Neutral Citation Number [2020] EWHC 2940 (Fam)

Case No: FD20P00034

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Sitting remotely

Date 28.10.20

Before:

Mr A. Verdan QC

(Sitting as a deputy high court judge)

RE: S

Mr James Turner QC and Mr Edward Bennett (instructed by Brethertons) for the Applicant

Mr Henry Setright QC and Ms Cliona Papazian (instructed by Access Law) for the First Respondent

Ms Katy Chokowry (instructed by Cafcass Legal) for the Second, Third and Fourth Respondents

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.
Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 30.10.20.

Introduction

1. In this case, I am concerned with three children: A aged 14 years 9 months, I aged 10 years 9 months and E aged 8 years 11 months. A's age is significant for reasons which will become apparent.
2. Their mother is KS; their father is MS.
3. The mother pursues two applications:
   a. pursuant to the Hague Convention 1980, dated 22.01.20, for the summary return of the children to Poland; and
   b. pursuant to Chapter III of Council Regulation 2201/2003 EC ('BIIa'), dated 17.07.20, for the recognition and enforcement of an order made by the Polish District Court on 19.12.16, which order was registered here on 22.07.20, and against which registration the father appeals.
4. The mother was represented by Mr Turner QC and Mr Bennett, the father by Mr Setright QC and Ms Papazian and the children, by Ms Chokowry (through their Children's Guardian Ms Huntington). I am grateful to them all for their extensive and helpful oral and written submissions.
5. The case was listed for final hearing on 14-15.09.20. The hearing took place remotely via the zoom platform in light of the current Covid-19 situation.
6. I have read all the relevant documents in the 481-page main bundle and 860-page authorities' bundle prepared for this hearing. The parties agreed that there was no need for oral evidence although, Mr Turner made some points about the form and content of Ms Huntington's reports which in some respects he challenged.
7. Due to the lack of time and the need to consider the complex issues arising in this case, I reserved judgment.

The parties' overall positions

8. The mother contends that the children have been wrongfully retained in England and so should be returned to Poland by either route, either because the Hague defences fail or because there is a live Polish order which should be enforced. Her position is that the Polish court is seised of this case and it is for the Polish court to carry out the full welfare assessment.
9. The father opposes the Hague return application, on the basis of Article 13(b) and the objections of the children. If the defences succeed, he submits that the Polish order should not be enforced by this court.
10. The children, through Ms Huntington, oppose a return to Poland on the same grounds but additionally she questions whether the children's habitual residence changed shortly after arrival in this jurisdiction.

Background

11. I refer to the Chronology of key dates and the Case Summary.
12. The parties are Polish nationals. They married on 5.08.06. The children were born in the USA at a time when the parties were residing there.
13. The children lived in the USA with their parents until May 2012 when the family relocated to Poland. In 2014, the father moved to England for employment and has remained here. The parties separated in 2015.
14. At the time, the mother and the children continued to live in Poland and the children attended school there.
15. The parties were divorced on 19.12.16. Orders were made in Poland that the children live with the mother and have contact with the father. The mother thus has rights of custody.
16. The father asserts that from 2017 he had concerns about the mother's care of the children.
17. From 2018, the children complained about the mother's treatment of them.
18. The mother's case is that the father was influencing the children against her.
19. On 14.02.18, the father applied to the Polish court for extended holiday contact for the children in the south of England, where he was then living. I understand that application was resolved, probably without a court hearing.

20. In around September 2018, the mother moved with the children to live with her parents in another part of Poland and the children say their treatment by the mother deteriorated.
21. In around May/ June 2019, A ran away from home twice. On the second occasion, A took I with her. On both occasions the children went to their paternal grandmother, some 25 km from their home with their maternal grandparents.
22. The mother and the father agreed that the children would, as they had done each year, spend the summer holidays with the father in England from July to 31.08.19. The father purchased return tickets for the children's return to Poland.
23. The father states that the children informed him that they wanted to remain in England once they arrived here on 20.07.19, now some 14 months ago. He says they disclosed physical abuse by the mother. A and I threatened to run away if they were sent back to Poland.
24. The father did not return the children. On 22.08.19 the mother received a somewhat strange social media message from someone she believed was a friend of the father's to say the children were not returning. It now seems a non-return was discussed or planned by the father and at least A in the preceding months.
25. The children began attending school in England in September 2019. The father and the children moved to a 4-bedroom house following their decision to remain in England.
26. On 4.09.19, the father issued an application in the local Polish court to vary the order dated 19.12.16 so that the children could live with him.
27. On 2.09.19, the mother had reported the abduction to the Polish police. On 6.09.19, the mother applied to the Central Authority in Poland for proceedings to be taken in England under the 1980 Hague Convention, but that application was initially misdirected to the USA, so was not issued in England until 20.01.2020. Also on 6.09.19 the mother issued an application in the court in Poland seeking an order requiring the father to return the children to Poland, but that application was subsequently stayed pending the outcome of proceedings in England.
28. In her written response to the father's application in Poland, the mother denied the allegations of violence and alcohol abuse. She accepted that she had been unable to spend much time with the children as they alleged because of her work commitments.

