Neutral Citation Number: [2024] EWHC 2190 (Fam)

Case No: FD24P00282

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2024

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

GT	**Applicant**
- and -	
LT	**Respondent**

- -

Re A and R (1980 Hague Convention: Return to Australia)

- -

Beverly Roberts (instructed by **WBW, Solicitors, LLP**) for the Applicant (father)
Mani Singh Basi (instructed by **Ellis Jones Solicitors LLP**) for the Respondent (mother)

Hearing dates: 20-21 August 2024

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Approved Judgment

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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, dated 4 July 2024 , concerns two children, who I shall refer to as A and R. They are the only children to be born to the relationship of the Applicant ("the father"), and the Respondent ("the mother"). A, a boy, is 5 years old; R, a girl, is almost 3 years old.

2. 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. The father seeks the summary return of A and R to Australia.

3. The mother opposes the application. The arguments which have been pursued before me are as follows:

    i) That immediately before the alleged retention (the date of which is now agreed to be 19 November 2023), the children had become habitually resident in England; accordingly the retention was not wrongful (Article 3 of the 1980 Hague Convention);

    Alternatively:

    ii) That a return of the children to Australia would expose them to a grave risk of physical or psychological harm, or otherwise place them in an intolerable situation (Article 13(b) ibid.) as a consequence of:

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

        b) The mother's mental ill-health, and the risk to A and R's wellbeing if she, as their main carer, returns with them, or they return 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 and R to Australia

4. The mother had earlier indicated an intention to pursue other grounds of defence, including that the father had acquiesced to the children remaining in this country (Article 13(a) ibid.); she also sought to argue that the date for determining the habitual residence of the children should be mid-January 2024 (rather than November 2023). However, at the outset of the hearing, through Mr Basi, she abandoned these points.

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

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

    i) Read the bundle of documents, including the lengthy statements of the parents and their multiple exhibits;

ii) Read and considered the expert psychiatric reports of Dr Tom McClintock MB BCh BAO MSc (Criminal Justice) MRC Psych, Consultant in Forensic Psychiatry;

iii) Received the oral and written submissions of counsel.

Both parents attended the hearing in person (the father having travelled over from Australia for the purpose). No party sought to question Dr McClintock. This *ex tempore* judgment is delivered on the second day of the hearing.

Background history

7. The father is 59 years old; he was born in Australia and is an Australian citizen. He is a farm manager, running two farms approximately five hours drive apart in regional South West Australia. He has two adult children from a previous marriage. Over the last twenty years or so he has also worked, for a period of a forty to fifty days each year, at an international event held in England.

8. The mother is 40 years old; she was born in England and is a British national with Australian citizenship. The mother has recently completed a Master's Degree in primary school teaching in Australia and has done some limited supply teaching. She also has an operational role for same international event in England which she has been able to conduct in the main (apart from an extended period in which the event falls) remotely. She has also worked on the family farms. Before moving to Australia she had a range of jobs in England; when she first moved to Australia she was a dancer in a Gentlemen's club.

9. The parents met approximately twenty years ago, while both working at the international event held in England; they first lived together approximately fourteen years ago, shortly after the mother had moved to Australia. After a brief separation in 2015, they became engaged in 2016 and were married in Australia in 2017. A was born in October 2018; R was born in November 2021. The children have dual British and Australian citizenship. The family home is on a farm at what is agreed to be a reasonably remote location in the heart of New South Wales.

10. It is the mother's case that the relationship has been characterised by controlling and coercive behaviour by the father towards her; she has deposed at length in her statement to examples of his anger, intimidation towards her, and his physical and emotional abuse of her going back to the very early stages of their relationship (long before they were married). She has described his sexual abuse of her. She has described abuse of others too, including his employees. She has described the impact on this alleged abuse upon her. She also describes the father's own struggles with his mental health. The father denies the alleged abuse, and expresses himself to be distressed that the mother should invent such a false narrative; he accepts that latterly he suffered 'situational depression' which he associated with the deterioration of the parents' relationship. The mother and father have attended couples' counselling on occasions in the past to assist their relationship, albeit, as it turns out, unsuccessfully.

