Neutral Citation Number: [2024] EWHC 246 (Fam)

Case No: FD23P00338

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 February 2024

Before :

MR JUSTICE PEEL

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Between :

T (Father)	**Applicant**
- and -	
G (Mother)	**Respondent**

- -
- -

Nicholas Anderson (instructed by **Williams and Co**) for the **Applicant**
James Turner KC and Maria Scotland (instructed by **HAB Law**) for the **Respondent**

Hearing dates: 1 and 2 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE PEEL

Mr Justice Peel:

Introduction

1. These are 1980 Hague Convention proceedings in respect of T, born in June 2020 and now aged 3 ½, pursuant to an application by his father ("F") issued on 7 July 2023 for return of T to the USA. T's mother ("M") brought T to this country on 3 February 2023, but did not return him to the USA on 1 March 2023, as had been planned. She accepts that this was a wrongful retention. She pursues an Article 13(b) defence.

2. As I shall explain, the application resulted in a return order made in August 2023 which was set aside by the Court of Appeal. The application was remitted for rehearing before me.

The impact on the child and the parents of these proceedings

3. In **Z v Z [2023] EWHC 1673 (Fam)** I said this at para 2:

> "As is so often the way in Hague Convention cases, these proceedings have been far from summary in nature. Further, the parties have inevitably ventilated matters which are sensitive, disputatious, and divisive. Again, as so often in these cases, the very fact of litigious Hague Convention proceedings has been inimical to the children's interests and enormously stressful for the parties. It has effectively suspended proper cooperation between the parties and a focus on the children's welfare interests until determination of the Hague application which is essentially jurisdictional in that it concerns where future litigation should take place. Unless and until a way is found to confine the proliferation of evidence (both written and oral), and to ensure that these cases take place promptly (the 6 week requirement for final determination is rarely achievable), I fear that Hague Convention proceedings run the risk of adding to the delay, acrimony and attendant harmful consequences for children. In this case, it seemed clear to me that at its heart is a concerned father who has not seen his children since February and is anxious that his relationship with them is suffering. Their mother told me she is supportive of the children spending time with him in Canada and England, yet the Hague Convention proceedings have stymied any meaningful focus on the issues which matter most to the children".

4. Those words apply with equal force to this case. A year has passed since the wrongful retention. F has seen T by video link but not in person. I strongly suspect that at the heart of this is his desperate, and entirely understandable, wish to maintain a relationship with T. Yet the parents have been so consumed by the Hague Convention proceedings that they have not even begun to put in place a sensible structure which enables T to spend time with each of them. Upon prompting by me, counsel for both parents confirmed that each has no difficulty in principle with the other spending substantial amounts of time with T, whether in this country or in the USA. It is a crying shame, and such a waste, that they have not been able to achieve this before now.

5. I have had regard to the totality of the evidence and submissions. The principal ingredients in this case are: (i) the volatile relationship of the parties, (ii) the undisputed evidence that M will not travel to the USA with T, even if a return order is made, and thus T will be separated from his carer, (iii) the mental health issues of the parties, and M in particular, and (iv) the settled, stable life enjoyed by T which would be impacted

by a return to the USA. At all times, I have had at the forefront of my mind the effect on this child to be returned to the USA in these circumstances. It is not an abstract analysis; it is rooted in the specific facts of this case.

6. I am enormously grateful to counsel for each party (who did not appear in the first set of proceedings) for their expert written and oral submissions, and the focussed and constructive way in which they presented their cases.

7. In the end I have come to the clear conclusion that I should refuse the application for a return order. I know this will be hugely disappointing for F. I propose to make a contact order which can at least operate as a starting point for this child going forward.

The background

8. F is 29 years old and a US citizen. M is 25 years old and a British citizen; she also has a permanent US resident card. They married in 2018 in England and moved to the USA in late 2019. T was born in 2020; he has dual British/American nationality.

9. M refers to a dysfunctional, peripatetic childhood, during which her mother was diagnosed with borderline personality disorder and attempted to take her own life when M was 14. After leaving school she went to work in Europe for a few months, where she was diagnosed with ADHD. She returned to England, working in a lettings agency.

