



Neutral Citation Number: [2023] EWHC 2890 (Fam)

Case number: FD23P00324

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16<sup>th</sup> October 2023

**Before :**

**Deirdre Fottrell KC**

**Between :**

**K**

**Applicant**

**- and -**

**E**

**Respondent**

**Mr Mani Singh Basi** (instructed by Duncan Lewis Solicitors) for the **Applicant**  
**Mr Edward Bennett** (instructed by Freemans Solicitors) for the **Respondent**

Hearing dates: 5<sup>th</sup>-7<sup>th</sup> September 2023

**Judgment**

This judgment was handed down remotely at 10.30am on 16.11.2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Deirdre Fottrell KC (sitting as a Deputy High Court Judge)

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



## Introduction

1. In this application under the **Child Abduction and Custody Act 1985** (pursuant to the provisions of the Hague Convention on the Civil Aspects of Child Abduction) the Court is asked to order the summary return of D a girl aged 2 years. The applicant is the child's father ('F') represented by Mr Basi and the respondent is the child's mother ['M'], represented by Mr Bennett. The applicant is a German national and the respondent is a British national. The child holds dual German-British nationality.
2. On 23<sup>rd</sup> July 2022 the child travelled from her home in Germany to London with M. It is F's case that this was for the purposes of an agreed holiday of 4 weeks duration. M says that she was relocating with D to London with F's knowledge and consent.
3. This application was issued on 22<sup>nd</sup> May 2023. At that time F did not know the whereabouts of M and D who had been housed at an undisclosed address by Solace, an organisation which provides support to victims of domestic abuse. Mrs Justice Theis made a range of orders on 23<sup>rd</sup> June 2023 which led to M being located in London. A further hearing took place before Mr Cusworth KC on 14<sup>th</sup> July when it was listed for a final hearing on 5<sup>th</sup> September 2023. On 18<sup>th</sup> August 2023, Ms Justice Russell granted M's application to instruct Dr Lucja Kolkiewicz, to undertake a psychiatric assessment and to prepare a report under Part 25 FPR 2010 having concluded that such an assessment was necessary in respect of M's defence under Article 13 of the Convention.
4. M resists the F's application on the basis that (i) F consented to the removal to England with D (ii) there is a grave risk that the return order would expose D to physical or psychological harm which would place her in an intolerable situation, under Article 13(b) of the Convention.
5. In determining this application, I have had the benefit of reading the Court bundle which was prepared for this hearing, including the statements of evidence of the parties, the lengthy exhibits to those statements and the expert report of Dr Lucja Kolkiewicz.. I have also heard brief oral evidence of both parties on the question of consent and from Dr Kolkiewicz on the issue of M's mental health. I have read the comprehensive skeleton arguments, of Mr Basi and of Mr Bennett. I have also heard

oral submissions from counsel and I am very grateful to them for the way in which they have conducted this hearing. There has been a slight delay in my sending out this judgment owing to other commitments.

### **Factual Background**

6. The history is set out by each parent in their respective statements and in their oral evidence to the Court. F is a German national of Afghan heritage. He and M are distantly related to each other. Both parents were married previously. Both parents are educated professionals, F works as a medical professional and M is an engineer.
7. M was born in Afghanistan and she moved to England at the age of 9. She and her family left Afghanistan in difficult circumstances. They spent a period of time in a refugee camp and then moved to Saudi Arabia. Then she moved to the UK. At various times during her childhood, her father was absent for periods of time which was difficult for her.
8. M attended school and university in England, she qualified as an engineer, and eventually began work as a risk analyst. She is part of a close family who all live in England. She has a number of siblings who she says have provided her with support throughout her life. In around 2018 she had a short marriage about which I have no details but it ended in divorce.
9. F set out some detail about his own family and his background. Like M he and his family had fled Afghanistan in his childhood, and they had moved to Germany. He has achieved significant professional success and has a senior medical post alongside an academic appointment. F was clear that he had been fully involved with his older child and that, before his marriage to M, he was seeing her on alternate weekends.
10. The parties first met in 2012 at F's first wedding. – In 2019 they met again after F and M had each divorced and they began to communicate with each other by text and to speak regularly on the phone and they became close. This progressed to meeting in person on a monthly basis when F would travel to London to spend time with M. M experienced a certain amount of pressure from family members for the parties to marry and they did so in January 2020. A civil ceremony was planned for July 2020 but it did not take place owing to the COVID-19 pandemic.

11. M left her job and her family and she moved to a city in Germany on 10<sup>th</sup> July 2020 as she and F wanted to be together. She found the move to be a difficult one for a variety of reasons. She did not speak German and she had no ties there, no family and no friends. This was made all the more difficult by the isolation imposed by the pandemic. She struggled to get work in Germany.
12. She began therapy with a therapist based in the UK. The focus of the therapy was to support her anxiety around the move and she attended it weekly. She was clear in her evidence that she wanted the move to be a success but she encountered real challenges integrating herself into German society and she found it hard to settle. Eventually she enrolled at University to complete a masters and she continued to apply for jobs – unsuccessfully. She and F bought a dog.
13. Over time M became frustrated about her inability to get a job and the fact that this left her dependant on F for money and she says this became a source of some tension between them. It was also clear that the parents encountered a range of challenges in their own relationship. M claims that F used cannabis regularly which she says affected his mood and his behaviour and it made him difficult to live with, an allegation which F denies. The issues around money were exacerbated by the fact that M discovered F was paying off a fine arising from an incident where he had been convicted for assault.
14. There were also ongoing arguments between them about F’s involvement with his ex wife which was required because of their shared care of his older daughter. M found it difficult to manage her emotions around this issue and F says that M was jealous and could be unreasonable when he had to communicate with his ex-wife. F said that sometimes the jealousy came through in M’s attitude to his daughter which was generally hostile. F’s relationship with his ex-wife was fractious and at times they would argue and this was also a cause of tension between the parties.
15. There are significant factual disputes between the parents as to domestic abuse. It is M’s case that, at an early stage in the marriage, F was abusive and then violent to her. She says the marriage deteriorated because F’s attitude toward her changed and he was verbally abusive to her calling her a ‘*whore*’, because she had previously been married

and that he called her ‘*dumb*’. Further she claims that F would refer back to her first marriage and that he did this to shame her publicly about the fact that she had been intimate with another man. M also claims that as things got worse between them F forced himself on her sexually and that he was violent to her during sex. F denies these allegations.

