Neutral Citation Number: [2023] EWHC 2082 (Fam)

Case No: FD23P00227

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/08/2023

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

M	**Applicant**
- and -	
L	**Respondent**

- -

Re A (Article 13(b): Mental Ill-health)

- -

Ralph Marnham (instructed by **WBW Solicitors LLP**) for the **Applicant Father**
Katie Chokowry (instructed by **International Family Law Group LLP**) for the **Respondent Mother**

Hearing dates: 7 and 8 August 2023

- -

Approved Judgment

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

.....

THE HONOURABLE MR JUSTICE COBB

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

The Honourable Mr Justice Cobb :

Introduction

1. The application before the court, issued on 2 May 2023, concerns one child, A, a boy born in April 2020, so he is just 3 years old. He is the only child of the applicant ("the father"), and the respondent ("the mother"). The application is brought under the 1980 Hague Convention On The Civil Aspects Of International Child Abduction ("the 1980 Hague Convention") as incorporated by Schedule 1 of the Child Abduction and Custody Act 1985.

2. The father seeks the summary return of A to Australia. The mother opposes the application, and asserts:

   i) That at the material time of the retention (agreed to be 31 January 2023), A's habitual residence was not in Australia but was in England and Wales;

   ii) A's return to Australia would expose him to a grave risk of physical or psychological harm, or otherwise place him in an intolerable situation as per Article 13(b) of the 1980 Hague Convention, as a consequence of:

      a) The domestic abuse which she alleges the father perpetrated upon her during their relationship, the impact of this on A, and the potential for this to continue;

      b) The mother's mental ill-health, and the risk to A's wellbeing if she, as his main carer, returns with him, or he returns without her.

   iii) That, on the basis that the Article 13(b) exception is made out on one or other of the grounds identified above, the court should exercise its discretion not to return A to Australia.

   The mother originally intimated that her case would also be based on acquiescence, but did not in the event pursue this.

3. It is not disputed that the father has rights of custody, and that he was exercising them at the material times.

4. For the purposes of determining this application, I have:

   i) Read the bundle of documents, including the statements of the parents, exhibits, and the expert psychiatric report of Dr Sumi Ratnam;

   ii) Heard brief oral evidence from Dr. Ratnam;

   iii) Received the able oral and written submissions of counsel.

   The father attended the hearing via a CVP link from Australia. The mother attended in person. I am conscious of the stress of these proceedings for these particular parties, and this judgment is therefore given essentially *ex tempore* on the afternoon of the second day of the two-day listing.

Background facts

5. The uncontested facts are these.

6. The father is Australian by birth, and is now 31 years old. The mother is British, and is 30. The mother travelled to Australia in 2017 (aged 24) to "broaden my horizons". She has an aunt, uncle and cousins in Western Australia and she initially stayed with a cousin.

7. The parties met in Western Australia 2018, and formed a relationship; the mother moved into the father's home in about October 2018. They have never married. In 2019, the mother applied for permanent Australian residence, and this was temporarily granted on 3 April 2021; it was fully granted in March 2022. A was born in 2020; he is an Australian citizen.

8. In the first 20 months or so, the mother was dedicated to looking after A full-time, while the father worked in a small business; his case is that he worked flexibly, so as to ensure that he was at home with A in the evenings. It appears (from recordings in the notes of the results of the Edinburgh Post Natal Depression Scale) that the mother suffered a degree of post-natal depression for which she was advised to seek medical attention. She did not. The mother then took some part-time work (when A was about 20 months old), working 5.30pm-11.00pm three evenings per week. It is agreed that when the mother worked the father looked after A. The parents had a social life, though the extent to which the mother had her own friends (through mother's groups and otherwise) is disputed.

9. The father has a large extended family who live in the area of the parents' home in Western Australia. It is reasonably clear that one of the sources of the mother's apparent unhappiness in Australia was her relationship with the paternal grandparents. The mother has an aunt and uncle, and cousins, in Perth, Western Australia; the mother's father (A's maternal grandfather) lives in Kent, England.

10. In 2022, the parties purchased a home together some 15 or so miles from their previous home; they moved in on 14 April. The property is registered only in the father's name, although the mother contributed financially to it; there is a dispute about the reason for this sole registration – the mother suggesting that it is evidence of the father's controlling behaviour and financial abuse of her, the father ascribing this to the fact that when the paperwork was being completed the mother did not yet have her Australian permanent residency, and this was an impediment to co-ownership.

11. Less than one week after they had moved into the new property, on 20 April 2022, the mother's mother (A's maternal grandmother), died suddenly at her home in Wales. The mother and father hastened to obtain a passport for A, and then travelled together with A to the UK on 27 April 2022 to attend the funeral and for the mother to deal with all other associated arrangements; return flights were booked for the three of them for 25 May 2022.

12. On or about 22 May 2022, the mother informed the father that she wished to end the relationship; the father accepts that the couple had been "going through a bad patch" prior to the visit to England. On 25 May, the father returned to Australia alone. It was agreed between the parents that the mother would stay a while longer; they

appear to have verbally agreed that the mother and A would return to Australia on about 15 June 2022.

13. The mother did not return. At the end of January 2023, the mother informed the father that she did not intend to return to Australia.

14. In the period between May 2022 and January 2023, the parents were in regular contact with each other. I have seen a number of communications passing between them, some of which are relevant to the issues in the case, including determination of the primary issue of habitual residence:

i) 9 June 2022: the mother messaged the father to say that she would like to stay in England with A until 30 September 2022 to attend a friend's wedding ("bearing in mind how much it's going to cost flying home and back. I totally understand it's hard and not nice I know that"… "[W]ould mid to end September be OK?"). The mother contemplated that the father would "want to go away with [A]" when she returned, and asked that he did not do so straight away; (emphasis by underlining added);

ii) In messages during September the mother confirmed that she would be returning to Australia, but did not give specific details;

iii) On 7 October, the father's Australian solicitors wrote to the mother to make clear that the father did not, and would not, consent to A remaining in England, and that he would pursue an application under the Hague Convention for A's summary return if he were not returned by 4 November 2022;

iv) On 13 October, solicitors previously instructed by the mother in England replied; the solicitors assert that the mother "denies" agreeing to return at the end of September ("this was [the father] pressurising her") and that the mother "cannot provide an exact date for her return and that of [A]… our client will be returning to Australia once the settlement of the relationship has been resolved … [she] does not have anywhere to return to";

v) On 1 December, the mother messaged the father: "thinking I'll return end of Jan" [2023]… "and hope you understand we will be back home until we get things organised and I find somewhere which I hope won't take long"; she indicates that she "probably should" book a flight soon; (emphasis by underlining added);

vi) On 20 January 2023, the mother texted "Are you doing Hague Convention"?

vii) On 31 January 2023, the mother messaged the father: "So you're going to do the application to force me back? Do you appreciate I stand a chance here with the support of loved ones which in turn is best for our son? He could have two parents that have split and doing well and work together even through distance, or you can do it and seriously put me in an even worse mental state, which isn't in [A]'s best interests… this will be detrimental to all three of us but it's up to you". She adds "I had full intentions of coming back!! You know that! Why would all my stuff be in storage … why on earth would I have begun getting house bits? I have realised how bad I have been struggling the

> past few years for various reasons and as a result how I am in a better position here with my support." (emphasis by underlining added).

