

# Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings

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## ABSTRACT

The focus of the article is on the intersection between domestic violence and parental child abduction, in particular, the interpretation of the Article 13(1)(b) 'grave risk of harm' defence in cases involving allegations of domestic violence by the abducting mother against the left-behind father, and on the protection of such abducting mothers in return proceedings. The content of the article is divided into two substantive parts. The first part explores the courts' approach to the grave risk of harm exception to return in circumstances where allegations of domestic violence have been raised. The second part of the article examines the courts' approach to protective measures, including undertakings, in child abduction cases involving allegations of domestic violence. The article engages extensively with the work of the Hague Conference on Private International Law and the EU in the area of international parental child abduction, as *inter alia*, it explores the problem of effectiveness of protective measures with reference to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children and the Regulation 606/2013 on mutual recognition of protection measures in civil matters.

## I. INTRODUCTION

Domestic violence directed towards a parent can be seriously harmful to children who are exposed to and/or have witnessed it, or who depend upon the psychological health and strength of their primary carer for their health and well-being. This article is concerned with the interface between domestic violence and international parental child abduction.<sup>1</sup> It addresses the problem of domestic violence against mothers who

1 See, generally, M. Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 694; M. Kaye, 'The Hague Convention and the Flight from Domestic Violence:

have abducted their child(-ren) across international borders and are involved in return proceedings under the 1980 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the 1980 (Hague) Convention') and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('the Brussels IIa Regulation' or 'Brussels IIa'), in circumstances where the child abduction was motivated by domestic violence by the left-behind father.<sup>2</sup> The focus of the article is on the interpretation of Article 13(1)(b) of the 1980 Hague Abduction Convention in cases involving allegations of domestic violence by the abducting mother against the left-behind father, and on the protection of such abducting mothers in return proceedings. The content of the article is divided into two parts. The first part sets out pertinent background information and explores the courts' approach to the 'grave risk of harm' exception to return<sup>3</sup> in circumstances where allegations of domestic violence have been raised. The second part of the article examines the courts' approach to protective measures in child abduction cases involving allegations of domestic violence, with emphasis on the protection of abducting mothers, whilst exploring the utility of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 (Hague) Convention') and the Regulation 606/2013 on mutual recognition of protection measures in civil matters ('the Protection Measures Regulation') in this context.

How Women and Children are being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and the Family* 191; C. Bruch, 'The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases' (2004) 38 *Family Law Quarterly* 529; B. Hale, 'Taking Flight — Domestic Violence and Child Abduction' (2017) 70 *Current Legal Problems* 3; O. Momoh, 'The Interpretation and Application of Article 13(1) b) of the Hague Child Abduction Convention in Cases Involving Domestic Violence: Revisiting X v Latvia and the Principle of "Effective Examination"' (2019) 15 *Journal of Private International Law* 626; J. Chamberland, 'Domestic Violence and International Child Abduction: Some Avenues of Reflection' (2005) 10 *Judges' Newsletter* 70; C. Kubitschek, 'Failure of the Hague Abduction Convention to address Domestic Violence and its Consequences' (2014) 9 *The Journal of Comparative Law* 111; K. Trimmings, *Child Abduction within the European Union* (Oxford: Hart Publishing, 2013); R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Oxford: Hart Publishing, 2013); R. Hoegger, 'What If She Leaves - Domestic Violence Cases Under the Hague Convention' (2013) 18 *Berkeley Women's Law Journal* 181; N. Browne, 'Relevance and Fairness: Protecting The Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction' (2011) 60 *The Duke Law Journal* 1193; S. Shetty and J. Edleson, 'Adult Domestic Violence in Cases of International Parental Child Abduction' (2005) 11 *Violence Against Women* 115; M. Freeman, 'The Outcomes for Children Returned Following an Abduction' (Reunite Research Unit, 2003); and M. Freeman, 'International Child Abduction: The Effects' (Reunite Research Unit, 2006).

- 2 The majority of parental child abductions (73%) are committed by mothers. N. Lowe and V. Stephens, 'A Statistical Analysis of Applications Made in 2015, Part I – Global Report' (Hague Conference on Private International Law (HCCH, 2017)) [10]. Although there are no comprehensive statistics on how many 1980 Convention cases involve allegations or findings of domestic violence, empirical research has confirmed that this phenomenon frequently plays a role in parental child abduction cases and may be present in about 70% of parental child abduction cases. See e.g. S. Shetty and J. Edleson (n 1); S. De Silva, 'The International Parental Child Abduction Service of the International Social Service Australian Branch' (2006) 11 *The Judges' Newsletter* 61; Freeman 2003 (n 1); and Freeman 2006 (n 1).
- 3 See 1980 Convention, Art 13(1)(b) and Brussels IIa Regulation, Art 11(4).

The article presents the UK approach to child abduction cases motivated by domestic violence and is threaded with recommendations of (what is considered) as good practice for consideration and possibly adoption by other Contracting States. An insight into the approach adopted by the UK judiciary in child abduction cases motivated by domestic violence will, it is hoped, enable other jurisdictions to benefit from the UK experience.<sup>4</sup> This experience is particularly valuable in respect of the recognition and enforcement of protective measures as UK judges can rightly be considered as ‘pioneers’ of new approaches to facilitate the cross-border circulation of such measures in return proceedings.<sup>5</sup>

## II. VULNERABILITY OF ABDUCTING MOTHERS IN PARENTAL CHILD ABDUCTIONS MOTIVATED BY DOMESTIC VIOLENCE

The 1980 Hague Abduction Convention is based on the premise that the wrongful removal or retention of a child across international borders is generally contrary to the child’s welfare and that, in most cases, it will be in the best interests of the child to be returned to the State of his/her habitual residence where any issues related to the custody of or access to the child should be resolved.<sup>6</sup> Accordingly, the Convention seeks to secure the prompt return of an abducted child to the country of his/her habitual residence<sup>7</sup> so that issues related to the custody of or access to the child be resolved in that jurisdiction.<sup>8</sup> Exceptions to the duty to secure the prompt return of the child<sup>9</sup> are justified only in exceptional circumstances,<sup>10</sup> including where ‘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’.<sup>11</sup> This defence is particularly pertinent to abductions committed against the background of domestic violence. Indeed, it is often raised by abducting mothers opposing the return, either based on the allegations involving the child as the ‘direct victim’, or as an ‘indirect victim’ where the child is exposed to the effects of domestic violence directed towards the mother.<sup>12</sup> The ‘grave risk of harm’ defence may also be raised where the abducting mother is unable to return with the child due to fear of the

4 The UK has been one of the most diligent and efficient Contracting States to the 1980 Convention. This is evidenced *inter alia* by available statistics, which shows that, on average, the UK courts conclude incoming return applications quicker than the global average. For example, in 2015, it took an average of 76 days to courts in England & Wales and 43 days to courts in Scotland to reach a final decision on a return application, compared with 179 days taken to reach a decision globally. Lowe and Stephens (n 2) para 114 and Annex 8. See also A. Hutchinson OBE, ‘Developments in Hague Child Abduction Cases: The English Experience’ [2009] *IFL* 186; and Momoh (n 1) 649 (in particular, the analysis of *Klentzeris v Klentzeris* [2007] EWCA Civ 533).

