



Neutral Citation Number: [2023] EWHC 1883 (Fam)

Case No: FD23P00239

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2023

Before :

THE HONOURABLE MR JUSTICE COBB

Between :

Mr A
- and -
Ms R

Applicant

Respondent

Re K & S (Article 13(b))

Mani Bassi (instructed by **Dawson Cornwell**) for the **Father** (Applicant)
Rachel Cooper (instructed by **Goodman Ray**) for the **Mother** (Respondent)

Hearing dates: 19 July 2023

Approved Judgment

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

.....
THE HONOURABLE MR JUSTICE COBB

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.

The Honourable Mr Justice Cobb :

Introduction

1. The application before the court, dated 5 May 2023, concerns two children, K (aged 4y 5m) ('K') and S (2y 6m) ('S'). They are the two children of the applicant ("the father"), and the respondent ("the mother"). The application is brought under the 1980 Hague Convention On The Civil Aspects Of International Child Abduction ("the 1980 Hague Convention") as incorporated by Schedule 1 of the Child Abduction and Custody Act 1985.
2. The father seeks the summary return of the two children to Virginia, in the United States of America ('USA'). The mother opposes the application, and relies for her defence on Article 13(b) of the 1980 Hague Convention.
3. For the purposes of determining this application, I have:
 - i) Read the bundle of documents, including the statements of the parents, the expert psychological report, and the addendum expert report;
 - ii) Viewed a number of videos of the children, and one of the mother driving a car in the USA;
 - iii) Heard the oral submissions of counsel for the parties.

The expert witness attended court, but neither counsel wished to cross-examine her, and she did not in the event give oral evidence.

4. The case has taken a relatively conventional course to this final hearing, save, perhaps in one regard. In late-May, the mother formally sought permission to instruct an "expert psychiatrist or psychologist" to advise the court in relation to her mental health; that application was granted by Mr Lock KC sitting as a Deputy High Court Judge on 8 June. It is apparent from the documents before me that Mr Lock was only "just persuaded" that the instruction of an expert was indicated in this case. The father applied for, and was refused, permission to appeal; the father renewed his application to the Court of Appeal, which was on 26 June, similarly refused by Moylan LJ.
5. This judgment has been anonymised for publication, in accordance with usual practice.

The issues

6. It is agreed between the parties that K and S were habitually resident in the USA at the point at which they were retained in this country (2 March 2023 when the mother indicated her intention not to return). At that time, the father had rights of custody and the retention of the children in the UK was in breach of his rights of custody.
7. Issue was joined between the parties on whether a return order would expose the children to a grave risk of physical or psychological harm or otherwise place them in an intolerable situation in the USA: Article 13(b). On this issue, I was asked to

consider a range of possible protective measures, and (if appropriate) consider what discretionary factors would be relevant.

Background facts

8. The father is Ethiopian by birth, but has lived in the USA for over 20 years; he is also an American citizen and holds an American passport. He is now 54 years of age, and works for the US Government. The mother is 40 years of age and is Eritrean by birth; she is a British national and has permanent residency in the USA. The parties' families had apparently known each other for some time, but the parties reconnected more recently on an internet site in or about 2013, formed a relationship, and were married in the USA in October 2017. The parties now live in a suburb of Washington DC.
9. It is the mother's case that she remained largely based in London after the marriage, at least until 2019; this is not entirely accepted by the father, who described the mother as based in the USA. The mother applied for her immigrant visa in 2018; she applied for a Green Card in the USA in 2019. The mother asserted that her Green Card application was simply so as to give her the freedom to travel easily between the USA and the UK; the father specifically challenges this, asserting that the Green Card is a permanent residency card and that the mother had applied for this because she intended to be permanently resident in the USA. There is little doubt that the mother was permanently in the USA after December 2019. The mother gave up her council property in London in 2020.
10. The parties have two children, K and S. The father had a daughter from a previous relationship who tragically died of cancer aged nine.
11. In January 2023, the parties travelled with their children from Washington DC to Germany to meet with the father's family; they spent nine days in Germany before travelling on to London to spend some time with the mother's family. Thereafter, and again in accordance with the agreed arrangements, the father returned to the USA on 31 January; the parties agreed that the mother would remain in London with the two children until 15 March 2023 in order to be able to spend time with her wider family. On 2nd March 2023, the mother informed the father that she did not wish to return to the USA, and asked him to cancel the return flight. The mother explained that she wished to remain in London so that S could receive speech therapy. Although puzzled by this turn of events and explanation, the father cancelled the flights.
12. On 12 April 2023, the mother contacted the father and informed him that she did not want to return to the USA at all, and wished to remaining living in London. At that time, she told him that she did not like the lifestyle in the USA. She made it clear that she would not return with the children; the father told her that he did not agree to the children remaining in the UK. The parents spoke regularly on the telephone over the following days; the father proposed some form of family mediation to resolve the disagreement, but the mother refused this. It is the father's case that when he told the mother that her decision not to return to the USA was "wrong", she responded by saying "my life comes first". The mother declined to give the father information about her, or the children's, whereabouts at that time.