10. F was brought up in the USA. After leaving school, he joined the US military. M and F met online in 2017, while F was serving at a US base in England. After 6 months they started living together. They married in England on 13 October 2018. F was posted to Jordan for 8 months while M remained in England. After his return, he was posted to the USA, and both M and F moved there in late 2019, prior to T's birth in June 2020. F left the military, and they settled in his home state where F bought a home for them. I have no reason to doubt that M felt very isolated in the USA, far from her support network of family and friends in England. She obtained part-time work in a bar and was, so it seems to me on the evidence, T's primary career, although F played a full role in T's life as well.

11. Both M and F have had issues with mental health. F says he has experienced stress and anxiety, but has learned to cope. He denies M's assertion that he was diagnosed with PTSD upon leaving the military, although he does refer to PTSD in one text message. He acknowledges that he received professional therapeutic help for his mental wellbeing through the Veterans' Association.

12. As for M, her mental health is vulnerable. This is not really in dispute; F in his written evidence refers to her "ongoing struggles with mental health" and the fragility of her mental health from a very young age, and says that "her mental health has always had a persistent impact upon her". He says that he was "scared about her mental health" and that M on occasions expressed suicidal ideation. M attended a clinic in Texas where she was diagnosed as suffering from adjustment disorder. She received therapy for three months. One graphic incident in December 2022 involved M writing what F describes as a "suicide note" and appearing to threaten to shoot herself with his shotgun, although M describes this as a cry for help and empathy rather than a genuine suicide attempt. As a result, she briefly attended another mental health professional in January 2023 and was prescribed medication for anxiety and depression. It seems to me that these

episodes are indicative of the deep lows which she experienced during this period in the USA.

13. My reading of the parties' evidence is that their relationship was toxic. M accuses F of physical and verbal abuse. F refutes the allegations and in turn refers to M's instability and emotional outbursts.

14. Summarising M's account of F's abusive behaviour, she says:

    i) On a number of occasions, she told F she wanted to leave him, but she felt trapped in the marriage, unable to separate and prevented by F, who was controlling and manipulative, from doing so.

    ii) F "gaslighted" M by telling her that her problems were the result of her own upbringing, that she drove her own mother to attempt suicide, and that she should be put in a mental hospital. He told her to go and kill herself, and that nobody would care.

    iii) F assaulted her on a number of occasions of which four are directly evidenced in the statements. Once, after she had (on her case) accidentally thrown up on F, he responded by stripping her naked and dragging her round the house. On another occasion, M in frustration beat F on his chest, and he reacted by throwing her to the floor. In 2022, when M said the relationship was over, he grabbed her by the hair and pinned her forcefully against a washing machine. And finally, M slapped F after he had verbally abused her, and F thereupon assaulted her.

    iv) F would regularly shout at her in intimidating and aggressive manner, smashing things around her. He called her "retarded" and "a bitch".

15. It appears that T was present during some of these incidents, and it is likely that he was exposed, at least to some degree, to the relationship conflict between his parents, which must have been disturbing (to put it mildly) for him.

16. Following established authorities, to which I will return, it seems to me that I can be satisfied that:

    i) It is reasonable to take M's evidence on F's behaviour at its highest, in that I cannot discount the possibility that her account is substantially correct; but

    ii) M was not blameless. The relationship was combustible and marked by verbal, emotional and physical outbursts on each side.

17. In my view, this highly conflicted relationship left a deeper negative impact on M than F. I strongly suspect that her perceptions of it are different from F's, and more intense. She views the relationship in a different light from F. I am confident also that her mental health issues and vulnerabilities contributed to, and were exacerbated by, the difficulties in the relationship; if you like, a vicious circle. And her sense of isolation will in turn have compounded her genuinely held anxieties.

18. On 3 February 2023, M and T came to England, on the basis that they would return to Texas on 1 March 2023. There is a suspicion in M's recent statement that she may have

intended from the outset that she and T would not return, but that was not really explored, and realistically does not affect the outcome of this case.

