



Neutral Citation Number: [2020] EWHC 3138 (Fam)

Case No: FD20P00531

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/12/2020

**Before :**

**MR TEERTHA GUPTA QC**  
**Sitting as a Deputy High Court Judge**

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**Between :**

**B**

**Applicant**

**- and -**

**A**

**Respondent**

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**Ms Mehvish Chaudhry** (instructed by **Hanne and Co.**) for the **Applicant**  
**Ms Clare Renton** instructed by **the Respondent** on a Direct Access basis

Hearing dates: 11 and 12 November 2020

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR TEERTHA GUPTA QC

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.

## **MR TEERTHA GUPTA QC sitting as a Deputy High Court Judge**

1. This is an application under the 1985 Child Abduction and Custody Act for the summary return of the parties' son, R (born on 2.5.12 and aged 8 years and 7 months) to the country where he has lived throughout his life until July 28 2020: Australia (NSW) pursuant to Articles 3 and 12 of the 1980 Hague Convention. I am grateful to counsel, Ms Mehvish Chaudhry (instructed by Hanne and Co who have produced a commendable paperless trial bundle) for the applicant father, to Ms Claire Renton (via the direct access scheme), and to the respondent mother, for their concise written and oral submissions and for agreeing that the only oral evidence that I was required to hear to determine this matter was that of the High Court Team Cafcass officer, Ms T Jolly and the consultant forensic psychiatrist: Dr T L McClintock. I have conducted this hearing entirely by "Microsoft Teams", organised by the RCJ staff, seamlessly.

### Introduction

2. Fifteen weeks ago, on Tuesday 28 July 2020 (after a week of a school term that ends in September), after spending the previous night at his father's home (and 9 days and nights in early July), R was collected by his mother from school. According to her (through counsel) she told R, while they were leaving school that she had booked flights to England to depart later that day and that he '...punched the air with joy...' but that she gave him a choice and would not have removed him from the country if he had said "No". Her plan was permanently to relocate to England and live with her husband (AD) who she married on 6 April 2018 and who lives in the England and with whom she had been conducting a long-distance relationship since 2016. Through her counsel, Ms Renton, she has confirmed to me that when she boarded the (one-way ticketed) flight to England on 28 July 2020, with R, she did not know about the 1980 Hague Convention. That is a tremendous shame for her, the father and most importantly for R. On 31<sup>st</sup> July 2020 the mother sent the father the following message:

*"R and I have come to England. Monday was really distressing for R and when he came back on Tuesday, he said L hit him again on the head so he ran upstairs and hid in M's bathroom where no one really goes. You can call him anytime, either by FaceTime on Rs' iPad or on my phone but for now I am keeping him out of harms way. He is fine, very happy to reunite with his family and is enjoying being with them".*

3. Up until then, the father had no idea that his son had been unilaterally and wrongfully removed from Australia. It must have come as a complete shock to him and R's elder brothers (from the father's previous relationship: L (23), M (18) and N (17)) the rest of R's paternal family and his close friends. On the mother's account of course, R only knew on the day that he was relocating to England, she says he knew it was imminent from 21 July when she applied for Covid-19 travel exemption clearance to leave and told him she had applied. But for reasons that I shall set out below, I find the former part of my previous sentence highly unlikely. Even if the mother was

telling the truth on that (and I am supported in this view by Ms Jolly) such a sudden dislocation and relocation of a child's life cannot have been good for him emotionally.

4. The following vignette from the mother's statement sets out her case:

“I brought R to England on 28<sup>th</sup> July 2020 because the severe symptoms of anxiety he was suffering for years were intolerable for him. Since coming to England the anxiety symptoms of R have abated. If summary return is ordered he will be profoundly disturbed and upset. What is more, I am his primary carer and I cannot cope in Australia. This will place R in an intolerable situation.

I am a victim of psychological abuse from the Applicant father. Since 2015 if not before I was exhibiting severe anxiety symptoms in Australia for which I was receiving continuing Trauma counselling. I was from March 2020 prescribed anti-depressants. I was at the end of my tether. My mother (MGM) who lived with us until July 2020 has now left Australia and will not return. The symptoms chest pain, Subacromial Bursitis and shoulder inflammation have now abated. I have no home or family support”.

5. At the beginning of the English Michaelmas school term, the mother placed R in a local school and did not mention the father to the head teacher. The mother has been represented by very experienced counsel since the first *inter partes* hearing in this matter on 4 September 2020, who no doubt has assisted her client on the ‘steep learning curve’ that respondents to Hague Convention applications often face. This was after the father had signed his request for the child's return on 3 August 2020 via the Australian and UK Central Authorities, obtained Legal Aid on 19 August 2020 and sought the usual Tipstaff and other orders to start these proceedings on 4 August 2020, within a month of removal. I accept the characterisation by Ms Chaudhry of this case as one of ‘hot pursuit’.
6. Of course, having been apprised of the terms of the 1980 and 1996 Hague Conventions, both of which Australia and the United Kingdom are ratified signatories, it was open to the mother to reconsider her actions and consent to a return. The fact that I am writing this judgment after hearing oral evidence and submissions and reading the bundle (which together with the other documents amounts to about 500 pages) amply illustrates that the mother has defended this application to the hilt. How much of this judgment is relevant at the ‘full welfare’ stage is a matter for the court that is dealing with R's interim and long-term welfare decisions.
7. I caution myself to make no moral condemnation of the mother's actions, the simple task for me today is to decide, on a summary basis, whether the mother has satisfied me that she has raised a defence under the 1980 Hague Convention and if so, whether I should exercise my discretion not to return R forthwith to Australia. It is rightly conceded by Ms Renton that Article 3 (habitual residence and the exercise of rights of custody at the material time) have been made out by the applicant father. She raises two defences, namely that the child objects to returning to Australia and *that “...the impact on the mother's parenting capacity is so severe that the child is at grave risk of severe psychological harm”* (from para.24 of her skeleton argument) and that the

situation would become intolerable for R. For reasons that will become apparent, I shall take those defences in reverse order i.e. Art 13(b) first namely:

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

and then the defence under what is often referred to as Article 13 "(2)" namely that:

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

But before I do so it is important that I set out what I consider to be relevant about the past, present and future litigation in Australia over R between his parents.