11. In March 2022, the mother reports that she suffered a panic attack (while in Australia); she says that she took herself to hospital where she was treated. Following this event, she received weekly counselling. She did not tell the father about this

event or the counselling. The hospital record for her attendance reveals that the mother was not complaining then about domestic abuse, and she had no concerns for her or the children's safety.

12. On the 19th of April 2023, the mother and children travelled to England for what was agreed to be an "extended stay", to include the parents' customary temporary employment at the international event in England. It is the father's case that the parents had agreed that the mother's trip in 2023 would exceptionally be extended, as this would be the last year in which she could come to England to attend the event in person, given A's upcoming commitment to day-school in Australia from early-2024. In early June 2023, the father travelled to England to join the family, and to take up his work at the event. At the end of July 2023, after the event, the father returned to Australia to continue managing the farm.

13. It is apparent from the contemporaneous e-mail exchanges which have been filed by the parties that the parents discussed various dates for the return of the children during the period August to November 2023. The mother acknowledges in one message that she was due back for work in Australia in September; it is evident from the mother's recent interview with Dr McClintock that "she was not planning to remain here". During August, the parents discussed by e-mail specific alternative homes for the mother to rent in Australia and schools for the children (immediately for A) on her return. Good-natured e-mails passed between the parents during September about the arrangements for the mother and children on their return to Australia.

14. In an e-mail dated 12 September 2023 from the mother to the father (which the mother opens with the words: "Hi Gorgeous"), she says:

> "The main reason for us to return is for you to be able to see the kids. I realise that you want to be a part of their life, and you should be part of their lives, I know this is incredibly important and I will always support this. … The main thing that they are missing [in England] is you".

15. In his reply (same day), the father materially says this:

> "I know that you have your heart set on living in England. If we are good friends and have established a happy productive relationship. I will move to England with you after 2 years."

16. Exchanges of WhatsApp messages in the period 8-17 September which have been exhibited to the father's statement were affectionate, even loving.

17. A medical entry of about this time (19 September) shows that the mother was saying to her general practitioner in England that she did not want to go back to Australia, "but may have to go back unless [the father] agrees to her staying". A later entry shows that the father was: "not allowing [the mother] to register the children for school [in England]…. [the mother] has disclosed that during her marriage he was and could be demanding and there has been elements of emotional and controlling behaviour". Later it was recorded that the father had been "manipulative and controlling".

18. In an e-mail to the father dated 30 September the mother acknowledged that the father had been "patient and understanding and I am happy to hear that you will continue to do (sic.) so"; in the same e-mail she was very clear that she would be returning: (i.e., "When A returns he will have a great deal to take on…": emphasis by underlining added) and proposed mediation to arrange the practical steps to set up separated lives on her return. She signed off the e-mail ("Love L x").

19. It is apparent from the evidence of both parents that the relationship between them had been deteriorating prior to April 2023; the father says that it was in September 2023 that the mother finally told him that she wished to bring their relationship to an end. The mother is non-specific about the date on which she made this clear to him. What is nonetheless clear is that between September and November the mother and father engaged in informal discussions, as well as more formal mediation, in an attempt to agree the children's futures. These discussions were unsuccessful.

20. On 3 November 2023, the mother sent the father an e-mail setting out her plans to move back to Australia; it contained the following:

> "I will keep moving forward as planned looking at rentals and schools. I spoke to an agency in [Mid North Coast] this morning (your time). They have given me all the information I need to know about applications and how to go about applying. Once I have spoken to the lawyer early next week I will be in touch about finalising everything."

21. In a medical consultation on 7 November the mother was reported to be experiencing stress ("struggling to get out of bed in the mornings") and was prescribed fluoxetine (anti-depressant) as a trial.

22. On 13 November 2023, the mother received a letter from the father's Australian lawyer seeking confirmation of the return of the children within days.

23. It is the father's case that on 15 November the mother confirmed to him in a telephone conversation that she was planning to return to Australia on a flight departing on 18 November.

24. On the 18 November 2023, the mother sent an e-mail to the father, advising him that she would no longer return to Australia with the children. She said this:

> "I have no job to return to, no home and no support network of my own. The prospect of returning as a single parent in these circumstances would be terrifying for anyone. I cannot even begin to envisage what life would be like there. I have begun to have panic attacks as a result of the anxiety this is causing and I am desperately worried that I won't be able to cope and I don't know where that would leave the children …. I have thought very long and hard about this but have decided that the children's home and future lies in England and that is where I feel they must stay. I sincerely hope you will be in agreement with this as I really do feel that this is best for the children".