16. F’s account of the marriage is different to that of M but he said there were issues early on between him and M around his relationship with his older child which caused tension. He had been travelling to see his child and to spend time with her at an apartment he rented in a city in Germany and he gave that up at M’s request and reduced his time with his older child. He is clear that he and M married out of choice and he denies that there was any cultural pressure to do so. F said he was not abusive to M. He said that there were lots of arguments later in the marriage, but that M was inclined to physically push him and he suggested that any physicality in arguments was mutual.
17. In January 2021, F’s daughter began to visit once a month and to stay for weekends. M took the opportunity of these visits to return to England to visit her family. She was clear that she was missing her family and she was not settling.
18. In May 2021, M discovered she was pregnant and she says that F was not pleased about this news when she told him. This led to an argument where it is alleged with F during which he kicked her so that she fell out of bed. It is M’s case that F became increasingly abusive to her during the pregnancy. In August 2021, M sent F a copy of the scan of the foetus with a message saying ‘*unfortunately for you, its still alive, maybe next time*’. There were more arguments about money during which there was verbal abuse of her by F and she claims that he continued to force her to have sex. F says he was excited about the pregnancy. Moreover, F says that M was settling in Germany and that she had friends there.
19. M continued to engage in therapy and in her evidence she stated that the focus of her therapy moved from being about supporting her to settle in Germany to helping her to manage her anxiety about F’s treatment of her and about her marriage. M also claims that F’s behaviour deteriorated so that by December 2021 when she was heavily pregnant there was an argument during which he pushed her and grabbed her by coat

and dragged her. At some point she fell on the ground and F spat at her. F denies that this happened. She makes further allegations of financial control including an occasion around that time when M was in the UK and she says F cancelled her bank cards. There was some acceptance of the latter by F in his own evidence.

20. F denied that there had been any financial control exerted by him over M. He said she had access to bank accounts and credit cards and he never sought to curtail that. He also told me that M had friends and was settling in Germany and that he thought she was not being honest now about her time there. He was clear that he loved M and that he wanted the marriage to work.

21. During this time M travelled to England with increasing frequency to spend time with her family, including a visit in the 8<sup>th</sup> month of her pregnancy. She returned to Germany shortly before D's birth and immediately after D was born her mother came to Germany to support her. Her mother returned to England in early February and then M travelled to England shortly thereafter and she stayed there until early March. It is notable that over this four month period M was very reliant on her family for support.

### **March 2022 Separation**

22. M says there was a significant argument between the parents on her return to Germany from England with D in March during which F was physically and verbally abusive. F agrees that the argument got out of hand but he denies being violent to her. A verbal argument between them began and it escalated and led to him taking D and running out of the room away from M, he says to protect her. M claims that she had injuries to her face and her finger because F attacked her and she has exhibited photographs of injuries. F has also provided photographs of injuries to his legs and back which he says he suffered in the melee. F provided a letter from a doctor whom he saw around that time which contains F's account of the incident as relayed to the doctor at the time. Whatever happened on that occasion it was sufficiently serious that it led to the M's family intervening to protect her. Both parents were clear that it was a very serious incident. M contacted her family and there was then a conversation between her brother and F during which the latter agreed to leave the family home.

23. The following morning M contacted the British consulate seeking advice and she reported that she had been the victim of domestic abuse. She asked for information about taking steps to protect herself. This led the consulate to call the police on her behalf and she was referred to a domestic abuse helpline. I have seen a note of M's conversation with the consulate.
24. M was then interviewed by the police and she gave a statement in which she made serious allegations that F had been violent to her. F returned to the home while the police were present and speaking to M. He packed his bags and left the home while they were there. M was then granted a restraining order against F by an administrative process. The police began an investigation of F for a physical assault on M. Her mother and her brother were sufficiently concerned about her wellbeing that they flew out to Germany to support her.
25. Her brother reached out to F and there were discussions which led to an agreement to reconcile. M says that she reluctantly agreed to this and that her family brokered an arrangement for F to return home when the restraining order expired. F then took M to visit a lawyer and M provided a statement to the lawyer for onward transmission to the police to say that the parties had reconciled and there were no issues which required further intervention or support. M says she was pressured by F to take that stance.
26. There is a letter from the lawyer, which states that the discussion took place in English and that '*she had expressly indicated her intention to exercise her right not to testify*'. The file memo from the lawyer states that M and F '*intended to live peacefully and harmoniously together with their daughter*'. I note that advice given to M by the lawyer was that signing the statement did not imply that statements she had given to the police '*might not have been untruthful*'. I note also that the lawyer who provided M with that advice and wrote the letter to the Court was described in police documents as F's '*defence*' attorney. She did not have any independent legal advice of her own at that time. When M was subsequently contacted by the police in early April 2022, she confirmed she did not wish to proceed with any complaint against or investigation of F.

27. After M and F had reconciled and he returned to the home, M met with children services in Germany which was an automatic consequence of the police referral. She was advised by them that if F had been violent to her she needed to bear in mind that he may be capable of hurting D. This was clearly worrying information for M and she says that it led her to reconsider her decision to resume her relationship with F. She became increasingly anxious about the possibility that he may hurt D or that she could be caught up in an argument between them.
28. M said that matters deteriorated in the weeks which followed and that in an argument around that time F shouted at her and told her he wished she was dead. F denies this.
29. M went to England again with D in early April and stayed with family for 23 days. For that trip she told me that she took a large duffle bags and two cabin bags. She said that she wanted to stay longer but that F came and he forced her to return to Germany. F says it was agreed that she would return around the 2<sup>nd</sup> May and F travelled to London to bring her and D back. In any event she went back to Germany where she says she was increasingly unhappy and unable to cope. Four weeks later she travelled to England again and stayed for 11 nights with her family.
30. In early July after she returned to Germany M and F went on a holiday together with N to Turkey. It was not a success and there were arguments between them. M says the trip was the final straw and that she knew her marriage was over. She says she could no longer tolerate the way that F was speaking to her and she was afraid that he might become violent toward her as he had done back in March.
31. F accepts that the holiday did not go well but he denies that the marriage had ended. After the holiday he says that M did tell him that she wanted to relocate to England as a family and she told him that she wanted a break. He said '*I made it clear to her that I did not agree to a relocation of the family because it needed a lot of consideration*'. He went on to explain he had commitments to his work and to his older child. He also said to her that he needed to investigate what qualifications he would need to relocate and that could take 2 or 3 years. He accepts that M began planning to go to London with D but he said that was only for a holiday.

