



Neutral Citation Number: [2022] EWHC 3588 (Fam)

Case No: FD21P00673

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/08/2022

Before :

UPPER TRIBUNAL JUDGE LANE
sitting as a Deputy High Court Judge

Between :

C
- and -
R

Applicant

Respondent

Ms Best (instructed by Sills and Betteridge LLP) for the **Applicant**
Ms Renton (instructed by Thomas Dunton Solicitors LLP) for the **Respondent**

Hearing dates: **13 and 14 July 2022**

Approved Judgment

This judgment was handed down remotely at 10.00am on 3 August 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

UPPER TRIBUNAL Judge Lane sitting as a Deputy High Court Judge:

1. I am concerned in this matter with an application made in respect of H, a female child born in 2018 and now aged 4 years. The applicant (C) is the father of H and he is represented by Ms Best of counsel. The respondent (R) is the mother of H. She is represented by Ms Renton of counsel. The father and H are citizens of Hong Kong. The mother is a British citizen who was born in Hong Kong. She is of Pakistani origin. Her parents, who also resided in Hong Kong, now live in the United Kingdom.
2. The father, who has been resident throughout these proceedings in Hong Kong, seeks a return order pursuant to the provisions of the Child Abduction and Custody Act 1985 and the Hague Convention 1980. The mother does not dispute the Article 15 declaration of wrongful removal made in Hong Kong on 8 September 2021. The application for return is resisted by the mother (who is currently resident with H in England and Wales) on the grounds that a return order would expose H to physical or psychological harm or would otherwise place H in an intolerable situation (Hague Convention 1980, Article 13 (b)).
3. In determining this application, I have had the benefit of hearing the oral evidence of Dr Ratnam, a consultant psychiatrist, and of reading and hearing the extensive submissions of Ms Best and Ms Renton.

BACKGROUND

4. The father and mother met in April 2017 and married on 18 January 2018. H was born in the summer of 2018. The parties and the child lived with the maternal grandparents in Hong Kong until September 2018 when the father left that property (the circumstances of his departure are disputed). In September 2019, the father purchased a property in Hong Kong; the parties were at that time still in a relationship and it was intended the mother and H would live with the father at the property.
5. In November 2019, the father suspected the mother of having an affair and his contact with H stopped. The father filed a divorce petition in Hong Kong in 2020 and sought joint custody of H. Those proceedings have not concluded and, at the date of the final hearing in July 2022, the parties remain married.
6. The mother and her current partner, Z (also a former resident of Hong Kong) married under Islamic law in August 2020.
7. On 14 September 2020, the Family Court in Hong Kong made an order for the father to have contact with H for one hour at the office of a social worker once every 2 weeks on a Tuesday starting on 13 October 2020. No contact took place; the mother did not take H to the arranged sessions. The father was also ordered to pay interim child support in the amount of HK\$4,500 per month. A further order for contact between the father and H was made on 24 November 2020. However, before that contact could take place, the father was informed by the mother's solicitor in Hong Kong on 5 November 2020 that the mother had, on 26 October 2020, taken H out of the jurisdiction and travelled to the United Kingdom together with her new partner, Z. The father was told by the solicitors that the mother needed to travel urgently to the United Kingdom to visit her father who was unwell. A letter written to the

father by the mother's solicitors at this time stated that, "our client will return to Hong Kong when [the mother's] father's health becomes stable".

8. On 11 November 2020, the father sought an undertaking from the mother that M would return with H to Hong Kong by 18 November 2020.
9. On 31 December 2020, the mother gave birth in the United Kingdom to a daughter by Z. The mother wrote to the Family Court in Hong Kong on 20 March 2021, stating that her reason for not returning to Hong Kong 'at this moment' was the high risk of contracting Covid-19 and her difficulties in paying for Covid travel tests, hotel quarantine and flight tickets.
10. In June 2021, the father applied to the Hong Kong Central Authority for the return of H. On 8 September 2021, the High Court of the Hong Kong Special Administrative Region Court of First Instance made a declaration pursuant to Article 3 of the Hague Convention that the removal to and retention of H in the United Kingdom was wrongful.
11. On 23 September 2021, the father applied pursuant to the Child Abduction and Custody Act 1985 for the summary return of H and, on 27 September 2021, Peel J ordered a port alert. On 18 October 2021, Arbuthnot J adjourned the mother's Part 25 application for an independent psychiatric assessment, the mother not having filed her evidence by that date. Contact by way of a WhatsApp call was ordered for 24 October 2021, together with further indirect contact by way of letters, gifts and photographs. The mother was ordered to provide weekly updates regarding H to the father.
12. On 1 November 2021, HHJ Harris-Jenkins granted the mother's application to instruct Dr Ratnam, a consultant psychiatrist, to prepare a report. Indirect contact by WhatsApp video calls 3 times per week was also ordered, the mother's partner and other children not to be present during the contact calls, if practicable.
13. In January 2022, the mother gave birth to a son by her partner, Z. That child is now aged 7 months.
14. On 25 January 2022, Dr Ratnam's report was completed (subject to an addendum dated 15 May 2022). The final hearing was originally listed on 31 March 2022 but there have been a series of adjournments caused, for the most part, by the sickness of representatives.