29. In reports dated 17.10.19 the Polish schools stated that all three children were thriving and raised no concerns.
30. On 27.10.19, the mother issued an application in Poland to suspend the father's application pending the outcome of the mother's Hague application.
31. On 31.10.19, a hearing took place in Poland, which the parties attended to consider whether the father's application for an interim change of the living arrangements of the children provided for by the order of 19.12.16 and the children were seen by the Judge. E informed the Judge that: the mother had beaten the children, they were a bit afraid of her, he had been beaten by her, she beat him with her hand several months ago, she beat I, she destroyed A's phone by hitting it against the floor, she did the same with I's, she got angry and threw everything and shouted a lot, she threw I's phone and she beat someone everyday. I stated that: the mother hit her a long time ago, the mother beat A very much, the mother beat each of them but mostly A, she was afraid of her mother, she beat A and E more than her, sometimes she was angry without reason and shouted and she destroyed A's phone and her phone. A stated that her mother mistreated and beat them, beat her the most, sometimes with her hand, she beat her when she said she wanted to live with the father, the beatings became more frequent at the maternal grandmother's home, in April she was very angry and beat her with a hangar, causing bruises on her hand and leg, she beat E from time to time, she rarely beat I. The record of the hearing states that the mother said she may have used physical punishment several times against A, that she slapped her with her hand after she had run away the second time, but that she did not use physical punishment against I and E. The mother asserted that the father had been turning the children against her and spoke of the various pressures on her. The court reserved its judgment.
32. The father returned to the UK with the children on 2.11.19, without the mother's consent and without seeking approval from the court in Poland.
33. On 8.11.19, the Polish court dismissed the father's application for an interim change of living arrangements and gave a detailed judgment. It held that the father had not proved that an interim variation of the order was in the children's best interests and that there were no grounds to the mother was at serious risk of causing physical or mental damage to the children or putting them in an unbearable situation. The children's wishes were taken into account but the court

held that giving precedence to their wish to live with the father would be an over-simplification at the current stage of proceedings before full evidence had been obtained. The court noted: some of the difficulties faced by the mother were a direct result of the father's conduct such as his failure to pay maintenance and his influence of the children; the father had exaggerated some allegations against the mother, for example, that she had neglected the children's care; the inconsistency in the children's allegations; the father did not suggest physical chastisement of the younger two children; the father's actions in bringing the Polish proceedings were pre-planned and tactical to bolster his position in any Hague case; and the father's actions were designed to present the mother with a 'fait accompli.'

34. The father appealed this decision but the appeal was dismissed on 17.12.19.
35. On 4.2.20, the Polish court directed an expert report on child arrangements, for the substantive proceedings in that country, setting a two month deadline for its filing. This has not occurred.
36. The mother's Hague application came before this court for the first proper hearing on 25.02.20 and directions were made. Cafcass were ordered to file a 'wishes and feelings' report and to say whether the children should be separately represented. A final hearing was listed on 30.04.20.
37. The father's substantive application for a change of living arrangements to allow the children to live with him in England continues in Poland but on 10.03.20, was stayed by the Polish court. Poland is thus seised of this case. To date the Polish court has not made a return order.
38. Subsequent remote hearings took place in this court on 30.04.20, when the children were joined and Ms Huntington appointed as their Guardian and on 19.06.20, when directions were made in respect of the mother's proposed second application (for recognition and enforcement), the Guardian was directed to file a final analysis and this final hearing fixed. On the latter occasion, a direction was also made that Polish Children Services file a chronology, any assessments and relevant documents and state what their role would be in the event of a return of the children. This direction has not been complied with, as Polish Children Services apparently need a Polish order before disclosing and such an order has not been obtained.
39. On 22.07.20, the Polish order dated 19.12.16 was registered by order of this court.

40. On 13.08.20 the Polish court refused the mother's application to issue a certificate under Article 39, on the basis that there were already pending proceedings in Poland and the order dated 19.12.16 remained in force.
41. On the 17.08.20, the father issued a Notice of Appeal against the registration of the order of 19,12,16 on the grounds that recognition was contrary to public policy pursuant to Article 23(a) BIIa. The hearing before me on 14.09.20 was the first 'inter partes' hearing of the BIIa application. The children have not yet appealed this registration but Ms Chokowry informed me that they would wish to, depending on the outcome of this case.

Interplay between applications

42. I heard detailed submission on which of the mother's two applications I should hear first and the interplay between them.
43. I was referred to the following articles of BIIa: 11, 16, 19, 21, 24, 26, 27, 28, 31, 33, 60 and 62 and also to recital/preamble 17.
44. I was referred to various authorities to support the respective positions, in particular, the following first instance decisions: **ET v TZ** [2014] 2 FLR 373; **H v B and V** [2020] EWHC (Fam) 961; **JRG v EB** [2013] 1 FLR 203; **SP v EB** [2016] 1 FLR 228; **MD v CT** [2015] 1 FLR 213; **E v E** [2018] Fam 24; **T v J** [2006] 2 FLR 1290 and three Court of Appeal decisions: **Re A** [2016] 4 WLR 111, **Re S** [2018] 2 FLR 1405 and **Re D** [2016] 1WLR 2469. I was also referred to the BIIa Practice Guide.
45. Mr Turner submits that, in so far as precedence might be relevant, for the substantive proceedings in that country the BIIa application takes precedence and should be heard first (and that the Hague application is superfluous unless the BIIa application is refused). In support of this he relies in particular on:
    a. the existence of a valid enforceable Polish order which continues to apply;
    b. the Polish court being seised first of the case;
    c. the principle that this court should trust the Polish court;
    d. the very limited grounds for non-recognition of the Polish order;
    e. the duty, save in exceptional circumstances, on this court to enforce the Polish order previously recognised;
    f. Article 60 of BIIa, which states this Regulation takes precedence over the Hague Convention and Articles 18, 29 and 34 of the 1980 Hague Convention;

g. the decision of **JRG v EB** [2013] 1 FLR 203; where Mostyn J, in a case involving 3 children under the age of 7, declined to adjudicate on a Hague application, adjourning the case and allowed the father to issue an application for recognition and enforcement, stating that in such cases the route of registration./enforcement should "*normally*" be adopted (as opposed to the Hague route);

h. the decision of **ET v TZ** [2014] 2 FLR 373; where Wood J, in a case involving an 8 year old, *with the agreement of all the parties* gave a ruling on the subject of enforcement first and having made a declaration of enforceability, then did not consider the Hague application;

i. the decision of **E v E** [2018] Fam 24, where Mostyn J, considered the interplay between the Hague Convention and asylum, and said in passing that the need for a return order provided by the Hague Convention was "obsolescent" given the relief available under BIIa; and

j. the decision of **H v B v V** [2020] EWHC (Fam) 961, where Macdonald J reviewed the decisions of **JRG v EB** and **ET v TZ**.

