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Case No: FD23P00109

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

1st Mezzanine, Queen's Building
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2023

Before:

DEXTER DIAS KC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between:

P

Applicant

- and -

O

Respondent

- -
- -

MS CHARLOTTE BAKER (at trial)
and **MS MIRIAM BEST (**for judgment) for the **Applicant**

MR GRAHAM CROSTHWAITE for the **Respondent**

- -

JUDGMENT

- -

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

DEXTER DIAS KC :

(sitting as Deputy High Court Judge)

1. This is the judgment of the court.

2. I divide it into six sections in accordance with the table below to assist parties and the public follow the court's line of reasoning. Some of these sections are very short.

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3. The parties to the father"). P has been represented by Ms Baker of counsel at trial and for judgment by Ms Best of counsel. The Respondent mother is O ("the mother"). She has been represented throughout by Mr Crosthwaite of counsel. The court is very grateful to all counsel for their first-class assistance during this case.

I. Introduction

4. On 9 December 2022, two children, two girls, were brought to England from their home in the Republic of Ireland. D is 12 and E is 10 years old. They were taken by their mother without the knowledge or consent of their father. They have been in this country ever since. The abduction complete, the mother then wrongfully retained them in this jurisdiction. Their father is deeply concerned. He wants his daughters back in their home country. The mother objects. Since the parents cannot agree

whether the children should return, this court must decide. That is the essential purpose of this judgment.

5. This is the final hearing of the Applicant father's application for the return of these two children to the Republic of Ireland pursuant to the 1980 Hague Convention. Proceedings were issued on 1 March 2023.

6. The children were born in Ireland and the parents lived together in the Republic for eight years until their separation in 2018. The mother developed a relationship with someone called Mr. Y. Mr. Y moved in with her and thus lived with the children in the home for a number of years. The children are living with Mr. Y and the mother in England presently.

7. The father alleges that the mother unlawfully removed the children from Ireland and that they were habitually resident in that country. They were taken without his consent and in breach of his rights of custody. The father has an Irish guardianship order which is equivalent to parental responsibility in respect of the eldest child D. That was granted in 2011. He also possesses guardianship in respect of the younger daughter E, because the parents cohabited with the children for 12 consecutive months after the relevant statute came into effect in the Republic of Ireland in 2016. However, in November 2022 he applied to the Irish court formally for a guardianship order in respect of E and for access to both children.

8. The mother accepts that the children were habitually resident in Ireland immediately prior to them being taken to England on 9 December last year. She accepts that the father did not consent to them living in England. She also accepts that he has relevant rights of custody within the meaning of the Hague Convention. However, she opposes the application on two bases: first, child objections under article 13 of the

Convention; second, article 13(1)(b) - grave risk of harm or otherwise intolerable situation.

II. Law

9. The law is agreed between parties in this case. It can be summarised in its most vital particulars as follows.

Article 13(1)(b): grave risk of harm or intolerability

10. Article 13(1)(b) of the 1980 Hague Convention provides as follows:

> "*Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that - […] 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*."

11. The leading Supreme Court authorities governing the Court's approach to Article 13(1)(b) are:

- ***Re D (Abduction: Rights of Custody)*** **[2006] UKHL 51;**
- ***Re E (Children) (Abduction: Custody Appeal)*** **[2011] 2 FLR 758;** and
- ***Re S (A Child) (Abduction: Rights of Custody)*** **[2012] 2 FLR 443.**

12. In ***E v D*** **[2022] EWHC 1216 (Fam)** MacDonald J, provided a summary of the law as follows:

> "*29. …The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in Re E (Children) (Abduction: Custody Appeal) [2012] 1 AC 144. The applicable principles may be summarised as follows:*

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

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

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

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

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

vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).

30. In Re E, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test

in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

31. 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), and this 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.

32. In determining whether protective measures, including those available in the requesting State beyond the protective measures proposed by one or both parties, can meet the level of risk reasonably assumed to exist on the evidence, the following principles can be drawn from the recent Court of Appeal decisions concerning protective measures in Re P (A Child) (Abduction: Consideration of Evidence) [2018] 4 WLR 16 , Re C (Children) (Abduction: Article 13(b)) [2019] 1 FLR 1045 and Re S (A Child) (Hague Convention 1980: Return to Third State) [2019] 2 FLR 194:

i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.

ii) In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.

iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.

iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.

v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care. vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.