15. Once the mother had announced her intention not to return, the father initiated these proceedings. The father has also made an application to the Family Court of Western Australia in relation to A, seeking equal shared care with the mother. That application has been issued and listed for a directions hearing on Monday 18th September 2023 at 10.00am at the Perth Registry.

16. In the period since May 2022, the mother initially lived with her father (maternal grandfather) in Kent. She then moved to Wales where she remained until September 2022. From then until April 2023 the mother was back in Kent. On around 23rd April 2023 the mother moved back with A to live in her late mother's property in Wales. Wherever the mother has stayed in the UK, she has enrolled A into nursery. The mother describes very fully how happy she is living in Wales, and how settled she now feels.

17. The mother had told the father in December 2022 that she intends to live with her friend (L) when she returns to Australia and indeed, L has collected some of the mother's belongings from the father in apparent fulfilment of that plan. L has filed a letter (exhibited to the mother's statement) in which she indicates that she will *not* be able to offer the mother accommodation. The father has exhibited messages from the mother's aunt and cousin both offering accommodation for the mother on her return; the mother has explained why this would not be suitable.

18. The father has a new partner. There is a suggestion in the statements filed for this hearing that the mother has 'started seeing someone' in Wales, but the mother denied this.

19. The father has had indirect contact with A over the last 16 months. There is some issue (on both sides) about whether this contact has been successful for A, and/or whether it has been misused by the parents to communicate with one another.

20. I address the mother's mental health more fully below. The mother's medical records show a number of contacts with the medical services while she was in Australia, principally in relation to A. There are no significant references to domestic abuse or mental ill-health. It is nonetheless the case that when A was taken to hospital for emergency treatment on more than one occasion, he was accompanied by *both* of his parents who were both seen to be "upset and concerned for A's wellbeing". I mention this because the mother claims that the father played little if any active role in A's life. I also note that in March 2022, when the mother took A to hospital having fallen off a toy, it was said that "[Mother] misses her family – they are in England".

21. As I mention further below, the mother has seen a counsellor for therapeutic sessions in the early part of this year to address significant problems with concentration, memory, sleep, and day to day functioning. The mother has consulted with her GP in the last few weeks asserting that she was suffering from anxiety, and flashbacks from her abusive relationship with the father. Last week the mother sought urgent mental health crisis intervention having attended the Accident and Emergency Department of her local hospital.

22. It transpires that the mother has obtained a British passport for A. The mother had previously asked the father if she could obtain such a passport, and the father had declined. It appears that the mother had gone ahead and obtained this unilaterally.

Habitual residence

23. Article 3 of the Hague Convention reads as follows:

> "The removal or the retention of a child is to be considered wrongful where –
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention". (Emphasis added)

24. Article 12 provides:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

25. Counsel agree on the applicable law in this case, and I have been referred to the well-worn checklist which appears in the judgment of Hayden J in *Re B (A minor) (Habitual Residence*) [2016] EWHC 2174 at [17] and [18][1]. It reads more or less as follows:

> **i)** The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (*A v A*, adopting the European test).
>
> **ii)** The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (*A v A, Re KL*).

[1] See also the judgment of the Court of Appeal in *Re M (Children)* [2020] EWCA Civ 1105.

iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': *A v A* (para 80(ii)); *Re B* (para 42) applying *Mercredi v Chaffe* at para 46).

iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (*Re R*);

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (*Re LC*). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

vi) Parental intention is relevant to the assessment, but not determinative (*Re KL, Re R* and *Re B*);

vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (*Re B*); (emphasis added);

viii) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (*Re R* and earlier in *Re KL* and *Mercredi*);

ix) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (*Re R*) (emphasis added);

x) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (*A v A; Re B*). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

xi) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the

> stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (*Re R*).

xii) The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (*Re B* supra).

26. Hayden J went on ([18]) to emphasise that the child is at the centre of the exercise when evaluating his or her habitual residence. 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.

27. Subsequent caselaw has cautioned against an undue reliance on the shorthand of "sufficient degree of integration" in the summary: see *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659 in which Moylan LJ stated:

> "…this is a shorthand summary of the approach which the court should take and that "some degree of integration" is not itself determinative of the question of habitual residence. Habitual residence is an issue of fact which requires consideration of all relevant factors. There is an open-ended, not a closed, list of potentially relevant factors."

And thereafter:

> "[17] As Baroness Hale DPSC observed at para 54 of A v A, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country

> concerned. 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."

28. I now turn to the facts of this case and summarise the parents' arguments.

29. The father points to the relatively short time between A's arrival and the date of the retention; A's lack of stability given his moves between Kent and Wales in the relevant period; that the mother was, throughout the whole of the period in question, expressly avowing an intention to return (albeit reluctantly) to Australia, and given his age his integration is more likely to be linked to that of his mother. Interestingly, in her communications with the father more than once she refers to returning "home" to Australia which may have indicated where subconsciously her roots lay (see above).

30. The mother contends that at some point after his arrival in England and/or Wales he sufficiently integrated into life here, as did she, as to warrant a finding that he had become habitually resident in England and/or Wales. She points to the fact that she is now living in the maternal grandmother's former family home – not a point which, in my judgment, helps her as she was of course living in Kent as at January 2023; she points to A having been enrolled in nursery, that he has many friends close to his home(s), and attends clubs and activities. She speaks of him being happy when in England (close to his maternal grandfather) and/or Wales (where he was for a period in 2022, and where he is now).