46. Further Mr Turner submits that, although I am not technically bound to, I should follow the above first instance decisions unless there is a powerful reason for not doing so, relying on **Willers v Joyce (No 2)** [2018] AC 843.

47. Mr Setright and Ms Chokowry submit the opposite, namely that I should determine the Hague application first, dismiss it and then deal with and allow the appeal against the BIIa registration.

48. I have considered all the points made even if I do not refer to them expressly and concluded that I should consider and determine the Hague Convention application first.

49. My reasons are as follows:

a. the Hague application is properly constituted and this court is seised of it and there is no 'compelling reason' to circumvent it;

b. the decision is agreed by the parties to be a matter for my discretion and choice;

c. the FPR do not assist as to which application should be heard first;

d. the Practice Guide does not suggest the Hague case should be heard second;

e. the Hague Convention route remains available despite the provisions of BIIa; the provisions are complementary;

f. it is the first application in time and pursued by the mother; she has not abandoned it;
g. the children are parties to the Hague case and fully engaged in it and raise important defences in their own right;
h. the children are also parties to the BIIa application and wish it considered second;
i. the children's voices need to be heard, given their ages and views and can be heard more effectively in the Hague case;
j. the Hague Convention has been carefully calibrated to safeguard the interests of parents and children and continues to have a role in such cases;
k. the Convention as complemented by the Regulation is designed with the best interests of the children concerned as a primary consideration;
l. the facts of the case are unusual and there are different considerations to the reported cases;
m. the lack of general guidance on the interplay and scope of the provisions from the first instance decisions, which cases can, in any event, be distinguished on the facts; and
n. the lack of specific Court of Appeal guidance on which application should be heard first.

Hague application

The Law

50. The burden of proving that the removal of the children was wrongful rests on the mother. Only if that is established does the Convention apply and then it is for the father and children to establish any defences.
51. If it does apply, the starting point is, of course, that Article 3 of the Convention states its object is to secure the prompt return of children wrongfully removed or retained.

Habitual residence

52. The father abandoned this jurisdictional point on 30.04.20 and although Mr Setright and Ms Papazian in their written skeleton argument submit that the children are habitually resident here, in oral submissions Mr Setright did not

advance this point. However, the children through Ms Chokowry have and so the court needs to determine the habitual residence of the children immediately before their removal/retention and whether A and her siblings intended to change their habitual residence before or shortly after their arrival.

53. Habitual residence is a factual assessment, as set out in **A v A** [2014] AC 1 where Lady Hale went on to 'draw the threads together' in para 54:

> "*i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.*
>
> *ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.*
>
> *iii) The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.*
>
> *iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.*
>
> *v) In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from R v Barnet London Borough Council, ex p Shah should be abandoned when deciding the habitual residence of a child.*
>
> *vi) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.*
>
> *vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts, which would produce a different result from that which the factual inquiry would produce.*

viii) As the Advocate General pointed out in para 45 and the court confirmed in para 43 of proceedings brought by A, it is possible that a child may have no country of habitual residence at a particular point in time."

54. As was explained in that case the factors to be considered when determining habitual residence include: the duration, regularity, condition and reasons for the stay, the child's nationality, the place and condition of attendance at school, linguistic knowledge and the family and social relationships of the child.
55. Ms Chokowry also brought to my attention the following cases.
56. **Re B** [2020] EWCA Civ 1187, in which the Court of Appeal has given recent consideration to the issue of the speed with which a child can acquire a habitual residence in light of the existing Supreme Court authorities. Moylan LJ stated as follows:

"90. Finally, on the issue of habitual residence, given the circumstances of this case, it is relevant to note that habitual residence can change from one state to another extremely quickly.

91. In A v A, at [44], in a passage approved by Lord Wilson in In re B at [39], Lady Hale made clear that she did not "accept that it is impossible to become habitually resident in a single day. It will all depend on the circumstances". As an issue of fact it will, clearly, "all depend on the circumstances" but, to use Lord Wilson's see-saw analogy, there is nothing which prevents "deeper roots" coming up very quickly and being replaced by another habitual residence which will frequently have shallower roots. Those latter roots can still provide a sufficient, "some", degree of integration to establish habitual residence.

92. It sometimes appears, as referred to further below, that Lord Wilson's observations in In re B have been interpreted as meaning that deep roots will invariably take time to come up. This is not the case in part because, if it was, it could result in a child continuing to be habitually resident in a country with which they had no substantive continuing practical connection.

93. Indeed, in my view, it was in part his concern to make clear that the loss of a previous and the acquisition of a new habitual residence could both happen equally quickly that led Lord Wilson to conclude, at [47], that Lord Brandon's third preliminary point "should no longer be regarded as correct"

because, at [39], it was "too absolute". The point which had been proposed by Lord Brandon, as set out in In re B, at [34], was that "there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B".

94. It is also relevant to note the terms of two of Lord Wilson's three "expectations", at [46], which were as follows:

"(b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."

It sometimes appears that these two elements have been overshadowed by the third, namely "(a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state".