33. With respect to undertakings, what is therefore required is not simply an indication of what undertakings are offered by the left behind parent as protective measures, but sufficient evidence as to extent to which those undertakings will be effective in providing the protection they are offered up to provide."

13. The **HCCH's Guide to Good Practice: Part VI Article 13(1)(b**) states as follows:

(1) Specific protective measures should only be put in place where necessary strictly and directly to address the grave risk. They are not to be imposed as a matter of course and should be of a time-limited nature that ends when the State of habitual residence of the child is able to determine what, if any, protective measures are appropriate for the child **[§44, p. 34].**

(2) In some jurisdictions, courts ordering the prompt return of the child may provide for practical arrangements to facilitate the implementation of the return of the child to the State of habitual residence. An example of practical arrangements is where the return order states who is to buy the airplane tickets for the child's return. Such arrangements are different from protective measures in that they are not intended to address a grave risk of harm. Practical arrangements should neither create obstacles to the child's return nor overburden either party (particularly the left-behind parent), nor exceed the court's limited jurisdiction **[§49, p. 35].**

(3) Where assertions of grave risk based on economic or developmental disadvantages upon the return of the child are made, the analysis should focus on whether the basic needs of the child can be met in the State of habitual residence. The court is not to embark on a comparison between the living conditions that each parent (or each State)

may offer. This may be relevant in a subsequent custody case but has no relevance to an Article 13(1)(b) analysis. More modest living conditions and / or more limited developmental support in the State of habitual residence are therefore not sufficient to establish the grave risk exception. If the taking parent claims to be unable to return with the child to the State of habitual residence because of their difficult or untenable economic situation, *e.g.*, because his / her living standard would be lower, he / she is unable to find employment in that State, or is otherwise in dire circumstances, this will usually not be sufficient to issue a non-return order **[§60, p. 40].**

(4) The taking parent may assert, for example, that he or she is unwilling to return to the State of habitual residence because he or she cannot afford legal representation, that the courts in that State are biased, or that there are barriers to access to a court for custody proceedings. If there is concern that the taking parent will not have effective access to justice, the court may consider coordinating with the relevant Central Authorities or using direct judicial communications to evaluate these claims and / or make arrangements, if possible, to facilitate access to court proceedings soon after return. The mere fact that the parent may be unable to afford legal representation has been found to be insufficient to establish lack of effective access to justice. In any case, the Convention being based on mutual trust between States, the evaluations in return proceedings should not compare the relative quality of judicial systems in both States (*e.g.*, as to the speed of proceedings) **[§69, p. 46].**

Child's objections

14. Article 13 of the 1980 Hague Convention provides as follows:

"*The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views*."

15. The law governing the Court's approach to the child's objections exception is well settled and remains as set out by Black LJ (as she then was) in ***Re M (Republic of Ireland: Child's Objections)*** **[2015] 2 FLR 1074** at **[§34]** onwards. The Court's task is as follows:

(1) **First,** to:

a) identify whether the child in fact objects to a return; and if so;

b) determine whether the child has attained an age and degree of maturity at which it is appropriate to take account of their views

If these **gateway** elements are not established, then the Court is bound to return the child forthwith. However;

(2) If the Court is satisfied of the above, then the **discretion** is at large.

16. In respect of the gateway stage, Black LJ stated at [§69]:

"In the light of all of this, the position should now be, in my view, ***that the gateway stage is 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. Sub-tests and technicality of all sorts should be avoided"*

(emphasis added)

17. The classic expression of the Court's discretion in a child's objections defence remains as described by Baroness Hale in ***Re M (Zimbabwe)*** **[2007] UKHL 55** at [§46], namely:

"In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the

> *United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so.* ***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 her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry.*** *But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."*
>
> **(emphasis added)**

18. MacDonald J summarised the correct approach to an objections defence in ***H v K (Return Order)*** **[2017] EWHC 1141 (Fam)** at [§46-47]:

> *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).*

III. Evidence

19. At trial, only the Cafcass officer Mr Lill gave evidence. In due course, I will highlight the relevant parts of his testimony during the evidential analysis. Mr Lill met with the children on 13 April this year. He met them at home and separately at the Cafcass rooms in the Royal Courts of Justice. His report is dated 16 May, the court having granted a short extension.