5 See sections 4 and 5 below.

6 See E. Pérez-Vera, ‘Explanatory Report on the 1980 Hague Child Abduction Convention’ (HCCH, 1982) [20-26].

7 1980 Convention, Art 1.

8 Pérez-Vera (n 6) [19].

9 1980 Convention, Art 12(1).

10 *Ibid*, Arts 12(2), 13 and 20.

11 *Ibid*, Art 13(1)(b).

12 Permanent Bureau of the Hague Conference on Private International Law (‘Permanent Bureau’), ‘Draft Guide to Good Practice on Article 13(1)(B) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction’ (HCCH, 2017) [11].

child's father; the resulting separation from the primary carer mother may be argued to create a grave risk for the child.<sup>13</sup>

The application of the grave risk of harm defence is limited to a strict minimum in intra-EU child abduction cases as Article 11(4) of the Brussels IIa Regulation prevents a return court from refusing to return a child on the basis of Article 13(1)(b) of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.<sup>14</sup>

Although it is not mandatory for the abducting mother to return together with the child, the mother (in particular if she is the primary carer), will typically accompany the child back to the requesting State, even if it means that she has to compromise her own safety. Indeed, neither the Brussels IIa Regulation nor the 1980 Convention take into consideration the safety of the abducting mother upon the return as the wording of both Article 13(1)(b) of the Convention and Article 11(4) of Brussels IIa makes it clear that 'it is the situation of the child which is the prime focus of the inquiry'.<sup>15</sup> Although the Hague Conference has on several occasions recognised that in considering the protection of the child 'regard should be given to the impact on a child of violence committed by one parent against the other'<sup>16</sup> and that 'the protection of the child may also sometimes require steps to be taken to protect an accompanying parent',<sup>17</sup> no solution was offered to the problem of the lack of enforceability of such 'protective measures' designed to address the safety of the abducting mother upon the return. This has led many commentators to recognise the extreme susceptibility of returning mothers in child abductions committed against the background of domestic violence.<sup>18</sup> Indeed, such abducting mothers are subject to particular vulnerabilities, including the risk of re-victimisation upon their return to the requesting State; the lack of financial and emotional support in the requesting State plus probable financial dependence on the left-behind father on the return; sometimes the lack of credibility as a respondent in return proceedings due to the failure to report the incidents of domestic violence in the requesting State prior to the abduction; and the exposure to 'intimidatory litigation' whereby the left-behind father abusively uses the return proceedings as a means of further harassment rather than from a genuine desire to secure the return of the child. Such 'intimidatory litigation' adds greatly to the anxiety suffered by the abducting mother who, as a survivor of an abusive relationship, is likely to be already overwhelmed with the repercussions of that relationship.

13 Ibid [9].

14 For a critical analysis of Art 11(4) see K. Trimmings (n 1) 137–161.

15 Permanent Bureau (n 12) [52] and [132]; and Permanent Bureau of the Hague Conference on Private International Law, 'Domestic and Family Violence and the Article 13 "Grave Risk" Exception on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper' (HCCH, 2011) [140].

16 Permanent Bureau, 'Conclusions and Recommendations of the Fourth Meeting of the Special Commission' (HCCH, 2001) [42].

17 Permanent Bureau, 'Conclusions and Recommendations of the Fifth Meeting of the Special Commission' (HCCH, 2006) [1.1.12].

18 E.g. Weiner (n 1); Kaye (n 1); Trimmings (n 1) and Bruch (n 1).

### III. 'GRAVE RISK OF HARM' AND DOMESTIC VIOLENCE

Article 13(1)(b) is by its very terms of restricted application.<sup>19</sup> The words 'physical or psychological harm' are not qualified; however, they 'gain colour' from the third limb of the defence (ie 'or otherwise [...] placed in an intolerable situation').<sup>20</sup> 'Intolerable' is a strong word but when applied in the context of Art 13(1)(b) refers to 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.<sup>21</sup> Although 'every child has to put up with a certain amount of rough and tumble, discomfort and distress', there are certain situations which it is unreasonable to expect a child to tolerate.<sup>22</sup> Courts in the UK have recognised that such situations include not only physical or psychological abuse or neglect of the child himself, but also exposure to the harmful effects of witnessing by the child of physical or psychological abuse of his own parent.<sup>23</sup> This approach is in line also with the Hague Conference Guide to Good Practice on Article 13(1)(b) ('the HCCH Guide'), which stipulates that the 'grave risk of harm' may result from the child's exposure to domestic violence perpetrated by the left-behind parent on the taking parent, as well as grave risk arising from an impact on the taking parent's ability to care for the child as a result of domestic violence.<sup>24</sup> Accordingly, it is imperative that, courts dealing with return applications ('Hague Convention return court(s)') in other Contracting States also recognise that the circumstances of the abducting mother and the child may be intertwined to the extent that domestic violence perpetrated solely against the mother may justify the finding that the return would expose the child to a grave risk of psychological harm or other intolerable situation pursuant to Article 13(1)(b).

Moreover, it is irrelevant whether the risk is the result of objective reality or of the abducting mother's subjective perception of reality.<sup>25</sup> Accordingly, anxieties of an abducting mother about a return with the child which are not based on objective risk to her but are nevertheless of such intensity as to be likely, if returned, to affect her mental health so as to destabilise her parenting of the child to a point where the child's situation would become intolerable, can found the grave risk of harm defence under Article 13(1)(b).<sup>26</sup> This approach is endorsed here and recommended for

19 Pérez-Vera (n 6) [34]. See also P. Beaumont and P. McElevay, *The Hague Convention on International Child Abduction* (Oxford: Oxford University Press, 1999) 140; and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10 [6].

20 *Re E* [2011] UKSC 27 [34].

21 *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51 ('*Re D*') [52]; and *Re S* (n 19) [27].

22 *Re E* (n 20) [34].

23 *Re E* (n 20) [34] and [52]. See also Permanent Bureau, 'Guide to Good Practice under the HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part VI – Article 13(1)(b)' (HCCH, 2020) [58].

24 HCCH Guide (n 23) [57]. As reflected on by Baroness Hale, 'one of the principal reasons' for the HCCH Guide was to protect 'victims of domestic violence and abuse from the hard choice of returning to a place where they do not feel safe and losing their children'. Hale (n 1) 15. See also D. Bryant AO, QC, 'Response to Professors Rhona Schuz and Merle H Weiner ('the authors'), 'A Mistake Waiting to Happen: the Failure to Correct the Guide to Good Practice on Article 13(1)(b)' [2020] IFL 207 where it is reiterated that the HCCH Guide provides ample support for the notion that a child's exposure to domestic violence can constitute a grave risk of harm.

