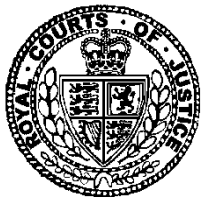

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly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

Neutral Citation Number: [2021] EWHC 665 (Fam)

Case No: FD20P00644

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
THE CHILD ABDUCTION ACT 1985
THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, THE HAGUE 25 OCTOBER 1980
The Children: **EB** ("E") AND GB ("G")

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2021

Before :

MR JUSTICE PEEL

- -

Between :

AB — **Applicant**

- and -

CD — **Respondent**

- -
- -

Jacqueline Renton (instructed by the International Family Law Group) for the **Applicant**
Mark Jarman (instructed by Access Law) for the **Respondent**

Hearing dates: 15-16 March 2021

- -

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 Peel :

Introduction

1. The Father ("F") seeks the return of E (7 years old) and G (3 years old) to Kazakhstan pursuant to the Hague Convention 1980. The Mother ("M") removed the children, unlawfully as it is now accepted, from Kazakhstan to this jurisdiction on 29 December 2019.

2. M initially defended the application on the following grounds:

   i) Habitual residence.
   ii) F does not have rights of custody and/or was not exercising them at the time of removal.
   iii) E objects to a return.
   iv) Article 13(b), the "grave risk of harm" or "otherwise intolerable situation" upon return defence.

3. In her counsel's skeleton argument for this hearing, M, correctly in my judgment, abandoned the habitual residence/rights of custody arguments. They were untenable in the light of the expert report on Kazakhstani law dated 24 February 2021. Accordingly, the remaining defences are E's objections and Article 13(b).

4. In **Re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51**, Baroness Hale of Richmond observed at paragraph 48 that:

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

5. Moylan LJ stated in **Re W (Abduction: Intolerable Situation) [2018] EWCA Civ 664** at paragraph 46**:**

> "Child abduction is well-recognised as being harmful to children. As was noted in Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144, [2011] 2 WLR 1326, [2011] 2 FLR 758, the 'first object of the Convention is to deter either parent … from taking the law into their own hands and pre-empting the results of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any disputes can be determined there'."

6. Immediately after arriving in this jurisdiction, M made an application for asylum. The court was informed at a hearing on 20 October 2020 that the basis of her claim was that "she and the children are in danger from the father, and the father has threatened to remove the children from her care". Although the documents from the asylum application have not been disclosed by M, and therefore are not before me, that brief description suggests that M has relied on similar facts and matters for her Article 13(b) defence as in her asylum claim. The children were dependent persons for the purpose of the claim; they did not make separate, free-standing claims. Thus, the claim falls within the fourth category at paragraphs 137-140 of **Re G [2020] EWCA Civ 1185**; the fact of an asylum application by the children's mother does not create a bar to either the making or the implementation of a return order under the Hague Convention. The Supreme Court gave permission to the mother in that case to appeal,

and heard the appeal over 2 ½ days in January. Judgment has been reserved and, I am told, is to be handed down on 19 March, a matter of 3 days away.

7. The Secretary of State was invited by the court to attend the PTR, but elected not to do so, setting out in a letter to the court the view that her involvement in the proceedings was unnecessary. At the PTR, F applied for disclosure of the documentation lodged by M in respect of her asylum claim. His aim was to establish whether there were inconsistencies between M's presentation to the Home Office and to this court. That application was refused.

8. I was informed the day before this hearing started that M has recently been notified that her asylum application has been rejected, although she has appealed. Both parties agreed that there is nothing to prevent me, under the state of the law as it currently stands, from (i) determining this Hague Convention application and (ii) if appropriate, making a return order. However, I indicated at the outset that I would in any event permit further representations in the event that the Supreme Court decision materially affects this approach.

9. Finally, to complete this summary of the course of the proceedings:

   i) M sought an expert psychiatric report as to the effect on her mental health should she return to Kazakhstan. That application was refused at the PTR.
   ii) An expert report was ordered as to Kazakhstani law, specifically (i) F's rights of custody within the meaning of the convention and (ii) what protective measures are available in Kazakhstan in terms of the recognition and enforcement of undertakings or by making orders.

