Neutral citation: [2025] EWHC 1344 (Fam)
Case No: FD 24 P 00459

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 June 2025

Before :

MR. NICHOLAS ALLEN KC

(Sitting as a Deputy High Court Judge)

BETWEEN

M

Applicant

- and –

A

Respondent

(No. 2: Application to Set Aside Return Order)

- -

Ms. Jacqueline Renton KC and **Ms. Alexandra Halliday**
(instructed by **McAlister Family Law Solicitors**) for the Applicant

Professor Rob George KC and **Mr. Edward Bennett**
(instructed by **RWK Goodman**) for the Respondent

Hearing dates: 13th and 14th May 2025

Draft judgment circulated to the parties – 28th May 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2nd June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr. Nicholas Allen KC:

1) I am concerned with an application brought pursuant to the Child Abduction and Custody Act 1985 (incorporating the Hague Convention 1980) for the setting aside of an order for the summary return to Poland of two children namely T (aged 9) and H (aged 6).

2) The application is brought by the children's mother. It is resisted by the children's father.

3) In this judgment I shall refer to the applicant as 'M' and the respondent as 'F'. No discourtesy is intended.

4) M was represented by Ms. Jacqueline Renton KC and Ms. Alexandra Halliday and F by Professor Rob George KC and Mr. Edward Bennett. I am grateful to counsel for the quality of their Position Statements and for their clear and focused oral submissions.

Background

5) The background is fully set out at paragraphs 7-28 of the judgment of Mr. Jonathan Glasson KC sitting as a Deputy High Court Judge of 9th December 2024 when he ordered the return of both children to Poland. The judgment was published as *M v A* [2024] EWHC 3230 (Fam). I shall therefore only set out a summary of the background in this judgment.

6) F is aged 38. He is a Polish national. M is aged 34. She is a British national. T was born in England on 1st December 2015 but moved to Poland when she was three months old. H was born in Poland on 9th May 2019. Both children are dual Polish-British nationals. The children in effect had lived all their lives in Poland and were habitually resident there prior to their travelling to England in July 2024.

7) M alleges that during the course of the parties' relationship F subjected her to domestic abuse, including controlling and coercive behaviour, emotional abuse, financial abuse, verbal abuse and on occasion physical abuse, often in the presence of the children. F denies these allegations.

8) The parties travelled to England for a holiday on 19th July 2024. It was planned that M and the children would stay for one month and that F would return to Poland after 10 days (which he did). M states that during the holiday she broke down to her family and disclosed everything that had been happening with F. She states that with the support of her family and friends she made the decision to remain in England with the children and did not return to Poland as planned on 20th August 2024. She informed F of her decision by text message on 19th August 2024.

9) It was common ground that this retention of the two children in England was a wrongful one.

10) On 25th September 2024, F filed a C1A and C67 with a statement in support. On 15th October 2024 there was a directions hearing before Ms. Barbara Mills KC sitting as a Deputy High Court Judge. Directions were given for a Cafcass report on T's wishes and feelings. The Deputy Judge determined that H was too young for his view to be ascertained by a Cafcass officer. Directions were also given for a further hearing to consider a Part 25 application for the instruction of an expert. The case was listed for final hearing on 26th November 2024.

11) On 1st November 2024 Mr. Justice Trowell granted M's Part 25 application and Dr. Pickering, a chartered psychologist and registered clinical psychologist, was instructed as a Single Joint Expert.

12) The final hearing was heard by Mr. Jonathan Glasson KC on 26th November 2024. He circulated a judgment in draft on 5th December 2024 which was finalised on 9th December 2024 (with the order finalised on 16th December 2024 after receipt of further submissions).

13) Mr. Glasson KC identified the two issues he had to decide were:

a) whether a return order would expose the children to a grave risk of physical or psychological harm or otherwise place them in an intolerable situation contrary to Article 13(b). He was asked to consider a range of possible protective measures; and

b) whether T objected to a return to Poland, whether she had attained an age and degree of maturity at which it was appropriate to take into account her views and, if those gateway conditions were satisfied, whether he should exercise his discretion not to order a return (Article 13).

14) In reaching his decision Mr. Glasson KC had the benefit of a Cafcass Report prepared by Ms. Daisy Veitch dated 19th November 2024. Her report recommended (i) if a return order was made it was not to be enforced until a child protection referral had been completed by M's solicitors; (ii) if a return order was made for the papers to be disclosed to the Polish courts; (iii) the court to consider F's protective measures; and (iv) the children to remain in the care of M and for there to be no spending time arrangements between the children and F until a risk assessment was undertaken by the Polish authorities. The parties agreed that Ms. Veitch did not need to give oral evidence.

