

Judgment approved by the Court for handing down

Re PZ (A Child) (Art 13(b))

Neutral Citation Number: [2024] EWHC 489 (Fam)

No: FD23P00601

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 6 March 2024

**IN THE MATTER OF THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS  
OF INTERNATIONAL CHILD ABDUCTION  
AND IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985  
AND IN THE MATTER OF PZ (A CHILD) (HAGUE CONVENTION: ART 13(B))**

**Before:**

**MR DAVID REES KC**  
**(Sitting as a Deputy Judge of the High Court)**

**(In Private)**

**B E T W E E N**

**HZ**

**Applicant**

**and**

**GA**

**Respondent**

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**Anita Guha** (instructed by Brethertons LLP) for the **Applicant**  
**Graham Crosthwaite** (instructed by Lyons Davidson) for the **Respondent**

Hearing dates: 20 and 21 February 2024

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I direct no official shorthand note shall be taken of this Judgment and that copies of this Judgment as handed down may be treated as authentic

David Rees KC, Deputy High Court Judge

**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.**

### **1 Introduction**

1. This is an application made under the 1980 Hague Convention (“the Convention”) and the Child Abduction and Custody Act 1985 for the return of a young girl, PZ, to New Zealand.
2. There is only one issue in the case; whether the Art 13(b) Convention exception is engaged; that is to say whether there is a grave risk that the child’s return would expose her to physical or psychological harm or otherwise place her in an intolerable situation. For the reasons set out below I am not satisfied that the respondent has made out this exception and I will therefore order the child’s return to New Zealand pursuant to the Convention.

### **Background**

3. PZ is now approaching her second birthday. Her mother is a British Citizen who was born and brought up in the UK. The father was born and brought up in New Zealand. He has dual New Zealand and Dutch citizenship. The child has dual British and New Zealand nationality.
4. The mother left the UK to go to travelling in New Zealand in December 2019. Shortly afterwards the global Covid-19 pandemic began, and New Zealand closed its borders meaning that the mother was required to remain there.
5. The parents met in New Zealand in or around May 2021 and began a relationship. Very soon afterwards the mother became pregnant. There were difficulties in the relationship and in October 2021 the mother returned to the UK. In March 2022 the father and the paternal grandmother travelled to the UK for the child’s birth. The child was born in the UK and the father and the paternal grandmother returned to New Zealand in late April 2022.
6. The parties decided to give their relationship a further chance (the mother describes it as “one last try”) and in June 2022 and the mother and child travelled to New Zealand. The mother initially entered New Zealand on a tourist visa, applying for a work visa based upon her partnership with the father after her arrival in the country. They moved back in together, although within a short period of time there were tensions in the relationship, the mother describing the father as being financially abusive. As I will explain later in this judgment, the mother had four sessions of counselling in July and August 2022 in which she described herself as having “very little control over things” and “constantly unhappy”.
7. By early 2023 the parents’ relationship had broken down and in March 2023 the mother moved out of the home that she had shared with the father and she and the child went to

stay with the paternal grandmother. Apart from a short visit to stay with the father, the mother and child remained at the paternal grandmother's home until July 2023.

8. In July 2023 the mother and child returned to the UK. They did so with the consent of the father, who agreed to the child travelling to the UK for a holiday until September 2023. In her witness statement the mother accepts that at the time that she left New Zealand she had every intention of returning at the end of the trip. However, as the date for return approached, the mother became increasingly concerned about doing so, and about the financial position that she and the child would face in New Zealand. Eventually she stopped communicating directly with the father, using her stepfather as a conduit. The mother and child did not return to New Zealand as planned and on 12 September the mother received a letter from New Zealand lawyers acting for the father.
9. On 27 September the mother, acting through New Zealand lawyers, issued an application before the New Zealand court for permission to permanently relocate with the child to the UK. Those proceedings were subsequently adjourned pending the father's application under the Convention to this court which was issued on 6 December 2023. There is a direction in the New Zealand proceedings that in the event I order the child's return, the father is to file a response in those proceedings within 10 days of my decision.
10. The father's application came before me for a final hearing on 20 and 21 February 2024. The father was represented by Ms Anita Guha of counsel and the mother by Mr Graham Crosthwaite of counsel. I am grateful to them both for their written and oral submissions.
11. I have been provided with two bundles, which I have read. One is the bundle of documents filed within these proceedings. The other is a bundle of documents from the New Zealand proceedings.
12. I did not hear any oral evidence from either parent. However I did hear oral evidence from Dr Damian Gamble a consultant forensic psychiatrist, who had been instructed as a single joint expert to advise *inter alia* on the effect on the mother's mental health of a return to New Zealand.