THE HAGUE CONVENTION

15. Article 13 of the Hague Convention 1980 provides:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

The parties agree that H is too young to express any view concerning her proposed return to Hong Kong.

THE LAW

16. Counsel for both parties helpfully agreed a statement of the relevant jurisprudence which, with their agreement, I have annexed to this judgment at 'A'. I have referred to particular items of case law as appropriate in the course of this judgment.
17. As Macdonald J observed in *Z v D* [2020] EWHC 1857 (Fam) [24] summarising the principles of *Re E (Children)(Abduction: Custody Appeal)* [2012] 1 AC 144:

In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process, which include the fact that it will rarely be the case that the court will hear oral evidence and, accordingly, rare that the allegations or their rebuttal will be tested in cross examination. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

I have adopted that methodology in determining this application, subject, where appropriate, to the remarks of Black LJ (as she then was) in *Re K (Hague Convention: Lithuania)* [2015] EWCA Civ 72:

52. The judge's rejection of the Article 13b argument was also criticised by the appellant. She was said wrongly to have rejected it without adequate explanation and to have failed to follow the test set out in §36 of *Re E* in her treatment of the mother's allegations. In summary, the argument was that she should have adopted the "sensible and pragmatic solution" referred to in §36 of *Re E* and asked herself whether, if the allegations were true, there would be a grave risk within Article 13b and then, whether appropriate protective measures could be put in place to obviate this risk. That would have required evidence as to what protective steps would be possible in Lithuania, the submission went.

53. I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Article 13b exception (see *Re E* supra §32) and for the court to evaluate the evidence within the confines of the summary process. Hogg J found the mother's evidence about what had happened to be inconsistent with her actions in that she had continued her relationship with the father and allowed him to have the care of E, see for example what she said in §37 about the mother not having done anything to corroborate her evidence. She also put the allegations in context, bearing in mind what Mr Power had said about something good having happened in E's parenting, which she took as a demonstration that E would not be at risk if returned to Lithuania (§36). The Article 13b argument had therefore not got off the ground in the judge's view. The judgment about the level of risk was a judgment which fell to be made by Hogg J and we should not overturn her judgment on it unless it was not open to her (see the important observations of the Supreme Court on this subject at §35 of *Re S*, supra). Nothing has been said in argument to demonstrate that the view Hogg J took was not open to her; in the light of it, it was unnecessary for her to look further at the question of protective measures. She would have taken the same view even if the child had been going back to the father's care, but the Article 13b case was weakened further by the fact that the mother had ultimately agreed to return with E.

THE ISSUES

18. The mother suffers from depression. She opposes a return order on the basis that her depression may, when aggravated by other factors, render her incapable of caring for H in Hong Kong, thereby exposing H to grave risk and/or an intolerable situation. Those other factors are detailed by Ms Renton as (i) Inadequate funds for a suitable home or living costs; (ii) The lack of family support; (iii) the need for her current partner to work long hours (iv) The likely lack of ongoing mental health support; (v) Fear of the father. In the course of the hearing, a further possible aggravating factor emerged, that is the difficulty which the mother would face in finding the funds to pay for her family, now consisting of three children including H and her partner (who is unskilled and not working in the United Kingdom) to travel to Hong Kong. The mother argues that, if these practical problems over the ability of the family to travel are not overcome, then H will be at grave risk in Hong Kong both by reason of the separation from her siblings and as a consequence of a worsening of the mother's mental health as a result of that separation.

THE MOTHER'S MENTAL HEALTH: THE EVIDENCE OF DR RATNAM

19. Dr Ratnam gave the only live evidence at the hearing. She was extensively questioned by both counsel. She discussed the findings of her report, namely that the mother fulfils the criteria for a diagnosis of depression and that she was depressed at the time of assessment. Dr Ratnam said that the mother reported to her that she had experienced depression first at five months gestation with H in 2018 following an incident with the father. The mother had been depressed one month postnatally but did not have access to treatment. Symptoms of depression during the pregnancy with H and postnatally had included low mood, reduced appetite and poor sleep. The mother had reported that her symptoms had improved when she established the relationship with Z in May 2020 and particularly when she came to the

United Kingdom in October 2020 but had deteriorated again in September 2021 when she received court papers regarding the Hague Convention proceedings. Dr Ratnam said that the mother's GP notes refer to the mother being low in mood in July 2021 due to her psychosocial circumstances but she was not at that time diagnosed with depression. Symptoms of depression since September 2021 had included low mood, reduced sleep, reduced appetite, reduced energy, reduced concentration, lack of enjoyment, hopelessness and suicidal thoughts. Dr Ratnam considered that the mother had also fulfilled the criteria for a diagnosis of generalised anxiety and that the course of the anxiety appears to have followed that of her depression. Symptoms had included rumination, sweating, palpitations and shortness of breath. The mother had reported traits of post-traumatic stress disorder (PTSD) with nightmares and flashbacks of her experiences with the father but she did not report other symptoms of PTSD so did not fulfil criteria for a diagnosis of PTSD. The mother also did not fulfil criteria for a diagnosis of a personality disorder.

