



Neutral Citation Number: [2020] EWHC 1857 (Fam)

Case No: FD20P00218

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

Sitting Remotely

Date: 14/07/2020

**Before:**

**THE HONOURABLE MR JUSTICE MACDONALD**

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**Between:**

**Z**  
**- and -**  
**D**

**Applicant**

**Respondent**

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**Ms Katy Chokowry** (instructed by **Best Solicitors**) for the **Applicant**  
**Mr Edward Bennett** (instructed by **Dawson Cornwell**) for the **Respondent**

Hearing dates: 9 and 10 July 2020  
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**Approved Judgment**

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

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**Mr Justice MacDonald:**

**INTRODUCTION**

1. In this matter I am concerned with an application in respect of F, a child born in 2008 and now nearly 12 years old. The applicant is the mother of F, Z, represented by Ms Katy Chokowry of counsel. The respondent is the father of F, D, represented by Mr Edward Bennett of counsel. Both parents and F are Brazilian nationals.
2. The mother's application is made under the Child Abduction and Custody Act 1985 for a summary return order pursuant to the provisions of the 1980 Hague Convention. The application is resisted by the father on the grounds that (a) there is a grave risk that a return order would expose F to physical or psychological harm for the purposes of Art 13b of the 1980 Convention and (b) that F objects to returning to Brazil for the purposes of Art 13 of the 1980 Convention.
3. In determining this application, I have had the benefit of hearing oral evidence from the Cafcass Officer with respect to F's account of her life in Brazil and her objection to returning to that jurisdiction and the extremely comprehensive written and oral submissions of Ms Chokowry and Mr Bennett.

**BACKGROUND**

4. The parents met in Brazil in 2007 and commenced cohabiting in 2008. Prior to the birth of F the father moved to England for work. The parties were married in 2011 and the father remained in England by reason of his job. He states that he has indefinite leave to remain in the UK. Whilst the parties intended to apply for a spousal visa for the mother, their relationship sadly broke down prior to that step being taken. In these circumstances, the father first met F when she was 14 months old. The father continued to see F each year, including spending a month with her in July 2019. The mother contends that had the allegations of physical and emotional abuse now made by F been true, the father would have noticed that something was wrong. The father concedes that he did not notice any signs of abuse when having contact with F and that nor did F say anything. The father, however, contends that his contact with F was in the mother's presence.
5. Following the breakdown of the parents' relationship, the mother formed a new relationship with one Mr S. In 2014 Mr S was sentenced to 11 years and 6 months in prison for organising an armed robbery at his place of employment. Later in 2014 the mother had a son by Mr S called G. G has certain disabilities. Mr S is scheduled to be released from custody in September 2022.
6. On 18 November 2015 the parents obtained a decree of divorce from the State Court. The decree of divorce also dealt with arrangements with respect to F. Sole custody of F was granted to the mother by reason of the father living outside the jurisdiction of Brazil. The parents agreed between them that F would spend one month per year with the father in England and that the father would have regular indirect contact with F via telephone and social media. In the latter part of 2019 the parents reached an agreement that F would visit the father in England for the 2019 Christmas holiday pursuant to the contact agreement I have outlined. F arrived in this jurisdiction on 8 December 2019 and was due, under the terms of the parents' agreement, to return to Brazil on 2 January

2020. Both parties accept that as at 2 January 2020 F was habitually resident in the jurisdiction of Brazil and that the father's retention of F in the jurisdiction of England from 2 January 2020 was wrongful of the purposes of Art 3 of the 1980 Hague Convention.

7. The father contends that the moment that F's inbound flight to England left Brazil he received a telephone call from the maternal grandmother and the maternal aunt begging him to keep F in England for her own safety and alleging that F was the subject of regular "beatings" by her mother at home in Brazil. In the bundle is a photograph that shows that the maternal grandmother was present at the airport on the day of F's departure. The father states that the maternal grandmother attended the airport with the specific intention of making sure F had boarded the flight and had also strongly encouraged F to speak to her father about the abuse.
8. The father asserts that prior to these events he had not had contact with the maternal grandmother or the maternal aunt with any frequency. As I have noted, the father accepts that prior to this phone call he had not been aware of any concern regarding the mother's care of F. In a document prepared by the maternal aunt subsequent to F's arrival in the United Kingdom, the maternal aunt alleges that the mother beats F and often leaves her skin purple with bruises, and leaves her alone as a punishment. In a document prepared by the maternal grandmother, the maternal grandmother asserts that the mother subjects F to "beatings, swearwords and domestic work". The maternal grandmother further alleges that the mother is a drug user.
9. The mother denies that she abused F in anyway and contends that F enjoyed a happy life in Brazil. The mother points to the fact that F did very well in school in Brazil. The school reports in the bundle are difficult to decipher but in fact appear to indicate a marked reduction in performance between the 3rd year in 2017 (during which year F appears to have changed schools for a year) and the 5th year in 2019, although it is possible that those years are scored differently. The mother concedes that social services were involved with F in Brazil following a referral from F's school but states that no action was taken. The mother further contends that, whilst she is "not entirely sure" why her mother and aunt would indicate to the father that she has been physically and emotionally abusing F, the mother contends that the allegations, and the documents prepared by the maternal grandmother and the maternal aunt containing them, were procured by the father in exchange for financial assistance and assistance in gaining immigration clearance for entry into the United Kingdom. The mother further points to the fact that, notwithstanding the allegation of the maternal grandmother that the mother is a drug user, the mother has recently undertaken drug testing the results of which are negative. I will come to those results in more detail below.
10. The father contends he did not raise the allegations of the maternal grandmother and the maternal aunt with F upon her arrival in order to give her an opportunity to settle. The father did raise them however, approximately 10 days later after F showed increasing anxiety about the prospect of returning to Brazil. The father asserts that when he raised these matters with F she showed him a faded bruise on her leg (in a later conversation with the mother the father describes the bruise as a "footprint"). The father further alleges that F made a number of concerning allegations, namely that:
  - i) When Mr S was on short-term prison release she had witnessed him beating the mother and taking drugs;