31. Having reviewed the material and taken account of the arguments, in my judgment, at the time of the retention, A remained habitually resident in Australia. I say so for the following reasons, in combination:

i) A was undeniably and deeply integrated into life in Australia before he was brought to this country in 2022 on the death of his grandmother; he was born there, is an Australian citizen, has close connections with his paternal family who all live there; he knew no different; he had very strong connections with Australia, and very few with England;

ii) Although, in England and separately in Wales, the mother made arrangements for A to attend nursery while she has attended to her late mother's affairs, and registered him with a doctor, these represent pragmatic solutions to facilitate child care, and child health, and do not amount to integration, particularly as in the period in question he moved nursery at least once;

iii) That A has enjoyed the company of friends in this country may have enabled him to start to build him a social network, but these were new friends, replacing the many friends in Australia with whom I am satisfied he was close before he left;

iv) A's residence in this country was not particularly 'stable' evidenced by the fact that the mother moved from Wales to Kent in the relevant period; interestingly, while she was in Kent (at the crucial date of the retention) it appears that she was intending to leave, and move back again to Wales, which she indeed did several weeks later;

v) At no time was the mother working in England/Wales;

vi) I am satisfied that during the whole of the relevant period leading up to the date of the retention, the mother was intending to return to Australia, albeit that she did not want to do so. The mother *repeatedly* told the father (acknowledged separately on one occasion by her previous solicitor) between June 2022 and January 2023 that she was returning to Australia (see 14 above). I reject the mother's solicitor's contention (13 October) that the father was putting pressure on her, but I accept that that may be how the mother felt.

Article 13(b): the law

32. Article 13(b) of the Hague convention provides that the court is not bound to order a return of the child if the person who opposes the 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".

33. The law in this area is well-known. The legal principles engaged on an application under the 1980 Hague Convention where Article 13(b) is raised are well-established. They were extensively discussed in *Re A (Children) (Abduction: Article 13b)* [2021] EWCA Civ 939, ("*Re A*"). In his judgment in that case Moylan LJ drew from the Supreme Court decisions of *In re E (Children) (Abduction Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 ("*Re E*") and *Re S (Abduction: Article 13(b) Defence)* [2012] 2 AC 257 ("*Re S*"). I have also found particularly useful the judgment of Baker LJ in *Re IG (Child Abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123, and Moylan LJ in *Re C (Article 13(b))* [2021] EWCA Civ 1354 ("*Re C*").

34. The following principles emerge from these authorities, relevant to the 1980 Hague application:

i) Article 13(b) is, by its very terms, of restricted application: [§31: *Re E (Children)*]; the defence has a high threshold;

ii) The focus must be on the child, and the risk to the child in the event of a return;

iii) The burden of proof lies with the person, institution or other body which opposes the child's return. The standard of proof is the ordinary balance of probabilities, subject to the summary nature of the Hague Convention process: [§32: *Re E (Children)*];

iv) The risk to the child must be "grave" and, although that characterises the risk rather than the harm, "there is in ordinary language a link between the two": [§33: *Re E (Children)*];

v) "Intolerable" is a strong word, but when applied to a child must mean a situation which this particular child in these particular circumstances should not be expected to tolerate. Amongst these are physical or psychological abuse or neglect of the child: [§34: *Re E (Children)*];

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

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

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

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

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

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

x) The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Thus:

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

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

> "… forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual

> residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That said, past behaviours and incidents are not per se determinative of the fact that effective protective measures are not available to protect the child from the grave risk". (§50)

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

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

He added:

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

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

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

38. In his judgment, Moylan LJ took the opportunity to emphasise the importance of adherence to *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings* issued by Sir James Munby P on 13 March 2018, and to the point that protective measures include not only those offered by the left-behind parent but also those available ordinarily in the state of habitual residence and their adequacy and effectiveness (§60).

39. I also have regard, as I must to the definition of domestic abuse contained in section 1(3) of the Domestic Abuse Act 2021 and PD12J FPR 2010,

40. It is relevant, in a case in which the mother has raised both domestic abuse and mental health issues, that I look at the allegations cumulatively and not independent of each other. In *In re B (Children)* [2022] 3 WLR 1315, Moylan LJ said:

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

41. Neither counsel referenced the Court of Appeal decision in *Re S (a child) (abduction: article 13(b): mental health)* [2023] EWCA Civ 208, but I found it useful. This case concerned a mother with chronic mental health problems with acute, severe, episodes; she too suffered from ADHD. This was a case in which the father sought the return of a child to Australia, and in that case too, expert evidence was given by Dr. Ratnam. Moylan LJ (allowing the appeal and overturning the decision at first-instance to return) recited the evidence of Dr Ratnam (describing the mother's mental ill-health) from [30] – [52]. While acknowledging that every case is different, and each must be determined on its own facts, it has been useful to have regard to *Re S* to provide a benchmark for the decision which I am required to make; while there are inevitably differences, there are also a number of striking similarities between the situation of this mother and the situation of the mother in *Re S*.

The mother's case on Article 13(b)

42. The mother presents her case on two alternative (but in some senses linked) bases:

i) That she has been the victim of domestic abuse by the father, and that there is a grave risk that a return of A would expose him to physical or psychological harm or otherwise place A in an intolerable situation;

ii) That it would expose A to a grave risk of psychological harm if he were to be returned to Australia *without* her; and that if the mother accompanied him to Australia (which would be the likely outcome) there is a grave risk that, in view of the likely deterioration of the mother's mental health, A would be exposed to psychological harm, or be otherwise placed in an intolerable situation.

43. *Domestic abuse*: The mother asserts that the father was abusive to her throughout their relationship in multiple ways.

44. She told Dr Ratnam that the physical abuse in the relationship started "very early" with aggression to inanimate objects and "he hit me a couple of times" including

hitting her in the chest when she was pregnant, which made her fall off the bed. She alleges that he threw food at her on at least one occasion; on other occasions he was physically violent to her and on another occasion had sexual intercourse with her without her consent. The mother describes the father throwing things at her and the wall in temper, and describes occasions when he has punched the wall. She says that she attempted to end the relationship on a number of occasions, but failed to do so. She complains that she became socially isolated while living in Australia, because of the father's controlling behaviour, and in the end effectively had only one friend (L). She asserts that the father "was extremely controlling, aggressive and intimidating" and alleges that the father abused alcohol and drugs. The mother says that she "struggled" after January 2019 (before she conceived A) and that the relationship deteriorated during the pregnancy. She said that after A's birth "life became even harder. I now had a young child to care for and [the father] was no help at all …. He refused to help … He was never there to support me or [A]." The mother alleges that the father :

> "… would lose his temper with [A]. He would very short with him especially if he had been drinking. Other times, [the father] would be completely oblivious to [A's] needs. On numerous occasions, I saw [the father] smack [A] on his bottom leaving a mark."