25. On the 18 December 2023 the father submitted his application under the 1980 Hague Convention (together with supporting affidavit) to the Australian Central Authority seeking the return of the children to Australia. For reasons which I have not been able to discover, this application was not submitted to ICACU until 1 July 2024; hence the unhelpful delay in the prosecution of this claim.

26. While waiting for his application to be issued, the father has travelled to England twice, the first time immediately prior to Christmas 2023, and later for a period in May 2024, on both occasions to see the children. The mother offered to arrange accommodation for the father for his visit; she offered to arrange his airport transfers; the father and mother agreed that the mother could join in with the father's activities with the children. On all of these aspects, the exchange of e-mail communications between them was, in my judgment, at least cordial.

27. Otherwise than when visiting the UK, the father has had regular video link contact with the children in the mean time.

28. The father's application under the 1980 Hague Convention first came before the court on 17 July 2024, before Poole J; the mother was granted permission to instruct a consultant psychiatrist to undertake an assessment of her. This application was premised on the fact that since November 2023, the mother has been receiving psychotherapy in England and had been prescribed anti-depressant medication (although she had not it transpires taken this). The mother's therapist describes treating her for post traumatic stress following years of emotional and physical abuse, coercive control, and sexual and financial abuse (Dr. McClintock questions this diagnosis). The mother had also described to the therapist her social isolation while living in Australia, with no friends or family there.

Article 3; unlawful removal or retention; habitual residence

29. 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 <u>child was habitually resident immediately before the removal or retention</u>; 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).

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".

30. Given that counsel agree on the applicable law in this case in relation to habitual residence, I do not propose to rehearse it here at any length. It is essentially a question of fact, but the cardinal principles which I have applied in this case have been drawn from a number of cases including but not limited to: *Proceedings brought by A* Case C-523/07, [2010] Fam 42, *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22), *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60 [2013] 3 WLR 761, *Re LC (Children)* [2013] UKSC 221, *Re B (A Child)* [2016] UKSC 4, [2016] AC 606; *Re B (A Child)(Custody Rights: Habitual Residence)* [2016] EWHC 2174 [2016] 4 WLR 156 (see below); *Re J (a child) (Finland: habitual residence)* [2017] EWCA Civ 80, *Proceedings brought by HR* [2018] 3 W.L.R 1139, at [54] and [45]; *Re M (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, and the recent comments of Moylan LJ from *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659.

31. The core principles to be applied are essentially these:

    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*).

    iii) The court is looking to the proximity of the child to the country; 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 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*);

viii) 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*);

ix) The requisite degree of integration can, in certain circumstances, develop quite quickly;

x) 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*).

32. 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."

33. In determining the issue of habitual residence, the factual enquiry which I have undertaken has been centred throughout on the circumstances of the children's lives. My investigation has been child-focused and I have considered most carefully the particular situation of these two young people.

34. The father contends, through Ms Roberts, that:

    i) The children were born in Australia;

    ii) The children's paternal roots are in Australia; they have an extensive network of family and friends there (some of whom have provided letters exhibited to the father's statement);

    iii) The children have a half-brother and half-sister in Australia with whom they are close;

    iv) Australia is the home-country where the children have had their primary experiences, living on the farm with their animals and pets, and benefiting from the joint care of both of their parents; it is where they have developed their secure emotional foundations;

    v) It is agreed that the parties only ever agreed that the children would be in England in 2023 for an 'extended holiday' including the period in which the parents would work at the international event;

    vi) During the whole of the relevant period from April 2023 to the date of the retention (November 2023), the mother was intending to return to Australia; the e-mails between the parents in the period after July 2023 up to November 2023 are all clear that the mother was intending for the children to return to Australia, accompanied by her;

    vii) The mother at one time had suggested that A should start 'transition' school in Australia in the autumn of 2023; the parties had agreed that A would be starting school full-time in Australia in January 2024;

    viii) Insofar as the mother arranged nursery and doctors in England, these represented pragmatic solutions to facilitate child care, and child health, and do not amount to stability or integration.