- ii) That she was beaten by the mother with an electric cable (or something similar) and was told by the mother subsequently that being beaten with an electric cable was good for her upbringing;
  - iii) That the mother hits G when G tries to stop the mother beating F;
  - iv) That G has been found by the maternal aunt alone and tied to the bed.
11. The father contends that in light of what F had told him he contacted the maternal grandmother and the maternal aunt who again informed him that this was a common occurrence and that, further, the maternal grandfather had witnessed the mother abusing F and had told her to stop.
12. Following these allegations being made by F the father contacted social services in this jurisdiction. The father contends that he was advised by social services that he should not return F to Brazil. The father then contacted the mother on 28 January 2020 to try and extend F's stay in England. He indicated to the mother that F would not be returning to Brazil until the allegations made by F had been resolved. With respect to his telephone conversation with the mother on 28 January 2020, a transcript of which is before the court, the father points to the following responses of the mother when he put to the mother the allegations he contends had been made by F:
- i) When asked by the father whether she beats F, the mother's initial response was "*Eh ? Were you never beaten in your life*" and "*Were you never beaten in your life ? I was beaten by my father...*"
  - ii) In response to the father then stating "*Fine, but that's not how you bring up a child. Not by whipping a little girl with a cable, hitting the girl on the head when she's not even doing anything to you. I don't think that's right. Understood?*" the mother stated that "*I don't hit the girl on the head, I don't beat her. I smack her on the bottom...And on her leg.....And on her arm. I don't hit her around the lungs and I don't hit her on the back, OK?*" (in her statement the mother contends that she *does* smack F on her "back").
  - iii) In response the father stated "*Ah, right then so you mean that you beat her and you think that's alright, beating her, doing whatever you like – and her as if she were a stray dog*" the mother stated "*No, I smack her when she does things wrong. You know...did you ask her why I beat her?*"
  - iv) The mother then makes threats towards him, reminding the father that he had already seen "*bad things happen with people who harm others*", threatening to take the father's mother from him and threatening to end the father's life.
13. Finally, the father alleges that the mother has threatened to disappear with F if she is returned to Brazil, having told the father that she would not return F to him if she went to Brazil on holiday and having been told by the maternal grandmother on 28 January 2020 that she will disappear with F. As I set out below, F has also stated that her mother has threatened to rip her passport up when she returns to Brazil and "*take me away*".
14. Against this evidence, the mother relies on evidence from F's childminder in Brazil to demonstrate that F was well cared for in Brazil, together with further letters from friends

and acquaintances in Brazil to the same effect. With respect to the question of chastisement, the mother denies “beating” F and asserts that she only used appropriate physical chastisement at all times. The mother further points to the fact that in the telephone conversation referred to above, the father offered the mother holiday contact with F in Brazil.