Background

10. F is 51 years old; M is 33. They are both Kazakhstanis, but of Chechen ethnicity. F is a construction manager by occupation. They were married in an Islamic ceremony on 6 June 2012, which is not recognised as a legal civil marriage in Kazakhstan. Under Islamic law, F was entitled to, and did, marry two other women in Islamic ceremonies. He has two other children, a 24-year-old son by a woman who was not his wife, and a 14-year-old son by one of his wives. M and F lived in Kazakhstan together, where the children were born. There is a dispute between them, which I do not have to resolve, as to precisely how much time they spent living together. What is agreed is that their relationship continued until mid-2018 (approximately 6 years after marriage) when they separated shortly after G's birth. Thereafter, the children lived with M as their primary carer although E was with F for 2 months until August 2018 in disputed circumstances. The parties disagree as to how much time the children spent with F after separation; he says he saw them 3-4 times per month, whereas M says it was no more than 6 occasions in total between mid-2018 and September 2019 as well as a fleeting meeting on 19 December 2019, the last time F saw the children.

11. In January 2020, E's school contacted F to tell him that she was not attending school, and that they had reported the situation to the Kazakhstani authorities. Upon making enquiries, F established that M and the children had left Kazakhstan on 29 December 2019, accompanied by M's sister, and flown via Belarus to the United Kingdom. It is not in dispute that M did not inform F of the move, nor seek his agreement. The only contact F has had with M since then is one text message from her in March 2020

which he describes as "offensive". F responded in kind with an abusive text message to M on 23 April 2020. He also sent a handful of threatening messages to members of her family in early 2020.

12. The children have not seen F in person, not seen him by videocall, nor spoken to him by telephone since December 2019, a period of some 15 months. They have had no interaction with him at all.

Kazakhstani proceedings

13. On 20 January 2021, F issued proceedings in Kazakhstan seeking contact with the children; a translated copy of the application has been produced. It was suggested to me that there may be a hearing in mid-April, although I have no confirmation of that. I was informed that M had not been served with the application, and had not seen it, but she is now undoubtedly on notice. Notably, F has not sought, nor does he intend to seek, an order transferring care of the children from M to himself. F's sole purpose in his application is to take up once more the contact which was in place prior to the children's removal from Kazakhstan.

The Single Joint Expert on Kazakhstani law

14. The expert, Mr Chumakov, provided a report and gave oral evidence. He was clear and helpful. He told me:

i) A Kazakhstani citizen seeking to relocate must obtain notarised consent of the other parent to remove children to another jurisdiction. If consent is not given, application may be made to the court. Absent either of these steps, relocation will be illegal. This applies equally to married and unmarried fathers. He made it clear that if the children are returned to Kazakhstan, M may thereafter apply for permanent relocation.

ii) There is no criminal offence arising out of an abduction from Kazakhstan, nor any civil remedy. The most that can be done under Kazakhstani law is for the left behind parent to apply for a return order.

iii) There is no international treaty between Kazakhstan and the UK on recognition and enforcement.

iv) Undertakings given in England pursuant to court proceedings are neither binding nor enforceable in Kazakhstan. Nor can they be secured as self-standing documents.

v) Mr Chumakov was unaware that F has brought a contact application in Kazakhstan. He told me that, provided the Kazakhstani court "accepts" the case, the parties can at any time, whether at the next hearing or beforehand, lodge with the court an agreement reflecting the undertakings. Such an agreement will have formal legal status and will, in principle, be enforceable. Thus, it seemed to me that with a modicum of cooperation, and provided the case is "accepted", the undertakings can be incorporated in a formal agreement referable to the contact proceedings.

vi) According to Article 14 of the Kazakhstan Constitution, "no one is above the law or court. No one may be discriminated based on ethnic or social origin, official or material status, sex, race, nationality, language, religion, belief, domicile or any other grounds". Similar principles are enshrined in Article 2.4 of the Kazakhstan Family Code, in particular, "the rights of citizens entering into marriage or family relations may not be prejudiced based on ethnic or social origin, official or material status, sex,

race, nationality, language, religion, belief, domicile or any other grounds. The exercise of rights in marital and family relations may E138 be restricted only by law and only to the extent necessary for the protection of constitutional system, public order, human rights and freedoms, public health and morals". The expert states therefore that "the Mother's ethnic origin and nationality" are irrelevant.

vii) In answer to questions raised by M, he says that the Kazakhstani civil court is the ultimate arbiter of disputes, not, as suggested by M, Chechen elders in the case of persons of Chechen ethnicity, although they can play a valuable role in facilitating out of court settlement. The civil court is juridically supreme.

viii) I was told that M can participate in Kazakhstani proceedings, whether living there or overseas. Although public funding is not available, a number of law firms carry out pro bono family law work.