### Australian litigation

8. The parents never married but had an 8-year relationship in Australia, the mother moved there from England as long ago as 2002 and both her and R are dual UK and Australian passport holders. Upon separation in March 2014, the parents ended up in litigation (on the father's application) over R and this culminated, after 2 years of litigation during which time an extensive clinical psychologist's report was obtained), in a consent order, stipulating that R lives with his mother but has extensive term-time visiting, staying and extensive school holiday contact with his father (who lives with his eldest three sons). This was approved by Judge Dunkley sitting in the Federal Circuit Court of Australia, on 8 March 2016 and part of the arrangements read as follows:

#### "Travel

12. That when R is spending time with the parties in accordance with these Orders, R is permitted to travel outside of New South Wales including internationally with the party with whom he is spending time with pursuant to the Orders, PROVIDED THAT the party intending to travel provides the other party with no later than (6) six weeks notice in writing of their intention to travel and together with this notice provides details of the trip including but not limited to:

- (a) Dates of travel;
- (b) Modes of travel;
- (c) Contact telephone numbers for the duration of the holiday; and
- (d) Details of persons accompanying R on the holiday".

There then followed a specific provision for the mother to take R to UK and France for 21 days before he started Kindergarten, and later in the same document:

"If a court finds that you have failed to comply with a parenting order without reasonable excuse, it may impose a penalty. Depending on the situation and the type and seriousness of the contravention, a court may:

- vary the primary order
- order you to attend a post separation parenting program

- compensate for time lost with a child as a result of the contravention
  - require you to enter into a bond
  - order you to pay all or some of the legal costs of the other party or parties
  - order you to pay compensation for reasonable expenses lost as a result of the contravention
  - require you to participate in community service
  - order you to pay a fine
  - order you to a sentence of imprisonment”.
9. Therefore, when the mother removed R on 28 July 2020 to England, clandestinely, with no notice to the father, on the face of it she was in breach of that order.

The extant proceedings in Australia

10. As well as there being an extant order from 8 March 2016, on 23 January 2019 the mother issued an application before the “Family Court of Australia” seeking to ‘discharge’ it and permanently to relocate R from the Sydney metropolitan area to England, so that she could live with her husband. She applied for the final orders ‘to be expedited’ no doubt in recognition that the proceedings may otherwise take some time. This is confirmed by the mother’s Australian lawyer who filled in the application by virtue of an email sent by her this very morning:

“There is a backlog, they are now saying from start to finish a matter can take up to 4 years. I believe your matter in Sydney if its running will probably take another two years noting you have already applied for an urgency at the beginning and it was denied. Your matter is currently waiting the allocation of a judge and has been waiting since last year once a judge is appointed we will then be directed to obtain an expert report which could take 6 to 8 months or more because many experts have a back log and are difficult to get into. If Boland is used her wait list is enormous, so after that we would then be allocated a hearing. The Court may give you a slight preference for urgency at that stage as often they will for relocation but you have to wait to get to that point. It would be far better for you to remain in England and have your matter determined.

How does the court think you will survive financially if you return to Sydney as I recall you had very limited savings and were not working, the rental here will be expensive especially on the northern beaches, you have no support as I am assuming your mother has returned to England, and he pays minimal child support.. good luck”

11. The mother’s case is that in the summer of this year, she became aware that the final hearing would not be for some time but that her decision to leave Australia so precipitously, with R, was not triggered by this, nor by her own anxiety and distress (which is an important point) but rather by R allegedly reporting mistreatment in his father’s home in the days leading up to and possibly including 28 July 2020.
12. I shall turn to R’s ‘allegations’ such as they are in due course but I accept the father’s argument that the timescales for litigation in Australia can have come as no surprise to the mother, especially when the court seems to do a far more thorough job in the early

stages than is arguably done in this country. I say this because I have had sight of the 46-page, detailed report of the court appointed SJE, the clinical psychologist Dr Catherine Boland in 2015 – which was part of the original private law proceedings and the 6-page “Intake Assessment”.

13. I have also been sent the following article from the mother’s team, which they ask me to take judicial notice of. It is said on the mother’s behalf that such a delay in determining her relocation application will add to the intolerability for R:

*“The chief justice of the Family Court says some parents are facing “unacceptable delays” as disruption caused by COVID-19, unfilled vacancies and judges being unable to keep up with their workloads stretch the bench to breaking point.*

*At least two Federal Circuit Court judges have put off hearings to clear case backlogs, and a third family law judge is on indefinite leave, with some parents being told their cases will only be heard before Christmas if they fall into the most urgent categories, – including child safety and homelessness.*

*Three Federal Circuit Court judges who recently retired have not been replaced — Melbourne-based Ron Curtain who finished last week and two general federal law judges — while the position of Family Court judge Ian Loughnan, who retired in July, is yet to be filled.*

*Chief Justice Will Alstergren, who has been the head of both the Family Court and lower-level Federal Circuit Court since December 2018, said Sydney was facing the biggest backlogs.*