13. The father, accordingly, issued this application on 5 May 2023. As I have earlier mentioned, the case has taken a largely unexceptional course. The father has had video contact with the girls most days; he travelled to the UK at the beginning of this month, and had direct contact with the girls on three consecutive days between 1-3 July 2023, between 10am – 5pm. This contact was ‘supported’ by the mother’s sister. I was told that the girls were pleased to see their father; the contact took place in the father’s cousin’s home. Although (I am told) S did not apparently eat very much (if at all) during the contacts, Ms Cooper told me that the contact was broadly successful.

The mother’s case

14. The mother accepts that she has retained the children in the UK in breach of the father’s rights of custody but asserts that the children would be exposed to a grave risk of physical or psychological harm, or would otherwise be placed in an intolerable situation if they were to return (albeit in her care) to the USA. As the burden is on her to demonstrate that the exception is made out, she presented her arguments before the father, and I deal with them first.
15. She asserts (in her ‘Answer’) that the Article 13(b) exception is made out by reason of the father’s conduct towards her and the children in the following ways:
- i) Emotional abuse, displayed through:
 - a) Gaslighting;
 - b) Mental abuse.
 - c) Isolation, of the mother and children, who were unable to leave the family home;
 - d) The father’s alcohol abuse;
 - e) Having a camera in the bedroom, which the father would turn on when the mother went to bed;
 - ii) Physical abuse (rape);
 - iii) Child abuse, through:
 - a) Not allowing the children to attend school, or any social activities, leading to S developing delayed speech, for which she is having support in England.

The mother asserts that this is “grave” risk, and cannot be ameliorated or mitigated in any way by the protective measures proposed by the father.

16. The mother says that should the children be ordered to return to the USA, she would return with them¹.
17. The mother’s case, it seems to me, has essentially three strands:
- i) That she is fleeing domestic abuse, and a return to the USA will expose her and the children to the continuation of this abuse;
 - ii) That she herself would be so psychologically affected by a return to the USA that this would impact on her care of the children, thus creating the grave risk of psychological harm to them;

¹ I take this from counsel’s position statement on behalf of the mother, although I had detected more ambivalence in her witness statement.

iii) The father was neglectful of the children.