### Removal to England

32. There was a dispute between the parties on their return to Germany because M wanted to apply for travel documents so that she and D could go to England, she says to relocate permanently. M was focused on what she called the '*practical*' elements of her move to England. M needed D's birth certificate and the parties' marriage certificate as she had lost her copies. M says that there were discussions about her and D returning to England to live and she says she told F again that the marriage was over. During one discussion she says that she told him that she could not '*do this anymore*' by which she meant stay with him and that she needed to leave him and to move back to England with D.
33. After this argument M also told me in written and oral evidence that she began openly to make arrangements to return permanently to England with D. She said the family had three large suitcases which she packed. But she said this was not enough for her to be able to pack all her belongings and those of D and so she asked F to buy her another suitcase which he did. M said in oral evidence that F was fully aware of what she was doing and that he knew that she was packing up all of the clothes. Once M packed these suitcases with her belongings and those of D on 21<sup>st</sup> July she sent them ahead of her to England. F paid for this with his credit card and he printed labels for her. F accepts that he did those things.
34. On 22<sup>nd</sup> July 2022 M says there was a discussion in which F asked her not to relocate to England with D. She was in the middle of packing her bags to travel. M told him again that she could not stay in the marriage and that she was leaving with D. There was an argument between them but later that day F gave M another suitcase to use and he told her that he would ship boxes to her after she left. M packed a further four bags, two large duffel bags and two smaller cases and she intended to take these on the plane with her. M says that she packed her gold but left less expensive jewellery. She packed up her books and her certificates into a box and F agreed to send those to her in London. On the day before she left F helped M to send belongings to England.
35. In oral evidence F was keen to emphasise that M had left many things including bottle sterilising equipment and winter clothes for D and for herself behind in the flat in Germany.

36. On 23<sup>rd</sup> July M travelled to England on a one way ticket. She did not have a return flight booked. In oral evidence she told me that sometimes in the past she had travelled on a one way ticket and sometimes she had a return but on this occasion she and F both knew that she was not coming back and neither was D.
37. She was clear in her oral evidence that in conversations in the days leading up to 23<sup>rd</sup> July that she had told F that she was returning to England with D to live there permanently and that F had agreed to that. He drove her to the airport, she said that he was upset in the car but he did not at any point say that she could not go or that she could not take D with her. He told me that driving her to the airport did not indicate that he was saying goodbye to her but he was ‘sad’ and ‘*worried as a loving father and husband*’.
38. When M was going through security she and D were stopped and she was asked to provide a letter from F to indicate he consented to the travel. She phoned F and he spoke to the immigration officers. In that call F said that he had agreed to his daughter going to England with M for a two week holiday.
39. In oral evidence F was challenged about the amount of luggage taken by M and in particular that it was obvious that in taking 7 bags in all that she was moving home to London with D. F maintained that M had a tendency to overpack. Mr Bennett also challenged him about the assistance he provided to her in the days before she travelled by ordering boxes, printing labels and helping her to find another suitcase. F said this was not unusual and he was simply trying to help her get ready for her holiday. He agreed that he had said he would send a box after M and Mr Bennett suggested to him that this evidenced his awareness and agreement to the relocation. He insisted that it was not unusual for M to take a lot of luggage and he was adamant that he did not consent to her a permanent relocation of D to London.
40. In his statement he sets out that M did not tell him she was leaving to return to England permanently with D and that had she done so he would not have agreed to it. He said they discussed her returning to England ‘*for the summer*’ and that she had initially said 4 weeks and then said that she wanted to stay until December. F said he told her she had to return in 4 weeks and she said to him ‘*we will see*’. F says there was no

discussion about divorce and that he was very clear about the expectation that D would be brought back in 4 weeks.

**July 2022-May2023**

41. M told me in evidence that when she arrived in England she felt an enormous sense of relief to be back with her family. She initially stayed with her parents at their home for some months and at a later stage she moved out to a home which was provided to her by Solace.
42. On 16<sup>th</sup> August F went to a psychiatrist because he was suffering from a depressive episode and a letter from the psychiatrist states that the father developed the episode *“as a reaction to the fact that his wife had left him 4 weeks earlier and moved to London to live with her parents, thus depriving him of his 1 year old daughter. The separation was preceded by a domestic dispute in which both spouses hit each other, which the wife had documented with the police in order to be able to blackmail him”*. This letter would appear to suggest that F was aware in early August that M and D had relocated to England. When challenged in cross examination by Mr Bennett he said that perhaps the letter had been mistranslated. But the Court must give contents of the letter its ordinary meaning, namely that at the time he went to his GP he knew that M and D had moved to London to live.
43. It goes on to refer to the fact that F had been trying *‘without success to resume the dialogue with his wife by sending her conciliatory messages and transferring money to her with the aim of continuing the marriage, especially since the family had given him reason to hope’*. That chimes with F’s own evidence that even though M considered the marriage was over he was keen to try to resolve issues and he worked with M’s male family members to do so. It is also consistent with the text messages that F sent her over the summer and into the Autumn of 2022.
44. I have been provided with extensive messages by F between him and M after her departure. The traffic appears to be one way from him to her and there is relatively little dialogue between them. On 27<sup>th</sup> August, F messaged M to say he had spoken to an elder from his community and suggested that M should speak to him also. On 26<sup>th</sup> September, F messaged M stating that *‘I know you don’t want to hear anything from me...’* He went on *‘I left you alone the first weeks after you left because of what I*

*want and what is important to me. I do want to share this with you*'. These messages are not consistent with F having an understanding that M was on holiday or that he had an expectation that she was to return after 4 weeks.