15. The mother applied to the Brazilian Central Authority and ICACU instructed solicitors on the mother’s behalf on 1 April 2020. These proceedings were issued on notice on 6 April 2020. Pursuant to directions given by Judd J on 30 April 2020 the Cafcass Officer, Ms Baker, filed a report on 1 July 2017 having interviewed F remotely on 18 June 2020. In that report, Ms Baker details the following allegations made by F:
- i) That “*my mama used to beat me up a lot*”;
  - ii) That she was beaten with “*a thread*” (Ms Baker observes that F made this allegation “*with her voice wobbling and beginning to cry*” and that the interpreter had held up a cable lead when trying to explain what was meant by the word F had used);
  - iii) That she was “*mistreated... a lot*” on a daily basis if she did not do things such as household chores or did not do them as well as her mother expected her to;
  - iv) That she had not shared this information with anyone in Brazil as she had feared her mother’s response: “*that she could beat me if I tell to (sic) someone, so when I came to the UK I felt more comfortable to say about this, because she would be far*”;
  - v) That “*one day I told to my teacher about this because I could not hide my mama had beat me and there was bleeds in my back and you could see this. I told this to her and it didn’t happen much*” (which Ms Baker took to mean that the allegation made little difference);
  - vi) That “*My teacher contacted Children’s Services and they went to my home but they said only if this happened again they’re going to take some action, but for now it’s only this*”;
  - vii) That her mother had emotionally abused her by saying things that made her feel “*very sad*” such as “*the same way I bring you into this world, I can take you away from this world*”;
  - viii) That her mother threatened to rip her passport up when she returns to Brazil and “*take me away*”;
  - ix) That she witnessed an incident where Mr S nearly broke her mother’s leg.
16. When giving evidence, Ms Baker highlighted the change in F’s presentation when she began to recount the matters set out above, observing that F went from being happy and relaxed to emotional and upset. F was noted to pause and look away from the camera when Ms Baker first asked about Brazil. Ms Baker considered this non-verbal communication significant and that it lent weight to the credibility of what F was stating. Within the foregoing context, Ms Baker notes that F was able to express herself

in a clear and coherent manner despite the increasing emotional difficulty she experienced as the meeting progressed and that F demonstrated an ability to balance different perspectives and experiences that suggested that she was sharing her own thoughts rather than those imposed upon her through any overt influence in the current home. Ms Baker also considered that F's accompanying emotional response indicated that her relationship with the mother was not a source of comfort to her. Further, with respect to the basis of F's objection to returning to Brazil, Ms Baker considered that F's objections appeared to be based upon her perceived risk of future harm as a consequence of her alleged past experience of emotional and physical abuse. The mother points out that in her report Ms Baker states that the majority of F's account mirrors, unsurprisingly, the account of the father.

17. Within the foregoing context, Ms Baker expressed the following clear view regarding the risk to F:

“[28] Should an order be made for F to return to Brazil, and taking the risks associated with her disclosures at their highest, there would be grave concerns for F if she were to return immediately to her mother's care. I would seek that there are clear protective measures in place to ensure that F is cared for by an alternative family member pending assessment by the Brazilian authorities into the allegations of harm to F, the domestic abuse in the home and the mother's partner's history of serious offending.

[29] Given the gravity of what has been said about [the mother] and her ability to parent safely, there are also concerns for G, a vulnerable child currently in her care. It is my intention to notify the relevant authorities through the ICACU about the potential risks G faces, as well as F, and I respectfully seek the Court's permission to disclose this report and translated copies providing during these proceedings to Brazilian authorities responsible for child protection.”

18. With respect to the question of objections, the father asserts that when he informed F that her mother wished her to return to Brazil F became upset and emotional and called her mother to tell her that she did not wish to return to Brazil. The father contends that F pleaded with her mother to let her stay in England.
19. Ms Baker states in her report that the ability of F to balance different perspectives and experiences that I have already noted suggested a degree of emotional maturity commensurate with her chronological age. Within this context, Ms Baker considered that F presents as an intelligent and sensitive almost twelve-year young girl whose views should be given some weight by the court in these summary proceedings. Ms Baker considered that what F expressed amounted to an objection to being returned to Brazil. As I have noted, Ms Baker considered that F's objections appeared to be based upon her perceived risk of future harm as a consequence of her alleged past experience of harm. Asked what she would write in a letter to the judge, F said:

“Dear Judge, I would like very much you allow me to stay with my father because he treats me very nice and I think it would be a very wrong choice to send me back to Brazil.”

20. With respect to protective measures that could be put in place were the court to order the return of F to Brazil, in her report dated 1 July 2020 Ms Baker suggested that a return into the care of the maternal grandmother, as originally suggested by the father, would safeguard F such that no grave risk would arise. However, on 6 July 2020, the maternal aunt sent an email in which she asserted that neither she nor the maternal grandmother could guarantee F's safety if a return to either of their care was ordered by the court:

“If the courts are operating on 9 July and if F has to be returned to Brazil, I understand that it is being suggested that the court might ask for F to be returned not to her mother but to her grandmother [C], who is 63 years old, or to myself. [The mother] is a volatile, emotional person and neither of us feels that we could guarantee F's safety if she were placed in our care. We would be particularly concerned about all our personal safety, especially because her current partner is about to be released from prison after his sentence for participating in an armed robbery for which he was sentenced to 11 years. For F's safety, we are both convinced that F must stay in the United Kingdom with her father.”

21. There is no evidence before the court of what steps would be taken by the child protection authorities in Brazil were the court to order the return of F. As Ms Chokowry points out, securing such evidence has been difficult in circumstances where many agencies in Brazil are not acting with expedition due to the COVID-19 pandemic and until very recently, the maternal grandmother presented a possible interim placement if the court were not minded to return F into the care of her mother. Finally, the mother has offered the following undertakings on the basis that she seeks the return of F to her care:

- i) Not to object to social services in Brazil undertaking an assessment of F in her care.
- ii) Not to physically chastise F.