19. After arriving in England, on or about 22 February 2023 M told F that she intended to remain in the UK with T; on her case, she decided she simply could not return to the USA. She and T have now been here for a year. She says her mental health is improving, she continues to access professional help, has been prescribed medication for depression and anxiety, and is on the waiting list for CBT. It is, in my judgment, of note that she contacted a Women's Aid service in July 2023 and recounted her relationship experiences in the USA in some detail. She said that: "I am scared he will make me go back….I would like to know if there are any support groups I could go to to help me deal with this trauma I've been through as the memories still hurt me". The records graphically set out M's unhappiness and reflect her genuinely held, subjective perceptions of lived experiences.

20. T is well-settled. He and M have accommodation near M's family and friends. He is happy and thriving at nursery school. There appear to be no welfare concerns.

The Texas proceedings

21. M and F had various discussions from 22 February 2023 onwards, but once it became clear that M would not change her mind about a return to the USA, F applied for orders in the Texan court. M was served with notice of the hearing on 25 May 2023 but did not attend and was not represented; she sent a letter to the judge saying that both she and T were habitually resident in the UK and therefore she did not believe that "the US court holds jurisdiction over decisions made regarding myself and my child".

22. The Texan court made what is described as a temporary court order on 25 May 2023, expressed to last until divorce or further order. It contains the following key provisions:

    i) It declares that the USA is the country of T's habitual residence, and that his home state is Texas;

    ii) It appoints F as 'temporary sole managing conservator', which vests him with significant and senior parental responsibility for T, and the right to determine where and with whom T lives (a later provision places T in his 'possession'); M is appointed as the 'temporary sole possessory conservator';

    iii) M was required to execute a bond in the sum of $4,000 to secure T's return to the USA;

    iv) M was ordered to return T to F by 31 May 2023;

    v) Thereafter M was to have supervised contact/'visitation' only; insofar as this was to be professionally supervised, this was to be at M's expense;

    vi) M was to pay child support to F for T;

    vii) F was to have exclusive use of the family home;

    viii) Many of the M's assets were frozen, and she was placed under various other injunctive orders.

23. F has not produced the evidence which he filed in support of the application, and it is to my mind unsurprising that M is suspicious about what the Texas court was told, and equally suspicious about what applications might be made by F in the event of her return with T.

24. It is all too common for the left behind parent to secure orders in the original country (often in the absence of the taking parent) which make significant, wide ranging welfare decisions; in this case, placing T in F's care and providing for supervised contact only. To do so pre-empts, or impedes, the purpose of the Hague Convention, which is to provide for a return of a child to the country of his/her habitual residence, so that welfare decisions may be made in the first country (see **Re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51**, per Baroness Hale of Richmond at para 48).

25. To seek, and obtain, welfare orders before a return order is made by the second country is arguably to approach these cases the wrong way round, particularly if such orders place the taking parent at an immediate disadvantage in the original jurisdiction. It places the returning jurisdiction (in this case England and Wales) in the invidious position of being asked to order a return to a country where important welfare decisions have already been made. It enhances the need for protective measures. It exacerbates the fears of the abducting parent about what awaits him/her upon return.

26. Perhaps as a result of prompting by me at the PTR, F secured a discharge of the order on 29 January 2024. But even so, there is likely to be a lingering worry in the mind of M about the ease with which such orders were secured providing for transfer of care and restricted contact.

The 1980 Hague Convention proceedings

27. F's application for a return order having been issued on 7 July 2023, the matter was listed for final disposal on 22 August 2023. On that date, M's counsel applied for an adjournment, buttressed by an application made on 9 August 2023 (13 days before) for directions which included various requests for disclosure of F's military records, medical records and bank records, as well as a request for a welfare assessment of T by Cafcass. The judge refused the applications.

28. During a brief adjournment, the parties, who were both represented, had discussions outside court. When they returned into court, the judge was informed that they had largely reached agreement on most issues, principal among them being an order for return to Texas. Importantly, this was predicated on the basis of protective measures being encapsulated in a mirror order in the USA. Further dialogue took place both inside and outside court. The parties endeavoured to agree a draft order. It became clear that evening that agreement could not be reached on the specific terms, and implementation measures, and the judge adjourned to 24 August 2023.