25 *Re E* (n 20) [34]; and *Re S* (n 19) [31].

26 *Re E* (n 20) [34]; and *Re S* (n 19) [34].

adoption by other Contracting States, not least due its welcome emphasis on the mental health of the child's primary carer.

#### IV. COURTS' APPROACH TO THE GRAVE RISK OF HARM DEFENCE

Although domestic violence against the abducting mother may present an Article 13(1)(b) defence, '[e]vidence of the existence of a situation of domestic violence, in and of itself, is [...] not sufficient to establish the existence of a grave risk to the child'.<sup>27</sup> The key question is whether the effect of domestic violence on the child upon his/her return to the requesting State will meet the high threshold of the Article 13(1)(b) exception.<sup>28</sup> Arguably, this assessment can only be reliably carried out if a prior evaluation of the merits of the allegations of domestic violence has been undertaken by the court in the return proceedings.<sup>29</sup>

The UK courts have conceptualised two distinct approaches to cases where factual allegations of domestic violence have been made under the grave risk of harm defence. Additionally, isolated incidences of alternative approaches have been recorded, although these remain largely non-theorised and conceptually undeveloped.<sup>30</sup>

##### 1. The 'protective measures approach'

In the case of *Re E*<sup>31</sup> the UK Supreme Court set out an approach which emphasises the role of protective measures and can therefore be termed as the 'protective measures approach'.<sup>32</sup> A court adopting this approach will refuse to carry out a fact-finding exercise to determine the truth of the allegations of domestic violence. Instead, the court will take the allegations at their highest and decide, whether on that basis, there is a grave risk that if the child returns to the requesting State he/she will be exposed to physical and psychological harm or otherwise placed in an intolerable situation.<sup>33</sup> Afterwards, the court will consider whether protective measures sufficient to mitigate the harm are available in the requesting State.<sup>34</sup> Only if the protective measures cannot ameliorate the risk, the court may have to try to resolve

27 HCCH Guide (n 23) [58].

28 Ibid. See also P. Ripley, 'A Defence of the Established Approach to the Grave Risk Exception in the Hague Child Abduction Convention' (2008) 4 *Journal of Private International Law* 461, 461–63.

29 Ripley notes that 'allegations of domestic abuse and violence are serious indeed and so courts should not be over-eager to accept'. Ibid 461.

30 See K. Trimmings et al, 'POAM Project Report – United Kingdom' (Centre for Private International Law, University of Aberdeen, 2019) 87.

31 *Re E* (n 20).

32 The 'protective measures approach' has been referred to with approval and/or explicitly followed in a number of cases that involved allegations of domestic violence, both in England & Wales (High Court and Court of Appeal) and Scotland (Court of Session). These cases included: England & Wales, High Court - *In the Matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)* [2019] EWHC 649 (Fam), *H v K (Abduction: Undertakings)* [2017] EWHC 1141 (Fam), *TAAS v FMS* [2017] EWHC 3797 (Fam), *B v P* [2017] EWHC 3577 (Fam), *CH v GLS* [2019] EWHC 3842 (Fam), *Z v D (Refusal of Return Order)* [2020] EWHC 1857 (Fam) and *AX v CY* [2020] EWHC 1599 (Fam); England & Wales, Court of Appeal - *Re F (A Child)* [2014] EWCA Civ 275. and *In the Matter of M (Children)* [2016] EWCA Civ 942; and Scotland, Court of Session - *GCMR Petitioner* [2017] CSOH 66.

33 *Re E* (n 20) [36].

34 Ibid.

the disputed issues of fact.<sup>35</sup> This approach relies on the availability of adequate and effective protective measures as a substitute for determining facts. It is based on the premise that determining the truth of the allegations is a matter for the court of the requesting State.<sup>36</sup>

## 2. The ‘assessment of allegations approach’

An alternative approach, which has been sanctioned by the English Court of Appeal,<sup>37</sup> can be termed as the ‘assessment of allegations approach’. Under this approach, the court will first seek to determine, to the extent possible, the merits of the disputed allegations of domestic violence. In this exercise the court will understandably be confined by the summary nature of the return proceedings, and therefore, may not be able to make findings related to the disputed allegations.<sup>38</sup> Once the assessment of allegations has been carried out, the court determines whether a grave risk of harm exists. Only afterwards, as part of the exercise of discretion, the court proceeds to assessing available protective measures.<sup>39</sup> This approach is based on the premise that it is necessary to assess the disputed allegations in order to evaluate the risk.

In *Re K (1980 Hague Convention) (Lithuania)*<sup>40</sup> Black LJ (as she then was) rejected an argument that the court was ‘bound’ to follow the approach set out in *Re E*.<sup>41</sup> She rightly suggested that, as it was the role of the abducting parent to demonstrate the Article 13(1)(b) exception, it was the role of the court to evaluate the evidence, pointing out that the evaluation should be carried out ‘within the confines of the summary process’.<sup>42</sup> Notably, however, Black LJ’s reasoning was limited to a specific scenario, in particular a situation when the evidence before the court allows the judge to ‘confidently discount’ the likelihood that the allegations give rise to an Article 13(1)(b) risk.<sup>43</sup> Black LJ described such circumstances as those where the Article 13(1)(b) defence does not even ‘[get] off the ground’.<sup>44</sup> In cases of this type it is redundant for the judge to look further at the issue of protective measures.<sup>45</sup>

The reasoning of Black LJ in *Re K* was referred to with approval by Moylan LJ in *Re C (Children) (Abduction Article 13(B))*.<sup>46</sup> At the same time, His Lordship sought to re-interpret the approach set out by the Supreme Court in *Re E* by saying that in

35 Ibid. In the context of the *Re E* approach, it has been suggested that only in such circumstances there might be scope for oral evidence. *TAAS v FMS* (n 32) [30].

36 See e.g. *TAAS v FMS* (n 32) [31].

37 *Re K (1980 Hague Convention) (Lithuania)* [2015] EWCA Civ 720, and *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834. This approach was endorsed also by the High Court in *Uhd v McKay* [2019] EWHC 1239 (Fam).

38 *Re C* (n 37) [35-38].

39 The leading UK authority on the exercise of discretion is the Supreme Court decision in the case of *Re M (Children) (Abduction)* [2007] UKHL 55.

40 *Re K* (n 37).