95. I would emphasise that Lord Wilson's graphic analogy of the see-saw does not mean that habitual residence cannot change very quickly. This, as I have endeavoured to explain, is, in my view, clear from what he said in In re B itself. However, it can also be seen from what Lady Hale said in In re LC:

"[63] The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then or even later. Of course, there are many permutations in between, where a person may lose one habitual residence without gaining another."

57 In **Re LC** [2014] 1 AC 1038, the Supreme Court considered that the state of mind of an older child was relevant to the issue of whether he or she has acquired a habitual residence. In so doing, Lord Wilson stated as follows:

> *37. Where a child of any age goes lawfully to reside with a parent in a state in which that parent is habitually resident, it will no doubt be highly unusual for that child not to acquire habitual residence there too. The same may be said of a situation in which, perhaps after living with a member of the wider family, a child goes to reside there with both parents. But in highly unusual cases there must be room for a different conclusion; and the requirement of some integration creates room for it perfectly. No different conclusion will be reached in the case of a young child. But, where the child is older, in particular one who is an adolescent or who should be treated as an adolescent because she (or he) has the maturity of an adolescent, and perhaps also where (to take the facts of this case) the older child's residence with the parent proves to be of short duration, the inquiry into her integration in the new environment must encompass more than the surface features of her life there. I see no justification for a refusal even to consider evidence of her own state of mind during the period of her residence there. Her mind may—possibly—have been in a state of rebellious turmoil about the home chosen for her which would be inconsistent with any significant degree of integration on her part. In the debate in this court about the occasional relevance of this dimension, references have been made to the "wishes", "views", "intentions" and "decisions" of the child. But, in my opinion, none of those words is apt. What can occasionally be relevant to whether an older child shares her parent's habitual residence is her state of mind during the period of her residence with that parent. In Ex p Nilish Shah [1983] 2 AC 309 , in which he propounded the test recently abandoned, Lord Scarman observed, at p 344, that proof of ordinary (or habitual) residence was "ultimately a question of fact, depending more on the evidence of matters susceptible of objective proof than on evidence as to state of mind". Nowadays some might not accept that evidence of state of mind was not susceptible of objective proof; but, in so far as Lord Scarman's observation might be taken to exclude the relevance of a person's state of mind to her habitual residence, I suggest that this court should consign it to legal history, along with the test which he propounded."*

58 In addition, in determining this issue, I shall ensure that the children are at the centre of the exercise and I adopt Hayden J's approach to this question in **Re B** [2016] 4 WLR at para 18:

> *"This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc and an appreciation of which adults are most important to the child. The approach must always be child driven."*

59 Ms Chokowry submits that the children in this case acquired a habitual residence in this jurisdiction very quickly in light of their state of mind not to return to Poland and she relies on what the children told the Guardian about their intentions and plans and the girls' long-standing wish to live with their father and their familiarity with England. A told the Guardian that she was expecting to stay in England when she came to visit her father in July 2019. She further shared that her father had agreed that she could come to live with him from April 2019. I told the Guardian that she had known from the outset that they would be staying in England for longer than a month, and that this had been discussed in Poland. She had come to England with the expectation of staying for good. E shared with the Guardian that he believed he was travelling to this jurisdiction for a holiday and decided to remain here when he knew his sisters had decided to stay here.

60 Ms Chokowry suggests the children achieved habitual residence in this jurisdiction by 31.08.19, being the date the mother says they were retained i.e. the planned return from the summer holiday.

61 As already referred to, the children came here on 20.07.19 and in my view that is the date of the alleged wrongful removal/retention given there was an element of pre-planning. At the very latest the retention date is 22.08.19 when the mother received the message referred to at para 24 above.

62 I have considered Ms Chokowry's submission on the issue of habitual residence carefully but do not accept it. In my clear view, the children's habitual residence remained in Poland. My reasons are as follows:

a. that is where the children lived, went to school and were deeply integrated, despite their varying degrees of unhappiness;

b. they are Polish children and Polish is their mother tongue;

c. Poland is where all the family, save the father, live;

d. they came to England for a one month holiday, that is what the father had the mother's permission for;

e. A may have had a plan to stay in England but it was a plan that her mother, with whom she lived by reason of a court order, was unaware of;

f. the younger children may to varying degrees have been aware of the possibility of staying in England but again it was a plan the mother was unaware of; and

g. the children were not here for a long enough period, given the particular facts of this case, to pass the integration test.

63 It therefore follows that the father's removal of the children or his retention of them was wrongful and breached the mother's custody rights. This court is thus required to return the children unless the father or children satisfy it that one of the exceptions is made out.

Article 13 defences

64 It is therefore necessary to consider the defences.

65 Article 13 provides (insofar as is relevant) that:

> "*the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—…….*
> *(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation …*
> *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*."

Child's objections

66 The law on a child's objections under Article 13 of the Convention is set out in detail in **Re M** [2016] Fam 2 and I have regard to the clear guidance in that case:

a. *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.*

b. *Whether a child objects is a question of fact. The child's views have to amount to an objection before Article 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.*

c. *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.*

d. *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.*

e. *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.*

67 In addition to the above, the following principles remain relevant, and are applicable in this case:

a. the word 'object' is to be construed literally **Re F** [2016] 1 FCR 168;

b. an enquiry should be made into the reasons for the objection. If it results from no more than a preference for staying with the abducting parent, then little or no weight should be given to the child's views **Re S** [1993] Fam 242;

c. the objection must be to being returned to the country of the child's habitual residence, not to living with a particular parent **Re K** [2011] 1 FLR 1268;

d. an objection to returning to a particular parent may be inextricably linked to a return to a particular country, in which circumstances both must be considered, for example where the only place the child will be able to live on returning to the foreign country will be with that parent **Re M** [1994] 1 FLR 390;

e. the court must consider whether or not the views expressed by the child were expressed out of free will and choice, whether or not they are genuine or whether they have been influenced by a party or person in contact with the child **Re R** [1992] 1 FLR 105;

f. where a child has been the subject of influence that has caused her to express certain views, the weight that should be given to any objection would be much reduced **M v M** [2008] 2 FLR 1884;

g. there must be a strength of conviction and rationality to satisfy the proper interpretation of Article 13 **Re K** [2011] 1 FLR 1268.