*The Federal Circuit Court handles almost 90 per cent of family law disputes as well as general federal law cases.*

*“There is no doubt there is a backlog in Sydney and we’re desperately trying to do something about it,” Chief Justice Alstergren said. “We recognise there are unacceptable delays. We were actually having an impact until COVID hit and that made it a bit of a challenge.””*

14. Counsel for the mother states: “The point made by Mostyn J in **B v B 2016 EWHC 717** that return to the requesting state is only for a short time before local courts will address the relocation, is not intended to hamper consideration of the practicality of return.” (para. 21 of her skeleton argument).
15. But surely there are a number of variables at play here: this is self-serving and headline-grabbing, journalistic evidence, in any event the Australian Chief Justice has identified the problem and is planning to do something about it, the mother has not renewed any application for an urgent interim hearing or to expedite the final hearing, and the day-to-day restrictions of Covid-19 have mostly disappeared in Australia (unlike England, which is in a second nationwide ‘lockdown’).

16. On a final point, I am limited in my approach to this issue. It would be entirely wrong of me, as the mere ‘Hague judge’ in a foreign country, to compare the efficacy of the legal systems of two signatory countries. In my consideration of the father’s application, my remit involves ensuring that there are protective measures in place, i.e. there is a ‘soft landing’ prior to an interim hearing, rather than a critique of whether a fellow Hague country’s family law system (especially one which has often been seen as superior to others) is fit for purpose, by analysing when a final hearing will take place.
17. The availability of an interim hearing is adequately covered by the recent email the father’s team, received, I add from a far more objectively reliable source:

*“Dear Madam,*

*Currently, dates for interim hearings are available from mid-January 2021. However, upon the filing of an Application in which urgency is sought, there may be capacity for the matter to be over-listed at short notice, that is, less than 28 days from the date of filing. Consideration is given on a case-by-case basis and having regard to the evidence filed in support of the urgent application.*

*Thankyou,*

*On Behalf of The Registrar  
Case Co-ordinator  
Family Court and Federal Circuit, Sydney Registry  
Phone: [1300 352 000](tel:1300352000)  
Fax: [02 9217 7189](tel:0292177189)  
Website: [www.familycourt.gov.au](http://www.familycourt.gov.au)  
[www.federalcircuitcourt.gov.au](http://www.federalcircuitcourt.gov.au)”*

### The Law

18. I am grateful to counsel for setting out the law on the two defences that have been raised.
19. The leading authorities on the Art 13(b) “exception” are the two Supreme Court decisions of *In re E (Children: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442. Also I have read: *KS v RS* [2009] 2 FLR 1231, and in *Re B A Child Abduction Article 13(B)* [2020] EWCA Civ 1057, Moylan LJ helpfully provides a pithy summary of the dicta from the two UKSC cases:

“The Law

71. The law in respect of Article 13(b) is well-established and I set out only a brief summary. I would also point to the recent *Guide to Good Practice on Article 13(1)(b)* published by the Hague Conference on Private International Law.

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

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

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

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

"33 Second ... the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.

34 Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or otherwise" placed "in an intolerable situation" (emphasis supplied). As was said in **In re D [2007] 1 AC 619**, at para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e g, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child."



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

"35 Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist."

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

"27 In *In re E* [2012] 1 AC 144 this court considered the situation in which the anxieties of a respondent mother about a return with the child to the state of habitual residence were not based upon objective risk to her but nevertheless were of such intensity as to be likely, in the event of a return, to 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".

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

"34 In the light of these passages we must make clear the effect of what this court said in *In re E* [2012] 1 AC 144. The critical question is what will happen if, with the mother, the child is returned. **EMPHASIS ADDED: 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. I accept and reproduce Ms Chaudhry's written submission on the law on article 13b), which I am sure Ms Renton agrees with:

"...the following form key features of the "exception":

- i) The burden of proof lies with the person who opposes the child's return. The standard of proof is the balance of probabilities;
- ii) Article 13(b) is not to be constructed narrowly; by its very terms, it is of restricted application. The words of the Article were plain and needed no further elaboration or gloss;
- iii) It is rarely appropriate to hear oral evidence of the allegations made under article 13(b);
- iv) The risk of the harm must be "grave"; it was not enough for the risk to be "real". It must have reached such a level of seriousness as to be characterised as "grave." A relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm;
- v) Intolerability denotes a situation that the particular child in the particular circumstances of the case should not be expected to tolerate;
- vi) The source of the risk is irrelevant: eg. where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child;
- vii) When assessing the risk that a child faces on return the court will have regard to protective measures;
- viii) Critically, pursuant to Article 11(4) of *Brussels II Revised* a court cannot refuse to order a child to return when Article 13(b) is raised when it is "established that adequate arrangements can be made to secure the protection of the child after return";
- ix) Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be;
- x) Inherent in the Convention is the assumption that the best interests of children as a primary consideration are met by a return to the country of their habitual residence following a wrongful removal. That assumption is capable of being rebutted only in circumstances where an exception is made out."

21. Indeed, on behalf of the Mother Ms Renton confirmed that the starting point for

applications under the 1980 Hague Convention is that a unilateral wrongful removal of a child by his or her parents was inimical to the child's welfare. But she added that is the starting point, her case on behalf of the mother is this exception (and the exception of the child's objections) is made out and I should exercise my discretion not to return R to Australia.

22. The two "Re M" authorities on child's objections that have been cited to me are: Re M [2007] UKHL 55 and of course M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal) [2015] EWCA Civ 26. It is rightly accepted by counsel for the other that the threshold for meeting the 13(b) defence is a high one (unlike the one for the defence of child's objections). If I find that either defence or 'gateway' is made out then I have a discretion to not return the child and as part of that exercise I should consider a number of factors in no order of priority, such as the policy of the convention and the best interests of the child.