20. I assess Mr Lill to be a thoughtful, balanced, fair, and deeply experienced professional witness. He was persuasive and convincing and his evidence carried weight with the court. Nevertheless, I emphasise that I judge the case on the totality of the evidence and Mr Lill's testimony and his report forms a small part of it.

IV. Child's objections

21. There are a number of factual matters in this case that are relevant to both exceptions relied upon by the mother. I will examine them principally under child's objections

and will not unnecessarily duplicate the analysis. There is of course a classic tripartite test in respect of child's objections. Although in his opening skeleton, the father disputed whether the views of the children did amount to objections, this was conceded at trial by Ms Baker, quite sensibly. These children clearly object to return to Ireland. Therefore, the first two limbs of the requisite test are conceded by the father. First, that the children object to the return to the Republic of Ireland; second, they are of sufficient age and maturity for their views to be taken into account. Thus, the focus of the court's analysis is the evaluation of the relevant factors.

22. I have identified the following factors:

- the age and maturity of the children;
- the nature, content and strength of their views;
- the authenticity of their views;
- their concerns about return to the Republic;
- whether there are likely to be problems of enforcement;
- the nationalities of the parties and their connection to the Requesting State;
- whether there are existing welfare proceedings in the Requesting State;
- which State is better placed to hear welfare proceedings;
- whether there will be separation from siblings;
- whether there will be separation from mother and other relevant people;
- the promptness of the application for return;
- the educational situation;
- the contact history; and
- any relevant Convention considerations.

23. **Age and maturity of the children**. D is 12, and the court must place, it seems to me, significant weight on her views. E is younger at 10. Nevertheless, I emphasise that I do take her views into account. I cannot place quite as much weight on them as her sister's, but they do count in the court's decision.

24. **Strength and content of views**. As to D, the Cafcass officer Mr Lill stated that she was clear in expressing a wish to live in England and to stay here. She said this for several reasons. She said that although she missed her family in the Republic, there was nothing else she missed about living in Ireland. She expressed partially negative experiences about the Republic, and did not enjoy school there. She said that if the Judge did decide that she must go back that she would be "depressed and sad". She was worried about her brother and also about Mr. Y remaining in England and therefore was concerned about separation from them. She says that she has never had such good friends as she now has and did not like conditions in her father's home. At times, she was scared about his behaviour.

25. As to E, she was clear also that she wished to remain in the United Kingdom. If the Judge decided that she should go back, she said that she would "feel depressed". That was because it was hard for her to make friends in school in Ireland and also because her younger brother and Mr. Y might stay in England and therefore she would be separated from them. She said that it was difficult to make friends in Ireland and that her school was strict and not enjoyable. Both these children prefer a more exciting lifestyle in England compared to their home town in County A.

26. The mother said that her daughters do not want to go back to the Republic of Ireland. They told her they do not want to go to their school in County A, that there had been a

photo of them circulated on social media. She states that they prefer the school in England and they definitely had a clear view that life is better in England.

27. While the children clearly express more than a preference, I do not understand Mr Lill's evidence to mean that their views fall at the extremely strong end of the spectrum. They want to stay in England. They like it here. They prefer it to their home country. But I do not get the sense from the totality of the evidence that it is significantly stronger than that. It is not in a category that this court sometimes encounters of children with such entrenched views that a return is something that is going to obviously have a significant emotional impact upon them.

28. This is reflected by the totality of what they told Mr Lill. His conclusion is that they would be able to adapt back to life in the Republic of Ireland. If they were implacably opposed to returning to that country, this would simply not be the case. However, the children also have concerns about returning to Ireland. I look at those in turn.