29. The next day (23 August 2023), M applied for expert medical evidence on her mental health. She said she had experienced severe flashbacks as a result of the proceedings the previous day and could not herself return to the USA "due to the severe impact such a return would have on her mental health".

30. On 24 August 2023, at the reconstituted hearing, it was confirmed to the judge that M would not return to the USA if a return order were made, and in any event she opposed

the making of such an order. The judge (i) determined that an agreement for a return order had been reached and should be made into an order, (ii) declined to provide that any protective measures should be incorporated in a USA mirror order prior to return, merely stating that it was "intended" that F's undertakings "should take effect in the Texas court as an order", and (iii) dismissed M's application for expert evidence which would necessarily have led to an adjournment.

The appeal

31. M appealed against the orders. A stay was imposed by Moylan LJ on 21 September 2023. Permission to Appeal was granted by Moylan LJ on 20 October 2023, and the appeal hearing took place on 14 November 2023 (**Re T (Abduction: Protective Measures: Agreement to Return) [2023] EWCA Civ 1415**. Judgment was given on 1 December 2023. The appeal was allowed, and the matter remitted for rehearing before a judge of the Family Division. The comprehensive judgment of Cobb J sets out in much greater detail than my short synopsis above the circumstances of the August hearing. Summarising the reasons for setting aside the orders, Cobb J said this at para 65:

> "65. The two orders made on 24 August 2023 cannot, in my judgment, stand. In making those orders, I regret that the Judge fell into error in the following ways:
>
> i) By holding the parties to what she regarded as a concluded agreement on 22 August 2023 to dispose of the application under the 1980 Hague Convention for the return of T to the USA, when the parties had not in fact reached accord on a core, fundamental, ingredient of the arrangements for T's return, namely the implementation of the proposed protective measures in Texas;
>
> ii) By relying on *Rose* / *Xydhias* to support her approach – namely, that the court could exercise a 'broad discretion' to hold parties to an agreement which was, in material respects in any event, incomplete;
>
> iii) By failing to address adequately or at all the mother's change of position on 23/24 August, and failing to consider it on its merits;
>
> iv) By approving two orders simultaneously (purporting to be of different dates) which were in some respects incompatible, and in others inherently defective."

32. The remitted hearing was listed before me on 1 and 2 February 2024. Prior thereto, on 18 December 2023 a PTR took place in front of me at which M made a number of applications for (i) disclosure of F's Army records, (ii) instruction of an expert psychiatrist as to the impact on M's mental health of a return to the USA, (iii) a Cafcass welfare analysis exploring the impact on the child of a return to the USA, (iv) expert evidence on Texan law, and (v) expert evidence on M's immigration status in the USA.

33. I refused all the applications for reasons given in an ex-tempore judgment. Those reasons, in summary, were:

    i) It was common ground that in reality the final hearing would have to be adjourned should the expert evidence and/or Cafcass report be ordered, thereby causing yet more delay to a case which has already lasted a year. I did not think that a further delay could be countenanced absent strong reasons.

ii) None of the applications were properly constituted under the Part 18 procedure. They appeared in Counsels' skeleton argument.

iii) Some of the applications had been made in August 2023 and refused.

iv) In principle, I would be able at final hearing to take M's case at its highest. I could not readily see what more would be gained by some of the applications.

v) The application for a Cafcass welfare analysis was, in my judgment, speculative. It is highly unusual, in my experience, to commission a welfare report in an Article 13(b) case, whereas a report on the objections of a child capable of expressing a view is routine.

vi) Expert evidence as to Texan law seemed to me to be premature. At that stage, M had not set out her updated list of required protective measures and F had not responded. I considered this could await the trial, particularly as there was no Part 18 application.

vii) Similarly, the application in respect of immigration status was premature and speculative. M was not even sure what her case on it was, and at the very least it seemed to me that she should present it in her updated statement.

Non-return by M and list of protective measures sought by her

34. I directed that:

i) M file updated evidence by 12 January 2024, including (a) her case as to whether she would return with T if a return order were to be made, and (b) a list of protective measures sought.

ii) F to file evidence in reply by 24 January 2024, including in respect of the protective measures.