23. Counsel for the father cites paras 42 and 43 of Baroness Hale in Re M ibid:

*"42. In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the Contracting States and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the Contracting States.*

*43. My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word "overriding" if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not."*

24. A useful extract from the dicta of Black LJ (as she was) in M (Rep. of Ireland):

"(1) Factual matters

35. It is established that whether a child objects to being returned is a matter of fact, as is his or her age, see for example Re S [1993] at 782 and Re T at 202. It seems to me that the degree of maturity that the child has is also a question of fact.

36. The authorities reveal a mild debate over whether, once the child's age and degree of maturity have been established and the court moves to the question of whether it is appropriate to take account of his views, it is making a finding of fact or exercising judgment. I am not sure that it would be of great assistance to get involved in this debate over how to

categorise the process. What matters is how to go about it in practice, and I will undoubtedly have to address that later.

(2) No chronological threshold

37. A second established feature is that there is no fixed age below which a child's objections will not be taken into account. However, the younger the child is, the less likely it is that he or she will have the maturity which makes it appropriate for the court to take his or her objections into account, Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716 at 729/730.

(3) Objections and not anything less

38. A further feature about which I think there is, in fact, no real difficulty is that the child's views have to amount to objections before they can give rise to an Article 13 exception. This is what the plain words of the Convention say. Anything less than an objection will therefore not do. This idea has sometimes been expressed by contrasting "objections" with "preferences".

39. The word "preference" made an appearance in the jurisprudence of the Court of Appeal as long ago as Re S [1993] at 782. Balcombe LJ quoted what Bracewell J said of Article 13 in in re R (A Minor: Abduction) [1992] 1 FLR 105, namely:

"The wording of the article is so phrased that I am satisfied that before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."

Balcombe LJ commented that there was "no warrant for importing such a gloss on the words of Article 13, as did Bracewell J" and that the right course was to take the "literal words" of Article 13 "without giving them any such additional gloss".

40. It is not clear whether Balcombe LJ was intending to outlaw the idea that an objection was something "more than a mere preference", or whether his disapproval was confined to Bracewell J's statement that "objects" imports a strength of feeling going far beyond the wishes of a child in a custody dispute. There may not be much to be gained from speculating about this, as I think it is fair to say that matters have moved on since then.
41. To demonstrate this proposition, I move to the present and the Supreme Court decision in In the matter of LC [2014] UKSC 1 [2014] AC 1038 (Re LC). The focus in the Supreme Court was principally on whether, when determining the habitual residence of a child, the court may have regard to the child's own state of mind. However, there had been

argument in the Court of Appeal (see Re LC (Children) [2013] EWCA Civ 1058 [2014 1 FLR 1458 at §§87 to 97] about whether Cobb J had been wrong to find that the wish not to return to Spain expressed by two of the children had the character of a preference rather than an objection. No attempt was made to persuade the Court of Appeal that reference to "preferences" was inappropriate in this context and, in the Supreme Court, Lord Wilson referred to the phraseology without apparent disapproval (see §8 and §17). I do not see it as a gloss on the Convention or as a term of art but rather as one way of summarising that, for reasons which will differ from case to case, the child's views fall short of an objection.

(4) Objection to return to country of habitual residence

42. It is said that the child has to object to returning to the country of habitual residence rather than to returning to particular circumstances in that country, although it has been clear from early on that there may be difficulty in separating out the two sorts of objection.
43. The ground for this acknowledgment of the potential difficulty was laid in what Balcombe LJ said Re S [1993] at 782D. However, it may be convenient to rely upon what he said a little later in Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716. Commencing at 729, he set out the principles which he considered were to be deduced from the authorities dealing with child's objections. He described the second of these as follows:

"The second principle to be deduced from the words of the Convention itself, and particularly the preamble, as well as the English cases, is that the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent. Nevertheless, there may be cases.... where the two factors are so inevitably and inextricably linked that they cannot be separated. Support for that proposition will be found in the judgment of Butler-Sloss LJ in Re M (A Minor)(Child Abduction) [1994] 1 FLR 390 at p 395...."

44. In Re M [1994], Butler Sloss LJ had said:

"It is true that article 12 requires the return of the child wrongfully removed or retained to the State of habitual residence and not to the person requesting the return. In many cases the abducting parent returns with the child and retains the child until the court has made a decision as to the child's future. The problem arises when the mother decides not to return with the child. It would be artificial to dissociate the country from the carer in the latter case and to refuse to listen to the child on so technical a ground. I disagree with the contrary interpretation given by Johnson J in B v K (Child Abduction) [1993] Fam Law 17. Such an approach would be incompatible with the recognition by the Contracting States signing the Convention that there are cases where the welfare of the child requires the court to listen to him. It would also fail to take into

account article 12 of the United Nations Convention on the Rights of the Child 1989. From the child's point of view the place and the person in those circumstances become the same....I am satisfied that the wording of article 13 does not inhibit a court from considering the objections of a child to returning to a parent."

45. Ward LJ's approach in Re T was similar. Listing the matters that had to be established in a child's objections case, he began with the following (at 203):

"(1) Whether the child objects to being returned to the country of habitual residence, bearing in mind that there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated."

(5) Objections are not determinative

46. I referred earlier to the House of Lords decision in Re D. One of the things which it and Re M together made quite clear was that the fact that a child's objections to being returned does not determine the application. I will set out in full §§57 and 58 of Baroness Hale's speech in Re D but the message is summed up in the final sentence of the latter paragraph:- hearing the child is not to be confused with giving effect to his views.