20. I found Dr Ratnam to be a truthful and helpful witness. Whilst she gave detailed evidence about the mother's interaction with her during the preparation of her report and its addendum, she candidly told the court that there were lacunae in the information which she had been given by and regarding the mother. In particular, she had not received the mother's medical notes from Hong Kong despite having requested these to be sent. She could not, therefore, assess the mother's recent depressive episode in the context of her longer-term mental health. Moreover, Dr Ratnam had not been given details by the mother or her representative about the most recent treatment which the mother has been receiving. In particular, Dr Ratnam was unaware of whether the mother had been prescribed an increased dose of the anti-depressant medication which she had been receiving (the lowest dose of Sertraline - 50mg) and whether the therapy referred to in the mother's evidence and the skeleton argument of Mr Renton had been counselling or a therapeutic treatment such as CBT (Cognitive Behavioural Therapy). Dr Ratnam said that, had CBT taken place, it would by now have ceased as it would have been a 6–8-week course only. Dr Ratnam said that CBT was likely to provide considerable benefit for the mother's mental health, whether she receives the treatment in the United Kingdom or in Hong Kong, where it is available.
21. Dr Ratnam was asked about an email dated 29 April 2022 in the bundle from the Hong Kong Hospital Authority [HA] part of which reads:

The HA provides comprehensive and integrated psychiatric services, including the provision of early identification, assessment and treatment services for patients with mental health needs. The multi-disciplinary professional team comprising healthcare practitioners in various disciplines, involving doctors, nurses, clinical psychologists, occupational therapists and medical social workers, provides a range of appropriate treatment and follow-up, including in-patient service, specialist out-patient service, day rehabilitation training and community support services, to psychiatric patients (including patients with postpartum depression) having regard to the severity of their condition and clinical needs. Based on the individual's needs, appropriate treatment or interventions with various level of frequency, for instance, medications, illness and symptom management training, cognitive behavioural therapy, psychosocial interventions or parent group/talk, will be provided.

Dr Ratnam described the services outlined in the email as 'absolutely appropriate' for the treatment of the mother.

22. The gaps both recent and historical in Dr Ratnam's knowledge of the mother's condition have clearly hampered her ability to assist the court to understand the prognosis of the mother's mental health condition going forward. I have not speculated on the reasons why the mother may have left Dr Ratnam in ignorance of her mental health history in Hong Kong or of the exact nature of her most recent 'talking' therapy or counselling here in the United Kingdom but I am reminded that the burden is on the mother to establish her case for opposing return.
23. My evaluation of the evidence of Dr Ratnam leads me to conclude that (i) the mother has experienced a period of depression and anxiety since she came to the United Kingdom for which she has received (and may require to receive again in the future) anti-depressant drug therapy at a relatively low dose; (ii) the mother would probably benefit from a short course of CBT if she returns to Hong Kong and if her depression worsens; (iii) as recorded in Dr Ratnam's addendum report, the mother 'made a threat to kill herself and her family in February 2022, which was triggered by feelings of being overwhelmed by her social situation and physical health problems that the family was experiencing. However, she does not have on-going suicidal ideation'; (iv) the stress of returning to Hong Kong may make the mother's mental health worse. However, an email from a Hong Kong lawyer which Dr Ratnam had been shown when preparing her addendum report stated that the mother will be able to access CBT through the public health system and the cost of medication will be free or nominal. There is therefore adequate care available in Hong Kong.' On the basis of that email, Dr Ratnam said that she believed that the mother would have access to appropriate treatment in Hong Kong; (v) the mother has recently experienced instances of suicidal ideation. However, Dr Ratnam considered that the presence of one or more of her children would act as a stabilising or restraining factor which would prevent the mother acting on any suicidal thoughts.
24. Drawing the elements of Dr Ratnam's evidence together, I consider that, whilst it is important not to underestimate the mental health problems which the mother has experienced, she would be able to access appropriate treatment for little or no charge in Hong Kong in the event that her depression worsens. A link to a website (Civil Service Bureau – Civil Service Benefits ([csb.gov.hk](https://www.csb.gov.hk))) provided by Ms Best on the second day of the hearing confirms that the mother and H will be entitled to free medical treatment whilst still married to the father and that H will remain entitled following the divorce of her parents.
25. In this analysis, I consider that it is important to avoid hypothetical situations and abstract concepts and instead address what, for want of a better phrase, is likely to happen in a 'real world' scenario. Having examined all the material before the court very carefully, I consider that, if required to return H to Hong Kong, the mother will endeavour to return together not only with H but also with Z and her younger children. The physical presence of the children in the mother's life, as Dr Ratnam was very clear, will act as an effective break on any suicidal thoughts. Increased drug therapy and CBT (which it seems the mother has not yet undertaken) will be available in Hong Kong and are likely significantly to lessen the impact and duration of any depression although the material circumstances of her family on return may increase her stress. I shall go on to examine the aggravating factors associated with those material circumstances going forward but, as I shall explain, I am unable to conclude that the mother's mental health on return to Hong Kong, whether aggravated or not by her material circumstances, will become so bad that H will, in turn, experience grave physical or psychological harm or will be placed in an intolerable situation. To adopt the expression used in *Re E*, the harm which H may experience as a result of her mother's poor mental

health may at times following return to Hong Kong be real but it will not, for the reasons I have given and will give below, be grave.