15) Mr. Glasson KC also had the benefit of Dr. Pickering's report dated 25th November 2024 (based on an assessment of M on 12th November 2024). She also gave oral evidence.

16) Mr. Glasson KC considered the two issues he had identified in turn.

17) In relation to the Article 13(b) defence he noted there were two strands to M's case which he considered individually and then cumulatively.

18) First, he considered M's allegations of coercive and controlling behaviour as well as on occasion physical abuse. Taking the allegations at their highest he concluded they represented a *"grave risk"* that the children would be exposed to a physical or psychological harm or would otherwise place the children in an intolerable situation on three counts namely (i) the risk to T of physical and psychological harm if the accounts of F shouting at her and pushing her were true; (ii), the risk to the children of being witnesses to F's abusive behaviour to M; and (iii) the risk to H of witnessing F's behaviour towards T.

19) Second, Mr. Glasson KC considered M's mental health. He emphasised that the question was not whether or not a return to Poland would expose M to psychological harm but whether or not the impact on M's psychological health would be such as to expose the children to a grave risk of psychological harm such that they would be in an intolerable situation. He took into account the unchallenged diagnosis by Dr. Pickering that M had *"severe depression and anxiety"* and symptoms which were indicative of a *"severe depressive disorder"*. He also took into account that overall Dr. Pickering's evidence was that M's mental health would deteriorate on a return to Poland.

20) On the *"critical question"* of whether the impact on M's mental health would be such as to give rise to a grave risk of harm to the children, he took into account factors including:

a) Dr. Pickering said she was unable to comment on whether or not the impact on M's psychological health of returning to Poland would impact on her ability to care for the children;
b) the evidence did not indicate that the impact on M of returning to Poland would mean that she could not care for the children or that her relationship with the children would be adversely affected;
c) Dr. Pickering was clear that M was not at risk of suicide or other self-harm. She did not require hospitalisation. To the extent that M would benefit from pharmacological treatment this was a matter for her General Practitioner. There was no suggestion that M would need a referral to a psychiatrist. Dr Pickering did not consider M would need psychological treatment beyond the 12 - 16 weeks of treatment that she had recommended; and
d) there was no evidence that suggested that M's psychological problems had impaired her ability to care for the children in the past whether in Poland or in the UK.

21) Mr. Glasson KC concluded that if M's mental health was the only basis for her defence under Article 13(b), the necessary threshold would not have been passed.

22) Mr. Glasson KC then went on to consider the cumulative effect of both aspects of M's Article 13(b) defence so as to evaluate the nature and level of any grave risks that might potentially be established as well as the protective measures to address such risks. Thereafter he set out F's proposed protective measures before concluding, taking the proposed protective measures into account, that the risks on return to the children could be addressed and sufficiently ameliorated so that they would not be exposed to a grave risk within the scope of Article 13(b).

23) As to the second issue Mr. Glasson KC was unable to conclude that T has attained an age and degree of maturity at which it was appropriate to take into account her views and, if he was wrong and if instead he had concluded that the gateway stage had been passed, he would not have exercised his discretion in favour of non-return.

24) Mr. Glasson KC therefore ordered the children's summary return to Poland conditional on F's undertakings. The children were due to be returned by 11.59 pm on 2nd January 2025.

25) There was no appeal arising from this judgment.

26) Prior to, during, and further to the proceedings M had engaged in therapy with Ms. Estelle Maxwell, an integrative counsellor and registered psychotherapist. On 23rd December 2024 Ms. Maxwell made an urgent referral to M's General Practitioner surgery with a request that she be referred for psychiatric assessment immediately because she was a suicide risk and was experiencing suicidal ideation. Her report included M stating that *"A few days ago while walking to the doctor surgery I walked into the road without looking on purpose and felt at peace with the possibility of being hit by a car. I have had this thought several times since then."* She also recorded M stating *"I stop eating on kind of on purpose because it is the only thing I have control over, to punish myself. I am worried that I will do that when I go back. I will give up on life."* Ms. Maxwell's report also confirmed M had said she would not go back to Poland with or without the children.

27) M had an appointment with her General Practitioner that day and was prescribed antidepressants. A referral to a psychiatrist did not take place as the General Practitioner noted that M was already under observation. M was not hospitalised.