"57. There is evidence, both from the CAFCASS officer who interviewed him after the Court of Appeal refused him leave to intervene, and from the solicitor who represents him, that A is adamantly opposed to returning to Romania. Yet until the case reached this House, no defence based on the child's objections was raised. This is not surprising. A was only four and a half when these proceedings were begun. At that age few courts would accept that he has "attained an age and degree of maturity at which it is appropriate to take account of its views". But he is now more than eight years old and he was more than seven and a half when these proceedings were heard by the trial judge. As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.

58. Brussels II Revised Regulation (EC) No 2201/2003 recognises this by reversing the burden in relation to hearing the child. Article 11.2 provides:

"When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child. It applies, not only when a 'defence' under article 13 has been raised, but also in any case in which the court is being asked to apply Article 12 and direct the summary return of the child - in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is, as already stated, not to be confused with giving effect to his views."

47. §§43 and 46 of Re M, quoted above, explain how, at the discretion stage, the court considers the child's objections alongside the other relevant factors. I will need to return to this but for the moment draw from it confirmation that the child's objections cannot be presumed to be determinative of the application; once the court's discretion arises, it is at large"".

## Discussion

### The mother's case under article 13(b).

25. During the Australian proceedings in 2015, R was assessed by the clinical psychologist Dr Catherine Boland. As part of her work, she observed R with his parents and states the following at paragraph 133:

*"...R was immediately and notably excited and affectionate to see his father and brothers... I observed the parents behave warmly and civilly to one another. Also A behaved warmly and affectionately to the boys and gave each of them a hug, as did her mother and the boys reciprocated those hugs openly. The maternal grandmother and father were also warm and polite towards one another. Throughout all these greeting R was observing and gravitating towards his brothers...The group observation was noisy, active and very positive."*

Later on, Dr Boland states:

*"I found that she had a very good capacity and a high degree of willingness to facilitate R's relationship with both his father and his brothers. Despite nervousness and somewhat elevated anxiety, the mother spoke of the*

*importance of him having a relationship with his father, the benefits that the father can bring to R and the importance of him having a relationship with his brothers.”*

26. Added to this is the plain fact that the order in 2016 was by consent (and no issues were returned to court for four years until the mother evinced a wish to relocate) and so I find it difficult to understand why the mother states as follows in her evidence before this court; *“I am a victim of psychological abuse from the Applicant father. Since 2015 if not before I was exhibiting severe anxiety symptoms in Australia...”*
27. The mother’s medical records appear in the bundle but an entry at C54 of December 2019 states as follows: *“Has an issue with anxiety. shortness of breath, at worst will get chest pain (has had prior) – nil since 2016* the mother has had bilateral shoulder pain which she puts down to her anxiety. But the medical records note that on 26 August 2019 she told the doctor: she *“...does remember using the car jack a few weeks prior to pain starting on L side”* and later *“Injected 28/1 and 31/1/20 with very good effect”*. Added to this is Dr McClintock’s oral evidence (to which I return below) that anxiety is not likely to cause shoulder pain, he said it was possible but highly improbable. *“...as a psychiatrist there is very little association between anxiety and shoulder pain...”* is what he said to me.
28. The mother was prescribed Escitalopram “for anxiety” on 18 March 2020 and 2 weeks later there is a medical note stating that it has *“definitely taken the edge off the anxiety”* and that the mother was *“not so anxious day-to-day”* with a *“more positive mood”* and crucially *“No awful side effects”*. I say crucially because through her counsel she now says that there was a serious side effect: Jaw clenching or ‘Lock Jaw’. This was not mentioned to her doctors in Australia nor was it mentioned to the forensic psychiatrist engaged as the expert in this case: Dr McClintock, who for his part said that he had *“...not encountered that before”* as a side effect of that particular form of medication. I find that if this particular side effect was of such significance, then the mother would have mentioned it to these people. The fact that she did not means that it was not a significant side effect of the medication but that as the record from March 2020 shows, it had taken the edge of her anxiety.
29. The mother states that she will not take any more medication if she has to return with R to Australia. I find this unlikely. It has worked in the past and Dr McClintock was very clear that although the mother is functioning perfectly well, if she does suffer from any form of anxiety then an anti-depressant medication would alleviate the symptoms within days. He was very clear that 1 in 4 people suffer from anxiety from time-to-time and that we must not confuse anxiety with depression. He said that the mother had dealt well with a period of depression in the past and repeats what she said in his report, namely that *“In my opinion she is suffering from an acute stress reaction because of her situation and although to A, her symptoms have an overwhelming quality, in psychiatric terms her condition is at the less severe end of the spectrum”*. He further said to me that the mother *“...does not have clinical depression”* and that the Escitalopram was not being used in that way but rather for anxiety. The mother he said *“has to help herself”* and that anti-depressants were highly effective and if ‘Lock Jaw’ had been a side effect of that old medication then if symptoms of anxiety returned then no doubt the doctors would prescribe a different one.