35. M has confirmed in her statement that if a return order is made, she will not accompany T to Texas.

36. In respect of protective measures, in the event that she does in fact return, she set out a lengthy list to which F responded. By way of overarching summary, F agreed to pay for return travel, to allow M and T to occupy the FMH to his exclusion, to discharge the Texas order (that has now been done), not to pursue any criminal complaint and to provide some interim financial support.

37. M said that these did not go far enough, although the debate was somewhat academic in that M has made clear she will not return. I had a sense of déjà vu; the parties were unable to agree the protective measures, just as they had been unable to do so in August 2023, and it seemed to be common ground that if I were to order a return and if (contrary to her case), M were to accompany T, then further submissions and/or court time would be needed to iron out the detail.

38. It does seem to be of some note that nothing in the list of protective measures offered by F prevents him from re-applying to the Texan court immediately, nor is there any guarantee that in the interim T would live with M, nor is there any clarity about how

she would fund legal proceedings. These might be readily capable of resolution, but one can see that from M's point of view they contribute to her genuinely held fears about the consequences for her and T of returning to the USA.

The law: Article 13(b)

General

39. The burden lies on M to establish, to the civil standard of proof, that there is a grave risk that a return to Texas would expose T to physical or psychological harm, or otherwise place him in an intolerable situation. The exercise is forward looking and addressed to this particular child in this particular set of circumstances.

40. For a general distillation of the applicable principles, I have in mind the dicta of the Court of Appeal in **Re IG [2021] EWCA Civ 1123**:

> "46. The leading authorities remain the decisions of the Supreme Court in Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144 and Re S (A Child) (Abduction: Rights of Custody) [2012] UKSC 10, [2012] 2 AC 257. The principles set out in those decisions have been considered by this Court in a number of authorities, notably Re P (A Child) (Abduction: Consideration of Evidence) [2017] EWCA 1677, [2018] 4 WLR 16 and Re C (Children) (Abduction: Article 13(b)) [2018] EWCA Civ 2834, [2019] 1 FLR 1045. Since the hearing of the present appeal, this Court has handed down judgments in another appeal involving Article 13(b), Re A (A Child) (Article 13(b)) [2021] EWCA Civ 939 in which Moylan LJ carried out a further analysis of the case law. I do not intend to add to the extensive jurisprudence on this topic in this judgment, but merely seek to identify the principles derived from the case law which are relevant to the present appeal.
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> 47. The relevant principles are, in summary, as follows.
>
> (1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".
>
> (2) The focus is on the child. The issue is the risk to the child in the event of his or her return.
>
> (3) The separation of the child from the abducting parent can establish the required grave risk.
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> (4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.
>
> (5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.
>
> (6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.

(7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

(8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.

(9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.

(10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks."

Impact on parent

41. To the above, I would add a particular aspect of Article 13(b) as expressed by Lord Wilson in **Re S (supra)** at para 34:

"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".

Separation of child from parent

42. Potential separation of the child from his/her primary carer can establish the required grave risk. As Moylan LJ said in **Re W [2018] EWCA Civ 664** at para 57:

"Putting it simply but, in my view, starkly, if the children were to be returned to the USA without the mother, the court would be enforcing their separation from their primary carer for an indeterminate period of time. It would be indeterminate because the court has no information as to when or how the mother and the children would be together again. These children, aged five and three, would be leaving their lifelong main carer without anyone being able to tell them when they will see her again. In my view it is not difficult to describe that situation, in the circumstances of this case, as one which they should not be expected to tolerate. I acknowledge that the current situation has been caused by the mother's actions, and that she was herself responsible for severing the children from their father but, as referred to above, the court's focus must be on the children's situation and not the source of the risk."

Approach to factual findings

43. The **Re E** approach does not prevent an evaluative assessment of allegations, or, to put it another way, a court is not bound to take the allegations at their highest. As Black LJ (as she then was) said in **Re K (1980 Hague Convention) (Lithuania) [2015] EWCA Civ 720,** at para 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."