35. The mother's case is predicated on the following:

    i) That she herself is English, with significant and established links to this country; although she has lived primarily in Australia since 2010, she has

spent a not insignificant period of time each year in England at the time of the international event;

ii) The father himself spends a significant period of time each year in England for the international event;

iii) The children have dual citizenship;

iv) The children spent four months in England in 2022; they spent a further seven months in England before the date of the alleged retention (April – November 2023); in R's case this represented a significant proportion of her short life;

v) The parents' relationship had deteriorated in Australia before the mother's departure in April 2023; thus the emotional connections with Australia were loosening and the stability of the children in Australia was therefore somewhat insecure;

vi) The children have a close relationship with their maternal grandmother, with whom they have been living for the period April – November 2023;

vii) Between April and December 2023, A was placed in pre-school in England for two days per week; from September 2023 R attended a nursery (also two days per week, though latterly five days per week) and she continued to do so throughout both term-time and holiday periods; the nursery describe her as "well integrated into the nursery routine"; both attended a nursery close to the international event for a period in 2023;

viii) Both children attend a local pool for swimming lessons, and have done so weekly since April 2023;

ix) R has attended a weekly playgroup ('the playgroup') to assist with her physical and social development;

x) Both children are registered with medical practitioners in England and have been so since July 2023;

xi) Both children have made friends from nursery.

36. The mother contends that cumulatively, this demonstrates a sufficient degree of integration and stability as to justify a finding that the children were habitual resident in England by November 2023. The mother contrasts this level of integration of the children in England with a less cohesive extended family network in Australia, given that the paternal side of the family live some five hours drive away, and the father's older children only being intermittent visitors to the family home. The mother contends that the father has exaggerated the children's connections with the wider paternal family in Australia.

Article 13(b) : Grave risk of physical / psychological harm; Intolerable situation

37. 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".

38. 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*").

39. 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) The separation of the child from the abducting parent can establish the required grave risk (*Re IG* at para.[47](3)";

    viii) In a case where allegations which amount to grave risk are disputed:

    > "… 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).

ix) In this case, the passage in §34 of *Re S* (Lord Wilson) is of particular relevance:

> "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".

x) 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;

xi) The situation which the child will face on return depends crucially on the protective measures (including the efficacy of undertakings) 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)*]

40. 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)

41. 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).

42. 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)

43. It is relevant 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).

44. I have had regard to my decision in *Re A (Article 13(b): Mental Ill-health)* [2023] EWHC 2082 (Fam) which has some similarities with the instant case, and also to *Re S (a child) (abduction: article 13(b): mental health)* [2023] EWCA Civ 208 which I referenced at [41] of my earlier decision (*Re A*).

45. 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 and R would expose them to physical or psychological harm or otherwise place them in an intolerable situation;

    ii) That it would expose the children to a grave risk of psychological harm if they were to be returned to Australia *without* her; and that if the mother accompanied them 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, the children would be exposed to psychological harm, or be otherwise placed in an intolerable situation.

46. As I referred at §10 above, it is the mother's case that she has been a victim of domestic abuse for an extended period of time, including physical, psychological, emotional, financial, and sexual abuse, and controlling and coercive behaviour. The behaviour which she has described in her evidence would correspond with the definition in Section 1(3) of the Domestic Abuse Act 2021 and PD12J.

47. The mother speaks at length of the father's behaviour towards her, his intimidating presence, and his controlling manner. She observes that she has become inured (my word not hers) to his behaviours over the years to the point where she no longer remembers all of the incidents. She contends that the father's behaviour towards her has had a serious and debilitating effect on her mental health. She complains that he 'gaslighted' her, repeatedly telling her that she had mental health issues and was unstable, and that these accusations caused or contributed to mental instability. The mother points to her attempt to separate from the father in 2015 as a result of his behaviour, although she accepts that they reconciled and became engaged in 2016 albeit attending couples counselling for some of their marriage.

48. In terms of the 'grave risk' to the children it is fully accepted by this Court that domestic abuse is extremely harmful to children; in the context of this case, the mother contends that the grave risk of harm has been done and would be done to them by a return. Section 3 of the Domestic Abuse Act 2021 reflects the fact that children can be regarded as "victim[s] of domestic abuse" where they see/hear abuse involving family members.