### **The 1980 Convention**

13. The application falls to be determined by reference to the provisions of the Convention. As Article 1 makes clear, one of the objects of the Convention is:

“to secure the prompt return of children wrongfully removed to or retained in any Contracting State.”
14. The wrongfulness of a removal or retention is governed by Article 3, which provides that:

“The removal or the retention of a child is to be considered wrongful where –

- (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, or under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

15. It is accepted here that:

- (1) Both parties enjoyed rights of custody in relation to the child within the meaning of Art. 3 of the Convention;
- (2) Immediately prior to her retention by the mother in the UK, PZ was habitually resident in New Zealand; and
- (3) The retention by the mother of PZ in the UK was wrongful and in breach of the father’s rights of custody under New Zealand law.

16. The substantive obligation to return is provided for by Article 12 of the Convention. This provides that:

“Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.”

17. The Convention provides for a number of limited exceptions to the obligation to return. The relevant exception to this case is that set out in Art 13(b). This provides as follows:

“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:

... (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.”

18. In relation to this Article 13(b) defence, there was broad agreement at the Bar on the law. Although the parties referred me to a number of authorities, I do not understand there to be any issue as to the approach that I must adopt. Both counsel referred me to decisions of MacDonald J summarising the law in relation to this exception. The following is taken from that judge’s judgment in the case of *E v D* [2022] EWHC 1216 (Fam):

“[29.] The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2012] 1 AC 144 . The applicable principles may be summarised as follows:

- i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
- ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.
- iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.
- iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. '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'.
- v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.
- vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).

[30.] 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. 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 Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

[31.] The methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 WLR 721), and this process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.

[32.] In determining whether protective measures, including those available in the requesting State beyond the protective measures proposed by one or both parties, can meet the level of risk reasonably assumed to exist on the evidence, the following principles can be drawn from the recent Court of Appeal decisions concerning protective measures in *Re P (A Child) (Abduction: Consideration of Evidence)* [2018] 4 WLR 16, *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 and *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] 2 FLR 194 :

- i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.
- ii) In deciding what weight can be placed on undertakings as a protective measure, 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, in the absence of compliance.
- iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.
- iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.
- v) 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.
- vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.

[33.] With respect to undertakings, what is therefore required is not simply an indication of what undertakings are offered by the left behind parent as protective

measures, but sufficient evidence as to extent to which those undertakings will be effective in providing the protection they are offered up to provide.”

19. For the father Ms Guha also drew my attention to the discussion by the Supreme Court in *Re S (A Child) (Abduction; Rights of Custody)* [2012] UKSC 10 of the approach to be taken where the grave risk of harm or intolerability is said to arise from the anxieties of the returning parent. There Lord Wilson, giving the judgment of the court held:

“[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 destabilise 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: eg, where a mother's subjective perception of events lead 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”.

In response to a suggestion by the Court of Appeal that the “crucial question” had been whether “these asserted risk, insecurities and anxieties realistically and reasonably held” by the mother and its 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.”

20. For the mother, Mr Crosthwaite identified two further points for my consideration namely:

- (1) In considering a defence under Art. 13(b) the court must evaluate whether there was a grave risk based on the allegations relied on by the taking parent as a whole, not individually. Therefore, although there might be distinct strands which



would have to be analysed separately, the court should not overlook the need at some point to consider the cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk or risks that might potentially be established, as well as the protective measures available to address such risks: *Re B (Children)* [2023] Fam 77.

