circumstances – on this basis she applied to set aside the return order. This application was granted, and the father appealed.

On appeal, Hayden J considered this was:

> 'a clear example of an attempt to reargue a case which had already been comprehensively determined. It is, in my view, precisely the kind of application which Moylan LJ was presaging in *Re B*.' [47]

He reiterated the purpose of the summary jurisdiction created by the 1980 Hague Child Abduction Convention, to:

> 'ensure that applications made pursuant to it are determined expeditiously' as 'intrinsic to the Convention is a recognition that delay in the legal process is likely to be inimical to the child's welfare. Underpinning the philosophy of the Convention, is an understanding that a speedy return of the child to his home country will, in

> principle, enable the child's future to be determined more effectively.' [48]

This, for Hayden J, is the reason the test for 'change of circumstances is so high: 'Were it to be otherwise it would corrode the central philosophy of the Convention' ([48]).

The authorities of the Court of Appeal were recently considered at a first instance decision before Mrs Justice Theis. In the case of *C v M and another* (above), Theis J reiterated the authorities of *Re B* and *Re A*, describing them as factually at 'opposite ends of the spectrum in relation to the type of situations that may prompt an application such as this.' In *C v M*, the change of circumstance alleged related to the child's objections and discretion – at this hearing, Theis J found that they were of a 'different quality and nature than the court was considering at the first hearing' [38], they were articulated more clearly [39], the objections had likely not been orchestrated by the mother [40], and there had been significant distress caused to the child since the order [42]. All these circumstances in the round led to the decision that there had been a fundamental change of circumstances such that enables the court to set aside the final order.

At para [44], Theis J noted:

> 'the court does not know whether the ultimate decision will, in fact, be the same. X should be under no doubt that the return order is an option to the court when it does consider all the information it has and reconsiders the balancing exercise it has to undertake.'

This reiterates Moylan LJ's remarks in *Re B* in relation to his 'four-part test' – that the exercise of whether to set aside the order is distinct to the court's redetermination of the substantive application, should set aside be granted. It may be usual for both to be heard at the same hearing (as per Moylan J's remarks at [90] of *Re B*), but the two stages should not be conflated.

Conclusion

This article has sought to give a recent overview of the case law on set aside of final Hague orders, following the introduction of FPR 2010, PD 12F, para 4 in April 2020. The case law may be summarised as follows:

a) The threshold for setting aside a Hague final order is high, therefore the number of cases which merit an application will be low;

b) Evidence is required to show that there has been a fundamental change to the basis on which the order was made;

c) Each case will turn on its own facts;

d) Set aside applications should not be used as an opportunity to reargue what has already been comprehensively determined;

e) Moylan J's 'four stages', while not set in stone, remain 'manifestly helpful' [*Re B*, para 46]; and

f) The test for set aside does not include consideration of whether the ultimate decision may still be the same – that question is dealt with separately, although will likely be dealt with at the same hearing.