29. There are concerns about the living conditions in the father's home. There are concerns about sanitation, a lack of activity and stimulation. That anxiety is not now relevant for this particular application because as part of the package of protective measures, the father has agreed that the children will not have staying time in his home unless and until the Irish court so directs. There have been concerns expressed about his behaviour at times. Sometimes the children say that he gets angry, he can speak to them in [his native language] in a way that they find upsetting. He shouts at them at times. Once more, the relevance of this has diminished as the father agrees that the children will not have direct contact unless and until ordered by the court in the Republic. There are other concerns about social life and education, but I will look at those shortly.

30. **Separation**. The mother has indicated that their brothers will return to Ireland should the court order that the children must return, thus this concern has vanished. As to separation from Mr. Y, while I accept they may miss Mr. Y because he has lived with them for several years now and has been part of the arrangement for caring for them, the court must also weigh against that his chequered record. That includes a history of disturbing offending against a child, not very different to the age of these children. This lessens the weight the court can place upon this particular factor in the scales against return, but I emphasise, does not eliminate it.

31. **Enforcement**. As Mr Lill puts it, if the court ordered a return, the children would be sad, confused, unsettled, "but not disappointed". They would be less disappointed he said if they knew that their brothers would be returning.

32. It seems to me that their concerns about the father will not materialise because of his undertakings. He has left it to the Irish court to decide what is best for the children. Mr Lill says that despite the level of objections about returning to Ireland that, "I think they would manage it without much difficulty if so ordered. I suggest that return would be better for them with some structure and clarity."

33. These are respectful children. For example, E's headmaster describes her as a bright and conscientious pupil, who is pleasant and helpful. There are also positive reports about D. Therefore, I find no evidence of enforcement problems.

34. **Authenticity of views.** I do not find that the children have simply repeated a rehearsed script that has been created by the mother, but there is no doubt that the children's views align with their mother's narrative. Mr Lill put it this way: he said there were two camps about the relocation to Ireland. The children were very much aligned with the mother. He said that there is a sense that the children are impacted

by the conflict between their parents and find themselves in a situation where they have, as he put it, taken a side. He said they are aligned to the mother's happiness, thus the mother's wishes exert a more subtle and nuanced influence on her daughters. She is their primary carer. Nobody disputes that they are well aware of the mother's wishes and ambitions, which are all about living in this country. It cannot be forgotten that the mother enlisted the children into the deception that made the flight to Ireland possible, and further that the children have been part of the subsequent retention. The children cannot but know the mother's wish to live in the United Kingdom.

35. Mr Lill put it this way: "I do think they have been exposed to her thinking and her intentions. And of course, that would have had an impact to some extent. The children are aware that they were going to the United Kingdom, but the level to which the children were exposed to her feelings and rationale to me is a concern. The idea that the family may be separated is unhelpful and may consolidate their wish to stay [in the United Kingdom]."

36. **Nationality and connection to the Requesting State**. All these parties are nationals of the Republic of Ireland. D recognised that she missed her relations in the Republic and that is a significant point. That country has been her home and that of her sister. It is submitted on behalf of the mother that the children maintained contact with their Irish family through video calls, but of course, the children can do precisely the same with their new friends in England. These are friends they have only recently made since arriving in this country.

37. **Concerns**. The children have concerns, as Mr Crosthwaite put it, about "living in a small rural community". For example, D complained that there were no shops except

Lidl and Aldi, but the children have grown up in such a community and there are significant parts of the Republic of Ireland beyond the metropolitan areas that are very similar. The children will return to the very place they have lived and grown up in. There may be more opportunities in England. There may be more opportunities to make friends, especially in a bustling town, but that cannot be in these circumstances sufficient reason to refuse a return.

38. On the other hand, D told Mr Lill that she had friends at school in the Republic. So while the court does not ignore the question of friendships, it does have limited weight in the global assessment. I cannot accept the submission made on behalf of the mother that "great weight" should be placed on these factors. That is obviously overstating the case.

39. **Proceedings in the Requesting State**. There are proceedings that have a welfare element in the Republic of Ireland at the local District Court. That is as a result of the application by the father. These proceedings were stayed due to the retention in England.