45. It was almost three months after M had gone to London when F first made the allegation that she had overstayed. On 17<sup>th</sup> October 2022 F messaged M asking to see D and he referred to the fact that M had *'planned initially 4 weeks, now its almost three months'*. This appears to be the first occasion on which F made this assertion to M. I note that they were not speaking to each other by phone or by any other means. He repeated it again on 26<sup>th</sup> October when he sent M a message in which he referred to discussions with the mother's brother in which the latter had suggested that M might return to Germany with D in December. F stated *'that will be almost 5 months away from home (initially planned 4 weeks)'*.

46. F continued to communicate with M right through until May 2023 but he did not repeat that assertion. F was often pleading with M to allow him to see D. He was distressed at being cut off from her and M provided him with no information about her. He expressed remorse for his part in the break down of the marriage. Mr Bennett draws the Court's attention to the fact that at no point did F request that his daughter is returned nor did he assert before 17<sup>th</sup> October that she had been expected back in mid August.

47. I have also been provided with a tranche of recordings between F and the mother's brother. The focus of these messages is on reconciliation. In March 2023 he travelled to Germany to discuss reconciliation with the father and acted as a sort of mediator.

48. There are also messages between the parents in law which are of a similar nature. What is notable about the former is that they are in particular a significant number of messages recorded by F in which he sets out his thoughts about M. There are messages in which he refers to her returning to live with him in Germany. It may be significant that at no point does he suggest that M has taken D from him without his agreement. While he was keen for M to return it is not apparent from the recordings that he had expected her to do so or that she had told him that she would and then reneged on that which is what he now asserts.

## **Expert Evidence**

49. Dr Lucja Kolkiewicz is a Consultant Forensic Rehabilitation Psychiatrist with vast experience as set out in detail in her report. She undertook a comprehensive assessment of the mother and she attended Court to be cross examined.
50. In summary, her opinion is that M suffers from a Recurrent Depressive Disorder which was characterised by periods of depression lasting between three and twelve months. It was her opinion on reviewing M's medical notes that she had experienced at least four episodes of depression since 2012 with recovery between those episodes. In her opinion M had a current diagnosis of a Severe Depressive Episode without psychotic symptoms which dated back to 2022 when she returned to the UK.
51. It was consistent with this diagnosis in her opinion that M was only able to manage her day-to-day functioning because she had a great deal of support from her family. She also required that support to meet D's needs. It was also the opinion of Dr Kolkiewicz that M had a diagnosis of PTSD as a consequence of her *'experiencing a stressful long lasting situation of a threatening nature which is likely to cause pervasive distress in almost anyone, who had the continued psychological , verbal and physical abuse she described taking place in her marriage'*.
52. Dr Kolkiewicz noted that M had a number of factors which predisposed her to mental disorders. These includes her having survived conflict in her home country, living in a refugee camp, separation from her father owing to his political activities, cultural dislocation in childhood. It also included the significant loss of support occasioned by her move to Germany to live with F and it had the additional impact of removing her ability to work which increased her isolation during the COVID 19 pandemic. Dr Kolkiewicz also referenced the domestic abuse that M has suffered as an additional factor.
53. In respect of treatment and prognosis she was clear that this needed to be addressed in a staged way. It was most urgent that M received therapeutic input and support for the recurrent severe depressive episode that she was experiencing. This was a priority because M would not be able to engage in any therapeutic work in respect of PTSD

until that was properly and fully addressed. Dr Kolkiewicz was clear that M may need medication for her depression which could be overseen by her GP.

54. It was her opinion that M was likely to require this intervention for her symptoms to resolve for at least 6 months before she could be considered to be in remission. At that stage or some time before it M could possibly begin psychological therapies for her Depression and then possibly for her PTSD. There are a range of effective therapies including Trauma focussed CBT and EmDR. M was also like to require therapy for relapse prevention of her Depressive Disorder. At the conclusion of these therapies M could show an improvement in respect of both her PTSD and her Depressive Disorder.
55. Dr Kolkiewicz described this as an acute phase of treatment which was required by the severity of M's Depression and she advised that it would take between 6 and 12 months.
56. It was only at that point that M could properly be expected to resume full responsibility for her day-to-day care of D and for her own social engagement without requiring the high levels of family support that she does at present.
57. Dr Kolkiewicz was clear that M's functioning was currently severely impacted by her disabling symptoms of depression. The severity of her symptoms impaired her day-to-day functioning including her parenting, to that extent that she is currently unable to accompany D to Germany unsupported, if an order for return was made.
58. She was also clear that there is a '*increased risk*' of the severity of M's mental illness worsening if she is returned to Germany before she has achieved full remission from her illness with an '*increased risk of suicide*' because she will feel a vulnerability to the threat of domestic abuse especially if she is without the immediate support of her family.
59. Were M to return to Germany without receiving the specialist psychiatric treatment she requires and without the extensive support she has from her immediate family, she would be '*at very high risk of psychiatric admission and her suicide risk would be high*'. She went on to explain that M could feel an increased vulnerability to domestic abuse from F if she were placed in an environment of close geographical proximity to F especially if she were lacking immediate family support.

60. In oral evidence Dr Kolkiewicz explained that it was not easy to treat M's two diagnosis concurrently and she was clear that it would take 6-12 months to treat her depression with a perhaps a longer time for treatment of her PTSD. A return to Germany before treating the depression would leave her vulnerable because of the severity of the depression. She also noted that the risk of relapse was high if she was to return to Germany before she had completed the treatment for both disorders because psychological intervention had as its focus the prevention of relapse. If the move were to happen now or in the immediate future M would find it very difficult and she would be at high risk of suicide.
61. She noted also that there was a risk to any child in her care if she were forced to return to Germany because she would struggle to engage with the child if she did not get the right treatment or the time to respond to the treatment. She needed to engage with it and it needed to be completed. She was currently receiving a lot of input from her family. She noted also that were D to return to Germany without her that there was a high risk of her depressive disorder worsening and it remained high which could mean that M would not be available to D.
62. In answering questions from Mr Basi on behalf of F she reiterated that there were a number of features of M's presentation which impacted on her depression. Domestic abuse was one predisposing factor as was her lack of support in Germany but also her own early life experiences in a refugee camp and being separated from her father for periods of time. Dr Kolkiewicz was clear in answer to questions that a key element of the treatment plan while M undergoes treatment is to have family support and that could not be easily replicated in Germany. It was a factor on which she placed some importance. She warned that if M became overwhelmed by events in the early stages of her treatment such as would occur with a return to Germany or separation from D then she could be at risk of worsening depression and inpatient admission. She could become suicidal which would make it harder for her to respond to the treatment because of the presence of what she terms 'additional stressors'. She was also very clear that M did not have the '*resilience*' at present to deal with the necessary treatment for PTSD and she could only do so when she was in remission.