18. *Domestic abuse*: While in the USA, the mother asserts that she lived a life of isolation, in a coercive and controlling relationship with the father, in which she was both physically and emotionally abused. She (somewhat surprisingly to my mind) suggests that the father's identification of A, L and M as friends from Europe who have moved to the USA, and with whom she has a friendship in the USA is "invented"; L and M, according to her, do not exist. The mother claims that the father regularly drank to excess, and when drunk he would become threatening and angry. He would demand sexual intercourse whether she consented or not. She claims to have been subjected to physical abuse from the father, who would become angry at the smallest things. She asserts that he would monitor the mother in the home by way of baby monitors. She says that she felt as if she was living in a prison. She says that she felt stressed and depressed; she claims that she lost weight and suffered hair loss. The mother relies on the evidence of the psychologist, Dr. Papatraian, which I address separately in the next section of this judgment.
19. *Psychological distress*: It is the mother's case that she is particularly psychologically vulnerable as a result of her early life experiences growing up in Eritrea. In her written evidence (and in discussion with the psychologist) she described the dire political situation there in the 1990s, and her daily experience as a child of conflict, terror, bloodshed, and death. She described the extreme hardships caused by the conflict, living without electricity, water and/or food for extended periods of time. Her education was significantly disrupted. She recounts that her brother was killed by Ethiopian soldiers, and during her childhood her mother was, for a number of months, incarcerated. The mother left the country when she was 11 (in 1994) with her older sister, and travelled to London via Addis Ababa; when in this country she was placed in the care of foster parents by the local authority. Her parents remained in Eritrea.
20. I pause here to observe that the father paints a rather different picture of the mother's early life, as he understood it. He describes the mother as having been born into an affluent family; he says that the mother's father was a successful businessman, who was extremely wealthy, and the family enjoyed the benefit of nannies, chefs, doormen and drivers during the mother's childhood (the mother denies this). He points to the fact that the war of independence ended in 1991 (when the mother was 8), and described the years from 1991 to 1997 as "the most peaceful, hopeful and prosperous years in Eritrea before the Ethio-Eritrea border conflict started in 1998". His understanding is that the mother moved to Europe aged 11 in 1994 for a "better life" and was taken in by her extended family (not foster carers as such). He observed that when the mother underwent her medical examination for immigration purposes in the USA, she did not then mention any post-traumatic stress or other legacy mental health issues deriving from her childhood.
21. I noted from the mother's evidence that she had returned to Eritrea in 2005, to see her parents and friends. I was told, during submissions, that the mother has visited Eritrea again multiple times – in 2008, 2009, 2010, 2011 (one month), again in 2012, 2013, and 2014.
22. In or about 1996, the mother was granted asylum status in England. The mother asserts that: "London is the only place that I feel safe, that I feel secure, that I have support, that I have family – being my brother and sister." I was told at the hearing

that the reference to “a brother and sister” was an error (a surprising one perhaps given the significance of the point), and under-represented the position. I was told that the mother has two sisters in London, and two half-sisters and one half-brother; Ms Cooper told me that the mother has paternal cousins too. The father disputed the reference to ‘half-siblings’, commenting (through counsel) that the family had re-characterised themselves for immigration purposes. Whether that is true or not I do not know. These family members are all said to live in London.

23. I consider the expert psychological evidence relevant to this point in the next section of this judgment.
24. *Neglectful father*: The mother maintains that the children suffered because of the father's behaviour towards her and them. The mother makes complaint about the father's lack of attentiveness to the children's well-being when they lived together as a family, his limited role in their daily lives, and his reluctance to pay for routine dental checks or nursery places. She complains that he curtailed their social lives and did not allow them to partake in activities such as swimming. The mother considers that the children's social isolation has caused developmental delay in S.
25. Materially, the mother says this in her statement:

“§54 All these facts have left me extremely distressed. I feel enormous levels of guilt that I was not able to give her children the life that young children, by rights, should have access to. It is for that reason that I made the decision to remain in England, where I believed my home to still be, with the children. The only way that I could achieve this was by to remain here when we travelled here as a family”.

A little later in the statement, she refers to her resistance to returning to the USA (“I need to think if I would survive”).

26. In spite of all the mother says about the father's conduct towards her, and towards the children in the USA, she maintains that she wishes to ensure that the children have a “good relationship with their father moving forward” and wants to ensure that the father “is fully involved in their upbringing and involved in every aspect of their lives”.
27. Finally, if I am minded to accede to the father's case for a summary return, the mother asks me to consider deferring the decision for at least 4 weeks in line with the approach taken by Mostyn J in *AO v LA* [2023] EWHC 83 (Fam) (see §93 thereof).

Psychological evidence

28. At an earlier case management hearing before Knowles J, the mother indicated her intention to seek permission to file a report from a psychologist addressing issues relevant to her mental wellbeing (the second strand above). That report was prepared by Dr. Papatraian on 10 July 2023; an addendum report was prepared on 18 July 2023 (the day before the hearing).