30. The mother has lived in Australia for a long time and all of that time she has had the society of her own mother and her sister, but they have relocated back to England now. Her case is that without them assisting her emotionally and practically and having no job to return to in a pandemic in Australia and limited savings of £11,000 after paying privately for these proceedings she will be virtually destitute. The mother's husband, who runs a garage cannot send her anything and although the father has carried on sending approximately £350 maintenance a month throughout this time, and no doubt will continue, her case is this will not help much. But by themselves these issues, though worrying for the mother and for this court do not satisfy the high threshold for satisfying a defence under article 13(b). In any event, this mother has shown herself to be very resourceful and she will take steps to ensure that she is capable of looking after R in reasonable accommodation, if I order her to return him to Australia.
31. A's husband has children of his own with whom he has contact on alternate weekends and therefore cannot relocate to Australia but it seems that R's father was presented with a *fait accompli* in July 2020 and it was no doubt hoped that he would accept that which A's husband would not countenance: live in a different continent to his children.
32. I remind myself of the dicta above, can I say (especially in circumstances that the mother confirmed through her counsel that her own anxieties were not the cause of her leaving Australia, but rather R's) 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*"? I find that I cannot say that. Especially in the light of Dr McClintock's oral and written evidence, the contemporaneous medical notes, and the mother's own stated position.
33. I should mention that it is the mother's case that R's anxieties were the reason for her removal of him to England. His medical notes have been disclosed and there is nothing to support the case that he was suffering "severe symptoms of anxiety for years that were intolerable to him". There is mention of neck movements and a pain and tick but nothing more and no expert evidence from Dr McClintock of an equivalent has (rightly) been sort. Indeed, the child's presentation to the Cafcass officer was "*...friendly, polite [and] bright*" and there is no evidence from his Australian or English schools that support the picture that the mother paints in her written evidence of an anxious boy.
34. Having reminded myself of the authorities and the wording of Article 13(b) and the high threshold, I find that the gateway or defence under Article 13(b) is not met and hence my judicial discretion is not engaged under this heading.

#### The mother's case on child's objections

35. Having read the Cafcass report and heard from Ms Jolly and reminded myself of the dicta from the two 'Re M' cases, I do find that the comparatively lower standard is met in establishing a gateway defence of child's objections. On interview with Ms Jolly (which lasted 90 minutes) R stated: "*My dad is being sort of bullying, and one of my brothers is bullying me in Australia and I want to stay here and they're forcing me to come back. I want to stay here because I like it here.... I don't want to [return]*"

*want to stay in England...because I have nicer family here... I like this country more; it is more peaceful.... I have lots of fun here.*” And bearing in mind the dicta of Black LJ (as was) I am compelled to say that this child is objecting to returning to Australia; it is questionable as to whether R is actually objecting to return to the country of his habitual residence but rather to the ‘*particular circumstances in that country*’ but the two have conflated in his mind as I said I accept the gateway has been crossed.

36. However, the matter does not end there - objections are not determinative and the question for me is whether, looking at the case holistically, as I am invited to by Ms Renton, I should exercise my discretion to refuse a return to Australia. Ms Jolly, who is very experienced, gave evidence before me yesterday. She was quite clear in her written and oral evidence that this little boy is in an invidious position. He has known for some time that his mother has wanted to relocate to England. He has known about the Court relocation application and on the mother’s case (as confirmed by Ms Renton) knew about the Travel Restriction exemption request on 21 July 2020.
37. Indeed, I pause there and remind myself of D15 which is a removal invoice from “OSS World Wide Removers” stipulating the mother’s Australian address, her address in England and the storage of her chattels from 3 June 2020 – 2 September 2020. This document is dated as long ago as 27 May 2020 - 2 months before the removal of R to England. The mother has produced a final shipment advice stating that the shipping crate left from Liverpool on 23 August 2020 but I fail to see how this latter document detracts from the former, which obviously shows that the mother planned to leave with R as long ago as May 2020.
38. Is it likely that this mother, who is very close to her son, was even as far as sharing a bedroom with her son in Australia (with the maternal grandmother in the second bedroom) recruited him to the narrative of wanting to leave Australia, seeing the father as obstructive to that plan and seeing his society with brothers as either bullies or expendable in the greater scheme of things? I have to answer that it was likely. I also find that, as R told Ms Jolly, he knew at least a day and half before arriving in England that he was leaving Australia (and by that I take it before boarding the aeroplane) and this means that the night before he left (when he was at his father’s home on 27 July 2020), he kept it secret from him and his brothers. Because in his words: “*...because we want to get there safely first.*”
39. The fact is that after all these years in Australia and growing up with his brother and in his father’s shared care, R (2 months after arrival in interview with Ms Jolly on 28 September 2020) stated nothing positive about his father, called him a liar (as overheard from the mother’s conversations), referred to one of his brothers as a bully because of a pillow fight and reference to him wearing ‘diapers’ and with no reference to the other brothers, named friends or the sheer natural beauty of Australia. This, to my mind speaks volumes.
40. This was a pre-planned move (as the OSS Removers invoice clearly indicates) and this little boy was actively recruited by his mother to the cause so that he boarded the flight readily and was not shocked by a sudden departure or arrival at a new home or school in England. Even though he states or even feels that he was given the determinative choice over the move: “*my mother said we can go to England if you want...*” such is his devotion to his mother and she knows it, as any parent would, he

was being beguiled into agreeing to the move and still is. By the time of the Cafcass interview, this boy who had had extensive contact with his father up until the day of departure, could not bear to see his face on the mobile phone for contact, came into the interview citing the word “aggressive” and then not knowing what it meant, and stating to Ms Jolly “...he does not know if he loves him...”. Other signs of recruitment to the mother’s cause and believing her narrative are the way that he spoke rapidly, which caused Ms Jolly to ask him to pause: “*R would do so only momentarily before continuing his account.*” His complete lack of balance and nuance in his description of his parents in his supporting of his mother’s position, his lack of recognition and minimisation of Australia: “*There are many beaches and lots of deadly animals ‘...and other stuff I can’t really remember because I have been here for 2 months...and its really hot there’.*” This is why in her written conclusion Ms Jolly says as follows:

“50. The extent of which R’s expressed views and wishes can said to be his own is difficult to distinguish. This is a young child who is aware of a longstanding wish by his mother to relocate to this country with him. There is much at stake here and I am sure R believes he carries some responsibility for helping to ensure he and his mother remain here. It can be difficult to express a view other than the person in whose care a child is in every day, and for them to give a more balanced perspective of life in the country they have left behind. R informing me that he was given a choice, is in my casework experience not uncommon for children seeking to deter any criticism of wrongdoing from their parent. There is an indicator of parental influence, even unintentional, by R overhearing adult discussions about his father lying at court. R presented as a child keen to relay his narrative which in many instances also accords to the information A has provided for these proceedings”.