68 Thus, if the court finds that this defence is made out, then the Hague Convention does not require the court to return the child. The court would however still be required to consider the effect on the child of disregarding his/her views when considering whether to exercise its ensuing discretion regarding the child's return.

69 I bear in mind also, that in normal circumstances, it is in the best interests of children that they be returned to the country whence they have been wrongfully removed/retained and it is only in exceptional circumstances that the court has a discretion to refuse immediate return.

Grave risk of harm

70 If the court does not accept any of the above arguments, then it can turn to the defence raised in terms of Article 13(b) of the Convention, namely that ordering the children's

return would place them in an intolerable situation and therefore expose them to a grave risk of harm.

71 As Ward LJ observed in **Re C** [1999] 1 FLR 1145:

> *"there is an established line of authority that the court should require clear and compelling evidence of a grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of habitual residence."*

72 The Supreme Court considered the test to be applied when assessing whether this defence was made out in **Re E** [2012] 1 AC 144. The applicable principles may be summarised as follows:

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

b. *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.*

c. *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.*

d. *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'.*

e. *Article 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, as in this case, Article 11(4) of BIIa applies, the court cannot refuse to return a child on the basis of Article 13(b) of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return). 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.*

f. *Where the defence under Article 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 Article 13(b).*

73 More recently, the Court of Appeal in **Re C** [2019] 1 FLR 1045 gave guidance on the issue through Moylan LJ. His Lordship quoting paragraphs 35 and 36 of **Re E** (above) stated as follows:

"At [35] the point was made that "art 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country". The judgment then returned to the approach the court should take to factual disputes.
"36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from

country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues.

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.

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).

74 In **OCI v Romania** (Application No: 49450/17) [2019] 2 FLR 748 the European Court of Human Rights 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."*

75 Macdonald J stated in **Uhd v McKay** [2019] 2 FLR 1159 that:

a. *the methodology articulated in Re E forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings;*

b. *within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before*

the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.

76 Ms Chokowry also referred to two further cases. **Re LC** [2015] 1 FLR 1019, a case involving 4 children under the age of 12, where Wood J concluded that if the children were separated with 3 being returned to Spain, there would be a grave risk of psychological harm to each and a grave risk that each would be placed in an intolerable situation, given their real and deep attachment to each other and the support they offered each other.

77 **Z v D** [2020] EWHC 1857 (Fam) is a recent example of a case where an Article 13(b) defence was established in respect of a 12 year old, whose mother sought her summary return to Brazil, where it was alleged the mother had beat her, causing bruising.

78 In considering the Article 13(b) defence, the court is bound to consider what protective measures can be put in place. Of course, the court is unlikely to refuse to return a child on the basis of Article 13(b) if it is established that adequate arrangements have been made to secure the protection/welfare of the child after his or her return.

79 Article 11(4) of BIIa places on the left-behind parent the burden of establishing that adequate protective measures have been made to protect the child after her return.

80 Macdonald J helpfully summarized the principles drawn from recent Court of Appeal decisions in respect of protective measures in **Z v D** at para 29:

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.

81 Williams J summarised the use of protective measures thus in **Re A** [2019] 2 FCR 673:

"A court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".

82 It is also well established that this court should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of Poland are equally adept in protecting children as those here; although this court will still need specific details of the measures it is proposed those authorities will take for that evaluative exercise to be undertaken.

83 The primary focus is on the risk of harm to the child. The situation 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 have to face those risks of harm.

Discretion

84 In addition to the points made above, in **H v K, B, M** [2018] 1 FLR 800 Macdonald J summariSed the guidance from **Re M** and **Re F** as follows:

> *47 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 considerations (Re M [2007] 1 AC 619)."*

85 In **Re WF v FJ, BF & RF** [2011] 1 FLR 1553 Baker J, as he then was, stated that in a case involving siblings, the court was to consider the position of the sibling group together and exercise its discretion whether or not to return the children 'in the round' rather than establishing whether or not the gateway to discretion was open in the case of each child before going on to consider the exercise of discretion.

86 Put simply, each case turns on its own facts and the approach to be taken in the exercise of discretion will depend on all the circumstances.

ECHR

87 In determining this application, I have also considered whether the making of a return order would constitute a disproportionate interference with the **Article 8** rights of those whose Article 8 rights are engaged. In this case, the father, mother and the children's rights are all engaged but it is trite law that in the event of a conflict, the children's rights prevail.

88 In considering the particular facts of this case, I am guided by the above legal principles.

Mother's case

89 The mother filed three statements in support of her applications that the children return to Poland. She says that the children were removed and are being retained without her

consent; and that the Polish court is seised of the case and has jurisdiction to make all welfare decisions. She thinks the children's views have been heavily influenced by the father. As for the allegations of physical abuse, she accepts in her written evidence in this case that on one occasion during a heated argument she "lost it and hit A" but denies hitting I or E. She considers that the Polish court should determine all issues.