22. As to F's current circumstances in this jurisdiction, she lives with her father and his fiancée in a three bedroom bungalow. F at present speaks very little English but has completed her first term at the local academy school and has made new friends locally (when talking to Ms Baker, F spoke positively about school, including favourite subjects, and some friends she had there). Exhibited to the father's statement is evidence that F has made some progress at school although it is clear that language remains a barrier, with F being educated as an EAL student. She is receiving private English tuition and engages in a range of extra-curricular activities. The father contends that F continues to have regular contact over social media with her mother, her grandmothers, aunt and G. The father is willing to meet the annual costs of the mother and G flying to the United Kingdom. F's maternal grandfather lives in England and she has recently had contact with him.

## THE LAW

23. The father seeks to establish that the ‘harm exception’ provided by Art 13(b) of the 1980 Convention and the ‘child objections exception’ provided by Art 13 of the 1980

Convention are made out in this case. Art 13 of the 1980 Hague Convention provides as follows:

“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(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. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.”

### *Harm*

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

- i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
- ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.
- iii) The risk to the child must be ‘grave’. It is not enough for the risk to be ‘real’. It must have reached such a level of seriousness that it can be characterised as ‘grave’. Although ‘grave’ characterises the risk rather than the harm, there is in ordinary language a link between the two.
- iv) The words ‘physical or psychological harm’ are not qualified but do gain colour from the alternative ‘or otherwise’ placed ‘in an intolerable situation’. ‘Intolerable’ is a strong word, but when applied to a child must mean ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’.



- v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.
- vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).
25. In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process, which include the fact that it will rarely be the case that the court will hear oral evidence and, accordingly, rare that the allegations or their rebuttal will be tested in cross examination. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.
26. With respect to the first question, namely defining the risk of harm, as I have noted before, the methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon to establish the exception under Art 13(b) at its highest is not an exercise that is undertaken in the abstract. The requirement set out in *Re E* for the court to evaluate the evidence against the civil standard of proof whilst taking account of the summary nature of the proceedings must mean that the analytical methodology endorsed by the Supreme Court in *Re E* cannot be one that excludes proper consideration of relevant evidence before the court. Indeed, in *Re C (Children)(Abduction: Article 13(b))* [2018] EWCA Civ 2834, Moylan LJ held as follows by reference to the judgment of Black LJ (as she then was) in *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720:
- “[39] In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations. In *Re W (Abduction: Intolerable Situation)* [2018] 2 FLR 748, I referred to what Black LJ (as she then was) had said in *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720 when rejecting an argument that the court was

"bound" to follow the approach set out in *Re E*. On this occasion, I propose to set out what she said in full:

‘[52] The judge's rejection of the Article 13b argument was also criticised by the appellant. She was said wrongly to have rejected it without adequate explanation and to have failed to follow the test set out in §36 of *Re E* in her treatment of the mother's allegations. In summary, the argument was that she should have adopted the "sensible and pragmatic solution" referred to in §36 of *Re E* and asked herself whether, if the allegations were true, there would be a grave risk within Article 13b and then, whether appropriate protective measures could be put in place to obviate this risk. That would have required evidence as to what protective steps would be possible in Lithuania, the submission went.

[53] I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Article 13b exception (see *Re E* supra §32) and for the court to evaluate the evidence within the confines of the summary process. Hogg J found the mother's evidence about what had happened to be inconsistent with her actions in that she had continued her relationship with the father and allowed him to have the care of E, see for example what she said in §37 about the mother not having done anything to corroborate her evidence. She also put the allegations in context, bearing in mind what Mr Power had said about something good having happened in E's parenting, which she took as a demonstration that E would not be at risk if returned to Lithuania (§36). The Article 13b argument had therefore not got off the ground in the judge's view. The judgment about the level of risk was a judgment which fell to be made by Hogg J and we should not overturn her judgment on it unless it was not open to her (see the important observations of the Supreme Court on this subject at §35 of *Re S*, supra). Nothing has been said in argument to demonstrate that the view Hogg J took was not open to her; in the light of it, it was unnecessary for her to look further at the question of protective measures. She would have taken the same view even if the child had been going back to the father's care, but the Article 13b case was weakened further by the fact that the mother had ultimately agreed to return with E.’

[40] As was made clear in *Re S*, at [22], the approach "commended in *Re E* should form part of the court's general process of reasoning in its appraisal of a defence under the article". This appraisal is, itself, general in that it has to take into account all relevant matters which can include measures available in the home state which might ameliorate or obviate the matters relied on in support of the defence. As referred to in *Re D*, at [52], the English courts have sought to address the alleged risk by "extracting undertakings from the applicant as to the conditions in which the child will live when he returns and

by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient" (my emphasis).

