4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

Re J (Children) (2004)

(2004) 2 FLR 64 : [2004] EWCA Civ 428; Times, April 12, 2004

05/04/2004

Barristers
Henry Setright KC

Court
Court of Appeal

Summary
A child was of an age and degree of maturity at which it was appropriate to take account of his views and his defence under The Hague Convention on the Civil Aspects of International Child Abduction 1980 art.13 was made out.

Facts
A child (S) appealed under the Hague Convention on the Civil Aspects of International Child Abduction 1980 against a decision that the threshold of art.13(b) of the Convention had not been met and the consequent order that S and his brother (X) be returned to Croatia. S's father (F) was Croatian and his mother (M) was English. F and M had never been married. F and M cohabited in Croatia where they had two children, S was born in 1991. On the breakdown of the relationship in 2000, M removed the children to England. M made serious allegations of domestic violence against F, which included physical and sexual assaults. M applied for a residence order in respect of the children. F issued an originating summons under the Child Abduction and Custody Act 1985 for the children to be returned to Croatia. M accepted that she had removed the children from Croatia in breach of F's right to custody under art.3 of the Convention and that her allegations against F failed to satisfy the requirements of art.13(b) of the Convention. By consent M returned to Croatia with S and X on the basis that F gave undertakings which included not to remove them from M's care. F breached that undertaking. There was also evidence that F had breached an undertaking not to be violent towards M. In 2001, in Croatia it was ordered that S and X should live with M and M returned to England with them. In 2002, F issued his second originating summons under the Hague Convention seeking the return of the children, an injunction prohibiting M's further removal of them and a parental responsibility order. It was ordered that S and X be interviewed by a CAFCASS officer. During that time they were attending school in England. At the hearing, serious findings were made against F but it was decided that the threshold of art.13(b) of the Convention had not been met. On the written evidence of the CAFCASS officer, it was decided that M's defence that S objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of his views was also not made out. An order was made that the children should be returned to Croatia. M's application to appeal was refused, following which S himself instructed a solicitor and was joined as second defendant in the proceedings. S submitted fresh evidence that he was unhappy at his school in Croatia and that he would prefer to stay in England with M. Further, S argued that the

judge had been wrong to conclude that it was not reasonable for S to take the view that, in the light of his history, a return to Croatia posed a serious risk of separation from M. He contended that in the light of the fresh evidence the judge's conclusions could not stand.

Held

HELD: S's solicitor was satisfied that S had not been forced to make objections by M and his views were not as a result of undue influence or pressure. In such an unusual case where a child was represented in Hague Convention proceedings, it was of the utmost importance to ensure that the child was acting independently. S's views were consistent with the evidence before the court and the findings against F in relation to his violent conduct. Those findings gave substantial credence to S's statements and strongly reinforced the strength of S's objection to a return to Croatia. S had good cause to fear F's behaviour. In all the circumstances, S's art.13 defence was made out. He was of an age and degree of maturity at which it was appropriate to take account of his views which were clear, coherent and rationally based. Furthermore the reality was that S had been living in the United Kingdom with X and M since 2001, was well settled and doing well at school. It would be a wholly inappropriate exercise of discretion not to take into account the delay in the hearing of the application when considering whether or not S and X should be returned to Croatia. The order would be set aside and the originating summons dismissed. S and X would remain with M in the UK.

Permission