90 In respect of the Hague application, Mr Turner submits that the defences have not been established, save that he accepts A objects to a return, or if they have been, that the court should in any event exercise its discretion to return the children, given that the Polish court is seised and will carry out the welfare investigation, the available protective measures and given policy considerations. Mr Turner places weight on the following factors: the 'low level' of A's objections, the possibility that A will return if her siblings have to; the return not being to the maternal grandmother's home where the children had been particularly unhappy; language problems for the younger two children in their English school; the father's "shameful" actions; the Polish court being seised already; the English court not being able to deal with the future arrangements for the children and comity.

91 The mother submits there is no evidence of a grave risk of serious physical or psychological harm to any of the children if they are returned to Poland for the purposes of a welfare investigation.

92 The mother does not accept that the children would be separated, as she suggests that A would in fact return if the younger two did and submits that in addition close sibling groups are often separated by circumstances and she asserts that any ascertainable consequences would be tolerable in the particular circumstances. She adds that the harm from any separation needs to be balanced against the harm from the children being separated from their mother. However she accepts through Mr Turner that she cannot force A to return.

93 The mother accepts that A and I have reached the appropriate age and maturity to take into account their views but not that E has. The mother does not accept the younger two children object and contends that their views amount to simple preferences.

Father's case

94 The father has filed two statements. He opposes the mother's application, asserting that the children all object to returning to Poland and that ordering the children's return would place them in an intolerable situation and therefore expose them to a grave risk of harm.

Cafcass

95 Ms Huntington has prepared two reports, dated 24.04.20 and 01.09.20 and produced a more recent contact note dated 11.09.20 referencing a conversation with A. She spoke to the children on the first occasion by video call and on the second during a home visit.

96 In her first report Ms Huntington recorded the following:

a. E said his mother got upset very easily and on an occasion had thrown I's phone; his mother was angry; and struggled to recall positive memories of her; unprompted he said he could not go anywhere to live without his sisters and could not even think about living without them, he spoke about the love and support the siblings offered each other, he said his mother "beat us up" and referenced an occasion when she was angry and hit him;

b. I said she got on ok with her mother; she said she could not think of living without A, she had discussed in Poland staying in England and not returning, she was not sure what she wanted to happen, she seemed positive when talking about her mother and missed her a bit, she said they got on very well, she said her mother had hit her but it was a long time ago, that E missed their mum the most; that nothing worried her about a return although she would be sad to return and

c. A described her mother's emotional volatility but said her mum could be nice, frequent fights between her mother and maternal grandmother, her mother's abusive behavioUr with her punching and slapping her when she became angry, which she said caused bruising, her mother would be aggressive every few weeks, would vent anger and frustration by hitting her and E and less so I;

she said she was exhausted by it and had self-harmed as she felt so low, that there had been an element of planning to stay in England from April 2019 and she was expecting to stay, she wanted to stay in England as it was safer; she was worried about a return to her mother's care as she feared punishment, she assessed the strength of her wish to stay as 8.5 out of 10.

97 Ms Huntington's opinion at this stage was as follows:

a. A had the strongest objection to a return;

b. E and I did not voice strong objections to a return to Poland but wished to stay in the UK;

c. The highest priority for the children was to remain together as a sibling group;

d. E was unable, given his lack of maturity, to process an objective and balanced assessment of his own circumstances and so his views should not be given significant weight;

e. I spoke with balance and a degree of insight about her circumstances and her maturity was commensurate with her age; and

f. A was thoughtful, reflective and insightful and slightly more mature than her age and so weight should be given to her views, particularly given her strong objection.

98 In her second report Ms Huntington recorded the following:

a. The children's views in respect of wishing to remain in the UK remained unchanged, although I and E particularly communicated a sense of loss in respect of their mother and all three children expressed that they would ideally wish for their mother to live close to them in the UK.
b. In speaking to A separately she expressed feelings of anger towards her mother and referenced longstanding difficulties whilst living in her mother's care in Poland. She scaled her experience of life whilst in Poland as 9/10 (with 10 being the most negative), and her fear that the same difficulties with her

mother would re-emerge if she were to return. A described feeling "terrified" at the prospect of a return. She suggested that she would likely run away.

c. The mother accepted that she had physically chastised A and that there was the potential for this to have resulted in A having sustained bruising. The mother appeared to accept that she had physically chastised A on several occasions, although she said A had exaggerated.

d. The mother told her that she would not force A to return but that the younger two needed to.

99 Ms Huntington's opinion was as follows:

a. The mother minimised or dismissed the children's experiences and assumed little responsibility for inappropriate parenting methods. Her ability to empathise with the children was questionable.

b. Her insight into her parenting difficulties was limited.

c. She showed little insight into the potential impact of separating the sibling group.

d. A has maintained her strong objection to a return. She has been consistent in her expressed wishes and feelings and appeared authentic, measured and objective and it would not be in her best interests for these to be disregarded.

e. A has been consistent in her expressed wishes and feelings and the basis for her objections, citing poor experiences in her mother's care.

f. A's emotional presentation appeared authentic, a view shared by her school.

g. The children's experience of their father's care has now been tested for over a year and their views remain the same, namely that he has provided them with safety and stability.

h. A forced return could potentially place A in a very vulnerable position, given the reports of self-harm and running away.

i. I and E have not expressed an objection to a return to Poland. They both freely articulate a sense of loss in having their mother live apart and at some distance from them and have conveyed a wish for her to be part of their everyday lives.

j. Whilst finely balanced, the separation of the sibling group would place I and E in an intolerable situation. Their highest priority is to remain together. They appear strongly bonded and supportive as a sibling group, which will have helped them cope with difficult situations. Sibling bonds are one of the most enduring and significant relationships, alongside the parental relationship and fracturing that relationship via separation is likely to causes emotional distress and harm.

k. I and E wish to remain in England and appear content.

l. They have experienced a number of changes to their living experiences and a return would introduce further change and instability.