44. Similar dicta were set out by the Court of Appeal in **Re A (supra)** at paras 91 to 98. Moylan LJ pointed out the need for a judge to be careful when conducting a paper evaluation of disputed facts. The assumption of the maximum level of risk based on the abducting parent's case must be reasoned and reasonable.

Refusal of parent to return with child

45. M's case is that she will not return to the USA even if the court orders a return of T. The HCCH 2020 Good Practice Guidance says this:

"… the circumstances or reasons for the taking parent's inability to return to the State of habitual residence of the child may in particular be relevant in determining what protective measures are available to lift the obstacle to the taking parent's return and address the grave risk" [65].

"In some situations, the taking parent unequivocally asserts that they will not go back to the State of the habitual residence, and that the child's separation from the taking parent, if returned, is inevitable. In such cases, even though the taking parent's return with the child would in most cases protect the child from the grave risk, any efforts to introduce measures of protection or arrangements to facilitate the return of the parent may prove to be ineffectual since the court cannot, in general, force the parent to go back. It needs to be emphasised that, as a rule, the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child. It needs to be emphasised that, as a rule, the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child" [72].

46. In **C v C (Abduction: Rights of Custody) [1989] 1 FLR 403 at 410D-F** Butler-Sloss LJ said:

"The grave risk of harm arises not from the return of the child, but from the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation, if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent."

47. That statement of principle has been contextualised in subsequent authorities. In **TB v JB (Abduction, Grave Risk of Harm) [2001] 2 FLR 515** at para 42 Hale LJ (as she

then was), suggested that the approach adopted in **C v C (supra)** should not be taken too far:

> "It is not an addition to the statutory test. It is merely guidance on what is more likely to surmount the high hurdle presented by Article 13(b). It is a useful way of distinguishing those cases where the abduction has caused the problems feared from those cases where it has not".

48. Sir Mark Potter P in **S v B [2005] 2 FLR 878 at [49]** sounded a similar note of caution:

> "The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation which she has herself created by her own conduct is born of the proposition that it would drive a coach and horses through the 1985 Act if that were not accepted as the broad and instinctive approach to a defence raised under Article 13(b) of the Convention. However, it is not a principle articulated in the Convention or the Act and should not be applied to the effective exclusion of the very defence itself, which is in terms directed to the question of risk of harm to the child and not the wrongful conduct of the abducting parent. By reason of the provisions of Articles 3 and 12, such wrongful conduct is a 'given' in the context of which the defence is nonetheless made available if its constituents can be established".

49. Williams J in **Re Q and V [2019] EWHC 490** (Fam) at para 48 (vi) expressed the judicial task thus:

> "The source of the risk is irrelevant. I do not agree with Ms Papazian's assertion that a self-created risk (i.e. a mother refusing to return with the children or conflict created by the mother) cannot form the foundation of an Article 13(b) defence. The "coach and four doctrine" deriving from C v C (Abduction: Rights of Custody) [1989] 1 WLR 654 has been substantially ameliorated following the judgment of Hale LJ in TB v JB (Abduction, Grave Risk of Harm) [2001] 2 FLR 515 (supra) and Potter P in S v B [2005] 2 FLR 878 and the Supreme Court decisions in Re E and Re S. Of course the court will evaluate carefully any assertion that a primary carer cannot return or any other alleged risk to the children arising out of some matter control over which is in the hands of the Respondent but ultimately the court must consider whether the grave risk of harm exists or not, whatever the source."

50. Similar dicta were expressed in **Re A (supra)** at paras 89 to 90**.**

51. Each case is fact specific. Thus, for example, the Court of Appeal in **Re C [2021] EWCA Civ 1236** upheld the decision of Cohen J who found as a fact that the mother in that case would return with the child, contrary to her articulated case, and made a return order. On the other hand, Holman J in **NP v DP [2021] EWHC 3626** concluded that the mother would not return, and refused to make a return order. In **Re W 2019 (supra)** the Court of Appeal overturned a return order in circumstances where the mother was (or appeared to be) unable to return to the USA with the children because of visa restrictions. In **Re A (supra)** the Court of Appeal overturned a return order made despite the mother's refusal to accompany the child. In **AT v SS [2015] EWHC 2703 (Fam)** MacDonald J made a return order, as did Judd J in **UG v NN [2022] EWHC 8 Fam.**

52. It is all a matter of judicial evaluation, to be exercised with appropriate caution and care. The court must assess the facts of each case to determine whether the stated intention at the time of trial not to return is genuine, whether the parent will in fact not

return when the moment comes, and how the refusal to return interacts with all relevant features in the Article 13(b) analysis.