49. The father emphatically denies the abuse; Ms Roberts asks me to look with care at the evidence advanced by the mother and to note the areas in which she has been obviously unreliable. The father has (reluctantly he asserts) exhibited WhatsApp and other messages from the mother to him which I accept give a quite different perspective on her assertions of sexual abuse and control than she has sought to paint, and shows her a willing participant in a range of sexually explicit activities involving third parties. In support of her own allegations the mother maintains that the father has been issued with an Apprehended Violence Order (AVO) for abusive behaviour towards a female former employee; this is not borne out by the evidence before me. Indeed, the father categorically denies that he has been issued with any form of conviction or AVO, and his police and employment records are shown (as exhibits) to be clean. If the mother has fabricated this allegation relating to the AVO, it is a serious matter. The father has exhibited a number of statements and references from friends, employers and others who describe him in very different terms from the

mother. While domestic abuse often occurs behind closed doors, without independent corroboration, I have been asked to note that there is no contemporaneous evidence of domestic abuse in the instant case; there are no police call-outs, no social services or mental health records to confirm the mother's account. The affectionate terms of the mother's correspondence with the father in 2023 does not entirely square with the picture she paints of their relationship in her later-prepared witness statement within this application.

50. It is the mother's case that a return to Australia would so adversely affect her mental health as to place their children in an intolerable situation. She describes being in a highly emotional state since being in England. In her written evidence she says:

> "The prospect of the children being ordered to return to Australia, of having to remove myself from our entire support network in order to return to a country on the other side of the world, fills me with feelings of utter hopelessness and despair".

51. A detailed psychiatric report has been filed by Dr Tom McClintock; he filed an addendum report on the eve of the hearing having read the father's statement and exhibits. Dr McClintock is of the view that the mother has developed an "adjustment disorder", sometimes known as reactive depression ("the psychological symptoms which arise out of a marked reaction to a life event which is perceived as unpleasant" – i.e., the prospect of a return to Australia). This is, he reported, affecting her sleep and appetite but is not represented a marked impairment of her ability to function on a day to day basis. The mother is reported to have heightened levels of anxiety about how she would cope in the event of a return to Australia: "her emotional symptoms are understandable as a reaction to the prospect of returning to Australia, something which [the mother] made very clear to me that she would not be able to cope with". Dr McClintock was clear that the mother was not suffering from post traumatic stress disorder, and in this regard it was a matter of concern to me that the mother's therapist appeared to believe that she was and was apparently treating her for this condition. The mother has described flashbacks of life with the father which have contributed to her sense of hopelessness.

52. Dr McClintock opined:

> "If she is allowed to remain in the United Kingdom with the children, then this would remove the source of her distress and I would anticipate that she would rapidly improve in her mental state. By this, I mean over a small number of weeks and under such circumstances she would not require ongoing treatment with psychotropic medication. She would have to conclude the contact with the therapist in a managed way, which would have come to a natural end given that her mental state would have improved."
>
> "If the Court directed [the mother] to return to Australia, then I would anticipate that there would be a deterioration in mental health as she has made it clear to me that she does not want such an outcome.

> … she would benefit from treatment with a small dose of a sedative antidepressant, such as, for example, amitriptyline, which although it is an antidepressant, is more frequently used to deal with anxiety and sleep disturbance. This could be prescribed by the general practitioner. Her emotional reactions are as a result of the prospect of what she perceives as an unpleasant life event, she is not suffering from a true depressive episode…
>
> … Whilst I am satisfied that a forced return to Australia would lead to a deterioration in the mother's mental state, this is difficult to quantify as it is very much dependent, I think, on whether [the mother] is able to draw on her coping skills to deal with the challenges of building a new life for herself, away from her partner.
>
> … I would stress that [the mother's] current presentation is of a nature and degree which would normally be managed by a general practitioner, without, for example, involvement of local psychiatric services and on return to Australia, her mental state and presentation would need to show a marked deterioration before it would be necessary to involve local psychiatric services, who would be able to offer more intensive support".