PROTECTIVE MEASURES

26. I now turn to the protective measures upon which the majority of the written and oral submissions focussed. The father has offered a package of measures which he submits are proportionate and reasonable and which he claims would mitigate the impact of H's return such that she would not face the grave risk of suffering physical or psychological harm. Those measures are summarised in Ms Best's skeleton argument:
- a. the father will pay for H and her mother's flights to Hong Kong providing these flights do not exceed \$4,000HKD (c.£372.60) per person.
 - b. the father will undertake not to institute any proceedings whether civil or criminal prosecution in relation to mother's removal of H from Hong Kong.
 - c. the father will undertake not to threaten violence, harass, molest, pester or contact the mother in any way when she returns to Hong Kong.
 - d. In respect of contact with H, the father will work with any appointed social worker to achieve this.
 - e. the father will undertake not to denigrate the mother.
 - f. the father will make no attempts to remove H from the mother's care and control save for the period of any contact agreed between the parties or ordered by the court.
 - g. the father will pay 1 months' security deposit and 1 months' rent for a 1-bedroom property to accommodate the mother and H providing this sum does not exceed \$12,000 HKD (c.£1,117.80)
 - h. Following H's return to Hong Kong, the father will pay \$4,500 HKD (c.£419.31) per month maintenance for H.
 - i. If the mother does not return to Hong Kong with H, H will reside with the father in his (2 bedroom) property, supported by the paternal family. The father will, if necessary, travel to the United Kingdom to collect H himself.
27. The mother says that she does not believe that the father will abide by any undertakings he may give. I note that the father is in arrears of child maintenance ordered by the court in Hong Kong but the mother does not cite that as a reason for not relying on his undertakings. Other than the somewhat obscure claim that 'money is a weapon that [the father] is ready to use' (see Ms Renton's skeleton argument at [26]) the mother gives no other reason to support her claim that the father will not abide by undertakings. I fully acknowledge that it is problematic to place reliance on undertakings which the court will have no power directly to enforce and which, indeed, have not yet been given to a court in another jurisdiction. However, in the particular circumstances of this application, I am satisfied that undertakings offered by the father may be trusted for the purposes of considering the efficacy of the protective measures. First, I consider that the father, as an officer in the Hong Kong Police, is likely to have a good understanding of the legal status of an undertaking and the consequences of breach. It is likely also that the father will be aware that his own position as a police officer may be at risk should he breach any undertaking he gives to a court. Secondly, I note that there was little, if any, emphasis in Ms Renton's oral submissions on the unreliability of the father. Instead, her focus was very much on what the mother considers the insufficient quantum of the financial package offered by the father. I consider that the court can proceed to consider the protective measures on the basis that the father is

likely to abide by any undertaking he may give both in respect of his own future conduct and by way of financial support for H and the mother.

28. The main thrust of the mother's case is that the financial package offered by the father is not adequate. Ms Renton's skeleton argument summarises the mother's counter requirements as:
- a. Rent – 3-month rent/deposit HK\$43,800 [£4,380]
 - b. One-way airfares (including baggage) £1,440
 - c. Minimum monthly income needed to cover basic needs HK\$9,955n [£995] (increasing to HK\$24,555 pm [£2,455] after two months when rent payments commence).

The father claims that he cannot afford those sums and that he objects to funding Z or the two younger children. He considers that he only owes an obligation to H although he acknowledges that he will need to provide for the mother in order to fulfil that obligation.

29. There were two other areas of significant dispute regarding financial matters. First, the mother argues that Z, her partner, is unskilled and would enter a difficult work environment on return to Hong Kong. The issue of Z working 'long hours', raised in Ms Renton's skeleton argument, was not discussed in oral submissions. Consequently, the mother says that Z could not be relied upon to provide a contribution to the family income. Secondly, the father and mother do not agree as regards the mother's entitlement to state benefits in Hong Kong. The mother says that she would not be entitled to benefits or that they would be very difficult for her to access and would be meagre. The father points out that the mother previously received comprehensive social security assistance funding amounting to HKD \$9,833 per month [£1,027.27]. During the course of the two-day hearing, additional documents were provided by both parties addressing this issue.
30. I acknowledge that there is a tension in the summary Hague process between the need to make a proper evaluation of the evidence whilst avoiding a detailed fact-finding exercise. In this application, the evidence of the parties themselves has not been tested by cross examination. However, on my evaluation of all the material before the court, I am satisfied on the balance of probabilities that the financial package offered by the father, together with other relevant considerations which I address below, is sufficient to ensure that H would not be exposed to Article 13 (b) harm. I make that assessment for the following reasons.
31. First, I am satisfied that the mother will be entitled to state benefits on return to Hong Kong. She has applied for and obtained benefits when living there in the past and there was no evidence to show that her absence from Hong Kong has led to disentitlement. Indeed, material provided by Ms Best appeared clearly to show that, as the wife of the father (which she continues to be until the divorce is finalised) she would be fully entitled to benefits. Moreover, I accept Ms Best's submission that H is likely to have her own entitlement to benefits. Whether Z may also be entitled was not considered at the hearing.
32. Secondly, I consider that the mother has significantly played down the contribution which her partner, Z, is likely to make to the family income. I fully accept that Z cannot be compelled to return to Hong Kong but I stress again the need for the court to proceed on the basis of what is likely to happen (the 'real world' scenario) and Z's role in the life of the family going forward cannot be ignored. As I have said, it is clear that if H returns, then the mother will go with her and also that Z and the younger children will return. It has not been suggested that Z or the mother will face any immigration obstacles on return to Hong Kong