29. The main report was prepared following an interview with the mother, and before the witness statements were filed. The report is based therefore on solely the mother's untested account. There was no interview with the father. At no time during the preparation of the main report did Dr. Papatraian have access to the parties' statements; she only received the father's statement (not the mother's) after the preparation of the main report, in order to address the issue of his proposed protective measures.
30. Dr. Papatraian was plainly influenced by the account which the mother had given of her childhood experiences in Eritrea and her flight from that country. Dr. Papatraian did not know that this history was contentious; nor can I say whether Dr. Papatraian knew that the mother had returned to Eritrea at least eight times since leaving in 1994, which – it seems to me – *may* have been relevant to her finding of PTSD. That said, when Dr. Papatraian had seen the father's statement, she later remarked that "I cannot confidently determine whether [the mother] had been directly exposed to war or conflict, whether she has recollections of collective trauma".
31. The mother had reported to Dr. Papatraian a "generalised state of tension, inability to relax, sleep disturbances, loss of appetite, and various types of physical discomfort associated with anxiety." Dr. Papatraian reports that the mother experiences the residuals of past trauma which recur through distressing recollections and flashbacks; the mother described distressing recollections of domestic abuse and occasional flashbacks of the war in Eritrea. Dr. Papatraian reported the mother further describing:
- "... occasional feelings of sadness and discouragement, worrisome thoughts, fatigue, some behavioural apathy, and loss of interest in pleasurable activities. [The mother] reported that her symptoms of depression had reduced in intensity and severity and that her self-confidence has improved since she returned to the UK, however, her anxiety has increased since the beginning of the legal proceedings."
32. The mother apparently told Dr. Papatraian that she had no support network in the USA and no financial resources to enable her to access medical and therapeutic services there.
33. Dr. Papatraian concluded that the mother met the DSM-5 criteria for generalised anxiety disorder associated with symptoms of post traumatic stress and depression. Dr. Papatraian recommended a 12-week course of cognitive behavioural therapy to help the mother to manage her symptoms of anxiety, post traumatic stress, and depression. It was further suggested that the mother would benefit from domestic abuse work, to learn how to identify early warning signs of abuse and maintain safe boundaries in her relationships.
34. Dr. Papatraian opined that the mothers asserted anxieties about returning to the USA were "realistic and reasonably held" stemming from "a lived experience... a conditioned fear response". She expressed the further opinion that the mother's symptoms of anxiety, depression and post traumatic stress will likely "accentuate" if she had to return to the same situation which she had left in the USA. Dr. Papatraian

offered the view that the mothers ability to protect their children would be compromised if she were to return to the USA, but did not in that assessment consider but the mother may in that event be living separately from the father.

35. She added that if the mother were back in the USA, she would benefit from access to separate housing from the father and financial support to enable her to live independently, access to support services to provide her with practical advice and help to enable her to settle into an independent life in the USA, and access to therapeutic services to address her mental health needs. In relation to the father's proposed protective measures, Dr. Papatraian said

“It is difficult to formulate a prognosis regarding [the mother]'s mental health if she had to return to the USA. It is reassuring to read in [the father]'s statement that [the mother] will continue to have access to medical insurance which covers therapeutic work... If this arrangement [the package of protective measures] is formalised, this will likely alleviate some of [the mother's] anxieties, at least in the short term..”