41 Ibid [53].

42 Ibid.

43 Ibid.

44 Ibid.

45 Ibid.

46 *Re C* (n 37).

setting out that approach the Supreme Court was not suggesting that no evaluation of the allegations could or should be undertaken.<sup>47</sup> Although a judge needs to be cautious when conducting a ‘paper evaluation’, this ‘does not mean that there should be no assessment at all about the credibility or substance of the allegations’.<sup>48</sup> Moylan LJ’s astute reasoning was sensibly supported by Lewison LJ who expressed the view that the basis of the ‘protective measures approach’ – ie the assumption that the allegations are true, differed significantly from the evaluative exercise undertaken by the court in other areas of law.<sup>49</sup> His Lordship then highlighted a serious shortcoming of the ‘protective measures approach’ in respect of the burden of proof in the particular context of intra-EU cases. He pointed out that Article 11(4) of Brussels IIa placed on the left-behind parent the burden of demonstrating that adequate arrangements had been made to protect the child upon the return.<sup>50</sup> However, when applying the ‘protective measures approach’, the burden of proof required by Article 13(1)(b) seems to be reversed as *Re E* requires the allegations to be presumed to be true but the effectiveness of the protective measures to be investigated.<sup>51</sup> This led Lewis LJ to conclude that the ‘protective measures approach’ was ‘unprincipled’<sup>52</sup> and to express a hope that judges dealing with child abduction cases ‘do not apply *Re E* in its full rigour; but recognize that some evaluative exercise is necessary’.<sup>53</sup>

Commendably, the ‘protective measures approach’ was revisited also by MacDonald J in the High Court case of *Uhd v McKay*.<sup>54</sup> Contrary to his approach in prior cases,<sup>55</sup> the learned judge indicated an acceptance of the need to evaluate the allegations and noted a number of recent cases where the *Re E* approach had not been ‘an exercise that is undertaken in the abstract’.<sup>56</sup> This methodology found support in the *Re E* requirement to evaluate evidence on the balance of probabilities (whilst taking into consideration the summary nature of the return proceedings), which implied that the *Re E* approach did not discount evaluation of appropriate evidence before the court.<sup>57</sup> Accordingly, MacDonald J came to a conclusion that ‘the court is not prevented from examining the evidence before it that informs the question of objective risk and evaluating that evidence in a manner consistent with the summary nature of these proceedings’.<sup>58</sup> In this case, the learned judge saw the importance of considering the seriousness and level of the grave risk of harm asserted and in evaluating the evidence considered

47 Ibid [39].

48 Ibid.

49 Ibid [68].

50 Ibid [69].

51 Ibid.

52 Ibid [70].

53 Ibid [69].

54 *Uhd v McKay* (n 37). The decisions in *Re C* (n 37) and *Uhd v McKay* were referred to and followed also in the recent High Court case of *C v B* [2019] EWHC 2593 (Fam).

55 See e.g. *H v K (Abduction: Undertakings)* [2017] EWHC 1141 (Fam), and *B v P* [2017] EWHC 3577 (Fam).

56 *Uhd v McKay* (n 37) [69].

57 Ibid.

58 *Uhd v McKay* (n 37) [81].



the merit of the mother's allegation which would then go on to inform his decision on the need for and effectiveness of protective measures.

### 3. Analysis

Although each of the above two approaches has its pros and cons, it is suggested here that the 'assessment of allegations approach' is more appropriate, and should therefore be endorsed for application not only in the UK but also in other Contracting States to the 1980 Convention.<sup>59</sup> Indeed, without determining whether domestic violence is present, it is difficult to see how 'grave risk' could reliably be assessed and effective protective measures determined. The 'protective measures approach' seems to be illogical – as if 'putting the cart before the horse' – as it 'involves the consideration of protective measures to mitigate risk before that risk has been established and assessed'.<sup>60</sup>

Admittedly, the 'assessment of allegations approach' may raise concerns over the length of the proceedings; however, speed should not take priority over the proper assessment of risk and consideration of the safety of the child and the abducting parent. Indeed, the emphasis on speed may encourage courts to minimise or ignore allegations of domestic violence rather than determining them, leaving thus an unassessed risk of harm. Besides, the Court of Appeal and the High Court have both emphasised that the assessment of the allegations should be carried out within the boundaries of the return proceedings which are by its nature summary. Importantly, the 'assessment of allegations approach' seems to be supported by the jurisprudence of the ECtHR, specifically the case of *X v Latvia*<sup>61</sup> where the Grand Chamber introduced the concept of 'effective examination'.<sup>62</sup> As Judge Albuquerque explained in his concurring opinion, 'effective examination' means a 'thorough, limited and expeditious' examination. Accordingly, it is suggested here that a 'thorough, limited and expeditious' examination of disputed allegations of domestic violence should be carried out by the court in return proceedings, before the court proceeds to determining the availability of protective measures.<sup>63</sup> This is important not only for the sake of the child and the abducting parent but also the left-behind parent who, 'in the interests of fairness and justice, deserves a degree of adjudication on allegations that may well

59 Importantly, the assessment of allegations approach seems to also correspond with the relevant proposal in the HCCH Guide. HCCH Guide (n 23) 31.

60 A. Barnett, 'Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention on International Child Abduction – a Perspective from England and Wales' 18, in *Eight Letters Submitted to the United States Department of State and the Permanent Bureau of the Hague Conference on Private International Law about a Draft Guide for Article 13(1)(b) and Related Draft Documents that were circulated for comment prior to the October 2017 meeting of the Seventh Special Commission on the 1980 Hague Child Abduction Convention at The Hague*, available at <https://law.ucdavis.edu/faculty/bruch/files/Letters-re-Hague-Convention.pdf>.

61 Application no. 27853/09, Grand Chamber [2013].

62 See P. Beaumont et al, 'Child Abduction: Recent Jurisprudence of the European Court of Human Rights' (2015) 64 *International & Comparative Law Quarterly* 44; and Momoh (n 1) 650–656.

63 For related practical matters such as evidence, burden of proof, and factors to consider, see POAM Project Team, 'Best Practice Guide: Protection of Abducting Mothers in Return Proceedings: Intersection between domestic violence and parental child abduction' (University of Aberdeen, 2020) [5.1.3].

be exaggerated or even worse – false'.<sup>64</sup> Indeed, the left-behind parent 'may be seriously prejudiced with the stigma attached to measures made against him, either by way of undertakings or injunctions imposed on him such as non-molestation orders, occupation orders or orders that there be no interim contact between him and the child'.<sup>65</sup>

## V. PROTECTIVE MEASURES

### 1. General Considerations

The Brussels IIa Regulation<sup>66</sup> and its Recast<sup>67</sup> prohibit a non-return order on the basis of Article 13(1)(b) of the 1980 Convention if it is established that adequate arrangements have been made to secure the child's protection upon his/her return. In the UK, the court's approach to protective measures in child abduction cases involving allegations of domestic violence has, in recent times, gained focus and clarity. The following 'principles' can be identified.