40. **Forum**. As to the appropriate forum for welfare decision, it is submitted on behalf of the mother that the courts in this country can just as easily make decisions about welfare as those in the Republic. Yet, it is accepted by the mother that Ireland is the country of habitual residence. It is the philosophy of the Convention that the home court should make welfare decisions unless there is sufficient reason to consider that another court should take over that essential role.

41. It seems to me there is no reason why the court in the Republic of Ireland cannot make welfare decisions about the children. Indeed, it is undoubtedly better placed. These are Irish children, they were born in Ireland, they have lived their entire lives in

Ireland until the international abduction and wrongful retention. I conclude that the Irish court is far better placed to make a judgment about welfare. Frankly, it is not realistic and unconvincing to suggest otherwise. I reject the contrary submission. Those proceedings in Ireland were stayed because of the mother's actions. The next court date was going to be 9 June, but these proceedings are extant and they can be fully revived.

42. **Promptness**. As to the promptness of the application, no point is made about the speed of the father's application for a return. He has unquestionably acted with sufficient promptness and he was and remains deeply concerned about his daughters.

43. **Education**. In terms of the educational situation, it must be remembered that the girls left the Republic in December 2022. They started school in England in January 2023. While it is right to observe that they have both settled in the school in this country and have been doing well, they are yet to complete two terms in the English school system. That has to be set against the years of education they have had in the Republic of Ireland.

44. **Contact**. Although there has been contact since March through video calls, usually for about 20 minutes, the court does have concerns that there was no contact between the father and the children from December until the first hearing in these proceedings on 17 March 2023 - and this is despite the children having regularly spent time with him before removal from the Republic. It seems to me there is a real risk that once the spotlight of these proceedings moves on that the contact with their father in the Republic of Ireland would not be as secure and robust as it is while these proceedings are continuing. That is a factor which I do not place a significant amount of weight

upon, but it is unquestionably one of the factors relevant to the court's discretion. And it is to discretion that the court turns.

Discretion

45. The court finds that the mother engaged in a systematic, premediated, carefully orchestrated and protracted deception. It had as its object to remove the children from their own jurisdiction contrary to the knowledge and wishes of their father who has rights of custody. The history of proceedings in the Republic is revealing. There was an application in the Irish court by the father on 22 November 2022. This was in respect of guardianship for E. There was going to be a first hearing on 9 December. The mother accepted that she received a letter in the post dated 22 November 2022 from the father's lawyers to say there was to be this hearing on 9 December to deal with his application for E's guardianship and also for access to both girls.

46. At about the time that this hearing was going to take place, the mother covertly travelled to the United Kingdom with the children. It is the father's case that the reason that they left was because of Mr. Y's previous history that would emerge in the Irish proceedings and would threaten their living arrangements in the Republic. The court, I emphasise, does not make a finding about that. Whilst there is suspicion that this was an important feature in the decision to leave, it seems to me that it is speculative and the matter should not be put higher than that.

47. In the end, the mother's reasons for wanting to live in England may be multifaceted, but the girls knew about the plan to leave Ireland before they left. D knew about a week before leaving for England. In that period the girls spent time with the father at the beginning of December. They could not tell him the truth about what was going to happen. Therefore, they had to act deceptively as if nothing was amiss. This was,

it seems to me, a very serious act by the mother and is undoubtedly harmful to the children to enlist them in all of this, to put them into a position where they had to practise adult deceit on their own father. It is telling that D has little remorse and regret for what has happened. It meant that the children did not say goodbye to their friends. As Mr Lill said, "It is concerning that even in a position where they were urging their father to relocate, I don't think it's inevitable or normal for children to be aware of relocation plans. I am concerned that the children would come into it in this way.".

48. The deception was effected to ensure that flight to England would be successful. The mother needed the children to deceive their father for it to succeed because if they said what was about to happen that might scupper the plan. They did not say anything to him and indeed the mother's scheme was successful.

49. The court is in no doubt that the children are strongly aligned with the mother's views and wishes. They are protective of her. They said they removed the father from the WhatsApp group. D at page 189 in the bundle at paragraph 25 said, "We removed him from WhatsApp because we knew he would ask a bunch of stuff about where we were." Mr Lill therefore concluded that it may well be the case that the children are being protective of mother (as the mother said she in fact did it).