- (2) If protective measures only might (in the sense of might or might not) ameliorate what would otherwise be a grave risk, the grave risk would remain: *Re S* [2023] 3 FCR 317 at [110] per Moylan LJ.

### **The Mother's Case**

21. On behalf of the mother, Mr Crosthwaite relies upon a number of matters which he says cumulatively mean that there is a grave risk of harm / intolerability. These can be divided into two broad categories. First, the practical / legal issues such as the mother's visa status on a return to New Zealand and the financial resources that will be available to her there. Second the likely effect of a return on the mother's mental health and her ability to parent PZ. In his position statement Mr Crosthwaite provided the following list of matters:

- (1) The mother feels that her mental health is not strong enough to cope with a return to the jurisdiction of New Zealand and believes that this would impact upon her parenting of the child and this will place the child in an intolerable situation because she is her primary carer.
- (2) The mother has no home to return to in New Zealand and cannot afford to fund in accommodation.
- (3) The mother has no family in New Zealand and will be isolated and lonely upon a return.
- (4) The mother has no financial support in New Zealand and will be unable to claim benefits or secure employment and will therefore be destitute upon a return.
- (5) The mother has no support network of any kind in New Zealand.
- (6) The mother believes that she would have no legal basis to return to New Zealand and remain there pending determination of her application for permission to permanently remove the child to live in this jurisdiction.
- (7) The mother cannot afford to continue to fund litigation in New Zealand and does not believe that she will be entitled to any form of legal aid or funding thereby effectively trapping her in New Zealand.
- (8) The mother believes that she would have no legal basis to remain in New Zealand temporarily or permanently and therefore risks being separated from the child.
- (9) The mother feels that the child would not be able to cope with being separated from her and this will place the child at grave risk of suffering from physical or psychological harm.
- (10) The mother feels that her mental health will deteriorate in the event that she is separated from the child and this would place the child in an intolerable situation because the mother would struggle to maintain contact and function adequately.
- (11) The mother fears for her and the child's safety and wellbeing will be at risk in New Zealand due to previous violent threats from the father's relatives.

**Immigration**

22. In terms of the legal arrangements surrounding a return, it is common ground in the light of the expert evidence of Julia Strickett, a New Zealand immigration lawyer that the mother cannot legally enter New Zealand under her existing partnership visa as her relationship with the father has come to an end. However, as a UK national she is entitled to enter New Zealand without a visa as a tourist for a period not exceeding 6 months in any 12-month period. She would not be entitled to work or receive publicly funded healthcare and would need to demonstrate that she had sufficient funds to meet her accommodation and maintenance costs (approximately \$1,000 NZ per month of stay). PZ, as a New Zealand national is, of course, entitled to enter and live in New Zealand.
23. Once she has arrived in New Zealand the mother would be able to apply for an Accredited Employer Work Visa. If granted such a visa, the mother would be entitled to work. In order to obtain such a visa, the mother would need to find employment paying a minimum of \$29.66 NZ per hour with an accredited employer, who would need to show that there were no suitable New Zealand residents or citizens available to undertake that role. Ms Strickett described the mother's prospects of obtaining such a visa as "challenging". The mother does not have any tertiary educational qualifications and her existing work experience is lower skilled. The current economic outlook in New Zealand has cooled which means that there is less demand for overseas labour to fill these less skilled roles. The total costs of such an application for such a visa would be between around \$2,000 to \$4,500 NZD.
24. An alternative path would be to apply for a discretionary residence visa. The Minister of Immigration has a discretion to grant a visa which would enable the mother to reside in New Zealand indefinitely. Such visas are in the absolute discretion of the minister. Preparation of such applications is time-consuming and complex. Ms Strickett estimates that an application would take one to four months to prepare and six to nine months for the minister to consider. The costs of such an application would be between \$5,000 and \$9,500 NZ plus disbursements.