The father's case

36. In response to the mother's case, he offers a range of protective measures, which I have listed as Annex A to this judgment. I deal with his response by reference to the three strands of the mother's case.
37. *Domestic abuse*: The father denies that he has been abusive to the mother, or that he has at any time exercised coercive or controlling behaviour towards her, specifically disputing her account that she was left without means of transport, relying upon evidence that he encouraged her to take driving lessons and that she had free access to her own car. He draws attention to the mother's friends in the USA, and her friends from the UK who visited her many times and stayed at the family home. The mother has an aunt (a mother figure to her, according to the father) who lives in Alexandria, Virginia, a 10-minute drive from the family home. The father references more than fifty family members of the mother (aunts and cousins) who live within a 5-to-10-mile radius of their family home in, Virginia, USA.
38. The father denies controlling the family finances to the detriment of the mother, and asserts that he has done everything to provide for the mother and the children. The mother did not work in the USA and the family was therefore completely reliant upon him. The father further denies the allegations about sexual assaults; of the mothers complaint that he monitored her around the home using baby monitors he says: “we have a baby monitor because we have a baby. This is all.” The father denies any form or physical abuse; he acknowledges that domestic abuse is wrong in all its forms.
39. *Psychological distress*: The father disputes the mother's account of her childhood (see above), and avers that at no time has she referenced PTSD in their relationship. He references the absence of any independent or contemporaneously recorded corroborative evidence of trauma, anxiety, or distress. He emphasises that the mother did not access mental health support in all the time they lived in the USA, nor – materially – when she arrived in the UK (after he had left) notwithstanding that she had told the expert that she had come to Europe “to escape...”; indeed he points to the

fact that she did seek any kind of talking therapy until she was required to present a response to his claim for summary return of the children, some time after the proceedings had started.

40. *Neglectful father*: The father disputes that he played a limited role in the children's upbringing, and specifically denies that he placed any obstacles in the way of enrolling the children either with a dentist or for nursery; he has adduced evidence that K was indeed enrolled. He claims that they, as parents, actively discussed specific schools for the children in the USA and prospective holidays including to Disneyworld.
41. The father doubts the mother's integrity when she asserts that she wishes to support his relationship with the girls, by recounting the considerable difficulties that he has encountered in seeing them over recent weeks, and the steps which the mother has taken to conceal their whereabouts and movements. The mother has enrolled K in nursery, he says without his knowledge, and had obtained a passport for S again without his apparent knowledge. The mother has been, in the father's view, secretive about her living arrangements.
42. On the father's account, the mother gave as her reasons for delaying and then cancelling her proposed return to the USA that she wished for S to undertake speech therapy in London. The mother later told the father that "she did not like the lifestyle in the US". The father points out that at no stage did the mother raise any of the allegations that she has now raised in her statement in opposition to his application for summary return. The father suspects but the mother has rekindled a relationship with a man in London, which much more likely explains her reason now for wanting to stay here. I have no evidence on this one way or another, and was not addressed on it.
43. The father seeks a number of undertakings from the mother; these are set out in Annex B.
44. The father opposes the deferral of the return, as this would be against the principles of the Convention.

The law

45. Before turning to the Hague Convention caselaw, I reference the definition of domestic abuse as given in the Domestic Abuse Act 2021, as follows:

Section 1(3)

"Behaviour is "abusive" if it consists of any of the following—

- (a) physical or sexual abuse;
 - (b) violent or threatening behaviour;
 - (c) controlling or coercive behaviour;
 - (d) economic abuse (see subsection (4));
 - (e) psychological, emotional or other abuse;
- and it does not matter whether the behaviour consists of a single incident or a course of conduct.

Section 1(4)

“Economic abuse” means any behaviour that has a substantial adverse effect on B's ability to—
(a) acquire, use or maintain money or other property, or
(b) obtain goods or services”.

46. Para.3 of PD12J of the Family Procedure Rules 2010 contains further useful definitions:

“coercive behaviour' means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;

'controlling behaviour' means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour”.

47. I have approached this case, with those principles and definitions in mind.
48. The legal principles engaged on an application under the 1980 Hague Convention where Article 13(b) is raised are well-established. They were extensively discussed in *Re A (Children) (Abduction: Article 13b)* [2021] EWCA Civ 939, (“*Re A*”). In his judgment in that case Moylan LJ drew from the Supreme Court decisions of *In re E (Children) (Abduction Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 (“*Re E*”) and *Re S (Abduction: Article 13(b) Defence)* [2012] 2 AC 257 (“*Re S*”). I have also found particularly useful the judgment of Baker LJ in *Re IG (Child Abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123, and Moylan LJ in *Re C (Article 13(b))* [2021] EWCA Civ 1354 (“*Re C*”).
49. The following principles emerge from these authorities, relevant to the 1980 Hague application:
- i) Article 13(b) is, by its very terms, of restricted application: [§31: *Re E (Children)*]; the defence has a high threshold;
 - ii) The focus must be on the child, and the risk to the child in the event of a return;
 - iii) The burden of proof lies with the person, institution or other body which opposes the child’s return. The standard of proof is the ordinary balance of probabilities, subject to the summary nature of the Hague Convention process: [§32: *Re E (Children)*];
 - iv) The risk to the child must be “grave” and, although that characterises the risk rather than the harm, “there is in ordinary language a link between the two”: [§33: *Re E (Children)*];
 - v) “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. Amongst these are physical or psychological abuse or neglect of the child: [§34: *Re E (Children)*];