50. There is nothing previously in evidence in preparation for the trial that the mother had in fact given notice on the family home. The first time anyone else knew that she could not return to the property was a letter of 19 May. In fact, she had given notice on that property on 18 January. The fact that she had not said that she had served notice on the authorities must cause the court to have concern about her ability to be frank and open with the court in her conduct of the case.

51. Further, the court does have concerns about the previous behaviour of Mr. Y both in terms of his criminal offending and also his disregard of court orders. He has committed acts of intimidation directly towards a female child. I of course recognise that these children have lived with Mr. Y since about 2019, and this has included living with him in both the Republic and England. I also recognise that Mr Lill stated that there is no indication of inappropriate behaviour from Mr. Y.

52. On the other hand, Mr. Y has extensive involvement with social services and the local authority. As Mr Lill put it, the pattern of offending and the pattern of incidents which have not resulted in convictions is "extremely concerning of course". That concern stems from the pattern of incidents, a pattern of behaviour over a period of time that continued into adulthood. There are offences against children and Mr Lill said that this should not be overlooked. He said, "I would expect the mother to be concerned about Mr. Y's offending history. I would be extremely concerned if she is not herself extremely concerned."

53. What the mother says, however, is that she understands Mr. Y had a criminal past and had been charged with offences in the past, but that that was some time ago. She believes he has changed since then. In her statement prepared during the course of the trial when the court directed that it wanted evidence about her response to these facts about Mr. Y's offending history and risk, she stated between paragraphs 3 and 5 that in essence she had no sense of concern about it.

54. It is troubling to the court that there appears to be in her statement a degree of victim-blaming. That is blaming the victim of Mr. Y's criminal behaviour. This is extremely concerning. D is now approaching the age of the child who Mr. Y harassed. His history of misconduct in brief is as follows. Police National Computer results show

that he has 19 convictions of 36 offences between July 2007 and October 2013, including convictions for violence and harassment, and he has received custodial sentences. His criminal history includes offences against a 13 year-old girl in 2008. At that point, Mr. Y was aged 19.

55. He then breached court orders that were put in place to protect that child. Information provided by the local authority, social services states that, "Mr. Y has a hazard of risk to children." He was in breach of a restraining order in respect of the 2009 conviction connected to that child and what happened was that she received a phone call from a withheld number. It had what she called "spooky music", and a male voice recognised to be Mr. Y was on the phone saying, "You are dead. We are going to kill you.". That is to a child. He stalked her and was abusive towards her and threw wood and stones at the victim. One of those missiles hit her foot, but there was no injury.

56. On 25 September 2012, there was a probation referral. Mr. Y moved in with his sister, after being released from prison. He has been assessed as "medium risk to children and has a violent history."

57. It must be recognised these are historic matters and the court has to take that into account when weighing their significance. I do. However, that temporal remoteness is in part offset by the particular relevance of these matters. Relevance flows from the fact that the two children in this case are females of a similar age to Mr. Y's victim. I emphasise there is no evidence of Mr. Y exposing these two children to harm, but he has previously harmed a young female of approximately their age.

58. This historic risk operates to some extent to neutralise the fact that the children have said that they would miss him. The court does not ignore what they say, but the court

must look carefully at the person who is going to be missed. And it is also of note that D told Mr Lill that it was not just their mother who suggested the move to England, but also Mr. Y. It is clear therefore that there is evidence that he was involved in this plan to move to England. And of course, common sense tells us that he had to be.

59. As to Convention considerations, as is made clear repeatedly by the provided authorities, Convention considerations are a factor to be weighed in the discretionary evaluation. As Baroness Hale stated in *Re M (Zimbabwe)* [2007] UKHL 55 at paragraph 42:

> "In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the Contracting States and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the Contracting States."

60. What are the Convention considerations here? In this case, there was a flagrant and carefully devised deception to effect an international abduction and wrongful retention. The court must take that into account without it being determinative.

61. Therefore, in conclusion, the court's view is that the children's perception and their wishes have been indirectly influenced by the strong views and actions of their mother. They are protective towards her and have strongly aligned with her narrative.