100 In the recent note Ms Huntington records that:

a. A said that she had made the decision that she would be staying (in the UK) in April 2019. It had reached a point where she could not stand the way her mum treated her anymore.

b. A was visibly emotional; tearful and struggling to speak. She told me that she had been sitting on her bed and thinking about things. A was very distressed and said that she and her siblings would not return, even if an order were made.

Discussion

General

101 In this case there are three children. I have considered their situations separately. In particular, I have considered the defences in relation to each child separately, although all parties agree the position of one child may be relevant to a defence in relation to one or more of the other children.

102 I take into account that a return order is simply a mechanism to enable the Polish court to determine the future child arrangements on the basis of welfare considerations and that therefore this court is only looking, in effect, at the interim position.

103 Further, that the purpose of the Convention is to reinstate the status quo and to negate the effect of unilateral actions and deter abductions/wrongful retentions.

Objections

104 Having regard to the evidence and applying the law, I am satisfied that A objects to returning to Poland for the purposes of Article 13 and is expressing more than a preference or wish to remain in England. I accept Ms Huntington's opinion and analysis on this issue. I accept that A is mature for her age and so it is appropriate to take into account her views. I conclude that her objections are grounded in her unhappy experience of living with her mother in Poland and her happiness at living with her father in England and that they are strong, consistent, reasonable, objective, rational, her own and genuine. The mother accepts that A objects and Ms Huntington records that the mother said she would not force a return of A. In the circumstances of this case I am satisfied there is an inextricable link between a return to the care of her mother and a return to Poland.

105 I am not satisfied that I and E object to a return, although I accept that they do not wish to. I am satisfied I is mature enough for me to take into account her views, whereas E is not.

106 I accept the Guardian's opinion evidence that the children, whilst exposed to parental conflict, have not been negatively influenced or alienated from their mother by their father. The children, including A, were able to speak positively of their mother and freely articulated their sense of loss in relation to her absence from their lives. The children did not present with any of the behaviours typically associated with children who have been exposed to alienating behaviours.

107 I agree with the Guardian that given the close bond between these siblings and the support they have offered each other, they must be considered in the round as a group

and therefore A's objection to a return impacts on I and E, as I am satisfied that there is a likelihood, given what she has said to Ms Huntington, that A would not return to Poland even if her siblings did.

Harm

108 Having regard to all the evidence before the court, including the children's statements and the mother's various admissions and the Guardian's analysis and opinion, I am satisfied that - making a reasoned and reasonable assumption as to the maximum level of risk to the children and considering the protective measures available to meet that risk - there is a high or grave risk, for these particular children in these particular circumstances, that returning them to Poland would expose them to physical or psychological harm or would otherwise place them in an intolerable situation for the purposes of Article 13(b).

109 The physical harm would be from physical ill-treatment or unacceptable chastisement by the mother. I accept that the children's allegations of consistent and ongoing physical punishment, taken as a whole, cross the threshold under Article 13b; the mother's behaviour towards them placing them in a situation which no child should have to tolerate. Whilst the greatest risk of physical harm is for A, there remains a risk to I and E. Moreover, A's siblings were and would be aware of her treatment by the mother and would have suffered psychological harm as a consequence. As would A, who was also aware of the treatment of her sister and brother. The abusive physical treatment of each child is also likely to have caused each of them psychological harm.

110 I am also satisfied, having regard to the totality of the evidence, that if the children return to Poland to their mother, it is reasonable to assume that her harmful treatment of them will continue. In so concluding, I also accept the Guardian's assessment of the mother's parenting vulnerabilities, lack of insight, empathy, understanding and minimization, which all remain unaddressed and so are significant and increase the risk of further harm to the children.

111 In addition, the children are a strongly bonded sibling group who have navigated instability and negative experiences together. I agree with the Guardian that their

collective experiences will have created a buffer and resilience that assists them in coping and managing difficult periods.

112 I find that that the children will suffer a significant negative impact if the sibling relationship is fractured via a separation, which will place them in an intolerable situation. As already stated, I conclude that there is a likely risk of separation in the event of a return order because there is a likelihood that A will not return and the mother accepts she cannot be forced.

113 As for protective measures, the father says he is not in a position to return to Poland to work and/or care for the children because his work and home is in England. He says the option of the children staying with his own mother is very improbable. If the children are returned to the mother he seeks the usual undertakings, in particular that she does not use or threaten violence, does not emotionally abuse the children, does not leave the children with the maternal grandmother and does not engage with Social Services.

114 The mother accepts that there is no one else that the children could be placed with if they return to Poland. She no longer lives with her parents and now has a rented apartment. Neither parent wishes the children to be placed with strangers. Thus, the children would return to the mother. She agrees to give a range of undertakings to the court, as requested by the father.

115 I am satisfied that there are no protective measures that could in reality protect the children from the risks that I have identified.

116 I am told that A thinks that she will not feel protected by a referral to Social Services, given the poor response that she experienced previously. In addition, she has conveyed that she felt unable to share her experience of ill-treatment with such services in Poland, knowing that the mother would be made aware of them.

117 In any event, it is difficult for this court to assess the effectiveness of any protective measures in Poland, given the lack of evidence on this issue. There is no evidence before this court from such services in Poland as to what protective measures would be put in place.

118 I am satisfied that there are no protective measures capable of guarding against the detrimental impact of the separation of the siblings, both in the short term, owing to the emotional distress and harm that the children will suffer now and in the long term, for the reasons outlined by the Guardian.