45. The mother asserts that she has been the victim of financial abuse throughout the relationship; most notably she complains that she gave $70,000AUSD to the father for the purchase of the new home, and $30,000AUSD for the purchase of a new car, both of which were in the end registered only in his name. She says that she "felt manipulated and pressured into this situation", and does not accept the father's explanation for why she has acquired no legal title to either property.

46. The mother contends that the father behaved uncaringly and callously when in Wales following the death of the maternal grandmother, plundering the house for items to sell, over the head of the mother herself who was so riven with grief that she felt powerless to stop him. She contends that he showed very little empathy and was more interested in drinking and clubbing. The mother's uncle and cousin from Australia flew over, and assisted the father to clear the maternal grandmother's house. She says that she has lost her relationship with her relatives in Australia "who behaved atrociously at the time of my mother's death in April 2022".

47. The exchange of messages exhibited to the mother's statement interestingly includes a number of allegations against the father including: "[y]ou've treated me so badly for so long I started not to care and now you're still trying to force me to do what you want"; "[y]ou have emotionally abused me, been physically abusive. You've never cared for [A] you've always left everything to me. All you care about is money [emoji]. You constantly get angry with him and ignore him you don't spend your days in and out with him teaching him playing with him, nurturing him." The father, in his short replies to the mother, notably does not take issue with much of what the mother has written. In late-August, she says this (an exchange which, in my view, in large measure summarises the essence of this case):

> "You're so manipulative how dare you say I'm just choosing to stay here?! Do you understand my mum died?

> Do you have ANY IDEA what I'm going through? Why would you expect me to want to come back to Australia right now after everything we have been through and what you've done to me when I have nothing and nobody there? How on earth can you expect that".

His response:

> "And how on earth do you expect me to not see my son, it's already been over 3 months".

Her reply:

> "I know [father's forename] I know 😔😔😭😭… I'm sorry I don't have an answer".

48. The mother explains the absence of contemporaneous corroboration of abuse saying that she "disclosed some of the difficulties I have been having with [the father] and his family to [A]'s health nurse, but I was not completely open with her as I was worried about things coming back to [the father]. She was encouraging me to tell her and to seek treatment".

49. In relation to the text messages which I set out earlier in this judgment, the mother says this:

> "It also true that I continued to suggest to [the father] until January 2023 that I would be returning at some stage, but did not state indefinitely, although we did have some discussions in between about me staying here and the kind of contact [the father] would have with [A]. I told [the father] that I felt as if I was being forced to return to Australia. I did not want to return, and [the father] and I would have discussions about the kind of contact [A] could have".

50. Ms Chokowry argues that these allegations cannot confidently be discounted and in the circumstances I should take them at their highest and consider whether the protective measures would be sufficient to meet and/or mitigate them.

51. It is the mother's case that protective measures would not be effective to protect her from a continuation or recurrence of the domestic abuse. She adds that her mental health issues would be likely to impact on her ability to seek the kinds of help, including court orders, which the father has indicated would be available to her.

52. *Mental state: Depression*: The mother invites the court to conclude that it would expose A to a grave risk of psychological harm if he were to be returned to Australia *without* her; and that if the mother accompanied him to Australia (which would be the likely outcome) there is a grave risk that, in view of the likely deterioration of the mother's mental health, A would be exposed to psychological harm, or be otherwise placed in an intolerable situation. In her witness statement she refers to being "terrified" of returning to Australia. She describes how the thought of returning gives

her "crippling anxiety and panic attacks" and wonders how she would be "able to do it".

53. Aside from her prepared witness statement in which she of course elaborates on this, the mother has exhibited exchanges over social media with the father which include some revealing insights into the mother's mental well-being and perspective on her return. One of them in August 2022 (which is illustrative of others) reads:

> "I'm scared because I have nobody there. You have no idea how it feels.... it's really hell doing everything alone and having no option to go home to your family and friends or even them to come sit with you at your lowest moments. I'm literally breaking myself by coming back. I don't want to be there. I'm scared and have no reason to be there… I just feel so lost and down. I'm coming back there and it's going to kill me. All I need is to be here, where I have people. I am so so broken, I can't handle it."
>
> "I don't even f***ing want to be alive and somehow you're still making my life worse… I'm past trying. I give up. I'll just come back and be happy for the rest of my life to suit you. All good. Thanks."
>
> "I never knew things would be so bad for me. I'm f***ing drowning. I can't do this".

54. The mother consulted a counsellor between January and March 2023. The counsellor has filed a short statement:

> "[The mother]'s anxiety increased during our sessions, as flashbacks of [the father]'s physically abusive and emotionally controlling behaviour caused anxiety/panic attacks and depression. It was apparent that the high levels of anxiety were causing her significant problems with concentration, memory, sleep, and day to day functioning. She was losing weight and physically sick with worry. [The mother] was on medication from the GP for anxiety and depression".

55. On 29 June 2023, Russell J gave the mother leave to obtain a report from Dr Sumi Ratnam, a consultant psychiatrist in forensic psychiatry. Dr Ratnam saw the mother on two occasions (6 and 10 July) and read the mother's medical records; she prepared one report dated 24 July 2023.

56. Dr Ratnam described the mother's early history; she referenced an abusive experience when she was in her teens (which led to the imprisonment of her abuser) which the mother herself felt "probably" adversely affected her mental health. She has a history of depression; on two occasions – when she was 14 years old [2007] ("genuinely didn't want to be alive") and 17 years old [2010] – she took an overdose. She reported feeling suicidal again when she was 21 [2014]. She was on regular and varied anti-depressant, beta-blocker, and associated medication (Escitalopram,

Diazepam, Temazepam, Fluoxetine, Amitriptyline, Propranolol) from 2010 to 2018. She used alcohol in an unhealthy way to self-medicate; it is apparent that before the mother travelled to Australia in 2018, she was suffering fairly constantly from depression and anxiety, and general mental ill-health. The mother has a history of suffering from panic attacks (these are recorded in her notes as occurring in 2010, 2011, 2014, 2015, 2016, 2017 and 2018).

57. The mother is recorded as having suffered "moderate" post-natal depression in Australia, but notably, there is little evidence of her experiencing other mental ill-health while in Australia. The mother explains that she did not want to open up to professionals there. It is worth noting that in her communication to the father on 31 January 2023, she references how she was "struggling" in Australia (§14(vii) above: "I have realised how bad I have been struggling the past few years for various reasons"); it is reasonable to infer from the context in which she says this that he knows to what she is referring.