They have been enlisted by her into the deceit of their biological father in a deeply inappropriate way. Even though they would be upset at first, they would be able to live in Ireland, where several family relations live.

62. As D told Mr Lill, she misses her family in Ireland. E also said that she misses them. She told Mr Lill that she thought her father did not love her and she, differently to D, felt a bit sad, as she put it, for deceiving him and leaving Ireland without saying goodbye. These children were born in the Republic, they have been schooled entirely in the Republic save for less than two academic terms, and there are ongoing welfare proceedings in Ireland; that court is undoubtedly best placed to make welfare assessments in the best interests of these children given the depth of connection to the Republic that they have, they and their parents being Irish nationals. It is unpersuasive to set against extensive history in the Republic the relatively short time in the United Kingdom that has been a product of manipulation, manufacture, and the mother's deceitful behaviour.

63. Convention considerations are not determinative. In this case, I must give them weight given the extent of the mother's deception. Thus, on the question of child objections, the court finds with no hesitation that the factors in favour of exercising the discretion to return heavily outweigh those against it. Therefore, this exception is rejected and dismissed.

V. Art. 13(1)(b)

64. The court turns to the question of Article 13(1)(b). There are two conceptually equivalent alternatives. First, grave risk of serious harm; second, intolerability

generally. The mother puts it this way. The children would be separated from her present partner Mr. Y if they returned to the Republic. She has handed in notice for their accommodation in their local town. The mother's other family members do not have sufficient room in their property to permit the children to stay with her in the Republic. The father has behaved in a physically and emotionally abusive way towards the children. The mother may be arrested for the offence of child abduction with the Irish police on her return given the father's criminal complaint. She would not qualify for Legal Aid to pursue any application for leave to remove the children from the Republic and this will cause her mental health to suffer as she will be unable to return to England to live with the (other) children and her partner.

65. These are important questions and the court considers them in turn. First, accommodation. Much time was used up during the course of the hearing with investigations about the mother's accommodation. In her statement at paragraph 39, she said this:

> "I have nothing in the Republic of Ireland and there would be nowhere for me to go with the girls. My youngest son H who would accompany us in the event of the making of a return order is still only a baby and very dependent on me to meet his needs. I do not have a car there. My mother and brother are said to be unable to accommodate us because they do not have enough space in their respective houses. My father lives in [Town B] but he does not have enough room in his house to accommodate us either.".

66. At paragraph 40, she said:

> "Ultimately, if this honourable court made an order, I would have no option but to sleep on my father's sofa with the girls and youngest son, but I do not believe that this would be suitable."

67. These children have lived in Ireland until December 2022 for the entirety of their lives. The fact that the mother has brought about this housing situation is a matter of

no great moment. The question the court must decide is the question of risk. What would be the situation facing the children upon their return? However, it is wrong for the mother to assert that she and children would have, as she put it, "nowhere to live". That is because her father said at B326 in the bundle, that they could live with him for "a few weeks". This would provide an opportunity for welfare services in the Republic of Ireland to assess the situation of the mother and the children.

68. As to the cramped conditions she suggests will follow, they have been living in similar conditions in England. The space is presently crowded and they are living in a four-bedroomed house with the mother, Mr. Y, two children, and two of Mr. Y's children. I cannot accept that they could not live for a short period in similar conditions in Ireland, that is, for a few weeks until this case comes in front of the court.

69. As the Good Practice Guide of the HCCH states at paragraph 60: "What is essential is that the basic needs of the child are met." There is no evidence to suggest they will be in peril. The question arises whether there is any evidence that the mother cannot apply for housing from this country. Counsel was asked this question by the court. Counsel did not answer it. The court cannot see any evidence that suggests that she is not able to make such an application. There is no evidence that she could not apply from England. Nothing in the form that was provided to the court suggests that. It is submitted on behalf of the mother, "We do know how much spare housing [County A] has."

70. Miss X of Council A says that the mother would have to make a new application. However, the mother has obtained social housing previously when she had two

children. She has more children now (four) which is likely to increase the level of priority.