or that Z or the mother (who is qualified as a teacher) cannot work legally there. I am satisfied that either the mother or Z will find work relatively easily; the assertions of the mother that Z would struggle to find unskilled work as a waiter in a city recovering from the pandemic were not supported by evidence and given the extent of the hospitality industry in Hong Kong, arguably contrary to common sense. Further, if either the mother or Z found work, the other parent would be able to remain at home to care for the children. I make that observation aware that the mother's parents, with whom she and H used to live and who had provided informal childcare, have now settled in the United Kingdom.

33. Thirdly, I consider that the support with accommodation costs offered by the father, albeit not particularly generous, is sufficient to ensure that H will not face an intolerable situation on return. I am aware that the father is seeking to provide for H and the mother only; he is not responsible for Z and the two other children. However, I refer to my remarks above concerning the ability of Z to work and of the mother to work and/or obtain benefits. On my evaluation of the evidence, it is clear that, faced with returning to Hong Kong, the mother, Z and their advisers will work to overcome any administrative obstacles so that benefit payments can commence on or soon after the family's arrival whilst either the mother or Z will also find work.
34. Fourthly, I consider that the arguments of the mother on the issue of accommodation came very close to a comparison of the standards of living the family currently enjoy and may in the past have enjoyed in Hong Kong and the accommodation now on offer. The parties correctly acknowledge that such comparisons of living standards should be avoided and will rarely succeed in defeating a return order (see Hague Conference on Private International Law (HHCH) Guide to Article 13 (b) and as both counsel observe in their agreed note of the law at [8]). I have no doubt that, in the short term, for a family of five to occupy the sort of accommodation for which the father's offer will enable them to rent will be difficult but I was not directed to any evidence to indicate that such accommodation (which, in any event, is likely soon to be superseded when benefits and work income become available) will be so poor as to expose H to an Article 13 (b) risk.
35. There remain three issues which are relevant to the central question of Article 13(b) harm and to the efficacy of the protective measures which, *prima facie* and for the reasons given above, I am satisfied are adequate. Those issues are: (i) the conduct of the father; (ii) the possibility and likely consequences of the separation of H from her half siblings, stepfather and maternal grandparents; (iii) the logistics and costs of return to Hong Kong. I shall address each issue in turn.

THE FATHER'S CONDUCT

36. The mother contends that the father presents a threat to her own welfare and that of H. That threat is summarised by Ms Renton in her skeleton argument as follows:

The mother is terrified that the father, as a Chinese policeman, has power, status and money that she entirely lacks. She experienced the response to her plea for help when he arrived drunk and abusive [towards the end of 2019] at the maternal grandmother's flat. She was sneered at. The mother does have to accept she is in breach of court order for interim contact at the social worker's office. The father plainly has no respect for her as a mother nor insight into the impact on his daughter and the other children of any action. The mother fears she

will face criminal liability and he will get her arrested. She places no reliance on any undertakings that the father may offer.

37. There was discussion at the hearing of a telephone conversation on 20 March 2022 between the father and the mother (there is a transcript of the conversation at [476-481]). Dr Ratnam was asked briefly about the transcript and understandably was reluctant to offer any view. There has been no cross examination of either parent regarding the conversation. I do not consider it helpful or appropriate to draw any conclusions from the transcript, either as regards the mother's acceptance of 'what the court may order' (it is unclear which court – in Hong Kong or London – she is referring to) or as regards the mother's contention that the conversation evidences the father's controlling behaviour.
38. Overall, I do not consider that the mother is, as she claims, genuinely 'terrified' of the father's 'status and money' (she has not explained exactly what she means by that expression) or that, even if the mother has a subjective fear of him, the father has shown any consistent pattern of behaviour or has perpetrated any single incident of abusive conduct such that any subjective fear which the mother may have may properly be described as objectively well-founded. I say that for the following reasons. First, the mother's claimed fear of the father sits uneasily with her own unambiguous evidence that, but for the pandemic, she would have returned to Hong Kong voluntarily. If she had reason to fear the father on account of his past behaviour towards her, she has not explained why she did not take steps immediately on arrival in the United Kingdom to remain here. Secondly, I am satisfied that the likelihood of domestic violence occurring in the future is significantly reduced by reason of the fact that the father and mother will be living separately, the mother in a household with her new partner, Z. I regard the incident involving drunkenness in 2019 as an isolated loss of control by the father which has not been and is, in my opinion, unlikely to be repeated. Dr Ratnam said that the mother had not discussed any allegations of domestic violence involving the father; indeed, she commented that the mother may have 'exaggerated her experiences in her relationship' with the father.
39. The father's likely future conduct is not, in my opinion, a substantial factor for the court when determining whether H faces a future risk of Article 13 (b) harm. The same is the case with the mother's claim that the father's colleagues in the Hong Kong Police would 'sneer' at her should she report to them any incident involving the father. There is nothing in the material before the court to indicate that the mother and H would be unable to access sufficient protection from the appropriate authorities or agencies in Hong Kong, including the police, should they ever need to seek it let alone evidence that the mother faces the prospect of false arrest, as she claims, at the instigation of the father. I agree with Ms Best that the fact that the mother's own sister in Hong Kong is a police officer will mean that the mother will be able to access police help if necessary. If the mother continues to have a subjective fear of the father, I do not consider that such fear is likely to continue in the long term or that it will significantly affect the mother's mental health. Moreover, there is a danger in the mother's submissions regarding the father's conduct of moving away from the child-centred focus which should properly inform any evaluation of the evidence; whilst I have no doubt that the mother's relationship with the father is poor there is nothing to suggest that the father presents or has ever presented any threat to H's welfare.
40. I am confident, upon a careful consideration of all the evidence, that I may confidently discount the possibility that the father's past and likely future conduct would, absent any other factors, give rise to an Article 13(b) exception (see my reference at [17] above to *Re K*