First, it is rightly recognised that the appraisal of the Article 13(1)(b) defence is a general process,<sup>68</sup> meaning *inter alia* that the court must take into account all relevant matters, including all available protective measures.<sup>69</sup> Therefore, where the evaluation of the merits of the allegations of domestic violence has led the court to the conclusion that the effects of domestic violence on the child upon his/her return to the requesting State meet the high standard of the grave risk of harm exception, the court must consider 'the availability, adequacy and effectiveness' of protective measures.<sup>70</sup> There is an obvious intersection between protective measures for the child and measures for the mother as protective measures for the mother are by extension measures that protect the child.

Second, in *Re E* the Supreme Court aptly noted that Article 13(1)(b) was forward looking, meaning that the situation the court is evaluating is not the past but the future.<sup>71</sup> Therefore, it is not the past but the future risks that should be assessed. The assessment of the future risks should be carried out against the background of available protective measures.<sup>72</sup>

Third, the Practice Guidance on Case Management and Mediation in International Child Abduction Proceedings<sup>73</sup> ('the Practice Guidance') contains helpful practical recommendations, which signpost the role of the parties in respect of protective measures from the start of the return proceedings. In particular, the left-behind parent shall describe in the return application (or when filing further evidence supporting the application) 'any protective measures (including orders that may be subject to a declaration of

64 Momoh (n 1) 651.

65 Ibid.

66 Art 11(4).

67 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), Art 27(3) ('Brussels IIa Regulation, Recast').

68 *Re S* (n 19) [22], and *Re C* (n 37) [40-41].

69 *Re C* (n 37) [40-41].

70 HCCH Guide (n 23) [59].

71 *Re E* (n 20) [35]. See also *Re C* (n 37) [48].

72 *Re E* (n 20) [35].

73 J. Munby, 'Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings' (President of the Family Division, 2018).

enforceability or registration under Art 11 of the 1996 Hague Convention or, where appropriate, undertakings) the applicant is prepared, without prejudice to his or her case, to offer for the purpose of securing the child's return'.<sup>74</sup> Similarly, the abducting mother, in filing her evidence, shall include details of 'any protective measures [she] seeks (including, where appropriate, undertakings) in the event that the court orders the child's return'.<sup>75</sup> This 'anticipatory approach' has the advantage of potentially accelerating the return proceedings, without prejudicing the need to evaluate the merits of the allegations of domestic violence,<sup>76</sup> and, on this ground, is recommended for adoption by other Contracting States.

Finally, the Practice Guidance distinguishes between protective measures that 'are available' and protective measures that 'could be put in place', making clear the potential extensive scope of the exercise.<sup>77</sup> Accordingly, the English courts have given a broad interpretation to the term 'protective measures' and held that the expression was not limited to specific measures but extended, for example, to 'general features' of the requesting State.<sup>78</sup> In particular, the Court of Appeal has held that 'the general right to seek the assistance of the court or other state authorities might in some cases be sufficient to persuade a court that there was not a grave risk within Article 13(b)'.<sup>79</sup> This type of protective measures includes for example access to courts and other legal services, state assistance and support, including financial assistance, housing assistance, health services, women's shelters and other means of support to victims of domestic violence; responses by police and the criminal justice system more generally; and availability of protective measures to victims of domestic violence in the requesting State such as non-molestation injunctions.<sup>80</sup>

This approach is, however, not regarded here as sufficiently rigorous and is therefore not supported. It also runs contrary to the Practice Guide for the Application of the Brussels IIA Regulation which states that '[i]t is not sufficient that procedures exist in the Member State of origin for the protection of the child, but it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question'.<sup>81</sup> Indeed, rather than relying merely on 'general features' of the requesting State, it should be explored whether there are any decisions of courts and/or other competent authorities (as appropriate), which can facilitate (or contribute towards facilitating) the protection of the abducting mother upon the return, available in the requesting State.<sup>82</sup>

74 Ibid [2.5(b)].

75 Ibid [2.5(d)].

76 See section 3 above.

77 Munby (n 73) [2.11(e)]. See also Moylan LJ's comment in *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352 [51].

78 *Re C* (n 37) [41]. See also *Re S* (n 77) [50] where Moylan LJ referred to his judgment in *Re C* (n 37) and reiterated that the 'expression "protective measures" has a wide meaning'.

79 *Re C* (n 37) [41]. See e.g. *Re M (Children)* [2016] EWCA Civ 942, where the Court of Appeal stated that the police force and justice system of other jurisdictions were part of the protective measures. This passage was recently quoted with approval in *CH v GLS* (n 32).

80 *In the matter of A* (n 32) [24].

81 European Commission, 'Practice Guide for the Application of the Brussels IIA Regulation' (Office of the European Union, 2016) 55.

82 E.g. civil and/or criminal protection orders in favour of the abducting mother.

## 2. Undertakings as Measures for the Protection of Abducting Mothers in Return Proceedings

The English courts have sought to address the grave risk of harm by ‘extracting undertakings’ from the left-behind parent.<sup>83</sup> Undertakings can be described as ‘promises offered or in certain circumstances imposed upon an applicant to overcome obstacles which may stand in the way of the return of a wrongfully removed or retained child’.<sup>84</sup> Undertakings are often utilised to address also concerns related to the safety of the abducting mother upon the return, rightly recognising the fact that the risk to the child and the risk to the mother are often intertwined.<sup>85</sup> Undertakings aim at ensuring a short-term welfare of the child and/or the returning mother, until the question of the child’s welfare, custody and access comes before the court of the requesting State.<sup>86</sup> Examples of undertakings include non-molestation/non-harassment undertakings (eg ‘not to use violence or threats towards the mother, nor to instruct anybody else to do so’, or ‘not to communicate with the mother directly’), undertakings related to the occupation of the family home (eg ‘to vacate the family home and make it available for a sole occupancy by the mother and the child’), undertakings related to financial support (eg ‘to pay for the return tickets for the mother and the child’, or ‘to provide financial support/maintenance to the mother and the child upon their return’), and undertakings related to residence or access to the child (eg ‘not to seek to separate the mother from the child’, or ‘not to seek contact with the child unless awarded by the court or agreed’). As can be seen from the above examples, undertakings do not always contain protective measures as such but may instead encompass ‘more light touch’ practical arrangements to facilitate and implement the child’s return and enable a ‘soft-landing’ of the child in the requesting State (eg the funding of return flights and financial support upon the return).<sup>87</sup>

## 3. Effectiveness of Undertakings as Protective Measures

The problem with undertakings, however, is that they are generally largely ineffective as a means of protection outside the common law world.<sup>88</sup> This is because undertakings as a legal concept are practically unknown and thus unenforceable in civil law jurisdictions. This makes undertakings unsatisfactory remedies in cases involving domestic abuse,<sup>89</sup> as, unsurprisingly, they are frequently not complied with.<sup>90</sup> Indeed,

83 *Re D* [2016] UKSC 34 [52].

84 *Beaumont and McEleavy* (n 19) 30.