Delay

53. Finally, I have been referred to authorities which signal the potential impact on the Article 13(b) defence of delay.

54. In **Re D (supra)** at para 53 it was held that lengthy delay is one of the relevant factors.

55. In **Re M [2015] EWCA Civ 26** Black LJ (as she was) said at para 11:

> "The longer that time elapses following a wrongful removal or retention, the more difficult it becomes to return the child".

56. In **RS v KS [2009] 2 FLR 1231** Macur J (as she then was) at para 43-46, said that the younger the child the greater the potential impact of delay.

57. As always, each case will turn on its own facts and the court will need to evaluate whether, and to what extent, prolonged delay before final hearing impacts upon the defence.

Protective measures

58. As for protective measures, I have in mind the comprehensive analysis of Cobb J in the Court of Appeal in this very case at paras 45 to 57.

Discretion

59. Should the Article 13(b) exception be established, that is not the end of the matter. The court is required to go on to consider whether, notwithstanding the availability of the defence, the child should nevertheless be returned. This is an exercise of discretion, albeit it is well established (see **Re M (Abduction: Zimbabwe [2007] UKHL 55)** that in the usual course of events it is unlikely that the court will order a return if to do so would place the returning child in the way of the very harm which has been found to constitute the Article 13(b) defence.

Analysis

60. I have already set out my essential conclusions on the relationship of the parties. In my view the blameworthiness of one or other party is less important than the fact of a deeply fractious relationship. Both parties had mental health issues, to a lesser or greater extent; their interactions were volatile, with physical and verbal altercations; they were under a variety of pressures; M's mental health difficulties are likely to have been exacerbated by the nature of the relationship; and, crucially, I am satisfied that for M, the prospect of returning to the USA (albeit not directly to resuming a relationship with F) would prompt a high level of anxiety and fear. What matters most is M's own perceptions, recollections and personal experiences, which are acutely negative.

61. M's mental health issues are well documented. The impact on her in the USA was serious, as F himself, candidly and fairly, acknowledged. Even now, although she says her mental wellbeing has improved since arriving in England, she remains under

professional care. I have little doubt that her vulnerability contributed both to the turbulence of her relationship with F and to her unhappiness in the USA. Being in the USA, isolated and far from family and friends, generated considerable unhappiness and probably accentuated mental health issues. Those memories, which she describes as traumatic, remain with her; thus, on 23 August 2023 the judge was told that the hearing the day before had triggered traumatic flashbacks. I am confident that (i) even the thought of returning to the USA would be highly corrosive on her psychological wellbeing, and (ii) actual return to the USA would be severely detrimental to her mental health.

62. M's evidence is that she will not return. That is not really disputed by F. The fact that she is entertaining the prospect of T returning to the USA without her is, in my judgment, a clear indication of the extent of the trauma which she feels at the prospect of return. Her refusal to return is not contrived or some form of forensic manipulation. It is rooted in a deep-seated fear of what will happen to her. It is hard to envisage that she would decline to return with T absent powerful, heartfelt reasons. She has stated in evidence that her state of health is fragile and believes that to return to the USA would be a "tipping point" for her, a proposition which seems to me to be a distinct possibility. This is nothing new; she said as much to the Women's Aid service in July 2023, referring to traumatic memories. She made clear to the judge in August 2023 that she could not face a return. She has her own past experiences of loneliness and an unhappy relationship to draw upon. I suspect that the fact of F having obtained wide ranging child arrangements orders (even if such orders have now been discharged) must have heightened her anxieties about what awaits her if she returns.