76. Dr Kolkiewicz also set out in her report an overview of M's medical history which she read in her detailed notes. M required intervention by way of counselling as early as 2012 when she was in her early 20's. Around the same time, she was referred for CBT and she was reported to be struggling with depression. A year later she was prescribed temazepam for sleep issues which seem to be related to an abusive incident involving a stranger. In 2015 she was again noted to be depressed, suffering from insomnia and having a range of issues which led to a further prescription for diazepam and she was warned to contact her GP if she had any suicidal thoughts. She had low mood again later in 2015. In 2016 her father went to see her GP with some concerns about her. She was referred to a psychologist in 2017. In January 2020 around the time she married F she visited her GP reporting panic attacks and anxiety and was referred again for support. In January 2023 M was reported to have a range of symptoms which were indicative of PTSD and the CBT therapist to whom she was referred noted that she agreed that '*this is not the right time for trauma work and reliving*'. As a result of this M was referred to Solace who assisted her to find accommodation. She was also seen again in April 2023 and was reported to be easily overwhelmed.

63. Dr Kolkiewicz told the Court the history was significant because it pointed to an underlying vulnerability which had not been addressed. She was clear however that M's current severe depressive illness and her PTSD were of a more serious nature than anything in her history.

### The Law

64. Both Counsel provided me with lengthy skeleton arguments setting out the law which is well known, in respect of the various defences and other aspects of the Convention. I am grateful to them and I take much of the summary of the law below from their documents.

### *Consent*

65. Consent is a fact specific exception to return which must be proven by the person asserting it. The consent must be to the relocation and it must be real and unequivocal. It cannot be based on any misunderstanding or confusion. Although it can be inferred as per **Re M (Abduction: Consent: Acquiescence) [1999] 1FLR 171.**

66. In **PJ (Children)(Abduction:Consent) [2010] 1 WLR 1237** Ward LJ summarised the position as follows at paragraph 48

*‘1. Consent to the removal must be clear and unequivocal.*

*8. The inquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case.*

*9. The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?’*

67. In **G (children) [2021] EWCA Civ 139; [2021] 2 WLR 1013**, Peter Jackson LJ reviewed the case law and summarised the position at paragraphs 24 – 26 as follows:

*“24 Consent is an exception that is infrequently pleaded and still less frequently proved. The applicable principles were considered by this court in *In re P-J (Children) (Abduction: Consent)* [\[2010\] 1 WLR 1237](#), drawing on the decisions in *In re M (Abduction) (Consent: Acquiescence)* [\[1999\] 1 FLR 171](#) (Wall J); *In re C (Abduction: Consent)* [\[1996\] 1 FLR 414](#) (Holman J); *In re K (Abduction: Consent)* [\[1997\] 2 FLR 212](#) (Hale J); and *In re L (Abduction: Future Consent)* [\[2008\] 1 FLR 914](#) (Bodey J). Other decisions of note are *C v H (Abduction: Consent)* [\[2010\] 1 FLR 225](#) (Munby J); and *A v T (Abduction: Consent)* [\[2012\] 2 FLR 1333](#) (Baker J).*

*25 The position can be summarised in this way:*

*(1) The removing parent must prove consent to the civil standard. The inquiry is fact-specific and the ultimate question is: had the remaining parent clearly and unequivocally consented to the removal?*

*(2) The presence or absence of consent must be viewed in the context of the common sense realities of family life and family breakdown, and not in the context of the law of contract. The court will focus on the reality of the family’s situation and consider all the circumstances in making its assessment. A primary focus is likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been given, and consequently an indicator of whether consent had in fact been given.*

*(3) Consent must be clear and unequivocal but it does not have to be given in writing or in any particular terms. It may be manifested by words and/or inferred from conduct.*

*(4) A person may consent with the gravest reservations, but that does not render the consent invalid if the evidence is otherwise sufficient to establish it.*

*(5) Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties.*

*(6) Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid.*

*(7) Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time or upon the happening of an event that can be objectively verified by both parties. To be valid, such consent must still be operative at the time of the removal.*

*(8) Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.*

*(9) The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective.*

*26 All of these matters are well-established, with the exception of the last point, which did not arise for consideration in the reported cases. As to that, there are compelling reasons why the removing parent must be aware of whether or not consent exists. The first is that as a matter of ordinary language the word “consent” denotes the giving of permission to another person to do something. For the permission to be meaningful, it must be made known. This natural reading is reinforced by the fact that consent appears in the Convention as a verb (“avait consenti/had consented”): what is required is an act or actions and not just an internal state of mind. But it is at the practical level that the need for communication is most obvious. Parties make important decisions based on the understanding that they have a consent to relocate on which they can safely rely. It would make a mockery of the Convention if the permission on which the removing parent had depended could be subsequently invalidated by an undisclosed change of heart on the part of the other parent, particularly as the result for the children would then be a mandatory return. Such an arbitrary consequence would be flatly contrary to the Convention’s purpose of protecting children from the harmful effects of wrongful removal, and it would also be manifestly unfair to the removing parent and the children.”*

**Article 13(b)**

68. Article 13 of the Convention provides that the Court is not bound to return a child if -  
*b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”*

69. The leading cases in which the Supreme Court has set out guidance on how interpret and apply the Article 13 (b) exception are **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.**

70. In paragraph 42 of Re S the Court reiterated that:

*“the terms of Art 13(b) are plain, require neither elaboration nor gloss and by themselves demonstrate the restricted availability of the defence and where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation; if so, the court must then ask how the child can be protected from that risk; if the evaluation of the protective measures fails to meet the identified grave risk, the court may have to do the best it can to resolve the disputed issues of fact”.*

71. Mr Justice MacDonald summarised the approach from those two cases in **MB v TB [2019] EWHC 1019 (Fam)** at paragraph 31;