41. During her oral evidence Ms Jolly added that by R believing that he was given a choice in leaving Australia by his mother: “...my mum said we can go to England if you want...we can try and live there and I said I really do and then we went there because we got permission. We were waiting for that a long time perhaps two months...” means that he feels that he has responsibility in the decision, to leave Australia. Obviously, Ms Jolly’s involvement has been nowhere near the in-depth assessment of Dr Boland in Australia and upon reading para 154 of the latter’s report from 2015, Ms Jolly stated that she did not get a fully accurate picture of R’s relationships and that she found his unwillingness to accept anything positive about his life and relationships in Australia: troubling. “R is extremely aware of his mother’s wishes”, she agreed that he is in what is often called the bubble of respite right now and said that his anger towards his father stems from a coping mechanism which recognises that he would be alleviated from the dispute between his parents if only his father would agree to the move. R was keen to relay a negative narrative of his father and to ‘get things out’ and remember everything ‘...don’t forget...’ was how Ms Jolly characterised his interview with her. He had an awareness of how important the interview was, and she said that it was possible his responses were rehearsed. Part of R’s complaint is that his father does not give him enough attention when he is with him and he is left to his own devices and forced to play video games. To my mind, I find that if this is true, this shows a desire for more time with his father rather than far less, which is what is happening now.

42. Ms Jolly stated that she “.... could not get to the bottom of his true feelings of Australia – there was a lack of balance.”
43. Taking a step back I ask myself: how does one get an 8 year old on a flight from Australia and settle him in permanently in a school and home in England in autumn and create an environment where he cannot bear to see his father’s face on FaceTime without carefully preparing him for the move? I find that the boy who spoke to Cafcass in such trenchant terms may not have known about the exact flight he was leaving on until 27 July 2020 but certainly knew of his mother’s unilateral plans to relocate from Australia well in advance of the trip and was actively recruited to the cause.
44. For completeness sake para 154 of Dr Boland’s report states:

“I think that these sibling relationships are very important for R’s sense of identity, integration into his wider family, ability to cooperate and get on well with others, solve conflict and compromise. Such sibling relationships are also important buffers in terms of parental separation and the ensuing stress that can occur. Despite the age difference between R and his brothers, I think he has a strong sense of integration with them and that this is an important and significant sibling relationship.”

This was written in 2015. I find it unlikely that a pillow fight or a few cruel words can have destroyed that significant relationship. There is also a photo of the brothers at C150 dated December 2019. They look like a happy sibling unit and for R to minimise this “his dad makes him smile for photos...” (Ms Jolly) is simply untenable.

45. And the telephone contact is as follows: “I don’t want to show my face that much to him just because I don’t really want to.” R spoke quickly about a pattern in which R tries to have a telephone call but his dad reverts to Face Time. R manages this by tilting the camera to the ceiling...” (Toni Jolly para 37).
46. To my mind R’s wish not to see his father’s face is for far deeper reasons than him being upset that his father is not agreeing to the move. What they are is a matter for a full welfare inquiry by a competent court.
47. On 20 July the mother sent the following email to the father:

“On 20 Jul 2020, at 12:10 10pm, A wrote:

B

R told me that L keeps saying I wear diapers and that he needs to go and change as they are full of wee. R said he kept telling him to stop and that he doesn’t wear diapers but said he goes on and on and won’t stop. He also said he keeps knocking on the front door, creeps down the side of the house and through the back of the house and comes up behind him and hits him really hard on the head with a pillow. R told me he said to L if he doesn’t stop he will get a knife out of the kitchen. L replied “OK”.

Him telling L to stop and threatening to get a knife when L keeps bullying him shows he doesn't like what is happening to him, he is anxious and again came home having bitten his lip until it was painful and sore, the skin broken.

I am concerned about R being in your care, can you guarantee he will not come into contact with L?

I believe this is a reasonable concern”.

48. This episode on the father's case was simply a pillow fight between a big brother and his 8-year-old little brother but ostensibly it caused the mother to do the following:

1. Go to the police; (R waited outside the police station with his grandmother, when the mother reported the bullying to the police);
2. Go to the GP; and
3. Apply for the travel exemption permanently to remove R as soon as possible, from the country of his birth without his father's knowledge.

49. There is no way that this 'pillow fight' was the cause of the removal, rather it is far more likely that it was the culmination of a plan of the removal and R was a pawn in a greater gambit. Any altercation (if indeed one took place) was blown out of all proportion and it has made R wrongly take ownership of his mother's decisions. This eight-year old boy is too wedded to his mother's cause for it to be the result of merely an unwitting influence of his mother's wish to leave Australia.