(1980 Hague Convention: Lithuania) [2015]) I am nonetheless of the view that, even if I considered that the father's conduct poses a threat to H's welfare, there are adequate protective measures in place to obviate any risk.

THE POSSIBLE SEPARATION OF H FROM HER FAMILY MEMBERS

41. The delays in determining this application have been unfortunate. Had the global pandemic not intervened and had the father's application been processed within the usual timescales, the circumstances of the mother and H would have been very different. Indeed, according to the mother's own evidence, she would have returned of her own volition with H to Hong Kong having visited her sick father. However, the lives of all involved have moved on and the mother now finds herself with not one but three small children to care for. Moreover, the mother's parents with whom the family had lived in Hong Kong are now settled in the United Kingdom.
42. The mother argues that H will suffer psychological damage if she is separated from her two younger half-siblings and her grandparents. Dr Ratnam told the court that, if the mother were to be separated in the long term from any of her children, the consequences for her mental health (and, in turn, for H's welfare) would be severe.
43. Whilst I acknowledge the distress which would be caused to H and to the mother (and the consequent impact on the mother's ability to parent H) if they were separated from the other children, I consider again that it is important to address what is likely to happen in a 'real world' scenario. The court is not applying Article 13(b) to a purely hypothetical set of circumstances, for example H returning alone to her father in Hong Kong or the mother and H being separated forever from the other two children. In the 'real world', there may be some brief separation of the mother and H from the other family members whilst the mother complies with any return order and finds a new home in Hong Kong but I consider that the mother and Z will endeavour to make any separation as brief as possible; in the 'real world' scenario, it is likely that the family will be living together within the short term. To conclude otherwise would be to ignore the reality of this family's intentions and ultimately to determine this application unjustly.
44. I have acknowledged above the role which the maternal grandparents have played in accommodating the mother and H and in providing a degree of security for her life in Hong Kong. Their absence from Hong Kong when the mother and H return will be an aggravating factor both as regards the mother's ability to cope with the stress of return and because the mother will be living in unfamiliar and possibly less agreeable accommodation. However, I do not consider that the effects on H or the mother of separation from the grandparents are likely to be other than short term. In the general course of life, adult children leave the homes of their parents and grandchildren see less of their grandparents. I do not consider that the effects of this separation either emotionally or materially are likely to expose H to Article 13 (b) harm.

THE RETURN TO HONG KONG

45. The latter part of counsels' oral submissions focussed on the costs of returning H and her family to Hong Kong. In short, the mother submits that, whilst the father may cover the costs

of flying her and H to Hong Kong, Z and the remaining two children simply cannot afford the costs of flying. A number of extracts from websites were produced by both parties some showing the total costs to be as high as £10,000 and flight times of several days. The mother submits that, if it is financially impossible for Z and the younger children to purchase tickets, then the family may be split indefinitely.

46. I consider that there is an important distinction to be made between protective measures which will prevent H suffering grave harm after she has returned to Hong Kong and the practicalities of getting her to Hong Kong in the first place. By analogy, in an asylum application, a decision maker will be concerned with whether an individual will be safe in his or her home area; only in relatively rare circumstances will the journey to the point of entry to the country of nationality and from there to the home area be a relevant consideration.
47. This distinction was noted by Macdonald J in *Z v D* at [29]. Summarising the relevant jurisprudence, he observed that:

There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.

Macdonald J does not say that the efficacy of the former should not be addressed with care but plainly the mechanics of the return journey should not be the focus of the court's analysis. Moreover, in the instant case the problems do not even arise directly over 'practical arrangements for the child's return' but over the arrangements for the return of her family although I am aware of the possible consequences for H if she is separated from her siblings. Most importantly, whilst the practicalities of return are relevant, it is difficult to see why those practicalities should trump the outcome of the court's analysis of Article 13 (b) risk. If resistance to a return application were to fail on all Article 13 grounds but then succeed on the sole issue of the cost of returning family members other than the child to the country of origin, then it is possible that the purpose of the Convention would be undermined. It is with those observations in mind that I have considered the costs and practicalities of the return to Hong Kong of H and her family.