85 E.g. *MR v HS* [2015] EWHC 234 (Fam), and *LS v AS* [2014] EWHC 1626 (Fam).

86 *In the Matter of the Child Abduction and Custody Orders Act, 1991 and in the Matter of R (A Minor)* [1994] 3 IR 507 (per Denham J).

87 *Re S* (n 76) [55].

88 *Re E* (n 20) [7]. See e.g. *Re O (Child Abduction: Undertakings) (No.1)* [1994] 2 FLR 349, and *B (A Child) (Abduction: Article 13(b))* [2020] EWCA Civ 1057 for illustrations of breaches of undertakings. For academic commentaries raising concerns about the use of undertakings in cases involving allegations of domestic violence see e.g. Trimmings (n 1) 155–161; M. Freeman, ‘Parental Child Abduction: The Long-Term Effects’ (International Centre for Family Law, Policy and Practice, 2014); Schuz (n 1) 291–293; Momoh (n 1); and Hoegger (n 1).

89 See expert discussion recorded in the meeting of the Special Commission to review the operation of the 1980 Convention: Permanent Bureau (n 17) [229].

90 A research study conducted by a UK child abduction charity ‘Reunite’ revealed that non-molestation undertakings had been broken in 100% of the representative sample of cases in which they had been

as noted by the Permanent Bureau of the Hague Conference, it is 'common' for the applicant parent to violate undertakings once the child and the abducting parent were returned.<sup>91</sup> The problem of effectiveness of protective measures was highlighted also by the Supreme Court in *Re E* when Lady Hale referred to concerns about the 'too ready' acceptance by the courts of common law countries of undertakings which are not enforceable in the courts of the requesting State.<sup>92</sup> Similarly, the Court of Appeal has acknowledged the anxieties about 'the court's perhaps giving insufficient weight' to the efficacy of undertakings given to the English court and cautioned about reliance on undertakings if they cannot be made enforceable in the requesting State.<sup>93</sup>

#### 4. The 1996 Hague Protection Convention

To address the concerns related to the lack of effectiveness of undertakings as protective measures, the English courts have suggested that the recognition and enforcement of undertakings can be facilitated by the 1996 Hague Convention by treating undertakings as urgent measures of protection under Articles 11 and 23.<sup>94</sup> This is in line with the 1996 Hague Convention Practical Operation Handbook ('the Practical Handbook'), which provides examples of measures which might be covered by Article 11. These include situations where 'there has been a wrongful removal or retention of a child and, in the context of proceedings brought under the 1980 Hague Child Abduction Convention, measures need to be put in place urgently to ensure the safe return of the child to the Contracting State of his/her habitual residence'.<sup>95</sup> Although the Practical Handbook refers only to the 'safe return of the child', it is proposed here that this does not exclude protective measures for the abducting mother as, as explained above,<sup>96</sup> in domestic violence situations protective measures for the mother serve also the protection of the child from the grave risk of psychological harm or other intolerable situation.

Protective measures taken under Article 11 of the 1996 Hague Protection Convention are enforceable outside of the territory of the Contracting State where they were issued. Accordingly, if orders are made under Article 11<sup>97</sup> then by virtue of Article 23 they shall be recognised by operation of law in all other Contracting States. Alternatively, instead of making a separate order, the Hague Convention return court can simply incorporate

given. The study also showed that left-behind parents were often instructed by their lawyers to agree to the undertakings that were sought in the return proceedings because the legislation in the requesting State was different and 'undertakings mean nothing'. Freeman 2003 (n 1) 31 and 33.

91 Permanent Bureau (n 17) [227].

92 *Re E* (n 20) [7].

93 *Re C* (n 37) [43], and *Re S* (n 76) [54].

94 *Re Y (A Child) (Abduction: Undertakings Given for Return of Child)* [2013] EWCA Civ 129. Following *Re Y* it has become common in the High Court to make orders under Art 11 of the 1996 Convention which then have the effect of satisfying the terms of Art 11(4) of Brussels IIa (e.g. *RD v DB* [2015] EWHC 1817 (Fam); *In the matter of A* (n 32); and *In the Matter of S O D*, High Court, 31 January 2019 (unreported).

95 Permanent Bureau, 'Practical Handbook on the Operation of the 1996 Child Protection Convention' (Hague Conference on Private International Law, 2014) [6.4].

96 See section 5.1 above.

97 Article 11 provides jurisdiction as it states that '(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection'.

undertakings into the return order with the expectation that the requesting State will treat them as urgent measures of protection under the 1996 Convention.<sup>98</sup>

Accordingly, for example, in the case of *RD v DB*<sup>99</sup> Mostyn J made orders equivalent to a non-molestation order and concluded that the orders could be issued under Article 11 as urgent measures of protection. Similarly, in the case of *Re A (A Child) (Hague Abduction: Art 13(b) Protective Measures)*<sup>100</sup> Williams J relied on Article 11 as a means of recognition and enforcement. Most recently, in *AX v CY*<sup>101</sup> Robert Peel QC explained that '[p]rotective measures may include undertakings, and undertakings accepted by this court or orders made by this court pursuant to Article 11 of the 1996 Hague Child Protection Convention are automatically recognised by operation of Article 23 in another Convention state [...]'.<sup>102</sup>

### 5. The Protection Measures Regulation

On several occasions, English judges have referred in return proceedings to the Protection Measures Regulation, recognising its potential to fill the gap in the civil law protection of abducting mothers who return with their children to the requesting State in child abduction cases involving allegations of domestic violence. For example, in *Re S (A Child) (Hague Convention 1980: Return to Third State)*<sup>103</sup> Moylan LJ noted that measures under Article 11 of the 1996 Convention were also measures under the Protection Measures Regulation.<sup>104</sup> In *In the matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)*<sup>105</sup> Williams J also acknowledged the potential utility of the Protection Measures Regulation in the child abduction context and commented on the strengths of the Regulation, before setting out a definition of a protection measure under the Regulation: '[...] any decision, whatever it is called, ordered by an issuing authority of the member state of origin' which '[i]ncludes an obligation imposed to protect another person from physical or psychological harm.'<sup>106</sup> The learned judge then commented that '[o]ur domestic law provides this court can accept an undertaking where the court has the power to make a non-molestation order', before concluding that 'a non-molestation undertaking given to this court could qualify as a protection measure within the European Regulation on protection measures'.<sup>107</sup> Williams J's analysis of the Protection Measures Regulation was quoted with approval by Robert Peel QC in *AX v CY*<sup>108</sup> and by Mr Justice

98 *In the matter of A* (n 32) [25]: 'Protective measures may include undertakings, and undertakings accepted by this court or orders made by this court pursuant to Article 11 of the 1996 Hague Child Protection Convention are automatically recognised by operation of Article 23 in another Convention state (see *Re Y (A Child) (Abduction: Undertakings Given for Return of Child)*.'

99 *RB v DB* (n 94) [9-10].

100 *In the matter of A* (n 32). Williams J's approach to Article 11 was cited and explicitly followed by Mr Justice Lieven in *CH v GLS* (n 32).