[41] I would also note that the measures being considered are, potentially, anything which might impact on the matters relied upon in support of the Article 13(b) defence and, for example, can include general features of the home state such as access to courts and other state services. The expression "protective measures" is a broad concept and is not confined to specific measures such as the father proposed in this case. It can include, as I have said, any "measure" which might address the risk being advanced by the respondent, including "relying on the courts of the requesting state". Accordingly, the general right to seek the assistance of the court or other state authorities might in some cases be sufficient to persuade a court that there was not a grave risk within Article 13(b)."

27. Within this context, as I observed in *MB v TB (Article 13: Alleged Risk of Oppressive Litigation)* [2019] 2 FLR 866, *TY v HY (Return Order)* [2019] 2 FLR 1284 and *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159, the assumptions made by the court as to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation of the relevant admissible evidence that is before the court undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention (see also *Re NY (A Child)* [2019] UKSC 49 at [12]).
28. In the circumstances of the nature of grave risk of harm contended for by the father in this case, Mr Bennett also draws the courts attention to the decision of the European Court of Human Rights in *OCI v Romania* (Application No: 49450/17) [2019] 2 FLR 748 in which the ECtHR held that:

“Corporal punishment against children cannot be tolerated and States should strive to expressly and comprehensively prohibit it in law and practice..... In this context, the risk of domestic violence against children cannot pass as a mere inconvenience necessarily linked to the experience of return, but concerns a situation which goes beyond what a child might reasonably bear”
29. With respect to the second question, namely determining whether protective measures can meet the level of risk reasonably assumed to exist on the evidence, the following principles can be drawn from the recent Court of Appeal decisions concerning protective measures in *Re P (A Child) (Abduction: Consideration of Evidence)* [2018] 4 WLR 16, *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 and *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] 2 FLR 194:
  - i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.
  - ii) In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.

- iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.
  - iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.
  - v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.
  - vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.
30. In addition to these factors, Mr Bennett submits that the discrete question of whether the court can *trust* a parent to comply with an undertaking can and, in this case should, form part of the evaluative evidential exercise with respect to protective measures, relying on the decision of the Court of Appeal in *re F (A Minor)(Abduction: Rights of Custody Abroad)* [1995] Fam 224. However, it seems to me that this question is one that is already encompassed in an examination of the extent to which the undertaking is likely to be effective, both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.
31. Within the foregoing context, it is well established that courts should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting State are equally as adept in protecting children as they are in the requested State (see for example *Re H (Abduction: Grave Risk)* [2003] EWCA Civ 355, [2003] 2 FLR 141, *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930 and *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433). However, having regard to the principles set out above, where the social service authorities of the requesting State are relied on as a protective measure, the court will still need specific details of the measures it is proposed that those authorities will be taking in order that the evaluative exercise set out in the foregoing paragraph with respect to the efficacy of the protective measures can be undertaken.
32. Finally, if the court determines that Art 13b is made out, a discretion arises as to whether to make an summary return order in any event. However, as Baroness Hale observed in *Re M (Children)(Abduction: Rights of Custody)* [2008] AC 1288, sub nom *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251, it is not the policy of the Convention that children be put at risk of serious harm or placed in intolerable situations. Within this context, in *Re M* Baroness Hale repeated the observation Her Ladyship had made in *Re D (Abduction: Rights of Custody)* [2007] 1 AC 619 at [55] that:
- “...it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate.”

### *Child's Objections*

33. The law on the 'child's objection' exception under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] 2 FLR 1074 (and endorsed by the Court of Appeal in *Re F (Child's Objections)* [2015] EWCA Civ 1022). In summary, the position is as follows:
- i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in 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 his or her views.
  - ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.
  - iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.
  - iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.
  - v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.
34. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention.

### DISCUSSION

35. Having considered carefully the evidence in this matter and the very helpful submissions of Ms Chokowry and Mr Bennett, I am satisfied that, making a reasoned and reasonable assumption as to the maximum level of risk to F and considering the protective measures available to meet that risk, there is a grave risk that returning F to the jurisdiction of Brazil would expose her to physical or psychological harm or would otherwise place her in an intolerable situation for the purposes of Art 13(b) of the 1980 Convention. Having so concluded, I am satisfied it would not be appropriate to proceed to exercise my discretion to make a return order in those circumstances. For the sake of completeness, I am also satisfied that F objects to being returned to Brazil for the purposes of Art 13 of the 1980 Hague Convention and has attained an age and degree

of maturity at which it is appropriate to take account of her views. Again, I am satisfied that it would not be appropriate to exercise my resulting discretion to make a return order. My reasons for so deciding are as follows.