28) On the same date M's solicitors gave notice to F's solicitors of her intention to apply to set aside the return order on basis of a fundamental change of circumstances.

29) On 24th December 2024 both parties made their applications: M to set aside the return order and F to enforce the same.

30) The cross-applications came before me for directions on 15th January 2025. In relation to M's application I considered the four stages as set out in *Re B (A Child: Abduction: Article 13(b))* [2021] 1 FLR 721 per Moylan LJ at [89] – set out in further detail below – and determined that stages (a) and (b) were satisfied. I therefore stayed the return order. I directed an addendum report from Dr. Pickering which was subsequently filed on 18th March 2025. I adjourned F's enforcement application to be determined at the final hearing.

31) In *Re W (Abduction: Setting Aside Return Order)* [2019] 1 FLR 400 Moylan LJ stated at [37] that:

> … it seems to me that there would be considerable advantages to the judge who made the final order being asked to determine whether the asserted change of circumstances justifies any reconsideration of the order and, if it does, whether it is of sufficient impact to justify a rehearing.

32) *In KS and Another v K (through his Solicitor Guardian Laura Coyle)* [2025] EWHC 210 (Fam) Mr. David Rees KC (sitting as a Deputy High Court Judge) expressed a similar view at [22] namely that *"clearly it is desirable that wherever possible, applications to set aside a return order should be listed before the original judge."*

33) Conscious of this guidance I directed that counsel were to approach Mr. Glasson KC's clerk to enquire about his availability to hear future hearings and in the event it was not possible to list the same in a timely fashion before him they were to be listed before me. Having made those enquiries, the case has remained before me.

34) I heard a further directions hearing on 1st April 2025 when I refused M's application for an addendum Cafcass Report. I directed further statements from the parties dealing with the issue of M's non-return and that the issue of whether M should give oral evidence on the issue would (if pursued) be dealt with as a preliminary issue at the final hearing.

35) On 17th April 2025 Mr. Richard Todd KC sitting as a Deputy High Court Judge refused F's application for direct contact with the children whilst he was in the jurisdiction for the forthcoming hearing but said it may be renewed at the final hearing (which it was not).

36) In advance of the final hearing on 13th May 2025 I was provided with (and read) an e-bundle running to 509 pages and detailed Position Statements from the parties' respective counsel.

37) Both parties attended the final hearing in person. When in court M sat behind a screen with a representative from her solicitors by way of agreed special measures.

38) At the outset of the final hearing I heard an application for M to give oral evidence on the issue of non-return. The application was opposed by F.

39) I gave an *extempore* judgment in which I refused the application. In so doing I referred to *Re C (A Child) (Child Abduction: Parent's Refusal to Return with Child)* [2021] EWCA Civ 1236 per Sir Andrew McFarlane P:

> [59] On the question of whether the judge fell into error by not requiring the mother to give oral evidence, it is clear that there is no reported authority on the point in this context. Hague Convention proceedings are summary and, save where it is necessary to do so on issues of habitual residence or consent and acquiescence, oral evidence is not adduced. In the present case, neither party either applied for, or even suggested, the mother to be called to give oral evidence. Against that background, it is very difficult to understand how the judge can be held to be in error by not himself requiring her to be called.
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> [60] In addition, I do not accept Mr Gupta's premise that any oral evidence that the mother might have given would have been short. On the contrary, it would seem likely that, if the mother were to be asked 'why?' she would not return to France, her testimony would have opened up and led to her listing all of her complaints about the father's past behaviour. Such a development would be wholly contrary to the approach taken to Hague cases in this jurisdiction.
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> [61] Whilst, in a case such as this where the issue is one of whether a parent is, or is not, likely to return to the home country with their child if the child is ordered to do so, it may be open to a court to receive oral evidence from that parent on the point, to do so is by no means a requirement. In the present case, the judge is not, therefore, open to criticism for making his determination in the absence of oral evidence.