vi) Article 13(b) is looking to the future, namely the situation as it would be if the child were to be returned forthwith to his home country: [§35: *Re E (Children)*];

vii) In a case where allegations of domestic abuse are made:

“... the court should first ask whether, *if they are true*, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison Judges are so helpful.” [§36]: *Re E (Children)* (Emphasis by italics added).

viii) In this case, the passage in §34 of *Re S* (Lord Wilson) was emphasised by Ms Cooper:

“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”.

ix) The court must examine in concrete terms the situation in which the child would be on a return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do;

x) 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. Thus:

“... the clearer the need for protection, the more effective the measures will have to be” [§52: *Re E (Children)*]

50. Moylan LJ in *Re C* [2021] (citation above) emphasised that the risk to the child must be a *future* risk (§49-50). He cited from the Good Practice Guide to emphasise that:

“... forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That said, past behaviours and incidents are not per se determinative of the fact that effective protective measures are not available to protect the child from the grave risk”.
(§50)

51. Thus, an assessment needs to be made of the

“... circumstances as they would be if the child were to be returned forthwith. The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence” (§50).

He added:

“It is also axiomatic that the risk arising from the child's return must be *grave*. Again quoting from *Re E*, at [33]: “It must have reached such a level of seriousness as to be characterised as ‘grave’”. As set out in *Re A*, at [99], this requires an analysis “of the nature and degree of the risk(s)” in order to determine whether the required grave risk is established” (emphasis in the original).

52. I am clear that my role is not to engage in a fact-finding exercise, but as Moylan LJ went on to observe:

“... unless the court properly analyses the nature and severity of the potential risk which it is said will arise if the child is returned to the requesting State, the court will not be in a position properly to assess whether the available protective measures will sufficiently address or ameliorate *that* risk such that the grave risk required by *Article 13(b)* will not have been established. As set out in *Re E*, at [36], the question the court is considering is “how the child can be protected against *the* risk” (my emphasis). The whole analysis is contextual and forms part of the court's process of reasoning, as referred to by me in *Re A*, at [97], adopting this expression from *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257, at [22]”. (§58)

53. In his judgment, Moylan LJ took the opportunity to emphasise the importance of adherence to *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings* issued by Sir James Munby P on 13 March 2018, and to

the point that protective measures include not only those offered by the left-behind parent but also those available ordinarily in the state of habitual residence and their adequacy and effectiveness (§60).

54. Should I reach the point in this process in which I could be invited to exercise my ‘discretion’ whether to order a return, I would have regard to the speeches in the case of *Re M (Abduction: Zimbabwe)* [2007] UKHL 55 at §43, as to which I highlight:

“... 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.”

And at §48

“... the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child. The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction”.

55. I would further consider the judgment of Peter Jackson LJ in *Re G (Abduction: Consent/Discretion)* [2021] EWCA Civ 139 at §41:

“...the exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare.”

56. Finally, as indicated above, Ms Cooper has asked me to consider the judgment of Mostyn J in *AO v LA* [2023] EWHC 83 (Fam) and specifically, the proposal that any return order is deferred to allow the mother to apply for permanent relocation and obtain an interim order.

Conclusion

57. It is rightly acknowledged by both counsel that the onus is firmly on the mother to demonstrate that the exception to a summary return under Article 13(b) is made out;

Article 13(b) is, it is agreed, of restricted application. The ‘risk’ has to be focused on the children, and it must be ‘grave’. Although I have read a great deal about the history of this couple’s relationship, and indeed a history which stretches back well beyond that, my focus in determining this application has to be on the *future* arrangements.