*Art 13(b)*

36. Having regard to the totality of the documentary evidence in this matter I am satisfied that it is reasonable to assume on the basis of that evidence that were F to be returned to the jurisdiction of Brazil she would be at a high risk of physical and emotional abuse by her mother and at risk of witnessing domestic abuse and drug use by Mr S in the family home. The evidence that grounds these reasonable assumptions comes from a number of cogent sources.
37. The original source of the allegations that F was the victim of physical and emotional abuse at the hands of her mother comes from the mother's own family, namely her mother and her sister. Whilst the mother contends that their allegations are motivated by financial self-interest, the only evidence that is said to support this contention, namely a transcript of an exchange between the mother and the maternal grandmother, is at best equivocal in this regard. It is plain on the documentary evidence before the court that the maternal grandmother did accompany F to the airport and, within this context, there is no reason to doubt the assertion that the father was contacted and told of the physical and emotional abuse as soon as it was apparent that F was in the air. The mother's mother and sister made clear allegations of physical abuse by way of beating in documents they have sought to be placed before the court. I accept Mr Bennett's submission that the fact that the maternal grandmother, who has a very close relationship with F, seeks for her to remain in England reinforces the credibility of the allegations she has made.
38. The statements made by F herself, both to the father and to Ms Baker, tend to corroborate the allegations originally made by the maternal grandmother and the maternal aunt immediately following the departure of F's flight and later in writing, particularly in circumstances where F's statements to the father and to Ms Baker tend to be consistent and to reflect the allegations made by the maternal family.
39. When speaking to her father, F stated in clear terms she had been beaten by her mother, including with an electric cable or something similar and that G had been beaten when he sought to protect F from her mother. It is of note that, both when speaking to her father and when speaking to Ms Baker, the precise nature of the cable used was the subject of detailed consideration, suggesting that F was seeking to describe something very specific, and that the one time social services had been involved in Brazil was when F claimed to have been bleeding on her back. When F repeated her allegation that the mother beat her to Ms Baker she again alleged she had been beaten with something that was like but not exactly an electric cable. F described the reasons she would be beaten. She also gave an explanation for why, save for one occasion when the abuse was obvious due to the bleeding, she had not told anyone about the physical abuse in Brazil but had done so in England, namely that she had felt able to speak with the security of considerable geographical distance from her mother in Brazil. F provided specific details of the words the mother had used to make her feel "*very sad*", namely "the same way I bring you into this world, I can take you away from this world". The statements made by F throw into stark relief the mother's insistence that F "*had a happy life*" in Brazil.

40. The mother contends that F's allegations are the product of F simply exaggerating incidents of physical chastisement, which the mother concedes she used on F, by reason of being in an environment where F overheard multiple discussions of these matters between the father and relatives and between the father and agencies in the United Kingdom. However, I am satisfied that the evidence of Ms Baker tends to gainsay that assertion.
41. Ms Baker made clear that there was a marked change in F's presentation when she came to ask F about Brazil and a marked increase in her level of upset when the allegations of physical abuse were discussed. Ms Baker considered this non-verbal communication was significant and that it suggested that F was relating a lived experience. Further, as I have noted above, Ms Baker was clear that F was able to express herself in a clear and coherent manner despite the increasing emotional difficulty she experienced as her meeting progressed and that F demonstrated an ability to balance different perspectives and experiences that suggested that she was sharing her own thoughts rather than those imposed upon her through any overt influence in the current home. Ms Baker also considered that F's accompanying emotional response indicated that her relationship with the mother was not a source of comfort to her. Ms Baker was at pains to make clear that her reflection that it was not surprising that F's account mirrored that of her father was not a comment on F's credibility but rather on what would be expected in circumstances where the father's account had come from what he had been told by F. Finally, I am not satisfied that the evidence with respect to the feedback on F's educational progress (namely that the fact that F is an EAL student makes progress more difficult) and F's own account of schooling (that she enjoys school and has made some friends) demonstrates F has been encouraged to give a false narrative. In my judgment, all these matters tend against a conclusion that F has been influenced to make the allegations of physical and emotional abuse that she has, whether by her father or others.
42. The mother also contends that F's allegations are demonstrated to be false or exaggerated by the fact that the mother has tested negative for illicit drug use. However, it is not clear that F has ever made an allegation that the mother has used drugs (although it is said that the father's partner's mother has reported that F suggested that she was *hiding* drugs for the mother). F has alleged to the father that when Mr S was on short-term prison release she had witnessed him beating the mother and taking drugs. The maternal grandmother has alleged that the mother is a drug user. Within this context, whilst the negative drug test result might suggest that the maternal grandmother has exaggerated the position in Brazil, I note that the drug test result provided by the mother does not indicate the length of hair tested (which is recorded as 0.00cm) and does not therefore appear to indicate the period covered by the negative drug test result, which result is dated 5 April 2020.
43. I am further satisfied that the response of the mother to the allegations made by F tends towards corroborating at least some of those allegations. During her conversation with the father on 28 January 2020 the mother conceded that she hits F but contended this comprised only physical chastisement. Within this context, I note however that the mother's account of this asserted physical chastisement changes as between her conversation with the father on 28 January 2020 and her statement to this court (stating to the father that she does not hit F on the back but in her statement that she does hit F on the back). There are also aspects of the mother's responses to the father on 28

January 2020 that tend to corroborate F's account of being beaten, in particular the mother's initial responses to this allegation being put (namely, "*Eh ? Were you never beaten in your life*" and "*Were you never beaten in your life ? I was beaten by my father...*") and a later point where the mother asks the father whether he has asked F "*why I beat her?*" The father further asserts that F was told by the mother in a subsequent conversation with her that being beaten with an electric cable was good for her upbringing, although I accept that there is no other corroborating evidence to support that latter assertion.