40) Ms. Renton relied upon *NP v DP (Hague Convention; Abducting Parent Refusing to Return)* [2021] EWHC 3626 (Fam) in which Holman J stated at [21] that *"notwithstanding the observations of the Court of Appeal in paragraphs [59] - [61] of the judgment in Re C, I personally consider that it is potentially unfair and unjust to make a finding against a parent on an issue such as this without, if she wishes, permitting her orally to explain her state of mind and intentions in her own way and for herself."*

41) In *Re R (Child Abduction: Parent's Refusal to Accompany)* [2024] EWCA Civ 1296 Peter Jackson LJ having at [39] cited the above three paragraphs from *Re C (A Child) (Child Abduction: Parent's Refusal to Return with Child)* stated:

> [40] Judges should therefore ask whether oral evidence is necessary in the case before them. As stated in *Re B* at [57], the threshold for permitting oral evidence remains a high one. I would agree with the submission of Reunite, supported by the parties, that where the court detects that a taking parent may refuse to return, it should act early to ensure that the position is addressed in statements, so that oral evidence is less likely to be appropriate. This would include addressing the issue of protective measures as required by the *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings of 1 March 2023*.

42) I determined that the high threshold for oral evidence was not crossed. I considered it unnecessary for several reasons namely (i) I preferred appellate guidance from the Court of Appeal over (inevitably) fact-specific first instance *dicta*; (ii) in accordance with *Re R (Child Abduction: Parent's Refusal to Accompany)* I had specifically directed that M address the issue of her reasons for non-return in a statement and she had done so; (iii) M's reasons for not returning were also set out in in Dr. Pickering's addendum report of 18th March 2025; (iv) M had therefore in any event (in Holman J's words in *NP v DP (Hague Convention; Abducting Parent Refusing to Return)*) had the opportunity to explain her intentions and state of mind in her own way and for herself; (v) as Professor George submitted, the purpose of oral evidence in this context was not for M to set out her case in her own words but to allow it to be tested by cross-examination which he did not seek to do on F's behalf; and (vi) Ms. Renton suggested that hearing oral evidence would (per paragraph 15 of her and Ms. Halliday's Position Statement) *"assist the court with its assessment as to M's genuineness and vulnerability"* as I would be able to assess whether M was (as she said in submissions) *"genuine or an actress"*. However I considered an assessment of credibility would be very difficult (if not impossible) from hearing only brief targeted oral evidence on one issue and drawing conclusions from a witnesses' demeanour is something that judges have rightly been warned to be extremely cautious about.

43) I therefore concluded (to adopt what was said in *Re B (A Child: Abduction: Article 13(b)*) per Moylan LJ at [64] in the context of the admission of oral evidence on the issue of consent) that it was not *"necessary to hear oral evidence in order to be able fairly to determine this central issue of fact in the context of what is a summary process and in the context of the available documentary/written evidence"*.

44) Having refused M's application I heard submissions. At no point during the hearing did I consider I had reached the incorrect conclusion in refusing M's application for oral evidence. I remained (and remain) satisfied that I was able fairly to determine the issues in the context of the available evidence. Thereafter I reserved judgment.

45) In this judgment I have not referred to every argument raised by the parties in their written and oral evidence or in their counsel's submissions. I have however borne all that I read and was said to me in mind.

The applicable law

46) The law relating to an application to set aside an order under the Hague Convention 1980 was set out in *Re B (A Child: Abduction: Article 13(b))* per Moylan LJ which in turn cited from *Re W (Abduction: Setting Aside Return Order)* [2019] 1 FLR 400. At [37] of the latter judgment Moylan LJ stated he would *"express the test as being whether there has been a fundamental change of circumstances which sufficiently undermines the basis of the court's decision and order to require the application to be reheard."*

47) Moylan LJ thereafter expressed his conclusions in *Re W (Abduction: Setting Aside Return Order)* as follows:

> [66] … [t]his power can be exercised when there has been a fundamental change of circumstances which undermines the basis on which the original order was made. I set the bar this high because, otherwise … there would clearly be a risk of a party seeking to take advantage of any change of circumstances such as a simple change of mind.
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> [67] I would add that the re-opening of a final Hague order (whether for return or non-return) is likely to be a rare event indeed and that, as the process is a summary one, any application for such an order will necessarily have had to be filed without delay. Further, where an application for rehearing has been issued, the court will case-manage it tightly so that only those applications that have a sufficient prospect of success are allowed to proceed and then only within parameters determined by the court.

48) This *"high"* bar was then adopted by the Family Procedure Rule Committee as part of the changes to FPR 2010 by r12.52A and PD12F para 4.1A the latter of which states *inter alia*:

> In rare circumstances, the court might also *"set aside"* its own order where it has not made an error but where new information comes to light which fundamentally changes the basis on which the order was made. The threshold for the court to set aside its decision is high, and evidence will be required – not just assertions or allegations.
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> And thereafter:
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> If the return order or non-return order was made under the 1980 Hague Convention, the court might set aside its decision … where there has been a fundamental change in circumstances which undermines the basis on which the order was made.