58. The mother’s allegations of domestic abuse are disputed, and I have not tried them. They are not particularly detailed and, as it happens, there is very little (if any) corroborative evidence of them. But I approach the case by first asking whether *if* they are true, would there be a grave risk that the children would be exposed to physical or psychological harm or otherwise placed in an intolerable situation if they were to return to that same situation?
59. On the facts of this case, the mother raises multiple and serious forms of abuse (as defined by section 1(3) of the 2021 Act and PD12J); *if* they are all true, and *if* the children were to be returned to the same situation, this would in my judgment be likely to present a ‘grave risk’ to the children’s psychological wellbeing. No one can now be in any doubt about the deeply damaging impact of domestic abuse on children who are exposed to it (see section 3(2) Domestic Abuse Act 2021). Accordingly, I must consider whether the comprehensive protective measures offered by the father, coupled with the protections of which the mother may be able to avail herself through the US courts, and the supports which may be available from her own wider family in the USA, can mitigate that risk. In my judgment, the protective measures offered (especially those at D, E, F and G below) do materially, and effectively, diminish the risk, to the point where I find that the risk of harm by domestic abuse – if it exists at all – is negligible.
60. What then of the psychological impact on the mother of a return to the USA? In her written submissions, Ms Cooper presented the case thus:
- “The crucial question for the court is therefore, are the anxieties of the mother about a return with the children to USA of such intensity as to be likely, in the event of a return, to destabilise her parenting of the children to the point at which the children’s situation would become intolerable or cause them psychological harm”.
61. For present purposes, I proceed on the basis that the mother is a vulnerable woman by virtue of what she claims are her early childhood experiences. It is not possible to know for sure the extent to which she was exposed to the worst of the war of independence in Eritrea which had begun long before she was born (1961), and ended when she was 8 years old, in 1991, but on her case it plainly had an impact on her and her family. I further proceed (as above, and *without making findings*) on the basis that she has probably suffered a range of domestic abuse in her relationship with the father.
62. I note, and take into account in my analysis, that the mother had made no contact with medical services to seek support for her anxiety, depression or PTSD at any time – either in the USA or the UK – until these proceedings were underway. That said, I accept the expert view that the mother has, on the basis of her own self-reported account, a generalised anxiety disorder associated with symptoms of post traumatic

stress and depression, and that she suffers occasional feelings of sadness and discouragement, worrisome thoughts, fatigue, some behavioural apathy, and loss of interest in pleasurable activities. Although it matters not whether the mother's anxieties about a return are reasonable or unreasonable, I accept the expert view that the mother does indeed have a "realistic and reasonably held" anxiety about returning to the USA.

63. I also note – and accept – the expert view that in the event of a return to the USA the mother would benefit from access to separate housing and financial support to enable her to live independently, access to support services to provide her with practical advice and help to enable her to settle into an independent life in the USA, and access to therapeutic services to address her mental health needs. Materially, the expert considered that the protective measures would indeed "alleviate" some of the mother's anxieties in the short term; notably, the expert found it difficult to formulate a prognosis regarding the mother's mental health if she had to return to the USA on the basis that the protective measures were in place. This is some distance from the scenario painted by Lord Wilson in *Re S* where he considered that if the court concludes that: "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".
64. I realise that the mother will be unhappy and disappointed by my decision, but that is far from a finding that her distress or anxiety would be of such a magnitude as to "destabilise her parenting of the children to the point at which the children's situation would become intolerable or cause them psychological harm" (to adopt Ms Cooper's formula, above) or create a 'grave risk' that the children would suffer psychologically by any resulting impact on her parenting. Her statement (see §25 above: "I feel enormous levels of guilt that I was not able to give her children the life that young children, by rights, should have access to. It is for that reason that I made the decision to remain in England, *where I believed my home to still be, with the children*") is perhaps revealing of her true motives for remaining (italics added). In any event, I am satisfied that the protective measures are appropriate and more than sufficient to alleviate/reduce to a meaningful extent the anxieties of the mother, giving her measurable independence from the father and access to therapeutic and other support services.
65. I am not at all satisfied that the alleged 'neglect' by the father of the children's needs justifies a finding of 'grave risk of physical or psychological harm' to the children. I note that in February 2022, there was no evidence of developmental delay in S. The letter from the general practitioner in the US (27.4.23) says (of the most recent assessment in February 2022):
- "She has been growing and developing normally without any areas of concern. There were no concerns regarding her speech from her parents and none were seen in the office by me in my interactions with her".
66. It is agreed that the mother was the children's primary carer; although the father claims to have played a material role in the children's upbringing, he accepts that he worked long and demanding hours. It was therefore, it is agreed, the mother who would have been most influential in meeting the developmental needs of the children,