Undertakings

15. F offers conventional undertakings, namely:

i) Not to take steps to further any criminal or civil proceedings against M arising out of the alleged abduction.

ii) Not to remove the children from M's care save for the purposes of contact, pending the first court hearing in Kazakhstan.

iii) To pay for the return flights of M and the children.

iv) To provide financial support including for general maintenance and rent.

v) Not to harass or pester M.

16. The question of whether these undertakings constitute protective measures, given their apparent lack of enforceability, has been an issue before me.

Habitual residence and rights of custody

17. By Article 3 it is a pre-requisite of a wrongful removal that it was "in breach of rights of custody attributed to a person…under the law of the State in which the child was habitually resident immediately before the removal…".

18. The children had always lived in Kazakhstan prior to their removal. They were settled there, E was at school there, the extended families were there, and they are Kazakhstani nationals. They had no links with this jurisdiction. I do not need to embark on an excursive analysis of the jurisprudence on the meaning of habitual residence. It can, for these purposes, be summed up by the comments of Baroness Hale in **A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [2013] UKSC 60** where she defined habitual residence as corresponding "to the place which reflects some degree of integration by the child in a social and family environment". In this case, as M properly accepts, there can be no doubt that the children were at the relevant time habitually resident in Kazakhstan.

19. By Article 5 rights of custody "…shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." As M again properly accepts, the conclusions of the single joint expert make it clear that F had rights of custody under Kazakhstani law and was exercising those rights.

20. Accordingly, as conceded by M, these two defences as originally pleaded, are no longer sustainable.

Article 13(b)

21. The leading authority is **Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27**, per Baroness Hale:

"29. Article 12 of the Hague Convention requires a requested state to return a child forthwith to her country of habitual residence if she has been wrongfully removed in breach of rights of custody. There is an exception for children who have been settled in the requested state for 12 months or more. Article 13 provides three further exceptions. We are concerned with the second:

". . . 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) . . . ; 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. . . . 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." (emphasis supplied)

30. As was pointed out in a unanimous House of Lords decision in *Re D*, para 51, and quoted by Thorpe LJ in this case:

"It is obvious, as Professor Pérez-Vera points out, that these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated: [Explanatory Report to the Hague Convention] para 34. The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of article 13b, which focuses on the situation of the child, could lead to this result. Nevertheless, there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of article 13 does not mean that it should never be applied at all."

31. Both Professor Pérez-Vera and the House of Lords referred to the application, rather than the interpretation, of article 13. We share the view expressed in the High Court of Australia in *DP v Commonwealth Central Authority* [2001] HCA 39, (2001) 206 CLR 401, paras 9, 44, that there is no need for the article 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".

32. First, it is clear that the burden of proof lies with the "person, institution or other body" which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination.

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

34. Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or otherwise" placed "in an intolerable situation" (emphasis supplied). As was said in *Re D*, at para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts

that, if there is such a risk, the source of it is irrelevant: e.g., where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.
35. Fourth, article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home.
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."

22. In **Re S (a Child) [2012] UKSC 10** Lord Wilson said at paragraph 34:

"In the light of these passages we must make clear the effect of what this court said in In *re E*. The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned."

23. In **Re D [2007] 1 FLR 961** Baroness Hale said at paragraph 52:

"In this case, it is argued that the delay has been such that the return of this child to Romania would place him 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". It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus the English courts have sought to avoid placing the child in an intolerable situation 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. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so. In Hague Convention cases within the European Union, article 11.4 of the Brussels II Revised Regulation (Council Regulation (EC) No 2201/2003) expressly provides that a court cannot 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 of the child after his or her return". Thus it has to be shown that those arrangements will be effective to secure the protection of the child. With the best will in the world, this will not always be the case. No one intended that an instrument decided to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm".