49) In *Re B (A Child: Abduction: Article 13(b))* Moylan LJ then turned to the approach which the court should take when a set aside application has been made:

> [89] I suggest the process, referred to above and adapted as follows, should be applied when the court is dealing with an application to set aside Hague Convention 1980 orders:
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> (a) the court will first decide whether to permit any reconsideration;
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> (b) if it does, it will decide the extent of any further evidence;
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> (c) the court will next decide whether to set aside the existing order;
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> (d) if the order is set aside, the court will redetermine the substantive application.

50) In *Re A (A Child) (1980 Hague Convention: Set Aside)* [2021] 2 FLR 1249 Hayden J (sitting in the Court of Appeal) stated at [46] that *"the logic and structure of [the Re B test] is manifestly helpful"*.

51) As set out above I dealt with (a) and (b) on 15th January 2025 when I determined that these stages were satisfied.

52) Moylan LJ thereafter stated:

> [91] I would further emphasise that, because of the high threshold, the number of cases which merit any application to set aside are likely to be few in number. The court will clearly be astute to prevent what, in essence, are attempts to reargue a case which has already been determined or attempts to frustrate the court's previous determination by taking steps designed to support or create an alleged change of circumstances.

53) In *ST v QR* [2022] EWHC 2133 (Fam) Mr Dexter Dias QC (as he then was) stated:

> [22] Stepping back, the court is asked to reverse what it has previously decided. It is not because what was decided was legally or procedurally wrong. Equally, this is not judicial review-type scrutiny. The available power is triggered by one thing: the facts have changed. But not every factual change is sufficient. It must be fundamental. I will come to what I understand that to mean shortly, but it involves in itself a finding of fact. The reason is that it is preferrable as a matter of principle for the court which made the original findings of fact, and which determined the return order, to decide itself if the facts have changed sufficiently to require a reassessment of its own substantive decision. In *Re W* at para.66 Moylan LJ characterised the test as:
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> "A fundamental change of circumstances which undermines the basis on which the original order was made."
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> [23] I judge that ten implications flow from this formulation:
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> (1) 'A fundamental change of circumstances' should not be elevated into something akin to a statutory test;
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> (2) It simply asks the judge to assess whether the basis of her or his decision has so radically change[d] that the decision cannot stand. The term "fundamental" should be understood in that light;
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> (3) It is more akin to foundational failure. In other words, the foundation for the decision has been swept away;
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> (4) It is not necessary at this step, step (c), third out of the four-point rubric, for the applicant to prove on the balance of probabilities that an Article 13(b) exception or indeed any other exception exists;
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> (5) That cannot be so, or step (d) would be rendered redundant. (See *Re A* at para.46.)
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> (6) Thus, the question I ask myself is: does the totality of evidence, old and new, that is existing at the time of the original return order and thereafter, indicate that the foundations for that order either no longer exist or are insufficiently secure to continue to support it;

(7) This is a finding of fact;

(8) The applicant must prove it on a balance of probabilities. That is because of the basic principle that she or he who asserts must prove;

(9) If proved, the court must go on to redetermine the substantive application;

(10) The court may make the same or a different decision.

54) Ms. Renton submitted that both the need to assess whether the basis of the decision *"has so radically change[d] that the decision cannot stand"* and a *"foundational failure"* were judicial glosses that put the test too high. Professor George agreed in relation to the former but not the latter, submitting that the word *"fundamental"* in *"fundamental change of circumstances which undermines the basis on which the original order was made"* and the words *"foundational failure"* as in *"the foundation for the decision has been swept away"* were in effect synonymous. I agree.

55) Ms. Renton submitted that the high threshold was considered *"pragmatically"* by Mr Dias QC in *ST v QR* at [25]:

> … It is emphasised that *"the threshold is high"*. But let me stress that I take none of this to mean that the bar should be impossibly high or unattainable. Equally, I do not compare this case to other cases and consider whether this is a rare case or not. Such forensic comparison is of little use to me. Instead, I simply consider whether there is a fundamental chance of circumstances as a question of fact. If so, I must and will redetermine the substantive application. Nothing more, nothing less.

56) It is also clear from *Re B (A Child: Abduction: Article 13(b))* per Moylan LJ at [94] that the court must not conflate stages (c) and (d). I must first consider whether there had been a sufficient change or changes to justify setting the December 2024 order aside and then, if so, go on to redetermine M's application. My consideration of the two stages should not overlap.