Protective measures

53. During the hearing, the parties agreed a suite of possible protective measures which could be put in place in the event that the court considered them appropriate to mitigate any 'grave risk' of harm (per Article 13(b)) to the children.

54. In reviewing those proposed measures, I have focused on whether such measures would be truly effective to meet the needs of the children (and their mother) in this particular case. In this regard, I remind myself of *Re T (Abduction: Protective Measures: Agreement to return)* [2023] EWCA Civ 1415 at [50], namely: "Protective Measures need to be what they say they are, namely, *protective*. To be protective, they need to be *effective*."

55. For some time (indeed since the parties agreed on separation nearly twelve months ago) the father's open position has been that the mother should be provided with "comfortable accommodation" separate from him and away from the family home, "so that the children may enjoy the benefit of the care and substantial time spent with both parents". I have noted that in the negotiations which took place in the autumn of 2023, the father was more than accommodating of the mother's wishes to set up home in an area of her choice, close to schools for A and R, and with easy access to work for herself. The correspondence at that time painted the father in a positive light, revealing his willingness to support the mother's rehabilitation back to Australia.

56. The father is willing to offer undertakings to the court here in the following terms:

i) Not to institute criminal proceedings, and/or civil proceedings in relation to any unlawful removal, or retention, or abduction of the children from Australia;

ii) Not to institute legal process in the courts of Australia by way of a without notice application;

iii) Not to assault, molest, threaten or harass the mother or children; the court accepting this undertaking on the basis that it has made no findings on the mother's allegations;

iv) Not to attend the airport on the return of the children;

v) Not to remove the children from the mother's care in the event that she returns to Australia, at least until there has been a hearing in the Family Court in Australia;

vi) Not to attend the property where the mother is to reside with the children, nor will he attend the nursery or school which either child shall attend.

The undertakings described at §56(iii) to (vi) above will plainly be capable of being varied by the courts in Australia as appropriate.

57. The father further agrees to leave any decisions about contact and the children's living arrangements to the Australian Courts. He has indicated that he would hope that the parents could agree that direct contact could take place between him and the children pending the determination of any Australian Court proceedings.

58. In relation to financial support, the mother seeks funding to cover:

i) A deposit, and six months' rent on a property in a town of the mother's choosing in New South Wales; the father's case incidentally is that the plan had always been that once A was at school, the family would either need to buy or rent a house in another part of the state to facilitate that;

ii) A flight ticket for R (she will no longer travel free as she is now over two years old);

iii) Ongoing financial support for herself and the children for at least six months;

iv) The cost of leasing a car;

v) The funding of ongoing therapy.

The parties have agreed the likely costs to the mother under those heads. The father has agreed to pay the mother an aggregated lump sum of AUS$31,200 (representing AUS$1,200 per week for 6 months) in order to cover these expenses. The father has told me that he needs no time to raise these funds; he offers to pay this to the mother on or before 30 August 2024. Moreover, the father has made clear that this offer is unconditional and he seeks no rebate should the mother receive income from employment in Australia (on her return) during the next six months. The father has further made clear that he also seeks no reimbursement of any of this lump sum if the

Australian Court fixes the maintenance for the mother and children in a lower sum than the sum agreed at court here. Moreover, the parents accept that the mother alone should benefit for the next six months from the child support (single parent) benefits which the Australian State may pay.

59. The parties agree that the mother and children will continue to benefit from the private health insurance cover; they have Medicare Benefits – which runs a Better Access initiative for people with a clinically-diagnosed mental disorder – in addition to the private health cover in Australia.

60. This is a case in which 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 ("1996 Hague Convention") is applicable. The 1996 Hague Convention will add to the efficacy of the protective measures by ensuring that they are recognised by operation of law in Australia and/or can be declared enforceable at the request of any interested party in accordance with the procedure provided in the law of the state where enforcement is sought (see Article 26); protective measures can be implemented as urgent measures under Article 11 of the 1996 Convention providing the measures fall within the scope of that Convention as provided in Articles 1, 3 and 4. It is, furthermore, clear that the Australian Court has the jurisdiction under its own Family Law Act 1975 to make orders which can constitute protective measures. The father adverts to the fact that should she wish to do so, the mother could apply for an Apprehended Domestic Violence Order (ADVO).