101 *AX v CY* (n 32).

102 *Ibid* [36].

103 *Re S* (n 77).

104 *Ibid* [26].

105 *In the matter of A* (n 32).

106 *Ibid* [26].

107 *Ibid*.

108 *AX v CY* (n 32).

Lieven in *CH v GLS*<sup>109</sup> who, following William J's reasoning, concluded that '[...] it seems that a non-molestation undertaking given to this court could qualify as a protection measure within the European Regulation on protection measures'.<sup>110</sup>

Finally, in *RD v DB*<sup>111</sup> Mostyn J issued orders under Article 11 of the 1996 Hague Convention and noted that these would be 'doubly enforceable'<sup>112</sup> in the requesting State – under the 1996 Convention and under the Protection Measures Regulation.

## 6. Analysis and Recommendations

The UK courts' method of utilising the 1996 Convention and the Protection Measures Regulation to secure the cross-border circulation of measures for the protection of abducting mothers issued by the Hague Convention return court in return proceedings represents a novel approach, which is highly recommended for adoption also in other Contracting States. However, the following considerations must be taken into account when determining which of the two instruments is to be used in a particular case.

### A. Intra-EU Child Abduction Cases

Although all EU Member States are Contracting Parties to the 1996 Convention,<sup>113</sup> in intra-EU child abduction cases<sup>114</sup> the Protection Measures Regulation is to be preferred over the Convention. This is especially for the following two reasons.

First, the recognition and enforcement procedure under the 1996 Convention is potentially too cumbersome to adequately facilitate the protection of domestic violence victims on an urgent basis. In particular, to be enforceable, the measures of protection under the 1996 Convention must, upon request by an interested party, be declared enforceable or registered for the purpose of enforcement in the requesting State pursuant to Article 26 of the 1996 Convention. This means that if the protective measures have been breached, the abducting mother will first need to seek a declaration of enforceability or registration of the undertakings, before being able to commence proceedings for the actual enforcement of the protection measures.<sup>115</sup> Although the Convention requires that Contracting States apply to the declaration of enforceability or registration 'a simple and rapid procedure',<sup>116</sup> the matter of fact is that court proceedings in many Contracting States are far from swift, making thus the Convention enforcement mechanism a not entirely adequate remedy in domestic

109 *CH v GLS* (n 32). See also *AX v CY* (n 32), per Robert Peel QC.

110 *CH v GLS* (n 32) [51].

111 *RB v DB* (n 94).

112 [31].

113 See HCCH, '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: Status Table'.

114 Except cases involving Denmark as this Member State does not participate in the Protection Measures Regulation (see Recital 41).

115 Moreover, the declaration of enforceability or registration may be refused on a number of grounds: 1996 Convention, Art 26(3). These grounds are the same as the grounds for the refusal of the recognition of the measures under Art 23(2) of the Convention.

116 1996 Convention, Art 26(2).

violence cases where the enforcement of matters such as non-molestation undertakings is of a truly urgent nature – sometimes literally a matter of life and death. This is understandably so as the Convention was designed to facilitate cross-border protection of children and not adult victims of domestic violence.

In contrast, no declaration of enforceability is required under the Protection Measures Regulation as this instrument allows for direct recognition of protection orders issued as a civil law measure between EU Member States.<sup>117</sup> Thus, ‘a civil law protection order such as a non-molestation order or undertaking issued in one member state, can be invoked directly in another member state without the need for a declaration of enforceability but simply by producing a copy of the protection measure, an Article 5 certificate and where necessary a transliteration or translation’.<sup>118</sup>

Second, the question of whether the 1996 Convention applies in intra-EU cases remains a matter for anxious scrutiny. In particular, in the Court of Appeal case of *Re S (A Child) (Hague Convention 1980: Return to Third State)*<sup>119</sup> an argument was raised that the 1996 Convention did not apply to intra-EU proceedings as the Brussels IIa Regulation states that it shall apply ‘where the child concerned has his or her habitual residence on the territory of a Member State’.<sup>120</sup> Does this mean that the Convention does not apply in intra-EU cases? Unfortunately, the Court of Appeal did not deal with this question.<sup>121</sup>

Nonetheless, it could be argued that, in intra-EU cases, there is no need to resort to either the Protection Measures Regulation or the 1996 Convention. Instead, Article 20 of Brussels IIa, which is an equivalent of Article 11 of the 1996 Convention, could be utilised to secure the cross-border circulation of protective measures issued in return proceedings.<sup>122</sup> The problem with Article 20, however, is that protective measures taken under this provision are not enforceable outside of the territory of the Member State where they were taken.<sup>123</sup> Nevertheless, the Brussels IIa Recast Regulation, which will apply from 1 August 2022, allows the court that has ordered a return of the child to ‘take provisional, including protective, measures in accordance with Article 15 of this Regulation in order to protect the child from the grave risk of harm’.<sup>124</sup> Such protective measures will be enforceable in any other Member State and will remain in force until a court of the Member State of habitual residence has taken measures it considers appropriate.<sup>125</sup> Although

117 Protection Measures Regulation, Art 4(1).

118 *In the matter of A* (n 32) [25], and *AX v CY* (n 32).

119 *Re S* (n 76).

120 Brussels IIa Regulation, Art 61 (‘Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children’).

121 *Re S* (n 77) [53].

122 See Mostyn J’s comment in *RD v BD* (n 94) [11] that Art 20 of the Brussels IIa Regulation could potentially be utilized as a jurisdictional ground for the making of protective measures which would then be entitled to recognition under Chapter 3 of the Regulation. The learned judge, however, concluded that it was, to his knowledge, not common to utilize Art 20 for this purpose. *Ibid.*

123 See *Bianca Purucker v Guillermo Vallés Pérez*, Case C-256/09, 15 July 2010, [2010] ECR I-07353.

124 Brussels IIa Regulation Recast (n 67), Art 27(5).

125 *Ibid.*, Recital 30.



several other Recitals also refer to protective measures and grave risk,<sup>126</sup> there is no reference anywhere within the Brussels IIa Recast Regulation to the safety of the returning parent. Indeed, the examples of protective measures in Recitals 45 and 46 make it clear that the Regulation is concerned solely with the protection of the child.<sup>127</sup> The lack of reference to the protection of the returning parent is disturbing as it undermines the interpretation proposed here – ie that in cases involving domestic violence protective measures for the mother are invariably by extension measures that protect the child. It is regrettable that the Brussels IIa Recast Regulation missed the opportunity to clarify that the risk to the child and the risk to the mother are often intertwined, and therefore, in such circumstances, in order to protect the child, the mother will also need to be protected. Such protective measures should fall explicitly within the scope of Article 15 of the Recast Regulation as indirect measures for the protection of the returning parent. Alternatively, if the legislator was not prepared to acknowledge the link between the protection of the child and the returning parent in child abductions committed against the background of domestic violence, an explicit reference to the Protection Measures Regulation should have been made as means of facilitating the protection of the abducting mother, independently of the protection of the child, in separate proceedings involving an application for a civil protection order made by the abducting mother in the requested State.