119 I am not satisfied that protective measures can be put in place to ensure that the children do not face an intolerable situation. No measures can protect them against the emotional harm that would be caused to them from being separated. Given the facts of this case, it is difficult to see how the children could be protected from the psychological and emotional harm that would be caused by a move of two of them.

120 The reality in this case is that the children would be returned to an environment where they were at high risk of physical and psychological harm, which was the same environment that the children left in July 2019.

121 I agree with Ms Chokowry that any undertaking from the mother would not provide sufficient protection, given her lack of insight and denial.

122 I therefore conclude that the Article 13(b) defence is established.

Discretion

123 I turn to stage two and whether I should exercise my discretion to make a return order. I have considered a wide range of factors and weighed up the policy and welfare considerations in favour of a return against the circumstances of the exception and welfare considerations in support of a non-return. I am conscious that the children came here ostensibly on holiday and that prior to coming here there had been a degree of discussion between A and the father about the children staying, none of which the mother was party to. I also take into account that the mother was the children's main carer before July 2019.

124 Against these points I have also taken into account the following:

a. A's objections are strong, reasoned, balanced and mature.

b. None of the children wish to return to Poland.

c. The establishment of the Article 13(b) exception.

d. This is not a hot pursuit case where a swift restoration of the status quo ante is possible. The children have now been in this jurisdiction for over 14 months. As such, the policy considerations are somewhat diluted.

e. The children's welfare will be adversely impacted by a further change engendered in a return.

f. The children have been required to make a number of changes to their living arrangements and will experience further instability on a return. They will be returning not to familiar circumstances but to another change of home and school and to no pre-existing relationships.

g. The children have experienced stability in the care of their father in England.

h. They are settled here and their needs are being met by the father.

i. They are settling into education here and enjoying life.

j. A feels safe here and is very upset at the idea of returning to Poland and says she would not.

k. A return to Poland is likely to place a further strain on the children's relationship with their mother.

125 When I weigh all these considerations, I reach the clear conclusion that I should not exercise my discretion to return any of the children to Poland pursuant to the Hague application.

BIIa

126 Having decided against a summary return under the Hague application, I turn to the mother's parallel application under BIIa and the father's appeal against registration.

Law

127 I have considered carefully the provisions of BIIa, in particular the preamble at paragraphs 17 and 21 and Articles 16, 19, 20, 21, 22, 23, 24, 26, 27, 28, 31 and 33.

128 It is not disputed that the 2016 Polish order must be recognized in this jurisdiction, unless one or more of the limited grounds are made out and potentially can be enforced.

Mother's case

129 Mr Turner submits that even if this court refuses a return pursuant to the Hague, it can still and should order a return under the BIIa and must consider this option.

130 Mr Turner submits that there is no reason why the 2016 Polish order should not be enforced by the making of a return order and that the father's pleaded ground for non-recognition, namely public policy, is a very high hurdle to overcome, relying on **Re D** [2015] 1 FLR 1272 at paras 70 and 73, per Peter Jackson J, as he then was, relying on **Re L** [2013] Fam 94, where Munby LJ described it as "*a very narrow exception*" which set "*the bar very high*."

131 Mr Turner submits that the mother's BIIa application here is legitimately pursued and not to permit it would lead to further delay.

132 Mr Turner however accepts the children are entitled to join the father's appeal.

Father's case

133 Mr Setright submits that if I find the Hague defences established, I should not make a return order via the BIIa route.

134 In appealing the decision to register the 2016 Polish order, the father relies on Article 23(a) which states:

A judgment relating to parental responsibility shall not be recognized if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account he best interests of the child.

135 The father contends that to order the return of these children under the BIIa route, following a decision not to return them under the Hague route would be in effect perverse and contrary to public policy namely the effectiveness of the Convention.

Cafcass

136 Ms Chokowry on behalf of the children, invites the court not to enforce the order for the return of the children in circumstances where A has expressed strong objections, I and E do not wish to return, Article 13(b) has been established and it is detrimental to the children to be separated from each other. Ms Chokowry also indicated that she would wish to join the father's appeal against registration and appeal in the children's own right.

Discussion

137 I have reached the firm conclusion not to order a return of the children via this route at this stage. My reasons are as follows:

a. The unusual circumstances of this case;

b. The parties need time to reflect on and consider my Hague decision;

c. To return the children via this route would undermine my decision in the Hague case and the two routes are meant to complement each other;

d. Given A's age, her views and her objections, she cannot and should not be forced to return to Poland;

e. These children need to remain together and to separate them would be emotionally harmful and intolerable for them;

f. The Polish orders were made on a different factual basis and assumed the children would remain together; there is a now a likely risk of separation;

g. The Guardian considers that a return to Poland would not accord with the children's welfare needs;

h. The Guardian's report is the most up-to-date professional assessment of the children's position;

i. The Polish court can reconsider the case given my judgment in Hague case;

j. The father wishes to consider this judgment and whether to amend his appeal to include a further ground pursuant to article 23;

k. The children wish to join the appeal already in process (which the mother accepts they are entitled to do).

138 In reaching this decision, I take into account that I have not been made aware of any authority to support the contention that the court should enforce a return via BIIa, having at the same hearing first refused a return via the Hague.

Decision

139 In the above circumstances, I refuse to order the children's return to Poland. This decision has been made on the very particular and unusual facts of this case.

140 I give permission for this judgment, the parents' statements and the Cafcass reports to be disclosed to any Polish court or agency dealing with the children's welfare.

141 However, I encourage the parties to engage in mediation in this case rather than continue this litigation, which overall has been ongoing for some time.

142 An order will need to be drafted to reflect this decision and the necessary ancillary directions.

143 This is my judgment.