**The Mother's Health**

25. The mother has provided some evidence in her witness statement and accompanying exhibits regarding her mental health, and she was assessed by Dr Gamble who provided a report for the court and who was cross-examined by both counsel. The mother's solicitors did not provide Dr Gamble with the mother's full medical records but only with the redacted extracts that had been exhibited to her witness statement. In summary the mother's evidence regarding her mental health was as follows:
  - (1) In 2017 the mother had attended a GP with a sore throat and cough after attending a music festival at which someone had died from meningitis. The GP note reports the mother as being "upset and seeking reassurance".

- (2) In May 2019 she was described by the GP as “worried”.
- (3) In a heavily redacted entry for September 2019, she is described as “anxious, not listening or hearing our discussion... really not taking info on board today because anxious”.
- (4) In an equally heavily redacted entry for October 2019 she was described as “worried, appears anxious”.
- (5) In September 2021, whilst the mother was in New Zealand and pregnant with PZ, the father reported to their GP that the mother was suffering from panic attacks and feeling down.
- (6) The following month the mother returned to the UK. Her witness statement describes her mental health at this time as “severely deteriorating”. She reported that she felt ignored and mistreated by the father and was “desperate for some sort of support”.
- (7) Following her return to the UK the mother attended hospital in relation to her pregnancy. The forms completed at the hospital in November 2021 recorded that she had felt anxious and on edge, unable to stop or control her worrying and worrying too much about different things for several days. She achieved a score of 5 on a Generalised Anxiety Disorder Assessment, equating to the top end of the “mild” range.
- (8) A GP note in November 2021 recorded that the mother’s mental health would be monitored.
- (9) Following her return to New Zealand in June 2022, the mother sought advice there. She described to her GP the stress of travelling back to the UK and was recorded as “struggling with mood and change in life,” She was prescribed a course of propranolol (a form of beta blocker that is sometimes used to treat the physical symptoms of anxiety) and received a mental health intervention referral, although following a triage call with the mental health intervention service she was subsequently referred to the local Family Service which it was felt could provide the mother with perinatal support.
- (10) Additionally in July and August 2022 the mother attended. A letter of December 2023 from the counsellor states:

“[The mother] presented with high levels of anxiety relating to both her relationship and being ‘stuck’ in [town] with her baby [...]. [The mother] felt high level of fear given she had got pregnant to someone who she did not know well and was trying to forge a relationship along with a new baby. She was finding this extremely difficult. She also discussed her aspergers and how that affects her. Childhood issues were also talked about specifically her relationship with her parents.

She felt confined in [town] with a lack of independence and was financially stressed heavily relying on her partner. [The mother] felt very little control over things in her life and felt constantly unhappy.”
- (11) In August 2022 the mother texted the paternal grandmother complaining about the lack of support that the father was providing, describing herself as being “a bit down at the moment” and saying that the father had made her “feel like shit”.

- (12) Medical notes for November 2022 show that the mother was continued on propranolol and told to continue counselling.
- (13) By December 2022 the relationship between the parents was clearly deteriorating with the mother alleging that the father shoved her (an allegation that is denied) and the father complaining that the mother was “playing the victim”.
- (14) By February 2022 the relationship had deteriorated to a point where the mother was complaining that the father would not speak to her, and at the start of March 2023 the father told the mother by text to pack her bags and go and stay with the paternal grandmother. The mother did not immediately leave and instead the paternal grandmother came to stay with the parents to lend some support, and shortly afterwards the mother’s stepfather came to visit. By the end of March 2023, the mother had left to stay with the paternal grandmother. The mother described herself as being “absolutely miserable” during this period and referred to her anxiety being at “an all-time high”.
- (15) The parents continued to exchange text messages and in May 2023 the mother explained to the father that the town in which she had lived with him made her “depressed”. She explained that:

“If we can compromise on some of our lifestyles choices eg. Working hours and where we live then maybe we could make things work. I'm just sick of feeling anxious 24/7, you made me feel anxious last night when you got moody at me for wanting to see my friends that I haven't seen in ages. It just makes me scared on what my life will be like. I'm just being honest and I hope you can appreciate how I'm feeling and me open up to you.”
- (16) The mother’s evidence is that by July 2023 she was “desperate” to leave New Zealand as her “mental health was severely deteriorating” and believed that she had no choice but to return to New Zealand to focus on her mental health.
- (17) Having travelled to the UK with PZ in July 2023 the mother arranged for her stepfather to speak to the father because of her anxiety, although the mother did send an email to the father on 31 August in which she appeared to be looking for a way to return to New Zealand, whilst having concerns about the financial consequences of doing so.
- (18) In October 2023 the mother made a GP appointment and was given a repeat prescription of propranolol.
- (19) In February 2024, shortly before she met with Dr Gamble, the mother discovered that she was pregnant. The mother told Dr Gamble that if ordered by the court to return to New Zealand she would terminate the pregnancy, and at the hearing Mr Crosthwaite informed me on instructions that (a) this remained the mother’s intention if a return order was made and (b) as at the date of the hearing the mother’s pregnancy was at approximately 6 weeks gestation.

### **Dr Gamble’s Evidence**

26. Dr Gamble conducted a video interview with the mother on 9 February 2024. His conclusions in his report dated 15<sup>th</sup> February 2024 are as follows:

- (1) The mother is experiencing stress and anxiety at present and has been worrying about a possible return to New Zealand.
- (2) The mother has traits in her personality that make her more susceptible to symptoms of anxiety and depression in some circumstances.
- (3) The mother had received a diagnosis of Asperger syndrome when she was 10. This term is no longer used, and the condition is now considered to be a form of autism. Dr Gamble considered that autistic traits are part of the mother's personality and were likely to play a part in how she feels about herself and how she relates to other people.
- (4) The birth of PZ and the mother's return to New Zealand in July 2022 triggered feelings of anxiety and insecurity.
- (5) Dr Gamble considered that the most appropriate diagnosis to describe the mother's symptoms of anxiety and depression is an adjustment disorder. This is a description of a time-limited psychological response to a major life event or change in circumstances.
- (6) Such disorders can be regarded "as maladaptive responses to severe or continued stress, in that they interfere with successful coping mechanisms and therefore lead to problems of social functioning".
- (7) This is part of a group of disorders including acute stress reaction (a psychological disturbance lasting only hours or days) and the most severe condition: post-traumatic stress disorder (PTSD). Dr Gamble states that:

"Adjustment disorder can be considered somewhere in between these two conditions. It is longer lasting than an acute stress reaction and not as severe as PTSD, although with some of the characteristics of both."
- (8) Dr Gamble made his diagnosis having regard to the nature and degree of the mother's symptoms and the association that these have had with events in her life. He states:

"...there is a history of her experiencing subjective distress and emotional disturbance in response to life events from childhood onwards. However, as other times in her life she has enjoyed good mental health and has been able to function normally. Arguably she has demonstrated resilience and independence... The clinical presentation prior to 2021, when she became pregnant for the first time, is not of a person with a severe or disabling mental disorder but the last few years have evidently been difficult for her."
- (9) In terms of treatment Dr Gamble advised that the prognosis for an adjustment disorder is generally positive and improvement is usually seen when the individual adjusts to their new circumstances or when the situation has been resolved satisfactorily. Treatment can include psychotherapy (including counselling, problem-solving and cognitive behavioural therapy) and medication. The mother has previously been prescribed propranolol, but the continued use of drugs during pregnancy is something which would need to be carefully assessed.
- (10) If the mother is ordered to return to New Zealand there are factors which would exacerbate her symptoms. These include the following:

- (a) A decision to terminate her current pregnancy. Dr Gamble states that there is “little doubt that some women experience mental health symptoms, mostly depression and anxiety, following termination”. He continues:
    - “In the case of [the mother], she would be dealing with a termination that she did not want at the same time as an enforced relocation to another country. I think it is likely this would adversely affect her mental health, leading to feelings that may include anxiety, guilt and depression.”
  - (b) An enforced return would negatively affect the mother’s sense of agency. Dr Gamble advises that there is an established link between a sense of agency (having control over one’s life decisions) and emotional state; individuals who feel they have none are more at risk of depression and other negative health outcomes.
  - (c) The mother would be returning to a country that has negative associations for her.
  - (d) The mother could face practical challenges on a return that could cause her stress and anxiety, including visa and residency issues, obtaining accommodation, employment and benefits.
  - (e) A lack of friends or support. Dr Gamble felt that the mother’s history suggests that she would be able to form friendships and establish support structures for herself, but this would take time.
  - (f) Ongoing legal proceedings and negotiations with the father over childcare arrangements could also be a cause of stress.
- (11) However, Dr Gamble identified that he had not been told of any concerns over the mother’s ability to care for the child. He concluded:  
“There is the potential for a detrimental effect on the quality of parenting provided to [PZ] if [the mother’s] mental health deteriorates significantly in New Zealand but there is not an imminent risk of this in my view”.
- (12) In terms of measures to assist the mother on a return to New Zealand he identified the following:
- (a) Practical measures (such as the provision of accommodation).
  - (b) Social support (for example joining social groups for parents for young children providing a way to meet similar people and form a social support network).
  - (c) Psychological support, particularly if the mother decides to terminate her current pregnancy. Dr Gamble identified that the mother had previously been able to access medical and psychological treatment in New Zealand, and that the standard of healthcare available in New Zealand would be similar to that available to the mother in the UK.

27. Dr Gamble was cross examined by both counsel. His oral evidence was in accordance with his written report. In response to questioning from Mr Crosthwaite on behalf of the mother Dr Gamble, he agreed that the mother would be likely to respond better if she

remained in England rather than return to New Zealand. Indeed he considered that if the mother remained in England she would probably not need any treatment. However, overall Dr Gamble was clear that he considered that the mother was a person of some resilience who had previously shown a capacity for independence and who had “a great deal of strength” in her character. Whilst he recognised that a return to New Zealand had the potential to impose stresses upon the mother in a number of ways (for example if she was unable to obtain a visa, or was without suitable accommodation), his evidence was that he did not consider that there was an imminent risk of the stresses on the mother leading to a deterioration in her capacity to parent PZ. Whilst he did not rule this out as a possibility, he felt that in order for this to arise it was necessary to imagine a “worst case scenario” where everything had gone wrong.

28. He recognised that a decision by the mother to terminate her current pregnancy could have a significant effect on her mental health and felt that it was important that the mother should have professional support available to her in New Zealand. Dr Gamble felt that the 3 months of counselling that had at that stage been offered by the father would be insufficient and suggested that a 6-month course of 20-25 sessions would be more realistic. However, even taking this factor into account he did not consider that it was likely (that is to say greater than the balance of probabilities) that the mother’s ability to parent PZ would deteriorate to the point where there was a risk of harm to the child.

### **Proposed Protective Measures**

29. In order to meet the concerns identified by the mother, the father has identified various resources that may be available to the mother in New Zealand including legal aid for the proceedings before the New Zealand family court and an “international custody dispute payment”. This is a discretionary non-recoverable weekly payment made on the grounds of hardship which is potentially available to a parent who has been required to return to New Zealand under the Convention. The father has also offered other protective measures. These are as follows:
- (1) Not to instigate or support any civil or criminal proceedings against the mother arising from the wrongful retention of the child.
  - (2) To pay the return flights for the mother and child to return to New Zealand.
  - (3) Not to attend the airport on their return.
  - (4) To provide the mother with a lump sum of \$22,500 NZ to meet the costs of accommodation, visa applications and maintenance on her return
  - (5) In addition to this lump sum to continue to pay \$200 NZ on a weekly basis for maintenance pending the resolution of the welfare proceedings
  - (6) To fund the costs of weekly counsellor sessions; and GP appointments at a frequency of twice a month and the costs of any medication for mental health issues over a 6-month period (the father’s proposal in this regard was increased from three months to six after having heard Dr Gamble’s evidence).
  - (7) To allow the mother the use of the paternal grandmother’s car.
  - (8) Not to threaten or use any physical violence against the mother or child whether directly or by or any third party and not to threaten, harass or pester the mother or