In fact, the protection of abducting mothers through protective measures ordered outside of the return proceedings as ‘self-standing’ protection measures offers an alternative avenue for facilitating the protection of the abducting mother upon the return.<sup>128</sup> In these circumstances, the abducting mother would seek a protection order from a competent court in the requested State, in proceedings separate from the Hague Convention return proceedings, prior to the return to the requesting State. Such protection order would be automatically recognised in all other EU Member States under the Protection Measures Regulation. Although there is no record of such a protection order having been issued by the UK courts, this avenue is recommended here for application in intra-EU child abduction cases as a viable alternative to the approach that treats protective measures for the mother as indirect protective measures for the child issued by the Hague Convention return court in the return proceedings.

### *B. Non Intra-EU Child Abduction Cases*

Outside of the EU in cases where the requesting and the requested State are both Contracting Parties to the 1996 Convention, the Convention should be utilised to facilitate the cross-border recognition and enforcement of protective measures in

126 Ibid, Recitals 44-46 and 59.

127 Recital 45: ‘such arrangements could include a court order from the Member State prohibiting the applicant to come close to the child, a provisional, including, protective measure from that Member State allowing the child to stay with the abducting parent who is the primary carer until a decision on the substance of rights of custody has been made in that Member State following the return [. . .]. Recital 46: ‘Such provisional, including protective, measures could include, for instance, that the child should continue to reside with the primary care giver or how contact with the child should take place after return until the court of the habitual residence of the child has taken measures it considers appropriate.

128 See POAM Project Team (n 63) [5.2.1.1 b)].

return proceedings, including measures of protection for the abducting mother.<sup>129</sup> Although some may question the appropriateness of utilising the 1996 Convention in relation to protective measures related exclusively to the abducting mother, as explained above, the rationale for employing the 1996 Convention for this purpose is based on the inter-relationship between the protective measures for the child and the protective measures for the mother where domestic violence is concerned. Nevertheless, as set out above, the 1996 Convention was not designed and is therefore not uniquely suited as a means of facilitating cross-border protection of abducting mothers who have been victims of domestic violence. The main shortcoming is the intermediate step of the declaration of enforceability/registration for enforcement of the protective measures, which does not sit well with the need for the abducting mother to be protected immediately upon the return.<sup>130</sup> In order to alleviate this inadequacy, it is recommended here that an application to declare the protective measures enforceable/register them so that they become enforceable be made before the return order comes into force.<sup>131</sup>

Where the requesting State is not a Contracting Party to the 1996 Convention, the court dealing with the return application must exercise extreme caution when undertakings are offered and/or other protective measures are sought in the context of Article 13(1)(b). The High Court decision in *Z v D (Refusal of Return Order)* [2020] EWHC 1857 (Fam) demonstrates such situation. The case involved Brazil as the requesting State. The High Court was not satisfied with the undertakings offered, finding that they ‘did not constitute sufficient protective measures [...] they amounted simply to promises [...] as that there was no evidence as to the extent to which undertakings would be enforceable in Brazil’ (paras 47–50). Such cautious approach is considered sensible and is endorsed here.

So called ‘safe harbour orders’ or ‘mirror orders’ whereby the court of the requesting State issues an order that will ‘mirror’ the undertakings order made in the requested State, with the aim to secure the enforceability of the undertakings in the requesting State, may be the only remedy in such circumstances. The difficulty with ‘safe harbour orders’ and ‘mirror orders’, however, is that such orders are not common in civil law jurisdictions as civil law judges do not generally believe that they are authorised to make such an order.<sup>132</sup> Safe harbour orders and mirror orders have been ‘invented’ by common law judges as the practice has developed mainly in the United States.<sup>133</sup> Another limitation concerns the length of the proceedings as the case must be dealt with by the courts of both the requested and the requesting State before the child is returned.<sup>134</sup> For example, in *TAAS v FMS*<sup>135</sup> the court referred to its past experience with the US State Florida where procedure resulted in

129 From the end of the Brexit transition period on 1st January 2021 this category includes all new cases involving the UK and other EU Member States. See UK-EU Withdrawal Agreement 2019, Art 67.

130 See section A above.

131 See *In the matter of A* (n 32). Admittedly, however, where the court system of the requesting State lacks in efficiency, the return of the child may be unduly delayed as a result.

132 Chamberland (n 1) 72.

133 Beaumont and McEleavy (n 19) 157.

134 *Ibid.* See also Weiner (n 1) 679.

135 *TAAS v FMS* (n 32).

a 6-months' delay, which in turn led to an application for the return order to be set aside.<sup>136</sup> Against this background, the use of safe harbour/mirror orders is not recommended as means of protection of abducting mothers in return proceedings involving allegations of domestic violence.

Last but not least, it shall be noted that, although there is currently no international instrument dedicated exclusively to the protection of abducting mothers in child abductions committed against the background of domestic violence, promisingly, the topic of recognition and enforcement of foreign civil protection orders is currently on the agenda of the Hague Conference on Private International Law.<sup>137</sup>

## VI. CONCLUSION

It is imperative that Hague Convention return courts recognise that, in cases involving domestic violence, the circumstances of the abducting mother and the child may be intertwined to the extent that domestic violence perpetrated solely against the mother may justify the finding that the return would expose the child to a grave risk of psychological harm or other intolerable situation pursuant to Article 13(1)(b). If the court concludes that there is a grave risk of harm to the child, the source of the risk is irrelevant. A 'thorough, limited and expeditious examination' of disputed allegations of domestic violence should be carried out by the court in return proceedings before it proceeds to determining the availability of protective measures.

Where the court is assessing the grave risk of harm on the basis of domestic violence perpetrated primarily on the abducting mother, in protecting the well-being of the child the court is compelled to protect the abducting mother so that the child may benefit from the safeguards afforded to that mother. Accordingly, protective measures for the mother are by extension measures that protect the child. In deciding what weight should be given to protective measures, the court must take into account the extent to which they will be enforceable in the requesting State. In intra-EU child abduction cases circulation of protective measures should be facilitated preferably by the Protection Measures Regulation. Outside of the EU, in cases where the requesting and the requested State are both Contracting Parties to the 1996 Convention, the Convention should be utilised to facilitate the cross-border recognition and enforcement of protective measures in return proceedings. However, where the requesting State is not a Party to the 1996 Convention, extreme caution should be exercised by the return court when undertakings are offered and/or other protective measures are sought in the context of Article 13(1)(b).

136 Ibid [48].

137 See Hague Conference on Private International Law, Protection Orders Project, <https://www.hcch.net/en/projects/legislative-projects/protection-orders>.