Discretion

61. For reasons which will become clear in the next section, this is not a case in which I need to consider exercising my 'discretion' whether or not to order a return (*Re M (Abduction: Zimbabwe)* [2007] UKHL 55 at §43).

Conclusion

62. The parties agree that the relevant date of the retention of the children in England was 19 November 2023. By that time, the children had been in this country for seven months. For children of this age, this represented a significant proportion of their lives – this is particularly so in the case of R. In that period, plainly the children had developed routines and a way of life which accommodated both of their parents' working commitments at the international event in England and otherwise. They plainly benefited from, and enjoyed, living with their maternal grandmother, while also having considerable contact with members of the maternal family and friends of the mother's. Their lives were evidently enriched with a range of pursuits which reflected their various needs (given their ages) for physical activity and stimulation (including swimming and the playgroup). The arrangements during this extended summer visit to England in 2023 was in many ways a reprise for the children of their extended visits in earlier years. In 2022, they were here for four months before returning home to Australia. In A's case, the 2023 and 2022 visits repeated earlier extended visits too.

63. It was during this period that the relationship of the parents finally came to an end, after what they both accept to have been a difficult period in Australia. It is striking

that until 18 November, the mother's explicit plan was to return to Australia with the children; the parents were focusing on the timing of when this would happen, and the precise arrangements for the 'new normal' for when the children and mother returned: where would the mother live? when would A start school? and where? how the mother/children's accommodation was to be funded? what should happen to the farm where the father worked and the family had lived? where would the mother work? how were the new arrangements to be financed? These were all questions which the parents were constructively discussing during the summer months and into the autumn of 2023. It was the search for answers to some or all of these questions which took them into formal mediation. What is apparent, from the contemporaneously generated evidence, is that until the 18 November the mother had not signalled to the father that she was intending to make England her permanent home. Her intention was, as I say, to return.

64. The medical records of early September shine a small light on the mother's quiet hope of remaining for the long-term in the UK. While I have no doubt that the children benefited from time with the maternal family, the evidence does not support the conclusion that in this phase of their lives prior to mid-November their lives had acquired such a degree of stability, or they had became so integrated into English life, as to change their habitual residence. They were Australian children, on an extended holiday in England staying with their maternal family, the second such extended visit in as many years, who would at the end of the holiday be returning to their home country. While of course they were supported by their mother in benefitting from health, educational (pre-school) and recreational (swimming) facilities while they were staying here, this did not represent integration into English life to a degree which enables me to conclude that they had become habitually resident here. Insofar as the mother's intentions are relevant to this evaluation, my finding is that for the whole of the period under review she was planning (with doubts and anxieties for sure) to return to Australia.

65. On this basis, the father has made out his case under Article 3 of the 1980 Hague Convention, and I would be obliged to return A and R to Australia unless the mother can demonstrate that one of the exceptions under Article 13(b) is made out.

66. Thus, I turn to the mother's secondary case, which is indeed based on Article 13(b). As I have described above, she asserts that the relationship with the father has been abusive in multiple ways, and that this has directly impacted on her and directly or indirectly on the children. The parental relationship is such, she asserts, that if the children are returned to Australia there is a grave risk that they would be exposed to physical or psychological harm, or be otherwise placed in an intolerable situation. The mother further argues that were she to return with the children, she would suffer such a serious downturn in her mental health, that this would have serious adverse consequences for the children and place them 'in an intolerable situation'. She relies on the evidence of Dr McClintock in this regard, but in fact his report does not support this conclusion.

67. The evidence of domestic abuse is largely founded on assertion by the mother. There is little if any independent verification for the mother's case; it is indeed limited to an extract from the confidential medical records of the mother for September 2023 which reveal her disclosing that the father "could be demanding" with "elements of emotional and controlling behaviour", "manipulative and controlling". The report

from the psychotherapist is not of any corroborative assistance; therapy was only commenced in November 2023 (coincident with the time of the wrongful retention, and with litigation in prospect) and is predicated solely on the mother's own statements; the diagnosis of PTS made by the therapist is, as I have said, challenged by Dr McClintock.