*“The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in Re E (Children)(Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144. The applicable principles may be summarised as follows:*

*i. There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.*

*ii. The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process*

*iii. The risk to the child must be ‘grave’. It is not enough for the risk to be ‘real’. It must have reached such a level of seriousness that it can be characterised as ‘grave’. Although ‘grave’ characterises the risk rather than the harm, there is in ordinary language a link between the two.*

iv. *The words ‘physical or psychological harm’ are not qualified but do gain colour from the alternative ‘or otherwise’ placed ‘in an intolerable situation’. ‘Intolerable’ is a strong word, but when applied to a child must mean ‘situation which this particular child in these particular circumstances should not be expected to tolerate’*

v. *Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child’s immediate future because the need for protection may persist*

vi. *Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child’s situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).*

*[32] The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures.*

72. In **Re A (Children) (Abduction Article 13(b)) 2021 EWCA Civ 939, 2021 4.W.L.R. 99**, Moylan LJ noted as follows:

*In the Guide to Good Practice, at para 40, it is suggested that the court should first “consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk” before then determining, if they could, whether the grave risk exception is established by reference to all circumstances of the case. In analysing whether the allegations are of sufficient detail and substance, the judge will have to consider whether, to adopt what Black LJ said in In re K, “the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an article13(b)risk”. In making this determination, and to explain what I meant in In re C, I would endorse what MacDonald J said in Uhd vMcKay [2019]EWHC1239(Fam);[2019]2FLR1159,para7, namely that “the assumptions made by the court with respect to the maximum level of risk must be reasoned and reasonable assumptions” (my emphasis). If they are not “reasoned and reasonable”, I would suggest that the court can confidently discount the possibility that they give rise to an Article 13(b)risk”*

77. It is clear also from Re E that in determining whether the Article 13(b) exception is made out it is not for this Court to engage in a fact finding exercise. In keeping with the summary nature of the Hague process the court must evaluate the evidence by assuming the risk of harm at its highest and if it meets the risk in Article 13 (b) the Court should go on to consider whether protective measures can meet that risk.

78. Where a party has raised both domestic abuse and mental health issues, the court should look at the allegations cumulatively and not independent of each other. In **In re B (Children) [2022] 3 WLR 1315, Moylan LJ said at 70:**

*“[70] The authorities make clear that the court is evaluating whether there is a grave risk based on the allegations relied on by the taking parent as a whole, not individually. There may, of course, be distinct strands which have to be analysed separately but the court must not overlook the need to consider the cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk(s) that might potentially be established as well as the protective measures available to address such risk(s).”*

73. Mr Basi submitted that the Court could delay the return of the child to Germany based on the possibility of a stabilisation of M’s mental health with some intervention. Mr Bennett signposts the Court to the recent decision of **Re S (A Child: Abduction:**

**Article 13(B): Mental Health) (Rev1) [2023] EWCA Civ 208** and the observations of Moylan LJ at 109:

*109...There was a suggestion that, if this was the only issue, it would be appropriate to wait for this to occur. I do not accept that for two reasons. First, the jurisdiction under the 1980 Convention is not a continuing jurisdiction but one which requires a summary decision to be made on the evidence at the date of the hearing. It is not a “wait and see” jurisdiction. Secondly, the evidence was that it was “impossible” to predict when this might occur “because mental health is not linear and improvement is not linear”. In those circumstances, there would be no justification in adjourning the proceedings and even less in making some sort of deferred order”.*

### **Protective Measures**

75. Mr Basi reminds me that I must have regard to protective measures and he directs my attention to the decision of Mostyn J who described it in **B v B [2014] EWHC 1804 (Fam)** as follows:

*‘[2] The Hague Convention of 1980 is arguably the most successful ever international treaty and it has over 90 subscribers to it, over half the countries in the world. The underlying and central foundation of the Convention is that, where a child has been unilaterally removed from the land of her habitual residence in breach of someone’s rights of custody, then she should be swiftly returned to that country for the courts of that country to decide on her long-term future.*

*[3] There are very few exceptions to this and the exceptions that do exist have to be interpreted very narrowly in order that the central premise of the Convention is not fatally undermined. It is important to understand what the Convention does not do. The Convention does not order a child who has been removed in the circumstances I have described to live with anybody. The Convention does not provide that the parent who is left behind should, on the return of the child, have contact or access in any particular way. The Convention does not provide that, when an order for return to the child’s homeland is made, the child should stay there indefinitely. All the Convention provides is that the child should be returned for the specific purpose and limited period to enable the court of her homeland to decide on her long-term future. That is all it decides’.*

## Discretion

79. Where one of the Article 13 exceptions is made out, the court has a discretion whether or not to order the child's summary return. The leading case remains **M and Another (Children) (Abduction: Rights of Custody) [2007] UKHL 55; [2008] 1 AC 1288.**

The headnote states:

*“That when exercising the discretion under the Convention there were general policy considerations, such as the swift return of abducted children, comity between contracting states and the deterrence of abduction, which might be weighed against the interests of the child in the individual case; that the Convention discretion was at large and the court was 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; that the weight to be given to the Convention considerations and to the interests of the child would vary enormously, as would the extent to which it would be appropriate to investigate such other welfare considerations; that it did not necessarily follow that the Convention objectives should always be given any more weight than any other consideration; and that the further away one got from the speedy return envisaged by the Convention the less weighty those general Convention objectives must be, since the major objective of the Convention could not be met.*

## Discussion

### Consent

80. It is clear that the marriage was in real difficulty by July 2022 and that both parties shared that view. F cannot have been unaware of M's unhappiness and her need for the support of her family in the months before and after the birth of D. She was in the UK immediately before D's birth. In the 6 months after D's birth M travelled to the UK on three occasions including for a long stay of 23 days. Further her family came to stay with her twice. Her need for support must have been obvious to F. Both parties agree that to some extent the marriage did not stabilise again after the separation in March 2022.