44. Finally, whilst I acknowledge that emotions would have been running high, I note that during the conversation on 28 January 2020 the mother presents as extremely volatile and at points threatening. Whilst the mother now seeks to pass these statements off as simply reflective of her fervent belief in God, I am not satisfied that this constitutes a credible explanation for threatening to end the father's life.
45. I am further satisfied that having regard to the totality of the documentary evidence in this matter that it is reasonable to assume on the basis of that evidence that were F to be returned to the jurisdiction of Brazil she would be at risk of witnessing domestic abuse between her mother and her mother's partner and drug use by her mother's partner. I am satisfied, for the reasons I have already set out, that the court can properly base this conclusion on the allegations that F has made, namely that when Mr S was on short-term prison release she had witnessed him beating the mother and taking drugs and that she had witnessed an incident where Mr S nearly broke her mother's leg. The mother does not address these incidents in her evidence.
46. Within this foregoing context, I am satisfied that an evaluation of the documentary evidence before the court undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention justifies a reasonable assumption that were F to be returned to the jurisdiction of Brazil she would be at a high risk of physical and emotional abuse by her mother and at risk of witnessing domestic violence and drug use by Mr S in the family home.
47. Turning to the protective measures that are before the court within the context of the foregoing evaluation of the risk at its highest, I am satisfied that those protective measures are not sufficient to protect F from the risk as evaluated above.
48. Whilst, as I have set out above, this court must accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting State are equally as adept in protecting children as they are in the requested State the court still needs specific details of the measures it is proposed that those authorities will be taking to protect against the identified risk of harm. None of those details are before the court. Whilst I accept that the mother only learnt very recently that the maternal grandmother and maternal aunt do not feel able to protect F from the mother by caring for her in the interim, it was self-evident that in considering the father's argument under Art 13(b) that information from the Brazilian authorities as to the child protection measures they could implement would have been important information for this court to have. In that context, I have given consideration to adjourning the case to obtain this information. However, within the context of the current global pandemic I am satisfied that this information would take some time to obtain from the relevant authorities in Brazil in circumstances where it is said to have been the mother's experience that those authorities are not acting with speed in the context of the COVID-19 crisis. In the



circumstances, I am satisfied that an adjournment would take this case outside the time limits that apply to the resolution of proceedings under the 1980 Hague Convention to an unacceptable degree. In any event, there is no cogent evidence before the court that the mother has been in contact with the authorities to determine what protective measures they could implement. Within this context, whilst I proceed on the basis that the Brazillian social service authorities are equally as adept in protecting children as our own, that general proposition is not sufficient for the court to conclude that there are sufficient protective measures of that type in place to address the risk identified in this case.

49. Further, the maternal family in Brazil have made abundantly clear in communications provided to the court that they do not consider themselves in a position to protect F from the risk of harm as evaluated above. The maternal grandmother and the maternal aunt assert plainly that they could not guarantee F's safety if a return to either of their care was ordered by the court. In the circumstances, whilst Ms Chokowry invites the court to order the return of F to Brazil on the basis that the maternal grandmother has in the past been considered a protective factor and in a position to protect F, in my judgment this would be inappropriate in the face of a clear indication from the maternal grandmother that this is not the case. This is particularly so in circumstances where the court would have to place considerable faith in the efficacy of this protective measure in circumstances where there is otherwise a paucity of other such measures before the court. In any event, the efficacy of this protective measure must be called into question in circumstances where the mother makes clear that she does not have a good relationship with the maternal grandmother.
50. I am likewise not satisfied that bare undertakings offered by the mother in this case constitute sufficient protective measures. Those undertakings amount simply to a promise not to object to any social services assessment and a promise not to physically chastise F. There is no undertaking not to physically or emotionally abuse F and not to expose her to domestic violence or drug use. Moreover, there is no evidence before the court as to the extent to which such undertakings as were given by the mother would be enforceable in Brazil. Finally, I accept Mr Bennett's submission that there must be some doubt that the mother would comply with the undertakings given the stark contrast between her assertion to the father on 28 January 2020 that she would seek obstruct or delay any court process in Brazil ("*You're going to have to get tired of coming here. You're going to have to come here several times to hearings because I'm not going to agree all the first few times, right? You know how it is*") and the claim in her statement before this court that "*I do not wish to disrupt the father's contact with his daughter...I will not interrupt the contact that he has with his daughter...*" As noted above, the mother has stated to F that she would rip up her passport and take her away, a threat the maternal grandmother tends to corroborate.
51. Within the foregoing context, I must look at the concrete situation for F on the ground were she to be summarily returned to Brazil. F would be returned to an environment in which she is at high risk of physical and emotional abuse and at risk of witnessing domestic abuse and drug use, in circumstances where that high risk of physical and emotional abuse and of witnessing domestic violence and drug use is not accepted by the mother, in circumstances where that high risk of physical and emotional abuse is one that her maternal relatives do not feel able to protect her from and in circumstances where it is entirely unclear on the evidence before the court at this final hearing whether

and to what extent the social services authorities in Brazil would intervene to address that risk. This amounts to broadly the same situation that F was in before she left Brazil.