58. Only in October 2022 did the mother once again consult medical professionals in the UK about her mental health; Dr Ratnam records that as at 28 October 2022, the mother had a PHQ9[2] score 23 out of 27 (severe depression), and a GAD-7[3] score 20 out of 21 (severe anxiety). In January 2023, she was reported to be suffering "multiple panic attacks daily". On 12 June 2023, the GP record reads:

> "[The mother] reported flashbacks from violence in the relationship with [the father]. She appeared highly anxious, tearful and emotionally distressed. She was worried about the detrimental impact on her mental health of returning to Australia where she would not feel safe. She spoke negatively of herself, feeling stupid and embarrassed for staying in the relationship for so long. She regretted not being able to say goodbye to her mother. She was described as futuristic in her thoughts. Since coming to the UK, she had lost three stones in weight and reported feeling nauseated. She denied being reliant on Diazepam and was taking 2mg up to three times a day".

59. In interview with Dr. Ratnam, the mother reported feelings of depression. The mother told Dr Ratnam that when she is depressed she does not "do anything", and "just hide[s] away from the world", she experiences reduced appetite but if her friends give her food, "she binges". Of the other symptoms of depression, the mother reported reduced sleep, reduced concentration and negative thoughts, diarrhoea and vomiting and weight loss. Dr Ratnam described the mother's symptoms of anxiety as including "palpitations, shortness of breath, sweating", "constantly shaking and trembling". She has had multiple panic attacks and "has consumed alcohol if they have occurred in the evening". Dr Ratnam reported that the mother was currently "unable to sleep" but does not feel tired stating "feel like I'm going and going". Her mood remains low, particularly since having recently returned to court and her concentration is poor. The mother told Dr Ratnam, perhaps ominously, "if I didn't have him (A), I would not be here right now".

[2] PHQ-9 is the depression module (Patient Health Questionnaire), which scores each of the **nine DSM-IV** criteria

[3] General Anxiety Disorder

60. The mother is currently prescribed Sertraline 200mg and Diazepam 2mg three times a day, although she admitted that she was "taking more than this… at least four tablets per day". She also takes Zopiclone (hypnotic) which she receives from a friend at dose of 7.5mg but has run out.

61. Dr Ratnam's opinion is that the mother "fulfils the criteria for a diagnosis of depression" and was depressed (in oral evidence this was: "severely depressed") at the time of the interview. Her symptoms of depression have included low mood, reduced energy, withdrawal from interpersonal interaction, altered appetite, reduced sleep, reduced concentration and negative thoughts. Dr Ratnam was of the view that the death of the maternal grandmother in April 2022 was an "aetiological factor for the current episode of mental illness" and that her symptoms have been "exacerbated by the current proceedings". Dr Ratnam was concerned about the mother's current use of Diazepam given that she appears to be using more than prescribed: "although not dependent, there is a risk of her developing dependency". She made this important point:

> "Consideration should also be given to a change of antidepressants but it is unlikely that full remission will be achieved when still facing stresses including proceedings here and in Australia, financial uncertainty, uncertainty about accommodation and the prospect of returning to a country that she does not want to return to. She has also made allegations about the nature of the relationship with [the father] and if her account is preferred by the court then this will also impact on recovery if she returns to Australia".

62. Additionally, Dr Ratnam expressed concern that the mother "has been consuming alcohol as a coping strategy. It is not uncommon for individuals to consume alcohol to manage their mental health but alcohol worsens mood and anxiety". The mother was reluctant to take medication for ADHD (see below) and this was an additional poor prognostic factor.

63. Dr Ratnam identified strong signs that the mother suffers from ADHD; this is relevant because: "ADHD is often associated with anxiety particularly when untreated". Dr Ratnam felt that the mother should be assessed for this.

64. Dr Ratnam was concerned about the impact of the mother's mental illness on A:

> "Depression can impact on emotional availability to a child and [the mother] admitted that this is currently an issue with [A] along with avoidance of physical contact with him. [A] has been exposed to her distress, which is likely to have impacted on his emotional well-being".

She added that:

> "It is likely that a return to Australia at this stage will impact adversely on her mental health and this in turn is likely to further affect her parenting. However adequate mental health care is available in Australia and it would be

> important for access to intervention to be clarified before any potential return".

65. Dr Ratnam gave brief oral evidence and was questioned by counsel. Dr Ratnam accepted that the mother's mental state has been (objectively viewed) worse since she has been back in England, likely caused by a combination of her mother's death (and her unresolved guilt about not seeing her before her death), and the current proceedings. Dr Ratnam told me that the mother was "incredibly distressed" in interview, "severely anxious" and "severely depressed"; her mental health was "significantly impacted". She felt that even since October 2022 (note the high PHQ and GAD scores recorded then: see §58 above), her mental health has significantly deteriorated.

66. Dr Ratnam told me that the mother's condition could be treated in Australia: it has very good mental health services, both in the private sector and the public sector, and "the Australian experts regularly present at conferences". But she felt that the psychiatric resources would be more likely available in the "big cities" and not in the rural locations. The father currently lives in a small township more than 100 miles from Perth. Dr Ratnam was reasonably emphatic that if the mother were to return, it would be important to identify who would be caring for her, and what the service would be. She told Ms Chokowry that: "it would be really important to clarify services… who she would have access to, and what would be the pathways of care". This was important because the mother's mental health was described as:

> "… very fragile at the moment; it is not being well addressed by medication; she will find a return difficult; she does not want to go back; facing stress can affect recovery; she lacks social support there; and there is relationship discord there; this will all impact on her recovery. The mother will find a return incredibly difficult, despite what is offered."
>
> "She is already severely depressed… if there is an order for return, we will not see any improvement. She will find any return difficult at the present time. I don't think we can predict the extent to which her mental health may deteriorate; any order for return will not help her. There could be an exacerbation; I could not say".

67. When asked by Ms Chokowry what would happen if the mother's mental health was to deteriorate (and given that she is already on maximum medication), she replied:

> "If it were to deteriorate… she may well need admission to psychiatric hospital … with ongoing stresses, any response to medication is unlikely to be full. Where there are stresses, you do not get full response to medication… If her mental health deteriorates further, then this would impact on her parenting".

She added in answer to a question from me:

> "… she has taken overdoses in the past. She had ideas of hopelessness and no suicidal intent. I think that A is a strong protective factor. But if she is faced with a return, one cannot rule out those passive feelings of hopelessness could escalate".

The father's case on Article 13(b)

68. *Domestic abuse*: The father does not dispute that the allegations of abuse are serious. He denies however that he has behaved as alleged.