81. After the holiday in Turkey M was clear that she wanted to return home to England with D and on both parties' accounts she told F that the marriage was over. It is

apparent from the evidence of both parties that she made plans to remove D and she did so openly so that F was aware. I prefer M's evidence as to these conversations, in part because F had a tendency to minimise the severity of the marital discord but also because M's account is consistent with the actions taken by both parties at the time. Mr Bennett submits that the following facts support the view that F knew what she was doing and he consented to it:

- i. M began by looking for travel documents.
- ii. She packed up three full suitcases of clothing for her and for N – more than she would need for four weeks.
- iii. She shipped that luggage with F's assistance including his printing labels for her.
- iv. She then asked F to buy another case and she packed four further bags.
- v. Separately she packed her certificates and books and asked F to ship them which he agreed to do.
- vi. She bought a one way ticket for her and D.

82. While it is suggested by F that M had a tendency to overpack and that I can infer nothing from that, I disagree and I consider the nature and volume of it was significant. As was the fact that it took place with F's oversight and involvement. There was a high level of activity over a few days when belongings were packed and shipped by M. I note that she had only taken two cases to London in May 2022 when she went for 23 days (a holiday which she thought was indefinite) where as on this occasion she packed 7 pieces of luggage, some of which she shipped in advance and she packed up a box to be sent on to her. On any view the amount of luggage which M packed and then shipped was more than she would need for a 2 or a 4 week holiday. It was more than she had previously packed for a similar trip. Further it seems to me that this exercise was of an obviously different character because she was also shipping over books and her certificates, which she had brought to Germany when she relocated.

83. Nothing about M's actions at the time was clandestine. It was all done in the open and this was consistent with her account that she told F she was leaving and he consented to her taking D. She told F on the holiday that the marriage was over and she wanted to go back to London. She began to action that immediately on her return. Further and of more relevance is the fact that F was fully aware of the packing, the labelling of

boxes and agreed to send material to her after she left. F's conduct around all of M's packing and planning suggested that he agreed to her removing D to live in London. By his actions F was facilitating and assisting M to make the practical arrangements to allow her to remove D to London.

84. There was significant texting and whatsapp messaging between the parents at this time. It was all practical and focused on the move. It is also relevant that M bought a one way ticket but I note that was not the first time she had done that. However, I do consider it significant that in the weeks after M had travelled to London, and in particular when four weeks had passed, that being the point at which he had expected her return, F did not travel to London, as he had done in May 2022 to escort her and D back to Germany. That seems to support the view that he was not expecting her to return.

85. But perhaps the two most compelling pieces of evidence, which support the conclusion that he had given his consent, come from F himself. The conversation with his psychiatrist on 16<sup>th</sup> August 2022, 3 weeks after M had removed D to London made clear that he was aware that his wife had left him and taken his daughter to live in London. He told his psychiatrist that he was finding it hard to cope. That was not consistent with an agreement or expectation that they would return in 4 weeks. At that point what he now says was the deadline for her return had not yet passed. That strikes me as an important piece of evidence from F himself which suggests that he knew when M removed D that she was doing so to move to London and he had agreed to it, perhaps reluctantly.

86. Further it was not until 17<sup>th</sup> October 2022, some three months after she had moved that F first suggested that she had overstayed and in particular that he had only agreed to D having a 4 week stay. Had F really only consented to a 4 week stay it is inexplicable that he would not have communicated this to M after 4 weeks or sometime soon thereafter.

87. Mr Basi submits that the reason F did not communicate that to M earlier was because he was trying to reconcile with her and to mediate via her family members. While I accept from the evidence he provided that F was seeking to reconcile with M between August 2022 and March 2023, that seems to me to support M's case that when she left

Germany in July 2022 with D to return to London she was clear that she was leaving F and the marriage was over rather than merely going on holidays. The fact that he made efforts to reconcile does not point to an absence of consent as is suggested. His wish to reconcile with her and repair his marriage after she and D were in London points away from the suggestion that M had merely gone on her holidays for 4 weeks. Indeed it is clear from his conversation with his psychiatrist in mid August that he knew M and D had left and gone to live in London but he was still holding a desire to reconcile.

88. I have also heard the evidence of both parties about the discussions which they had in the days leading up to 23<sup>rd</sup> July 2022. I accept M's account that she told F that she was moving back to London with F and although reluctant he gave his consent for her to do so with D. The actions of both parties are consistent with that evidence and I therefore conclude that F did give consent to M to remove D to England in July 2022 in which case there was no wrongful removal of this child from Germany

#### **Article 13(b)**

89. I also find that M's defence under Article 13(b) is made out in this case. I am satisfied having reviewed all of the written and oral evidence, that there is a grave risk that the return order would expose D to physical or psychological harm which would place her in an intolerable situation, in keeping with Article 13(b) of the Convention.

90. It is not the role of the English Court to determine the disputed facts between the parents as to the allegations of domestic abuse but I must approach M's evidence on this issue at its highest. In this case there is also compelling and stark evidence as to M's current mental ill health. The Court must factor that and its potential risk to D were the Court to order a return of D to Germany.

91. The evidence of Dr Kolkiewicz as to diagnosis and prognosis of M's conditions are of particular importance in this case in assessing the gravity of the risk that D would be placed in an intolerable situation were the Court to order her return. She has provided a stark picture of the nature and the seriousness of M's mental ill health and I attach particular weight to her evidence. The following is of some relevance:

- i. Her diagnosis of M's current mental ill health is that she has a severe depression and is suffering from PTSD. These two disorders cannot be treated at the same time and the depression must be treated first.
- ii. She requires urgent medical intervention by way of medication and talk therapy to treat her depression.
- iii. She would expect that M could show improvement in about 6 months so that she could begin treatment for PTSD but that the latter may require more time. She may be in remission from both within 12 months.
- iv. M required the support of family day-to-day both for her own sake and to enable her to care for D.
- v. While M goes through her treatment she will require the support of her family and indeed she is unlikely to respond positively to the treatment away from her family.
- vi. M was at high risk of a deterioration in her mental health were the court to order that D return to Germany such that she might require hospital admission and she may experience suicidal ideation.
- vii. The risk of a deterioration in her mental health was similar if M returned to Germany with D.
- viii. Dr Kolkiewicz was clear that M did not have the resilience to return to Germany owing to her mental ill health.

92. When asked in oral evidence about the consequence of any deterioration in M's mental health for D she said it would be detrimental because it would affect the care she could give to her child and it would impact on D psychologically. This could be worsened if M was hospitalised. In assessing the nature of the risk to D under Article 13(b) it is highly relevant that Dr Kolkiewicz's evidence was that the risk of deterioration of M's illness is real and it must be carefully managed. That is in the context of M's current depression being so severe.