24. The court should ordinarily assume the risk of harm at its highest and then go on to consider whether protective measures are sufficient to mitigate the identified harm. That said, as Macdonald J pointed out in **Uhd v McKay[2019] EWHC 1239**, the evidence cannot be viewed entirely in the abstract. The court is entitled to weigh all the evidence and make an assessment about the credibility and substance of the allegations. He cited dicta from Moylan LJ in **Re C (Children) (Abduction: Article 13(b) [2018] EWCA Civ 2834,** and said this at paragraphs 70-72:

"70.In the circumstances, 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) (see *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. 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.
71.That the analytical process described in *Re E* includes consideration of any relevant objective evidence with respect to risk is further made clear in the approach articulated by Lord Wilson in *Re S* to cases in which it is alleged, as it is in this case, that the subjective anxieties of a respondent regarding a return with the child are, whatever the objective level of risk, nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable. As noted above, in *Re E* the Supreme Court made clear that such subjective anxieties are, in principle, capable of founding the exception under Art 13 (b). However, it is also clear from the decisions of the Supreme Court in *Re E* and in *Re S* that there are three important caveats with respect to this principle.
72. First, the court will look very critically at an assertion of intense anxieties not based upon objective risk (see *Re S (A Child) (Abduction: Rights of Custody)* at [27]). Second, the court will need to consider any evidence demonstrating the extent to which there will, objectively, be good cause for the respondent to be anxious on return, which evidence will remain relevant to the court's assessment of the respondent's mental state if the child is returned (see *Re S (A Child)(Abduction: Rights of Custody)* at [34] and see also *Re G (Child Abduction: Psychological Harm* [1995] 1 FLR 64 and *Re F (Abduction: Art 13(b): Psychiatric Assessment)* [2014] 2 FLR 1115). Third, where the court considers that the anxieties of a respondent about a return with the child are not based upon objective risk to the respondent but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable, the court will still ask if those anxieties can be dispelled, i.e. whether protective measures sufficient to mitigate harm can be identified (see *Re E (Children)(Abduction: Custody Appeal* at [49]). Within this context, in *Re S* Lord Wilson observed at [34] as follows:
"The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the courts mental state if the child is returned".

25. Should the Article 13(b) exception be established, that is not the end of the matter. The court is required to go on to consider whether, notwithstanding the availability of the defence, the child should nevertheless be returned. This is an exercise of discretion, albeit it is well established (see **Re M (Abduction: Zimbabwe [2007] UKHL 55)** that in the usual course of events it is unlikely that the court will order a return if to do so would place the returning child in the way of the very harm which has been found to constitute the Article 13(b) defence.

26. M's case is summarised thus in her written evidence: "during my relationship with the Applicant I suffered domestic abuse both physically and emotionally". She makes a number of assertions:

i) F would swear at her, call her names and criticise her for minor matters. He referred to her as his "slave". He was critical and undermining.
ii) Over time this progressed to physical abuse, including punching, kicking and slapping all over the body. He would beat her in front of the children, slamming her head against the wall. On occasions he strangled and choked her.

iii) On one occasion he broke a bottle of glass on her head. On another occasion he attacked her with an extension cord.

iv) On occasions, F threw her out of the house.

v) Just before separation he slapped her across the face and kicked her in the stomach.

vi) M says F was abusive towards his first wife, and their 14-year-old son, although she has provided a letter vigorously denying any such violence.

vii) She refers to one specific incident on 25 January 2014 when she attended hospital with a head injury, although the hospital note does not specifically refer to an allegation of an attack by F. Curiously, the hospital which she says she attended is 2000 kms distant from where M was living at the time, a matter which she has been unable to explain satisfactorily beyond saying that it is where her sister lives.

viii) She refers to a second specific incident on 26 June 2018 where it is alleged that F beat her around the head, also resulting in hospital attendance. The hospital record produced by her refers to a beating, but makes no mention of F. Since then, F has made enquiries and the hospital has confirmed that (i) there is no evidence of M attending the hospital that day and (ii) of the three doctors mentioned on the record, two never worked at the hospital and one did not hold the role ascribed by the note. F is convinced that the record is false; M says that F must have obtained this recent evidence from the hospital by corrupt means. I cannot make a finding on this, but it does raise a legitimate question mark about the evidence relied upon by M.

ix) M says that when she arrived in the United Kingdom, she initially lost 10kgs, before recovering. She has struggled to eat and sleep as a result of these proceedings.

x) M claims that the criminal justice system in Kazakhstan would not support her. There are, she says, no domestic violence groups. She maintains that by ethnic Chechen tradition the children would be removed from her and placed with F.