69. The father denies that he has been abusive to the mother, and challenges her account of her isolated life in Australia. He specifically denies drinking alcohol to excess; he asserts that he does not take drugs. He offers to be tested for both in the context of the Australian court proceedings when determining the long-term arrangements for A after his return. He denies the mothers accusations of physical and sexual abuse and claims that he "never laid a hand on" the mother, nor has he thrown things at her as she alleges. He denies calling her names, and being disparaging about her to other people as she has claimed. He accepts that they have argued with raised voices. He denies that he has ever smacked A, but accuses the mother of having done so, with such force as to leave a handprint; he exhibits to his statement a WhatsApp message which references this. The father accepts that on at least two occasions they discussed ending their relationship; her main upset was over the involvement of the paternal family in A's life.

70. The father disputes the mothers account of financial control, pointing out that the property which they purchased together could not be registered in their joint names because the mother's residency application had not yet been granted (the mother, I may add, disputes this reason). The father accepts that the mother has made a meaningful contribution to the cost of the property. He also accepts that she contributed to the purchase of the car. The father points out that these are matters to be sorted out between them once the mother returns to Australia. The father further denies that he callously set about selling items from the maternal grandmother's home after her death; he asserts that it was the mother who organized a garage sale at her mother's property which went on for about five days in respect of which he helped. He says that he helped to clean the property which had not been well looked after. He denies taking any items to try and sell them without the mother's knowledge or consent: "she was fully aware of everything that was sold and she kept all of the proceeds for herself".

71. The father fairly points to the absence of corroboration of the mother's account of domestic abuse from the limited Australian records available. There are no records from the police or social services. He points to the contemporaneous medical records which give very little indication of the case which she now presents. On the contrary, he points to an entry which refers to the mother "getting a bit more help from dad" (albeit that "football season has started and it is a bit harder now"). In the same entry (and contrary to the mother's current case) it is said that "[the mother] has supportive friends." Elsewhere in the notes it is recorded that the father is "supportive when home". A recurrent claim within the notes is that the mother is "stressed with in laws" (i.e. the father's parents). A later entry refers to "[the mother] managing so well but with stress from husband and extended family; has seen GP and does talk

with [the father]; strategies given". In October 2020, the entry reads "good support from husband.; Family functioning and wellbeing: Discussed: no concerns; Caregiver mental health: Discussed: no concerns".

72. In the following year, the mother saw the paediatrician who referred to the mother receiving "some support from partner – not much but [mother] says it is better". Notably in the same session, the mother is reported to be missing her family in England. It was further recorded that A "[e]njoys books with mum & dad." Notably, "Family domestic violence: Discussed: no concerns".

73. The father invites me to attach significance to the fact that these allegations only appeared for the first time when the mother is in this country, and there is a purpose to be served by her making these allegations. He points to the fact that the mother has, more than once, invited him (and his partner) to stay with her in Wales; he points to the fact that the mother contemplates him having ready access to A ("I know eventually you'll want to go away with him [on the return to Australia] but I'll be a mess if you do it straight away": August 2022). He pointed out that the mother offered the father the chance for A to spend three months of the year with him and the rest of the year with her when he is in school. He contends that she would surely have made none of these proposals if he had behaved as she now claims.

74. The father contends that the mother has never expressed the intention to return to live in the UK. He says that the mother had always wanted A to grow up in Australia and had also tried previously to persuade her parents to move to Australia.

75. *Mental State: Depression*: The father asserts that he would be able to be supportive of the mother if/when she returns with A, and that her 'support network' will grow quickly and organically (as it did in the past) once she is back. He is confident that she would quickly access the mental health services which he has highlighted in his evidence, and has agreed to fund five sessions of CBT to tide her over until she is plugged into the mental health services.

76. The father relies on the protective measures now set out below, which are principally directed to the allegation of harm based on abuse, but also encompass other practical arrangements, and protection for the mother in relation to looking after her mental health.

Protective measures

77. The father offers a range of protective measures; these are discussed in the written evidence. Mr Marnham has helpfully distilled them into one document which I reproduce in full as follows:

> **Protective measures offered by the father in relation to the allegations of domestic abuse:**
>
> 1. The Father proposes the following undertakings:
>   i. Without prejudice to his denials of the mother's allegations, to give an undertaking not to abuse, harass, use or threaten violence against the mother or A;

ii. Not to institute any criminal proceedings against the mother arising from her wrongful retention of A;
iii. Not to attend at the airport upon return;
iv. Not to separate A from the mother's care without the mother's prior agreement or order of the Australian court;
v. Not to attend at the property that the mother and A are staying at;
vi. Not to attend at A's nursery save by the nursery's invitation.

Protective measures offered by the father in relation to the mother's mental health and accommodation

2. The Father proposes the following undertakings:
   i. To continue to pay for A's private medical care;
   ii. To pay the mother up to $400 per week for rent along with any holding deposit required for two months from the date of her return;
   iii. To make further financial support available to the mother of $250pw for two months from the date of her return;
   iv. To supply a vehicle for the mother's exclusive use for six months from the date of her return; this will not be the former family car which is being sold to meet expenses in Australia;
   v. To fund up to 5 counselling sessions if the mother is unable for whatever reason to obtain these for free in Australia;
   vi. The father has already provided the mother with a television, but also agrees to provide furnishings of a double bed and linen, basic kitchen utensils, a fridge/freezer and a sofa.

78. Additionally, the father points out that:

i) The mother can apply to the Magistrates Court in Australia for a Family Violence Restraining Order; this is said to be a very quick procedure;

ii) The mother could access 'Medicare' services, which are offered as a state service offering access for patients to Psychiatrists, Psychologists and General Practitioners. The father has filed evidence about the Better Access initiative which is available to patients with an assessed mental disorder who would benefit from a structured approach to the management of their treatment needs;

79. There is a question over whether the mother would be entitled to funding for litigation in Australia; this is a concern to me, given that I am doubtful that (having seen her in court at this hearing, when she *was* represented, and having regard to the medical report of Dr Ratnam) she would be able to litigate effectively as a litigant in person given her ADHD and mental health issues.