93. When Dr Kolkiewicz was cross examined by Mr Basi she was clear that the risk could not be ameliorated by the provision of medical care in Germany. M was likely to be incapable of managing her own mental ill health if she had to return to Germany and

that this ran the likely risk of a deterioration of a potentially severe nature. If D returned to Germany without M, this would have a similar impact on M's mental ill health in England. She did not consider the existence of good medical care in Germany to be a factor which would reduce the risk in circumstances where the very fact of returning to Germany would be likely to cause a deterioration.

94. There is a real risk that M could be subject to a serious psychiatric decline were she to be required to return to Germany or if she were to be separated from D because the latter was returning to Germany. I cannot ignore Dr Kolkiewicz's evidence to me that return to Germany for M carries such a high risk of a deterioration in her mental health. Further the loss of the day-to-day support of her family on which she is very reliant both for herself and for D could increase the risk of that deterioration being more severe. Separation from her family would exacerbate her mental ill health and impede any recovery from it. She would also experience the social isolation as a result of not speaking the language and not working. She would be living on her own. There is a risk of hospitalisation identified by Dr Kolkiewicz.
95. The grave risk to D arises were the mother to become incapable of caring her. In my assessment that is a serious and significant risk to D. It could be both a short term risk as to impact if she was removed from her and a longer term risk of M's health on separation deteriorates in the way which Dr Kolkiewicz anticipates so that the separation is for an indefinite period of time.
96. This is a very young infant whose entire life has been spent in the care of her mother. Her mother has been able in recent months to continue to care for D with the support of her family and that is to D's benefit. It would be intolerable for her to return to a strange environment without her mother (if her mother remains in England) or to do so in circumstances which carry a grave risk that her mother's mental health could effectively collapse leading to a separation from her mother which could be of many months duration.
97. Mr Basi made the submission that the Court could order D's return on her own if M either choses to remain in the UK or if her mental health difficulties are such that she has to remain in the UK. Firstly on the evidence of Dr Kolkiewicz it seems wrong to

characterise M as making a choice. She is as I understand it, incapable of returning to Germany because she is too unwell and to use Dr Kolkiewicz's phrase she lacks the 'resilience' from a mental health perspective.

98. But I also do not accept Mr Basi's submission that this could be reduced or managed if D was returned to Germany to live with F. It would be an enormously confusing and intolerable situation for this child given her lived experiences thus far to be separated from M and returned to Germany to be with F in circumstances where it would not be clear when or if she would return to the care of M. I pressed Mr Basi on whether his client was pursuing that suggestion and he confirmed to me that F was inviting the Court to order D's return with or without her mother. By his own admission F has never had the day-to-day care of D. He has seen her once in 15 months. This is an unattractive proposal which rather than manage or ameliorate the grave risk to D of harm, it would in fact increase it.

99. Mr Basi also submitted to the Court that there could be a delayed return order to allow M to begin her treatment before she returned in the hope of improvement at some point which would allow an order to take effect. Further he suggested that M could receive adequate care in Germany to treat her mental ill health and that her family could visit or stay with her to provide her with support. The Court cannot accept that those proposals meet the risk in this case. The prognosis of Dr Kolkiewicz is that M's recovery could take 6-12 months at least and there is no guarantee that it can happen in that timescale.

100. I must consider whether the grave risk of harm can be managed or reduced by any protective measures. In his helpful document, Mr Basi sets out the following which are aimed in part at addressing her mental health difficulties:

- i. F has previously funded M's online therapy and will do so again.
- ii. F will fund her flight and that of D.
- iii. F will not contact her or initiate any criminal or civil action in Germany.
- iv. He will move out of the family home to allow her to move in or assist her to rent a property the location of which can be confidential.
- v. He will financially support her.

- vi. He will not remove D from her care .
- vii. He will collect D from the UK if necessary.

101. The protective measures do not address the nature of the risk, if I accept the evidence of Dr Kolkiewicz, which I do. The very fact of a return to Germany is something I am advised M could not manage and she is not sufficiently resilient to be return. As noted above being in close proximity to F would be potentially triggering for her according to Dr Kolkiewicz given the domestic abuse which she has suffered which has caused her to have PTSD. Returning to the home or in the alternative being in another flat would increase her isolation socially in circumstances where she is not working and does not have a support network. Being away from her own support network and her family is something she simply cannot manage at present. F suggests that her family could travel over and back to support her but I do not consider this to be a realistic that her members of her family could simply relocate for an indefinite period of time to Germany. M requires that support while undertaking the urgent medical interventions she needs.

102. Any one of these factors are likely to lead to more severe mental ill health but taken cumulatively they simply do not address the grave risk to D. Moreover Dr Kolkiewicz accepted that the nature and extent of a deterioration in M's mental health were she to return to Germany with D could not be predicted but she considered it likely that it would deteriorate beyond its current level and it was for that reason that she reached the view that M could not return to Germany at this time. I accept that evidence.

103. Further it is the clear opinion of Dr Kolkiewicz that M requires medical treatment now to stabilise her mental health and that she cannot return to Germany. I am also required to follow the guidance of Lord Justice Moylan in the case of **Re S (supra)** in which he made clear that it would not be appropriate for a Court to take such an approach which delayed the return of the child in Hague case to allow M to have treatment or to review that treatment at some point in the future. The Court is concerned with the evidence as it is at the time of the hearing because the jurisdiction is not a continuing one.

104. It will be clear from the foregoing that I have reached the conclusion that M's case is made out in respect of Article 13(b).

### **Discretion**

105. If I am wrong as to consent then I am required to consider whether it is appropriate not to order the return a child who has been wrongfully removed to Germany. I am satisfied that the expert evidence as the nature and the extent of M's mental ill health is such that it would not be appropriate to require M to return to Germany with D. For the reasons set out in this judgment this is a case where the separation of the child from her mother would in all of the circumstances expose her to grave risk of harm.

106. Therefore I have reached the conclusion that I should not make the return order.

107. It therefore follows that F's application for D's summary return to Germany is dismissed.

DFKC

16<sup>th</sup> October 2023