- child or come within 200 yards of their apartment.
- (9) Not to bring the child into contact with the father's step grandfather (against whom an allegation of sexual abuse against another individual has been made) without the mother's consent or knowledge.
  - (10) Not to remove the child from the mother's care save for the purpose of contact to be agreed pending determination of any substantive application before the Court in New Zealand.
  - (11) To cover the costs of ensuring that these undertakings are made into an enforceable court order in New Zealand.

### **Discussion**

30. I have carefully considered the position that the mother and PZ would face if returned to New Zealand and have concluded that the mother has failed to make out her Art 13(b) defence. I am not satisfied that the matters identified by the mother, either singly or cumulatively, amount to the grave risk of harm or intolerability that must be demonstrated in order to establish this defence.

- (1) I am satisfied from Ms Strickett's evidence that if a return is ordered the mother will be entitled to enter New Zealand on a tourist visa and remain there for a period of six months, with the possibility of a discretionary extension thereafter. In my view this is clearly sufficient time for the mother's application before the New Zealand court to relocate to be properly considered by that court. The New Zealand court is already seized of proceedings and by its orders to date (which require steps to be taken within 10 days of any decision of this court to order a return) it has made clear an intention to progress that application expeditiously.
- (2) I do not accept the mother's argument that a grave risk of harm or intolerability arises as a result of the fact that her application before the New Zealand court to relocate with the child to the UK may fail and that if it does so she would (absent a new visa being granted) be required to leave the country without the child after six months. I consider that this is a matter for the New Zealand court to consider as part of the overall welfare assessment which it will need to perform within the relocation application. It does not assist the mother in establishing a defence to a return order under Art 13(b).
- (3) I am satisfied that the mother will be able to find and pay for independent accommodation on a return to New Zealand for at least this first six-month period (I accept that it is not reasonable to expect her to move in with the paternal grandmother given her support for the father in the litigation). The father has offered a lump sum payment of \$22,500 NZ (of which part is to be made available for a deposit for accommodation before the mother leaves the UK). The mother has estimated that weekly rental costs will be between \$590 and \$750 NZ. Adopting a mean figure of \$670 NZ, would mean that the cost of accommodation for a six-month period would be \$17,420 NZ. This would leave a balance of around \$5,000 NZ which could be used by the mother to supplement her maintenance or take steps to apply for a further visa should her application to relocate be refused.



- (4) On top of this, the father is offering to continue to pay maintenance for the child of \$200 NZ per week.
  - (5) Additionally, I am satisfied from the information provided by the New Zealand central authority that there is a legal aid scheme under which the mother can seek assistance, and there is also a discretionary international custody dispute payment scheme from which the mother can seek financial assistance in the case of financial hardship. Overall, I am wholly satisfied that there will be adequate financial resources available to the mother in New Zealand throughout the period that it takes for the New Zealand court to determine her relocation application.
  - (6) There is a single (and disputed) allegation by the mother that the father has in the past physically shoved her. Even taken at its highest, I do not consider that the father's alleged past behaviour would suffice to ground an Art. 13b defence. In any event any risk in this regard is ameliorated by the protective measures that have been proposed. On a return the mother and child will not be living with the father and the father is willing to provide undertakings (to be incorporated into an enforceable court order in New Zealand) not to threaten or use any physical violence against the mother or child and not to threaten, harass or pester the mother or child or come within 200 yards of their apartment. I am satisfied that such an undertaking removes any risk to the mother and child from this source. The undertaking not to bring PZ into contact with the father's step grandfather also addresses any concern that might otherwise arise from the unconnected allegations that have been made about this individual.
  - (7) I recognise that the mother will be returning to a country in which she will have a very limited support network. The reality of contested litigation means that it would be unreasonable to expect her to rely for emotional support upon the paternal family. Nonetheless, there is evidence that she made some friends in her past stay in New Zealand, and she will be returning to a country with which she has some familiarity and there will be (as Dr Gamble has suggested) opportunities to join social groups and meet other parents with young children.
31. Having carefully considered Dr Gamble's evidence I do not consider that the mother's adjustment disorder presents a grave risk of harm or intolerability for PZ. Dr Gamble was clear in his evidence that although the stresses that will be experienced by the mother in New Zealand will be greater than those experienced if she remains in England, her ability to cope should "not be underestimated". Dr Gamble's conclusion was that it was not likely that the mother's ability to parent PZ would deteriorate to the point where she was at risk of harm, and for such a scenario to come about "everything would have to go wrong".
32. I do not consider that in the light of the protective measures offered by the father there is any realistic likelihood here of everything going wrong. As I have set out above, I am satisfied that on a return to New Zealand the mother will have an entitlement to stay for a minimum period of six months, which will be long enough for her relocation application to be determined. She will be provided by the father with sufficient funds to