71. The next question is that of upheaval. It is submitted that a return would be a significant upheaval for the children. The fact is, however, that the return is to correct the upheaval of the clandestine and wrongful abduction. That resulted in the children having to live in a country that is not their own and of which are not nationals, having to enter a school system in a different jurisdiction, having to leave their friends behind without saying goodbye, and having to deceive their father. The court considers that Mr Lill's evidence that the children will be able to manage the return to be persuasive.

72. As to the problem of prosecution, the father undertakes not to support any proceedings against the mother.

73. I turn to the question of Legal Aid. It is submitted that she would be unable to afford lawyers' fees in the Republic. She has Legal Aid here. The Good Practice Guide makes clear that her lack of legal funding is not a basis to find that the exception is met (see paragraph 69). If necessary, of course, the mother can appear in person in the Republic. Many unrepresented court users do so in cases in the courts here. But very importantly, I come back to the ethos of the Convention. It is for Requested States generally to have confidence and trust in the legal system of the home country, unless there is reason to doubt it. That is fundamental to the principles of comity and mutuality. This jurisdiction can certainly and does trust the legal system of the Republic of Ireland.

74. In conclusion, I find that there is nothing remotely close to a grave risk of physical or psychological harm that these children would be exposed to. There is no other intolerability they would suffer. The evidence comes nowhere near to establishing

either limb. Given this conclusion, the court does not need to move on to consider protective measures being satisfied, as I am, on the evidence before the court that there is not a grave risk of harm, nor other intolerable situation that shall arise to be protected against.

75. The case advanced by the mother comes nowhere near to satisfying the threshold set by Article Art. 13(1)(b) of the 1980 Hague Convention. I find on this exception that in fact there is no discretion to exercise because the constituent building block, the condition precedent, has not been satisfied.

VI. DISPOSAL

76. The essence of the policy that underpins the Hague Convention 1980 has been repeatedly stated by the court. A succinct exposition comes from Mostyn J in *SP v EB* [2014] EWHC 3964 at paragraph 2. The Judge stated:

> "The underlying and central foundation of the Convention is that, where a child has been unilaterally removed from the land of her habitual residence in breach of someone's rights of custody, then she should be swiftly returned to that country for the courts of that country to decide on her long-term future.".

77. That precept of course clearly applies to wrongful retention.

78. Therefore, to summarise the court's ten prime findings:

(1) The date of the children's abduction and subsequent retention was about 9 December 2022;

(2) The abduction and retention were effected by the mother;

(3) Importantly, before that crystallising point, each child was habitually resident in the jurisdiction of the Republic of Ireland for the purposes of Article 3 of the 1980 Convention;

(4) The mother's retention of the children in the jurisdiction of England and Wales is wrongful for the purposes of Article 2;

(5) As conceded by the father, the court finds that each child objects to returning to the Republic of Ireland;

(6) Equally, it is conceded and the court finds that each child has sufficient understanding of maturity such that their objections must be properly taken into account;

(7) However, considering the gateway discretion, the court unhesitatingly exercises its discretion to order a return of each child to their home country;

(8) The court is completely satisfied that returning each child to the jurisdiction of the Republic of Ireland would not expose either of them to a great risk of physical or psychological harm and would not otherwise expose them to an intolerable situation;

(9) The child objections exception has not been established as the factors in favour of return significantly outweigh those against;

(10) The Article 13(1)(b) exception has not been established.

79. In the circumstances, this contracting State's obligation is to return the children to the Republic of Ireland. The return must be forthwith, but there is a limited discretion to

delay the return in the best welfare interests of the children. Listening carefully to Mr Lill's recommendation, the court has determined that the appropriate point of the children to return is immediately after the end of the school year. The precise date will be agreed between the parties. If it cannot be the court will decide it.

80. In this case, the mother accepts that she "took matters into her own hands". The court must be clear what that means. It means that she took the law into her own hands. There is no defensible justification for doing so. Any welfare issues must be resolved by the home court which is the Republic of Ireland. As suggested by Mr Lill, the court has agreed to write a letter to the children. It is important that the return does not exacerbate the conflict. The children should not view the outcome of this case as being one parent winning and the other losing. Instead, the court will carefully explain how it is the decision of the Judge and that that decision has been made looking at what is best for each child. In other words, in their best interests.

81. That is my judgment.