68. The mother's statements about the father's abuse of her are not entirely consistent with the tone and content of the e-mail exchanges which passed between the parties in the summer of 2023, which I have had the chance to consider; nor is her case entirely borne out by the way in which she explicitly sought to involve the father more fully in the children's lives (as per her communications) over the second half of 2023. The mother's statements have been shown to be at least questionable. That all said, for present purposes I proceed on the basis that *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. I then ask myself how could these children be protected against the risk (per *Re E* at [36])?

69. As I mentioned above, during a number of short adjournments in the hearing over the last day, the parties agreed what could represent 'protective measures', should they be relevant. The mother is satisfied that in the event of a return, these would indeed mitigate in material ways the harm she fears; she says in terms in her witness statement that "the Australian authorities would be in a position to put in place protective measures in relation to [the father's] behaviour". I am satisfied that the undertakings offered by the father will be capable of ready enforcement in Australia, and will offer immediate protection for the mother from the father's alleged conduct. Although the mother fears a deterioration in her mental health in the event of a return, I am satisfied – having regard to the opinion of Dr. McClintock – that her mental well-being can be managed sufficiently through access to medical and therapeutic services in Australia. This is not a case (such as that contemplated by Lord Wilson in *Re S* see above) where the evidence points to the mother suffering such anxieties that their effect on her mental health will create a situation that is intolerable for the children. Although the mother has been prescribed medication, Prozac, in this country, she has in fact been "non-compliant" with that medication (i.e., has rarely taken it, so she told Dr. McClintock); it is nonetheless readily available in Australia should it be required. Moreover, the father has indicated that he will pay an enhanced premium on the family's private health cover to include provision for counselling and other psychological support for the mother.

70. The provision of a sizeable lump sum (AUS$31,200) for the mother will furnish her with the financial wherewithal to enable her to rehabilitate back to life in Australia independently of the father, in suitable rented accommodation with the children in a location of her choosing (which is likely to be some 2-3 hours drive from the father); within this lump sum fund, provision has been made for her to be able to continue with her therapy, and to acquire the lease on a car to ensure her independence. The father has helpfully exhibited the protective measures fact-sheet (referenced in the *Re T* judgment) which can be referenced by the parties and their Australian lawyers, to assist them in ensuring that the offers made here are enforceable there. As may be necessary and/or appropriate, the Australian International Social Service may be in a position to offer valuable support for this mother on her return to Australia; the mother should take note of 1980 Hague Convention Support Service (iss.org.au).

71. Overall I have concluded that a return of the children would not create a grave risk to them of exposure to physical or psychological harm; I do not find that a return would otherwise place them in an intolerable situation. The mother's case in this regard has been more than adequately addressed and answered by the father in the ways I have set out above.

72. It is extremely regrettable that this application was so delayed in the administrative phase in passing between central authorities between December 2023 and July 2024; the upside is that the children and the mother have benefitted from greater time spent with the extended maternal family and the mother's friends here in England. The downside is that it has prolonged for many unnecessary and uncertain months the almost inevitable decision-making on whether the children are to be returned to Australia. The parties have been in limbo for too long; this decision should have been made much closer in time to the point at which discussions between the parties about their futures, and the formal process of mediation, had failed.

73. Having regard to the matters placed before me, as I have outlined them above, I am driven to accede to the father's application for the return of these children to Australia and that is the order which I make. I shall require the father to make arrangements for the provision of the lump sum to the mother to put her in a position to plan for her return, and I hope that the parties can agree a suitable timeframe within which the return can be effected. I envisage that the flights will be booked to ensure that they are on Australian soil within approximately one month.

74. Both parties contemplate that they will engage in Family Court process once the children and mother are back in Australia; they need to bring their marriage formally to an end, they need to resolve the financial issues between them; they both seek welfare orders in respect of children. It seems highly likely that the mother will apply for formal permission to relocate permanently to this country with the children. In the e-mails which I have seen, the father at one time appeared to acknowledge this (see §15 above), and – perhaps significantly – appears also to contemplate relocating himself "after two years"; he is, after all, familiar with the life in England, having worked here for four to six weeks every year for the last couple of decades.

75. My decision to return A and R to Australia in accordance with the specific articles of the 1980 Hague Convention will rightly enable the Family Court of the country of the children's habitual residence to take responsibility for their longer term welfare-based decisions.

76. That is my judgment.