80. The father has exhibited a statement from a lawyer in Australia setting out the mechanism for filing with the court the undertakings offered in this country. Additionally, a letter from the Central Authority in Australia, was filed with the court at the start of the hearing, and this confirms:

> "…protective measures made in one country can be recognised and enforced in another country through the operation of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the Child Protection Convention) which provides for international cooperation between convention countries. I note that both Australia and the United Kingdom are signatories to the Child Protection Convention. As such, protective measures made in the UK may be recognised in Australia provided they meet the requirements under the Convention.
>
> Australia has a simple and rapid process for registering measures of protection made under the Convention. Measures can be registered under regulation 12 of the Family Law (Child Protection Convention) Regulations 2003.
>
> …
>
> "The position with respect to undertakings attached to orders is less [clear]. The Australian courts have registered some orders that include undertakings where the undertakings are specifically referred to in the overseas court orders. The decision to register orders (whether or not they include undertakings) rests with the relevant Registrar. It is also important to be cognizant of the Convention's scope. Orders (or parts of orders) will not be able to be registered if they deal with matters that fall outside the Convention's scope. Timeframes for registration are a matter for the Registrar, but it is usually possible registration to occur within a month from the ACA receiving the original request.
>
> Once orders are registered under regulation 12 the measure has the same force and effect as if it were an order made by the court that registered it (sub regulation 12(2)). Once registered the parties may be able to seek to enforce the order in the event that the orders are breached. The ACA is not involved with that process. Enforcement would be a matter for the parties to the orders and they may want to seek legal advice on this issue."

Conclusion on Article 13(b)

81. *Domestic abuse*: While I make no findings of fact in this respect, I cannot confidently discount that the mother has been the victim of domestic abuse (as defined by section 1(3) of the 2021 Act and PD12J) in her relationship with the father. It is accepted that their relationship was not entirely harmonious, with discussions about separation on one, or more than one, occasion in the past. Without any corroboration of them, it is

difficult – without hearing the evidence of the parties – to gauge the reliability of the account given by the mother. I nonetheless take into account what the mother said to the father in her messages to him in the summer of 2022 (see above: "[y]ou have emotionally abused me, been physically abusive. You've never cared for [A] you've always left everything to me"), and the absence of any rebuttal of her assertions. But I also note her comments of June 2022:

> "I miss you but not the you of the last few months, but now I'm getting space I remember you before and us when we have been happy... I just think we are worlds apart and don't know if we can work but also stuck missing the good times we have had".

This would suggest that the relationship was not bad from the start, as the mother suggested to Dr Ratnam.

82. I emphasise that I do not make any findings on the allegations of domestic abuse. However, *if* the allegations are indeed all true, and *if* A was to be returned to a situation in which he was unavoidably drawn in to an abusive parental relationship, I am satisfied that this would be likely to present a 'grave risk' to his psychological wellbeing. As I have said elsewhere, and I repeat here, no one can now be in any doubt about the deeply damaging impact of domestic abuse on children who are exposed to it (see section 3(2) Domestic Abuse Act 2021). Accordingly, I must consider whether the protective measures offered by the father, coupled with the protections of which the mother may be able to avail herself through the Australian courts, and the supports which may be available from her friends in Australia, can mitigate that risk. In my judgment, the protective measures offered by the father, together with the protective orders which would be available to the mother, diminish the risk sufficiently – providing the mother with adequate independence from the father – as to reduce to a sufficient extent the grave risk of harm to A of exposure to any ongoing domestic abuse.

83. *Mental health*. In my discussion of this part of the case, I start by reminding myself of Lord Wilson's comments in *Re* S namely that if I were to conclude 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. He confirmed that 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.

84. Dr. Ratnam provided careful and thoughtful evidence to the court; she was of considerable assistance. At the conclusion of her evidence, and taking account also all that I had read, I was left in no real doubt that the mother is currently mentally very unwell.

85. Indeed, I am persuaded on the evidence that she is so unwell that were I to order a return of A to Australia, this would have a significantly debilitating effect on her. Dr Ratnam did not rule out the possibility that the mother's sense of hopelessness at her situation – if returning to Australia with A – could lead her to inpatient hospitalisation on her return.

86. In this case, I have been presented with more than the usual anxieties of the returning mother. Far more. This mother has a long history of mental ill-health stretching back twenty years to her early adolescence (and even before that). Her GP records contain a number of entries of referrals for anxiety; she is recorded as having suffered from panic attacks from the ages of 17 to 25; she carries the legacy of an abusive traumatic experience. On two recorded occasions in her adolescence she took an overdose of tablets, which - even if not intended as life-threatening – at the very least are a serious indicator of significant distress. Following the birth of A she is recorded as having suffered "moderate" post-natal depression which for which the mother failed to access treatment. The pattern of her mental health reflects serious downturns coincident with significant stressful life events – the divorce of her parents, the abusive trauma of her teenage years, the failure of a relationship, the death of her mother. Alongside the expected feelings of her current grief, she feels guilt (at not being able to say goodbye) and regret (at not having seen her mother for 4 years). To that list of adverse life events which have triggered a decline in her mental health, it is reasonable to add, in my judgment, a return to Australia at this stage, an outcome of which she says that she is "terrified".

87. The mother has been "severely depressed" since at the latest October 2022; there is reason to consider – having read the messages passing between the father and the mother – that her depression long precedes this. By July 2023, when seen by Dr Ratnam, her depression was worse. I accept Dr Ratnam's view that the mother was "incredibly distressed", and "severely depressed" in interview; her mental health was "significantly impacted". It is Dr Ratnam's view that since October 2022, her mental health has significantly deteriorated as she has lived with the grief of her mother's death, and the anxieties surrounding a return to Australia have risen.

88. The mother's depression has been overlayed by high levels of anxiety, which also affect her functioning. It is Dr Ratnam's view that the mother's anxiety may well be aggravated by untreated ADHD.

89. The recurrent / daily symptoms of her depression and anxiety were described vividly by the mother in her statement, and laid out in the report of Dr Ratnam: they include palpitations; shaking; weight loss, nausea and vomiting; she hides away from the world. Dr Ratnam confirmed that the mother's anxiety has been amplified very considerably by the fear of having to return to Australia, and what is likely to greet her there. Dr Ratnam told me that "it is likely that a return to Australia at this stage will impact adversely on her mental health and this in turn is likely to further affect her parenting". That is to say, we can reasonably expect that her condition will get worse.

90. The mother's mental state is not being well controlled by medication. The mother is over-medicating, a source of considerable concern to Dr Ratnam; she has, worryingly, been taking other medication provided by a friend, and consuming alcohol as a coping strategy.

91. While mental ill-health does not inevitably impact on parenting ability, it is obvious that the mother's mental state has impacted and will impact further on her care of A, particularly if A is returned to Australia. The mother is already conscious of the extent to which her depression and anxiety is making her emotionally unavailable to A; in this case, this is unsurprising given the mother's account of her lack of sleep, her

overmedicating on diazepam, her wish to "hide away", and her experience of regular panic attacks. I was struck by the descriptions of how she was feeling in her communications with the father in the autumn of 2022, at a time when she was also saying that she would return to Australia (hence they were not self-serving).