As the letter from the (UK-based) speech and language therapist says: “What parents and carers do with children every day at home is what makes a difference to a child’s communication skills”, by doing such simple things as “follow your child’s lead in play”.

67. In the circumstances, and for the reasons set out above, I propose to grant the father’s application for summary return. I would like to emphasise that in ordering a return of the children to the USA under the 1980 Convention I am enabling the court of their homeland to decide on their long-term future. My decision should not be interpreted by either parent as indicative of the longer-term futures of the family.
68. I accept the undertakings offered by the mother as set out in Annex B. I do not propose to defer the order for a month or more (as sought) to allow the mother to apply in the courts of Virginia for an interim order for permission to relocate temporarily with the children to England, within the context of an application for permission permanently to relocate here. No principle was established to that effect in the case of *AO v LA* (see above), which was in any event, very different on its facts from the instant case. In my judgment, and having close regard to the philosophy of the 1980 Convention, there is no proper basis for delaying the return of the children to the USA; the father proposes a return within 21 days (by 11 August 2023) and that would in my judgment be appropriate..
69. I will invite counsel for the parties to work out the practical arrangements and draw an order.
70. That is my judgment.

Annex A: Proposed protective measures: The father undertakes....

- A. That he will not support any criminal or civil proceedings relating to the children’s wrongful retention;
- B. That he will pay for the mother’s and the children’s return flight to the USA; he undertakes to send the funds to purchase tickets to the mother. The mother shall send confirmation that flights have been booked to the father’s solicitors but this information shall not be passed on to the father;
- C. That he will not attend at the airport on the day of arrival in the USA and he shall not send any third party on his behalf;
- D. That he undertakes not to threaten or encourage anyone else to threaten or abuse the mother;
- E. That he will arrange and pay for a year long lease on an apartment for the mother and children, without prejudice to any financial remedy or other proceedings in the USA. He proposes a cap of rent at \$2000 per calendar month; he agrees not to attend within 100ms of the same;

- F. That he will make the mother's car available for her to use and will meet the costs of the car (including MOT, service and insurance);
- G. That he will pay \$2000 per calendar month to the mother for three months pending the decision of a family court in the USA, without prejudice to any argument he may subsequently wish to raise in financial remedy proceedings in the USA; he will put the first month's allowance in an account before she travels to the USA and make subsequent payments to her monthly thereafter;
- H. That he will ensure that the family have medical insurance and will pay the premiums (they are still in existence);
- I. That he will fund and support ongoing nursery fees for K;
- J. That he will fund and support speech and language therapy for S;
- K. That he will fund and support therapeutic work for the mother as recommended by her General practitioner (available on medical insurance) (the father's solicitors have sent the mother's solicitors a list of therapists);
- L. That he will not remove the children from the mother's care save for periods of agreed contact.

Annex B: The mother's agreed undertakings

In the event that the children are ordered to be returned to USA, the mother agrees/undertakes:

- M. Not to remove them again without leave of the court or the father's agreement.
- N. To lodge the passports with the court.
- O. To the children spending reasonable time with the children but not every day or every Saturday, as this is likely to be highly disruptive and unmanageable. The mother is also concerned about the length of time the father seeks. The mother would ask that the handovers and the contact itself be supported by a third party and that the father undertake not to drink alcohol when the children are in his care or in the 24 hours prior to them being in his care.