48. Ms Best responded to the question of air fares by submitting that there may need to be a two stage return of the family. That may prove necessary but, if it is then, for the reasons I have given above, a brief separation would not expose H to Article 13 (b) risk. Moreover, there is a further issue which was not addressed in submissions. It is the mother's case that the father has been in arrears of payment of child maintenance ordered by the Hong Kong court since January 2021. The figure quoted in Ms Renton's skeleton argument is HK\$72,000 [£7,200]. If the father were to pay that sum to the mother now (he has not offered any reason why he cannot or should not pay), then she would have sufficient funds to pay for Z and the younger children to accompany her and H to Hong Kong. Whatever solution is found to the problem of the airfares, I am satisfied that a solution will be found, that any separation of H from her siblings will be brief and that H will not be exposed to Article 13 (b) risk.

CONCLUSION

49. In the light of my evaluation of all the evidence and for the reasons I have given, I grant the father's application under the Child Abduction and Custody Act 1985 and I make a summary

return order in respect of H. I have listed this matter for a remote directions hearing on 4 August 2022. I invite counsel to draft an order which can be considered at that hearing.

50. That is my judgment.

ANNEX A

C v R

Agreed Note on Law

13.7.2022

Article 13(b) grave risk – the legal framework

1. The leading authorities on this “exception” are the two Supreme Court decisions of *In re E (Children: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442.
2. In *Re S (A Child)* the Supreme Court repeated and stressed the approach taken in *Re E*: the terms of Art 13(b) are plain, require neither elaboration nor gloss and by themselves demonstrate the restricted availability of the defence and where allegations of domestic abuse are made, the court should first ask 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 ask how the child can be protected from that risk; if the evaluation of the protective measures fails to meet the identified grave risk, the court may have to do the best it can to resolve the disputed issues of fact.
3. **Article 13(b)** the grave harm exception is summarised as follows:
 - i) The burden of proof lies with the person who opposes the child’s return. The standard of proof is the balance of probabilities;
 - ii) Article 13(b) is not to be constructed narrowly; by its very terms, it is of restricted application. The words of the Article were plain and needed no further elaboration or gloss;
 - iii) It is rarely appropriate to hear oral evidence of the allegations made under article 13(b);
 - iv) The risk of the harm must be “grave”; it was not enough for the risk to be “real”. It must have reached such a level of seriousness as to be characterised as “grave.” 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;
 - v) Intolerability denotes a situation that the particular child in the particular circumstances of the case should not be expected to tolerate;
 - vi) The source of the risk is irrelevant: e.g. where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child;
 - vii) When assessing the risk that a child faces on return the court will have regard to protective measures;
 - viii) Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be;

- ix) Inherent in the Convention is the assumption that the best interests of children as a primary consideration are met by a return to the country of their habitual residence following a wrongful removal. That assumption is capable of being rebutted only in circumstances where an exception is made out.”

1. Of recent cases at appellate level

C (A Child) (Abduction: Article 13(b)) [2021] EWCA Civ 1354

Failure to analyse the child’s circumstances in a forward-looking manner or why those circumstances would fall within article 13(1)(b). Judgement solely focused on past events

Re A (Children) (Abduction: Article 13(b)) [2021] EWCA Civ 939

Separation of the child from the taking parent can establish a grave risk. The court “should not”... “discount allegations of physical and emotional abuse merely because he or she has doubts as their validity or cogency”

Re A-M (a child) (1980 Hague Convention) [2021] EWCA Civ 998

The lower court judgment failed to analyse whether, if what the mother said was true, that would establish a grave risk to the child. The judge failed to adopt the approach set out in *Re E (Children) [2011] UKSC 27*

2. In *KS v RS [2009] 2 FLR 1231 at §45* Macur J (as she then was) noted as follows:

“That undue delay and settlement may, in appropriate cases, constitute the basis of an argument that a child would be exposed to an intolerable situation if summarily returned to their country of habitual residence prior to removal is recognised by Baroness Hale of Richmond in *Re D (A Child)(Abduction: Custody Rights) [2006] UKHL 51, [2007] 1 AC 619, [2006] 1 WLR 989, [2007] 1 FLR 961* at paras [51]-[53]. In particular I note that the word 'intolerable' in this context should be taken to mean 'a situation in which this particular child in these particular circumstances should not be expected to tolerate'.”

3. ***GP (A Child) [2017] EWCA Civ 1677***: The court of Appeal held that by granting an order requiring the return of an 11-year-old girl to Italy Hayden J had failed to consider in sufficient detail what circumstances would face the child upon her return for the purposes of the 1980 Hague Convention and Article 13(b). In particular, the Judge had failed to consider the possibility that the mother, who would return with the child, might be required to serve an outstanding 12-month custodial sentence; he had also failed to consider where the mother and child would live and the funds that they would live on. The Court of Appeal held that, if necessary, the matter should have been adjourned to obtain more evidence.