92. I am entirely satisfied that high-quality psychiatric services would be available to the mother were she to return to Australia, and that these would be accessible as public services. Similar (if not identical) medication would plainly be available in Australia. The father references a significant level of mental health support which she could access in Australia, for example Medicare rebates are available following a referral from a GP for up to ten individual and ten group allied mental health services to anyone with an assessed mental disorder.

93. But I have material reservations about whether the mother would be quickly able to access *effective* health care; the mother is not currently registered with psychiatric services in Australia. She has no current home in Australia, nor does she have an address from which to register for services. The parents used to live, and the father currently lives, in relatively rural Western Australia, not in a city where Dr Ratnam expected that the relevant mental health services would be found. She has no immediate means of financial support in Australia. I have doubts about the efficacy of the non-specific proposal of the father that the mother could benefit from the state 'Medicare' services. I see the risks to the mother's mental health as very real, and the proposed protective measures insufficiently focused on her actual needs. There are additional question marks over the extent of her social support network in Australia; she has apparently fallen out with her only family there, and I am satisfied that she will not wish to access support from the father's parents who may well have contributed to problems which the mother experienced when she lived in Australia. Her friendship group in Australia has largely fallen silent recently. The father's offer of support for CBT or other therapy is very much time-limited, whereas the mother plainly needs some reasonably long-term and intensive help. On the information presented at this hearing, there is a real risk that the mother would fall between the cracks of mental health services.

94. The mother would also be returning to an unfamiliar environment – now separated from the father, and living alone. Judging by the limited social media 'conversations' to which I have been privy, the relationship between them post-separation has been angry and confrontational. It is a concern that the father may not fully understand the mother's parlous situation; I am not sure that he could be relied on to be sympathetic and understanding. In his second statement, he says "I do not see any reason why the Respondent should be concerned about returning to Australia".

95. The court will always scrutinise carefully and critically the assertions of a respondent parent to an application under the 1980 Hague Convention whose case is that a return of the child (i.e., to the country from which they have been abducted) will cause the accompanying parent such distress as to create a grave risk of psychological harm to that child. The respondent in such a case will almost always have a level of anxiety about the prospect of return, for any number of reasons. This case, exceptionally in my own judicial experience, is in a different league.

96. I have looked at the *cumulative* (see §40 above) stresses on this mother of a return to Australia, knowing: (a) the extent of her current mental illness; (b) her unusually

heightened (clinically assessed) anxieties; (c) her untreated ADHD (which is likely to be aggravating those anxieties); (d) the apparent ineffectiveness (at least in her own mind) of her current medication; (e) the profound uncertainties surrounding her accommodation and means of support in Australia; (f) her lack of family support there (and loss of family support which she has in England and in Wales); (g) the discordant relationship with the father; (h) the prospect of litigating in the Australian courts to obtain protection from abuse and child arrangements for A possibly as a litigant in person; and (i) the fragile state of her emotions. Having regard to those matters in combination, I am left in no real doubt that a return of A to Australia at this point in his life would be likely to have a significant deleterious impact on the mental health of this mother, which would be likely in my judgment to impact on her ability to parent him. In turn, this gives rise to the grave risk that A would be caused psychological harm. Although A is, himself, a strong protective factor against rash action on the part of the mother (she told Dr Ratnam: "if I didn't have him (A), I would not be here right now"), Dr Ratnam could not rule out that (if she is faced with a return) those passive feelings of hopelessness could escalate, as they did in the past, leading to suicidal ideation. I further assess as 'grave' the risk that a return would cause such a deterioration in the mother's mental state that she would find herself – as Dr Ratnam at least contemplated – hospitalised; this would place A in an 'intolerable situation'. Although, as Dr Ratnam fairly commented, the mother has shown a reasonable degree of resilience in the past, I am satisfied that her emotional resources are now close to empty.

97. Dr Ratnam was clear that the mother would need an effective network of professional mental health support to be in place well in advance of a return to give her the best chance of coping with the return; she emphasised the need for "clarity" about this. I find that the measures proposed by the father –indicating in broad and general terms what *may* be available to the mother – fall short of offering this court that level of clarity and assurance.

98. For these reasons, I am satisfied that the mother has established an exception to return reflected by Article 13(b) of the 1980 Hague Convention. The risk has "reached such a level of seriousness as to be characterised as 'grave'" (*Re E*).

Discretion

99. Having reached the point in this exercise when I must exercise my 'discretion' whether to order a return, I have regard to the speeches in the case of *Re M (Abduction: Zimbabwe)* [2007] UKHL 55 at §43, as to which I highlight:

> "… in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare."

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

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

101. But on the facts of this case, I can do no better than to turn to the speech of Baroness Hale said in *Re D (A Child) (Abduction: Custody Rights)* [2007] 1 AC 619, at [55]:

> "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate."

In short the discretion will almost inevitably be exercised by refusing to make a return order where the Article 13(b) exception is made out on the basis of a grave risk of harm.

Conclusion

102. The mother has established to my satisfaction that a return of A to Australia at this point with or without his mother would place A at grave risk of psychological harm, or otherwise place him in an intolerable situation. It is therefore clear that I must exercise my discretion to refuse a return. I cannot wait to see if the mother's depression will ease as her grief, and the impact of her failed relationship, subsides; I cannot wait to assess whether the anxieties will be alleviated by a reduction in conflict with the father. As Moylan LJ pointed out in *Re S* [2023] at [109]:

> "… the jurisdiction under the 1980 Convention is not a continuing jurisdiction but one which requires a summary decision to be made on the evidence at the date of the hearing. It is not a "wait and see" jurisdiction".

103. However, I should add that I refuse the father's application with a little hesitation.

104. The father's role in A's life is an extremely important one, but I regret that it is bound to be impacted very significantly by the geographic distance between the parents (or more pertinently between A and his father). I note that indirect contact has not been easy to achieve, perhaps particularly given A's age and the parties' difficult relationship, and this needs to be addressed urgently; the onus is on the mother.

105. I note that the mother had written to the father in September 2022 "I need him and he needs me. Doesn't take away from you, but you and him don't need one another like we do", and I am concerned by the mother's comment to her GP (reported to Dr Ratnam) in December 2022, that "she did not want her ex-partner to be part of her

son's life". I had wondered aloud during the course of submissions whether this is what the case is all about, but Ms Chokowry was emphatic (on specific instructions) that this is not so. Miss Chokowry made clear, again on instructions, that the mother wishes the father to play as full a part in A's life as possible. I accept the mother's assurance in this respect (indeed, I could see the mother nodding her confirmation of this assertion while her counsel was making these submissions), which I trust will be repeated in any substantive welfare hearing, and then acted on.

106. That is my judgment.