27. It is right to observe that F adamantly denies the allegations made against him by M. Largely, they are unparticularised and in my judgment the factual allegations put forward by M are to a degree undermined by:

i) Both hospital records are at best questionable for the reasons I have given above.

ii) F's first wife has in a letter adduced in evidence denied the allegations of violence towards her.

Nevertheless, and for the purpose of the Convention proceedings, I am willing to accept that M has suffered significant verbal and physical violence at the hands of F.

28. On the other hand, a number of matters persuade me that M, upon whom the burden falls, does not establish the Article 13(b):

i) There is no evidence that the conduct of F about which M raises complaint, constitutes a risk of harm to the children, let alone a "grave" risk of harm to them, or otherwise would place them in an intolerable situation, should they be returned to Kazakhstan. There is no evidence of any matters giving rise to safeguarding concerns about F's relationship with the children.

ii) Should there be any risk attributable to F's conduct, it is instead to M. However, it is very heavily discounted by the fact that the parties have been separated for two years. There is no suggestion of violence by F to M in that time. In the event of a return to Kazakhstan, M would not return to live with F and would therefore be far less likely to be exposed to abusive behaviour by F.

iii) M does not produce any evidence to justify her assertion that she would not be protected by the Kazakhstani courts, police or other authorities. She has not shown, for example, that she made applications to the authorities which were simply ignored or dismissed. This assertion was somewhat speculative. I have no reason to believe that M, on her own behalf and/or on behalf of the children, would not be able to seek any protection at all, no matter how grave the risk. In this regard, it is notable that, contrary to her case, there are a number of domestic abuse agencies in Kazakhstan, as demonstrated by F in his evidence.

iv) The suggestion that the children would be required to live with F under ethnic Chechen tradition is not made out. I have referred to the expert evidence which specifically records how Kazakhstani law disavows any discrimination made on ethnic or other grounds. True, agreements may be mediated or conciliated by Chechen elders, but these give way to the supremacy of the civil court. M's case on this is, again, largely speculative.

v) Further, after separation the children lived with M and there is no suggestion that those arrangements were compromised either by the ethnic Chechen tradition to which M has referred, or by operation of law. M appears to have been content for the children to spend time with F, who did not seek to retain them at the end of such periods of contact. Nor has F ever made any application for the children to live with him, whether to the civil court or by Chechen tradition. The risk raised by M is, in my judgment, exaggerated.

vi) The financial support offered by F will enable M to rent property. She has, in addition, extended family to whom she can turn if need be.

vii) The impact on her mental health in the event of a return is not corroborated by any medical evidence at all. One would have expected at the very least a history from her General Practitioner, and evidence of any mental health services which she has accessed in either jurisdiction, but none is forthcoming.

29. I acknowledge that the undertakings offered by F are not directly enforceable in Kazakhstan, although they may be capable of being embodied in an agreement in the existing contact application as the expert indicated. Does this enable M to bring her case within the Article 13(b) exception? In my judgment it does not.

30. It is important to recognise the nature and scope of so-called "protective measures".

31. In **Re C (supra)** Moylan LJ considered the courts approach in considering Art 13(b) and the issue of protective measures at paragraphs 40 onwards:

> [40] As was made clear in Re S (A Child) (Abduction: Rights of Custody) [2012] UKSC 10, [2012] 2 AC 257, [2012] 2 WLR 721, [2012] 2 FLR 442, at para [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 (A Child) (Abduction: Custody Rights) [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, at para [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 Art 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 Art 13(b).
[42] In the light of the submissions made in the present case, I would make two further brief observations. They are brief because this is not the occasion for a detailed analysis of the issues.
[43] First, in respect of Ms Cooper's submissions about the efficacy of undertakings given to the English court, it is clear that, in deciding what weight can be placed on them, the court has to take into account the extent to which they are likely to be effective. This applies both in terms of compliance and in terms of consequences, including remedies, in the absence of compliance. The issue is their effectiveness which is not confined to their enforceability: see, for example, H v K and Others (Abduction: Undertakings) [2017] EWHC 1141 (Fam), [2018] 1 FLR 700, at para [61]. In saying this, because I acknowledge the concerns that have been expressed about the court's perhaps giving insufficient weight to the point made by Ms Cooper and the need for caution when relying on undertakings, I make clear that I am not saying that enforceability is not an issue, only that it forms one element of the court's assessment.
[44] Secondly, as referred to above, we were told by Mr Jarman that the issue of the enforceability in South Africa of the specific measures proposed in this case, and about which the judge raised doubts (in para [34]), was not raised either before or at the hearing below. From the statements it appeared that the issue was only whether the undertakings should be lodged with the court in South Africa or whether an order should be made there. From the submissions, as set out in the judgment (para [34]), it appears that the issue was when the undertakings should be lodged. In any event, if enforceability was to be an issue, it should have been raised well before the hearing.
[45] The President of the Family Division issued Practice Guidance on 13 March 2018: Case Management and Mediation of International Child Abduction Proceedings [2018] Fam Law 448. The issue of protective measures is dealt with in a number of paragraphs which make clear that the issue of specific protective measures, both proposed and sought, must be addressed at the earliest opportunity. It also makes clear that, when required, steps must be taken 'in the most expeditious way available, to ensure that information is obtained, whether from the central authority of the requesting State or otherwise, as to the protective measures that are available, or could be put in place, to meet the alleged identified risks'; para 2.11(e). At para 3.12 reference is made to International Judicial Liaison as being one means of ascertaining whether the courts of the home state 'can accept and enforce orders made or undertakings offered by the parties' in that state or can make a 'mirror order'.

32. Williams J summarised the use of protective measures thus in **A (A Child) (Hague Abduction: Art 13(b) Protective Measures [2019] EWHC 649:**

"23. Article 11(4) of BIIA rules out a non-return where it is established that adequate protective measures are available. The Practice Guide makes clear that this is intended to address the situation where authorities have made or are prepared to make such arrangements. The Court of Appeal has recently confirmed that protective measures include all steps that can be taken, including housing, financial support, as well as more traditional measures such as non-molestation injunctions (see *Re C* [2018] EWCA Civ 2834).
24. Protective measures may include undertakings, and undertakings accepted by this court or orders made by this court pursuant to Article 11 of the 1996 Hague Child Protection Convention are automatically recognised by operation of Article 23 in another Convention state (see *Re Y (A Child) (Abduction: Undertakings Given for Return of Child*). To be enforceable they must be declared enforceable pursuant to Article 26. The 1996 Hague Convention Practical Operation handbook provides examples of measures which might be covered by Article 11. European Regulation 606/2013 on the Mutual Recognition of Protection Measures in Civil Matters sets up a mechanism allowing for direct recognition of protection orders issued as a civil law measure between member states, thus a civil law

protection order such as a non-molestation order or undertaking issued in one member state, can be invoked directly in another member state without the need for a declaration of enforceability but simply by producing a copy of the protection measure, an Article 5 certificate and where necessary a transliteration or translation.
25.A protection measure within that is defined as any decision, whatever it is called, ordered by an issuing authority of the member state of origin. It includes an obligation imposed to protect another person from physical or psychological harm. Our domestic law provides this court can accept an undertaking where the court has the power to make a non-molestation order. Thus, it seems that a non-molestation undertaking given to this court could qualify as a protection measure within the European Regulation on protection measures. "

33. Article 11(4) of Council Regulation (EC) No 2202/2003 provides that: "A court cannot refuse to return a child on the basis of Article 13b 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". This provision only applies to EU Member States and will continue to be operative in this jurisdiction for Hague Convention 1980 applications made before 11pm on 31 December 2020. They are recognised and enforceable in EU Member States by Article 23 of the 1996 Hague Child Protection Convention. If adequate protective measures are put in place, the Article 13(b) defence must fail and a return order is mandatory. It does not, however, follow, that if adequate protective provisions are <u>not</u> put in place, a return order will not be made; it will depend on the nature of the defence and all the relevant circumstances.