63. Article 13(b) is focussed on the child, but the impact on the child's primary carer is directly relevant. I am satisfied that if I make a return order, his mother will not accompany him. He will thereupon be separated from her. I consider that there is a grave risk of harm (psychological and emotional) to him upon separation from M. She was his primary carer after birth, and for about a year has been his sole carer. He is settled and happy in England, in the care of M, with her support network, and at his nursery. He has not seen F in person for a year. F acknowledges that at the very least T would be upset if separated from M (it would be "a difficult time for T" and "he will naturally miss M and will struggle to understand why she has left him"). This shows insight on F's part, but in my view, it understates the real risk to T of losing his mother for an indeterminate time, with uncertainty as to whether, when and where he will see her again.

64. Further, the act of separation would of itself be destabilising for M, which creates additional risks for T about his long-term relationship with her. Detrimental impact on M's mental health carries a grave risk of undermining the essential relationship between mother and child.

65. I have well in mind that the length of time in this country (over a year, about a third of T's young life) is far beyond that which was envisaged under the Hague Convention. That lengthy delay has (i) crystallised M's decision not to return to the USA and (ii) created an intolerable situation for T were he now to be removed from his mother. For T, he would be parted from his carer after a year of settled and stable conditions in this country, and returned to the USA where he has not been for a year, with no certainty about his ongoing relationship with his mother.

66. Although counsel proceeded on the basis that M will not return, I consider that, in the alternative, if she were to return, she would likely experience a severe deterioration in her mental health for the reasons set out above, which include the fear of litigation, isolation, financial worries, unhappy memories and traumatic flashbacks, and her own concerns about what the future holds. That would in turn generate an intolerable situation for T, caught between his parents, in the care of a deeply unhappy, vulnerable mother, and exposed to a potential deterioration in her mental health. I acknowledge that she would not return to live in the same house with F. But she would be returning to a country which she had left, where she was unhappy, and the consequences of that failed relationship would need to play out for her far from her native country. It does not matter whether M's fears about a return to the USA (bound up with memories of the relationship and isolation) are reasonable or not (**re S supra)**. If, as I find, they are genuine, I am entitled to consider them in the context of all the circumstances as part of the Article 13(b) analysis.

67. On both alternatives (return of M or not), in my judgment the defence is prima facie made out. Protective measures in the event of M not returning are largely irrelevant. F says that T can be placed in his care which would of itself constitute a sufficient protective measure. I accept that there is no real evidence that F cannot meet T's basic needs in the USA, and does not pose a risk to T; I reject M's suggestions to this effect. But in my judgment, although F is not ruled out of caring for T, the real impact on T of a return would be the separation from his mother which would cause him lasting psychological and emotional harm going far beyond the normal, short-term instability which inevitably accompanies return orders.

68. Even if, contrary to the evidence, M were to return with T, I am not satisfied that the raft of protective measures offered by him would mitigate the harm. My clear sense is that, no matter what arrangements are made for housing, travel, non-molestation order, finances and the like, M is at such a fragile state (the "tipping point") that there is a real risk to her mental health of a return which would, in turn, detrimentally impact upon T. No doubt there are professional therapeutic and other services in Texas, and M accessed help before she left in early 2023, but in and of itself that does not, to my mind, sufficiently ameliorate the grave risks attendant upon M, and therefore T, returning. This scenario would in my judgment fall within the category of cases referred to by Lord Wilson in **Re S (supra)** where the impact on the parent would be so severe as to create an intolerable situation for the child.

69. I reiterate the significance of M and T having now been in England for a year. That is not the fault of either party; it is a consequence of prolonged litigation which took a misstep in August 2023. A prompt return order did not take place. The potential for risk to T in the event of a return has, in my judgment, correspondingly increased as time has passed; the destabilising effects on M and T of a potential return have grown. And I am of the view that the risks to which I have referred are not merely short-term discomfort; they are likely to endure long into the future.

70. The Article 13(b) defence is made out. Following **Re M (supra)** I decline to exercise my discretion to make a return order.

Conclusion

71. The Hague Convention application is dismissed. The parties shall reach agreement as to contact between F and T. In the first instance, I suggest it take place in England, and there shall be a plan in principle for it to take place subsequently in the USA.