4. In ***Re B A Child Abduction Article 13(B)) [2020] EWCA Civ 1057***. The Court of Appeal found that the Article 13(b) threshold of grave risk of harm or intolerability was met, determining that this was a case in which permission should have been given for further medical evidence to be obtained when the mother first applied. Moylan J stated:

71. The law in respect of Article 13(b) is well-established and I set out only a brief summary. I would also point to the recent Guide to Good Practice on Article

13(1)(b) published by the Hague Conference on Private International Law.

72. The only authorities to which I propose to refer are [*In re E \(Children\) \(Abduction: Custody Appeal\)* \[2012\] 1 AC 144](#) and [*In re S \(A Child\) \(Abduction: Rights of Custody\)* \[2012\] 2 AC 257](#).

73. In *In re E*, the Supreme Court addressed the scope of Article 13(b) and the correct approach to its application. The essence of its conclusion, as set out below, is that the wording of Article 13(b) itself restricts its scope. I would add that, sometimes, as in the Guide to Good Practice, at [25], it is suggested that this Article, as an exception to the obligation to order a child's return, is to be "applied restrictively". Sometimes, as in *in re E*, it is suggested that the Article is "of restricted application". These are nuanced not substantive differences because the underlying principle is the same, namely the Article has a high threshold for its application and, as a result, the scope for its application is limited.

74. The approach set out in *in re E*, was explained as follows, at [31], in the judgment of the court delivered by Lady Hale and Lord Wilson. There is "no need" for Article 13(b) to be "narrowly construed" because, "By its very terms, it is of restricted application. The words of article 13 are quite plain and need no further elaboration or 'gloss'".

75. After dealing with the burden of proof, this is further explained as follows:

"33 Second ... the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk 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.

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" (emphasis supplied). As was said in [*In re D* \[2007\] 1 AC 619](#), 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: e g, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child."

76. The judgment then makes a further observation which is of particular relevance to the present case:

"35 Fourth, article 13(b) 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, 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 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist."

77. In *In re S (A Child)*, the judgment of the court was given by Lord Wilson. The case dealt with the question of whether, in the context of the effect on a parent's mental health for the purpose of Article 13(b), there needed to be an objectively reasonable or realistic risk or whether the parent's subjective perception of the risk could be sufficient. Lord Wilson said:

"27 In *In re E* [2012] 1 AC 144 this court considered the situation in which the anxieties of a respondent mother about a return with the child to the state of habitual residence were not based upon objective risk to her but nevertheless were of such intensity as to be likely, in the event of a return, to destabilize her parenting of the child to the point at which the child's situation would become intolerable. No doubt a court will look very critically at an assertion of intense anxieties not based upon objective risk; and will, among other things, ask itself whether they can be dispelled. But in *in re E*, it was this court's clear view that such anxieties could in principle found the defence. Thus, at para 34, it recorded, with approval, a concession by Mr Turner QC, who was counsel for the father in that case, that, if there was a grave risk that the child would be placed in an intolerable situation, "the source of it is irrelevant: e.g., where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child". Furthermore, when, at para 49, the court turned its attention to the facts of that case, it said that it found

"no reason to doubt that the risk to the mother's mental health, whether it be the result of objective reality or of the mother's subjective perception of reality, or a combination of the two, is very real".

78. Later, in response to Thorpe LJ's suggestion that the "crucial question" had been whether "these asserted risk, insecurities and anxieties [were] realistically and reasonably held" by the mother and his dismissal of the mother's case founded on her "clearly subjective perception of risk", Lord Wilson said:

"34 In the light of these passages we must make clear the effect of what this court said in *In re E* [2012] 1 AC 144. The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the

mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned

5. The court is referred to the HHCH guide to Article 13(b) which provides:
- *“Specific protective measures should only be put in place where necessary strictly and directly to address the grave risk. They are not to be imposed as a matter of course and should be of a time limited nature that ends when the state of habitual residence of the child is able to determine what, if any, protective measures are appropriate for the child” [para 44].*
 - *“The court is not to embark on a comparison between the living conditions that each parent (or each State) may offer. This may be relevant in a subsequent custody case but has no relevance to an Article 13(1)(b) analysis. More modest living conditions and / or more limited developmental support in the State of habitual residence are therefore not sufficient to establish the grave risk exception. If the taking parent claims to be unable to return with the child to the State of habitual residence because of their difficult or untenable economic situation, e.g., because his / her living standard would be lower, he / she is unable to find employment in that State, or is otherwise in dire circumstances, this will usually not be sufficient to issue a non-return order” [para 60].*

Discretion

6. In the event that the mother establishes a defence pursuant to Article 13(b) in this case then the Court's discretion arises in relation to whether to, nonetheless, order the child's return. The House of Lords decision in ***Re M and Another (Children) (Abduction: Rights of Custody)*** [2007] UKHL 55, [2008] AC 1288, is the authoritative statement of the law relating to exercise of discretion in Convention cases when exceptions under Art 12 or 13 have been established. The leading opinion of Baroness Hale held that earlier decisions which sought to import an additional gloss into the Convention by requiring a test of exceptionality to be met, in addition to finding that one of the Art 12 or 13 exceptions applies, were wrong. In Hague Convention cases general policy considerations may be weighed against the interests of the child.

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