34. Article 11(4) does not apply to the application before me as Kazakhstan is not a EU Member State. It is nevertheless commonplace in non-EU Member State cases for the term "protective measures" to be used, and for the court to consider the practical arrangements on return as part of its enquiry into the Article 13(b) defence. Ordinarily, such measures are offered by way of undertaking. If the applicant for a return order can put in place such measures as will ensure the protection of a child, the grave risk of harm to a child defence is self-evidently much reduced. But it does not follow that such protective measures are a pre-requisite to the failure of the Article 13(b) defence. Were that the case, no return orders would ever be made to a jurisdiction where undertakings made in the course of Hague Convention proceedings are not enforceable in the state of origin.

35. It is therefore not the case, as a matter of law, that undertakings given in this jurisdiction must be enforceable in the jurisdiction of the requesting state before a return order may be made. I accept also that it is possible for the court simply to rely on the bona fides of the applicant, as was the case in **H v K and others (Abduction; Undertakings) [2018] 1 FLR 700**. The offering of undertakings, whether enforceable or not in the requesting Member State, is one of the many factors which I must take into account when considering the Article 13(b) defence in the round.

36. In this case in my judgment the lack of enforceability of the proposed undertakings in Kazakhstan does not of itself, or in conjunction with the matters raised by M and summarised above, enable M to cross the high threshold of Article 13(b):

    i) Some of the undertakings can be implemented and therefore complied with prior to a return. They are not dependent upon F's compliance once the children are returned to Kazakhstan.

ii) I do not have any particular reason to doubt F's bona fides. He has not instituted or caused to be instituted in Kazakhstan proceedings arising out of the abduction. He has issued an application for contact, but has not ventured into the territory of seeking orders for the children to live with him. He has made it clear that his purpose in these proceedings is to secure a return in order to enable him to resume his relationship with the children. There is nothing to indicate that he has breached any orders in Kazakhstan; he is not, as is sometimes the case, a serial non-complier.

iii) The expert confirmed that there can be no criminal proceedings against M in Kazakhstan arising out of the abduction as it does not constitute an offence under national law.

iv) There are ongoing proceedings about contact in Kazakhstan and M will be able to bring matters to the court's attention there.

v) I have already indicated that I am willing to accept in principle the ability of the courts and other authorities in Kazakhstan to ensure the protection of the children regardless of the undertakings offered.

vi) It appears from the evidence of the expert that an agreement reflecting the undertakings can be obtained within the existing court proceedings in Kazakhstan.

37. M's written evidence does not state that she will not return to Kazakhstan with the children if a return order is not made, nor does any directions order in these proceedings flag up this matter. Counsel for M asked Ms Demery some questions about the impact on the children if M does not return. At the end of her evidence, I asked counsel what M's case on this was. He was properly circumspect in his reply. He did not advance a case that M will not return in the event that the children are ordered to be returned. He said that she would "consider her position carefully". She believes that the children would be removed from her care although this is somewhat circular in that I would expect her, as a devoted mother, to return with the children to ensure that does not take place. Further, I have concluded that there is no real risk, objectively, of the children being removed from her care. I consider it likely that she will in fact return with the children.

38. Looking at matters in the round, I am satisfied that M does not establish the Article 13(b) defence.

39. All that said, I am minded to delay implementation of the return order until a written agreement is lodged with the Kazakh court. That can take place when the court "accepts" F's contact application. It may be that it has already been "accepted" in which case an agreement can be lodged immediately. If not, there may be a delay before the agreement can be lodged. By taking this course I am endorsing a return order but staying implementation for a limited period of time. I consider it appropriate to do so, not because I view it as necessary in Article 13(b) terms that an agreement to be lodged to secure the protection of the children, but because I consider it would be helpful to both parties and to the children going forward. M in particular may benefit from a greater sense of security and her concerns (which in my judgment are largely unfounded) about the children being removed from her care will be alleviated. It would create a better environment for the welfare proceedings in Kazakhstan. This possible approach was explored in submissions and F indicated his

agreement to it; he did not press for a forthwith return. I therefore propose that my order shall record:

i) F's undertakings shall be incorporated in the English Hague Convention order, subject to an amendment to undertaking (b) that "pending the first hearing" be replaced by "pending the final hearing" and to undertaking (g) that the monies be paid for a 3-month period in one lump sum.
ii) F's acknowledgment through counsel to me that he does not presently anticipate seeking the care of the children.
iii) That this court considers it desirable, and in the best interests of the children, that they continue to remain in the care of M, whilst recognising that it is a matter for the Kazakhstani court.
iv) That the parties should enter into an agreement to be lodged as part of the Kazakhstani contact proceedings, and which shall incorporate what are currently listed as undertakings (b) (subject to the amendment above), (e), (f), (g) and (h). The court expects the parties to cooperate and act expeditiously in this.