52. Within the foregoing context, I am satisfied that for the purposes of Art 13(b) of the 1980 Hague Convention there is a grave risk that if returned to Brazil, F would be exposed physical and psychological harm or otherwise placed in an intolerable situation. Having reached this conclusion, I am further satisfied that it would not be in F's best interests, and indeed would be perverse, to go on to exercise my discretion and make an order returning F to Brazil within the context of the conclusions that I have reached above.

#### *Child's Objections*

53. Whilst my conclusions with respect to Art 13(b) are, in my judgment, determinative of the outcome of the mother's application, for the sake of completeness I also make clear that I am satisfied that F objects to returning to Brazil for the purposes of Art 13 of the 1980 Convention. Whilst it is the case that, at times, F has expressed her wish not to return to Brazil as an objection to returning to the care of her mother in Brazil, Ms Chokowry properly accepts that there is an inextricable link in the circumstances of this case between a return to the care of her mother and a return to Brazil. Having regard to the contents of Ms Baker's report, as summarised above, I am further satisfied that F has attained an age and degree of maturity at which it is appropriate to take account of her views.
54. Turning to the question of discretion, I of course bear in mind carefully the policy of the 1980 Hague Convention and that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly. I am conscious in particular that F came to England on holiday. However, this is not in my judgment a paradigm case of a child being retained following a holiday. Whilst F did arrive in this jurisdiction on holiday, once in England it became abundantly apparent that F is at a credible and high risk of serious physical and emotional abuse were she to be returned to the jurisdiction of her habitual residence. Within this context, I am satisfied that F's objection is strong, reasoned, balanced and mature. She has expressed a clear and strong objection to returning to Brazil based on the abuse she has stated that she suffered in that jurisdiction. F has, as Mr Bennett put it, offered a rational rationale for her stated objection. For the reasons I have set out above, I am satisfied that the strong objection voiced by F is authentically her own and not the product of influence by others.
55. It is clear that F has settled well in England and is having her physical and emotional needs met here. Whilst the language barrier is at present affecting the efficacy of her education, it is clear that F is settling into education in this country, is enjoying that experience and is making friends. Importantly, it is evident that F feels safe here. Whilst I accept that when it comes to determining the outstanding welfare issues in respect of F, some of the evidence relevant to that determination is in Brazil, the physically and emotionally abusive behaviour alleged having taken place in that jurisdiction, I am satisfied that much of that evidence has already been obtained in the form of evidence from the relevant family members and such other evidence that remains outstanding can be obtained from Brazil to inform welfare proceedings in this jurisdiction. The mother has been able to participate effectively in this hearing from her lawyer's offices in Brazil.

56. Within the foregoing context, in addition to my conclusions with respect to Art 13(b) making it inappropriate for the court to exercise its discretion to make a return order in this case, I am further satisfied that the factors set out in the foregoing paragraphs also lead to the conclusion that the court should not in this case exercise its discretion to make a return order.

## CONCLUSION

57. In the circumstances, for all the reasons I have set above, I decline to make a summary return order with respect to F and I dismiss the mother's application under the Child Abduction and Custody Act 1985. I will invite counsel to draft an order accordingly.
58. As I have alluded to above, I accept that this result means that a child who has been wrongfully retained following a proposed holiday in England will not now be returned to her jurisdiction of habitual residence pursuant to the provisions of the 1980 Hague Convention. Within this context, and having regard to the clear policy objectives of the 1980 Convention, it is important to emphasise that my decision is one that has been reached on the very particular and, indeed, very unusual facts of this case. Namely, that the child's holiday to England was also the method by which that child was able to alert her other parent and thereafter the authorities in this jurisdiction that she was at a credible and high risk of serious physical and emotional abuse upon return (as F herself said, "*so when I came to the UK I felt more comfortable to say about this, because she would be far*") and that, again in the very particular circumstances of this case, the protective measures proposed are not sufficient to protect her from that credible and high risk were she to be returned to the jurisdiction of her habitual residence, in addition to the child's objection. In these circumstances, as I have already made clear, I do not consider this to be a paradigm case of wrongful retention following a holiday and I am satisfied it is not a case of forum shopping on the part of the father.
59. That is my judgment.