50. And so, these factors weigh heavily in the consideration of how I exercise my discretion. There are other factors at the discretion stage, that to my mind all militate against the mother's case. They are as follows:

- i. R's relationship with his father and his siblings has been shelved by this move to England, he must be close with all of them bearing in mind the report from 2015 of Dr Boland and the extensive contact he has had since. R wants to have contact with them but on his mother's terms i.e. holidays only and when the Cafcass officer asked him how he would deal with his brother, L's behaviour he said: "...he would just tell them to stop their behaviour, or otherwise he would run away and hide somewhere in the house." This shows me that the 'pillow fight' and other complaints are surmountable in R's mind. In view of the lack of meaningful indirect contact since his arrival here, R is far better off being reunited with his father and paternal family until the Australian court determines the relocation application. This significant change in R circumstances has happened far too quickly and without any input from his father.
- ii. The reality of life in England on the other side of the world is that he can have no real contact with his father, brothers or friends: his 'best mates' (E, F and S) who on the father's case visited often and had sleepovers - but are of course not mentioned by R to Ms Jolly. Everything from Australia has been marginalised and this situation cannot continue, or it will be to R's long-term emotional detriment. Given the distances involved between England and Australia, and difficulties with travel in the time of Covid-19, it will be difficult for R to resume the pattern of contact with his friends and paternal

family and father which would meet his needs even on an interim basis whilst longer term decisions are made about his care.

- iii. The policy of the Hague is to return children to the country of their habitual residence for decisions to be made, with their best interests being paramount. I am reminded by counsel for the father of the preamble to the Convention itself and Re D:

The second preamble notes that the aim of the Convention is: “Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.” Article 1 states the objectives of the Convention, which are as follows:

1. to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
2. to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

*In Re D (a child) (abduction: rights of custody)* [2006] UKHL 51, [2007] 1 AC 619, [2007] 1 All ER 783, [2007] 1 FLR 961, Baroness Hale described the operation of the 1980 Hague Convention at §48 of her speech, as follows:

*“The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their “home”, but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed...”*

- iv. The extant Australian order from 8 March 2016 and the extant relocation proceedings in Australia, comity and mutual respect of a fellow Hague country’s procedure and orders are further reasons to return R. The courts there are seised with the case. The mother should not profit from her wrongful actions unless there is a constellation of factors militating towards the child benefitting from staying here. There is no such constellation here. The Australian proceedings are far advanced, a psychologist, Dr Boland has already met R in 2015 and there is talk of her being reinstructed in the relocation application (by the mother’s own lawyers). The parties have Australian solicitors (the mother has none here) and can hit the ground running with applications for urgent hearings and expedition. Added to this is the simple fact that it will be nigh on impossible for a court to make any in-depth assessment until such time that R and the parents are living in the same country.
- v. I have found that R’s views have been influenced by his mother; she has knowingly recruited him to her cause of living with her husband in England.

This affects the weight I attach to his stated objections. R has "...a level of cognitive, emotional and social maturity commensurate with his age and stage of development" (Ms Jolly). At the mere age of 8 years old I must not place him in the centre of this debate, he has had to carry enough responsibility on his young shoulders already. I also ask myself whether, at this age he actually understands what long-term relocation means for him, his Australian family and 'best mates'.

- vi. R has attended School in Australia since kindergarten and is currently in Year 2. He was removed without saying goodbye to anyone least of all his school, which was simply terminated. The English school have noted 'a discrepancy between R's abilities and what is expected academically for a child of his age'. I find this unsurprising in view of what he has been through recently. July was the beginning of the third academic term in Australia and this woeful situation must be corrected as soon as possible. It is in R's academic best interests to return to his old school, learn what he has missed and for *the status quo ante* to be in place.
- vii. It is in R's overall and long-term best interests for him to return to Australia so that as swift a decision as possible can be made about the mother's application and any cross-application that the father may make. I gather he is very worried about recent developments and what R was saying to him the night before he left Australia.

51. For these reasons I decide not to exercise my discretion to refuse to return R to Australia. This is a double negative, which means that I grant the father's application. R should be returned forthwith, ideally in his mother's care, but if she refuses to go, in his father's care as soon as is practicable.

52. I have looked at the undertakings that the father has offered in comparison to the mother's request and in the knowledge that the mother has lived and supported herself in Australia (and for periods without her own mother or sister) for almost two decades. She has £11,000, is able bodied and her son is not a babe in arms. In Dr McClintock's words: "She needs to help herself" to medication if she needs it, as many people have to do from time to time when faced with anxiety. What the father is offering provides for more than adequate arrangements upon return. I am not interfering with the existing order of 2016 of Judge Dunkley, I have no jurisdiction or inclination to do so and I am not asking the father to undertake not to have any contact ('save as agreed') with R after arrival until a court hearing. Perversely, the mother is open to unsupervised staying holiday contact taking place in Australia between R and his father and brothers (as is R) but if I order her to return now with R she does not agree to any direct contact until there has been a court hearing. I find this approach truculent and not focussed on the child. Also, the very fact that she agrees to holiday contact of course torpedoed any alleged concerns that she has about the father's care of R in any event.

53. What this position does show is that the mother wants still to dictate the contact that the father can have with R with no logical explanation. Her actions in unilaterally removing R and recruiting him to not tell his father and brothers (and school mates) that he is about to leave them permanently, and create an environment where R is

angry at his father for having the temerity to want him back and refuses even to allow him to see him again via FaceTime contract (by titling the phone to the ceiling), fills one with dread that the mother's actions might be symptoms of a deeper wish to eradicate the father and his sons' society from R's life.

54. I respectfully ask that the Family Court in Australia (which is no doubt as overburdened as the Family Court is in England and Wales) list a short interim hearing in this matter as soon as possible – ideally during the third week of R's arrival back in Australia (to allow for the two-week quarantine, (if no special concession can be granted) for R's welfare to be considered.

END