accommodate and maintain herself and PZ. She will have access to appropriate healthcare whilst in New Zealand. Whilst previously living there she has been able to access counselling and medication for her anxiety. The father's proposed protective measures will ensure that she has access to weekly counsellor sessions; bi-weekly GP appointments and the costs of medication for any mental health issues for a 6-month period.

33. I recognise that a decision by the mother to terminate her current pregnancy is likely to have a significant effect on her mental health, although if she does take that step then she would be able to resume the medication that she has been prescribed for her anxiety. However, in the light of Dr Gamble's evidence and the protective measures that will be in place to ensure that other potential sources of stress and anxiety are ameliorated, I do not consider that this factor (either on its own or in conjunction with the other factors identified on behalf of the mother) means that it is likely that there is a grave risk that the child's return would expose her to physical or psychological harm or otherwise place her in an intolerable situation.
34. The mother's defence under Art 13(b) therefore fails.

### **Order**

35. In the circumstances, as I have found that the mother has failed to establish her Art 13(b) defence, I am required to order the return on PZ to New Zealand in accordance with the Convention. I would make the point that in ordering a return I am not deciding the issue of where ultimately PZ should live. That is a decision which will fall to be taken by the courts of New Zealand in due course.
36. The Convention requires me to order the return of PZ to New Zealand "forthwith". There was dispute at the Bar as to the time period which I should allow for the mother and child to return in this case. For the father, Ms Guha urged me to impose a short, 21-day, period for the return. For the mother Mr Crosthwaite argued that I should recognise the effect that a forced return (and the inevitable lack of agency) would have on the mother and argued that it would be particularly stressful on the mother if she had to undergo a termination in New Zealand. He therefore sought a minimum period of 12 weeks for the return to take place.
37. Given the very specific circumstances in which the mother finds herself, I consider that a 21-day return order would not give her sufficient time to reflect upon the outcome of this case and to make decisions in relation to the important matters now facing her. A longer period will also ensure that she has adequate time to research and put in place accommodation for her return. Nonetheless, it seems to me that the 12-week period sought by Mr Crosthwaite is simply not consistent with the obligation under the Convention should be "forthwith". I have therefore concluded that I should give the mother a period of approximately six weeks from the date of this judgment before she is

Judgment approved by the Court for handing down

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required to depart the UK. I will therefore order that the return should be effected by 23.59pm on 21 April 2024 (New Zealand time).

38. One final issue I need to determine are the dates for the payment to the mother of the lump sum offered by the father. My decision is that 50% of the sum should be paid to the mother upon her providing proof of the purchase of tickets for her and the child's return to New Zealand. The remaining 50% should be paid within 7 days of the mother and child's arrival in that country.
39. I will ask counsel to draft an order reflecting my decision for my approval. The parties intend that the undertakings offered by the father should be reflected in an enforceable order made by the New Zealand court, and steps should be taken to begin that process forthwith.