Children's objections

40. I turn to the remaining defence, namely the child's objections (in this case, those of E). The law on the gateway defence and the exercise of discretion is conveniently summarised by Williams J in **Re Q and V [2019] EWHC 490** at paragraph 50:

"The law on the 'child's objection' defence 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**) and I have regard to the clear guidance given in that case. 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.

vi) 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)."

41. In **Re T (Abduction: Child's Objections to Return) [2000] 2 FLR 192** at p.204, the court indicated the need to consider the strength and validity of the child's views which will call for an examination of the following matters, among others:

i) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is her views which have to be judged appropriate.
ii) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?
iii) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?
iv) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?"

42. The Family Court Adviser, Ms Demery, has produced a clear and helpful report, which she supplemented with oral evidence:

i) E's level of maturity is consistent with her chronological age.
ii) E could not recall any positive memories of F. She does not want to live with him.
iii) E thought going to Kazakhstan would be worse for her because she wants to stay with M. She expresses a strong wish to be in the UK.
iv) E does not appear to have negative memories of Kazakhstan per se. She recalls school, friends and family, and has said she would like to visit. Her concern is the behaviour of F.
v) It is likely that she has picked up the influence of her mother. In the past 15 months she has not seen or spoken to her father, so has had no counterbalance to M's negative views of F. M has told E that she does not want to return to Kazakhstan which inevitably, in my view, must affect E's views about the country. Ms Demery reported that E has said she would not want to return even if M goes with her, although when I explored this with her, Ms Demery acknowledged that this may be a function of being "enmeshed with her mother"; if M says she does not want to return, then E's views follow.

43. In my judgment, and applying a fairly robust approach, this defence is not made out:

i) E's objection is not to a return to Kazakhstan but to the thought of living with F. Her objections are bound up in her relationships with her parents. Far more significant to her than the country is her carer. This is wholly unsurprising in a child who is just shy of 8 years of age, has picked up M's views and has not had any interaction with F for over a year.
ii) I do not consider that at her age she is fully able to appreciate the nature and implications of a return to Kazakhstan, how it fits in with the purposes of the Hague Convention, the intended swift consideration by the courts of future welfare issues including any relocation application, and the wider consequences of proceedings in the state of origin as against the state where she now is.

44. If I am wrong in this, I would in any event exercise my discretion to order a return for the following reasons:

i) I accept that the children have been in England for 15 months, F did not make his Hague Convention application until October 2020 (10 months after the abduction) and their mother wishes to stay here. On the other hand, both children are Kazakhstani nationals, as are their parents. They have lived in Kazakhstan all their lives, in E's case she went to school there, they have extended family on both sides in Kazakhstan, they were settled there in the care of their mother and they had, at the time of removal, no identifiable links with this country.

ii) Their removal was clandestine and implemented with no prior warning to F.

iii) The views of E, even if to be taken into account, are very far from determinative at her young age.

iv) I do not consider that M has necessarily turned the children against F, but it would be unsurprising if, after 15 months in this country, they have not picked up M's negative impulses towards him.

v) The Kazakhstani court is seised of welfare matters, and there are ongoing proceedings.

vi) Prima facie it is in the interests of the children to resume their relationship with F. That is more likely to be achieved through the courts of their home country rather than the Family Court in this jurisdiction.

Conclusion

45. I conclude that M's defences are not made out. I will make an order for return until the later of the following:

i) 30 March 2021. That will allow time for consideration of the Supreme Court decision in **G v G.**

ii) 7 days after the lodging of the agreement referred to at paragraph 39(iv) above.

46. There shall be liberty to apply as to implementation.