57) The burden of proving that fundamental change of circumstance rests on M who seeks to set aside the original return order.

M's application

58) M's set aside application is pursued on the basis of (i) the significant decline in her mental health following the making of the return order; and (ii) her position (contrary to that at the final hearing before Mr. Glasson KC) that she will not return to Poland with the children, whether or not the return order stands.

59) It is submitted on M's behalf that (i) and (ii) are linked. M's rationale in respect of not returning is linked to her vulnerability, in particular her mental health and the significant decline in her mental health following the making of the return order in December 2024.

60) I shall therefore consider the two bases in turn but bear in mind it is said they are linked. In doing so I bear in mind the observation made in *KS and Another v K (through his Solicitor Guardian Laura Coyle)* per David Rees KC (sitting as a Deputy High Court Judge) at [22] – with which I agree - that *"where, as here, a different judge is hearing the set aside application, particular care is required and that there will need to be clear evidence that the basis upon which the original judge made the order has been undermined by a fundamental change in circumstances."*

Decline in M's mental health

61) It is conceded (rightly) on M's behalf that Dr. Pickering's addendum report of 18th March 2025 (and which was based on an assessment of M on 10th February 2025) effectively reaches the same conclusions as her first report of 22nd November 2024. Dr. Pickering stated at para 3.8 of her addendum report that *"[m]y conclusions remain in respect of her mental health problems, which remain severe and highly likely to deteriorate further if she had to return. I reiterate my conclusions in respect of psychological therapy and medication".*

62) However, it was submitted by Ms. Renton and Ms. Halliday on M's behalf at paragraph 9 of their Position Statement that it was *"far too simplistic"* to assert that this meant there has been no *"change of circumstances"* as the court has to undertake a holistic evaluation of M's mental health, and consider whether the serious deterioration in M's mental health that occurred in December 2024, in close proximity to facing a return order, would happen again, as set against M's vulnerability more generally.

63) Ms. Renton therefore submitted that M's mental health at the time of her being assessed by Dr. Pickering in February 2025 was not the complete picture. The complete picture – and what was said to be the change of circumstances - was the serious and acute deterioration in her mental health at the time she was faced with the *certainty* of a return – i.e. from 5th December 2024 onwards.

64) Ms. Renton submitted that by the date that M was reviewed by Dr. Pickering the certainty of a return to Poland had faded. The set aside application had been made and a stay of the original order had been in place for four weeks. It was seven weeks after her acute presentation to Ms. Maxwell. M was also undergoing CBT in a safe and supportive environment in England. As such, the immediate stressors that were causing the decline in M's mental health had been temporarily alleviated by the staying of the return order, coupled with M undertaking ten sessions of CBT, and as such her presentation was no longer acute. Given the stay and her set aside application, the return was once again a *possibility*, not a *certainty*. In such circumstances, it was unsurprising that her mental state was the same as it had been when originally assessed when there was no certainty that the children's return to Poland would be ordered. It was, however, all but inevitable that if the return was reaffirmed, there would be a like decline. Ms. Renton submitted the improvement in M's mental health from acute to severe in the time period between 23rd

December 2024 and 10th February 2025 demonstrated that, whilst M's mental health ebbed and flowed, it was inextricably linked to the issue of return, and deteriorated when M was faced with the *certainty* of a return. There was, it was said by Ms. Renton, a *"nexus"* between the return order and the acute decline and I could safely *"join the dots"* that it would happen again.

65) My difficulty with this submission is, as I said to Ms. Renton during her submissions, that there is no evidence from Dr. Pickering that the improvement from late December 2024 to a position unchanged from November 2024 was a result of the stay and that the certainty of return had receded. Her response to me was that Dr. Pickering had not been tasked with considering this *"chronological point"*. However, as Professor George submitted, if it was being said that Dr. Pickering had either not understood what she was being tasked with when M was reassessed and/or if it was said there were flaws in her analysis, then this needed to be put to Dr. Pickering and there had been no request for her to give oral evidence. She had answered the questions she had been asked and reached clear conclusions. Further, it was clear that Dr. Pickering had considered Ms. Maxwell's report, M's account of her actions and how she had felt in December 2024, and she had also had input from M's General Practitioner. It could therefore not be said that Dr. Pickering's assessment was one that was (in effect) just a snapshot on 10th February 2025 but after a full chronological review had concluded there had been no meaningful change.

66) It is also the case that a deterioration in M's mental health if a return order was made was predicted. As Mr. Glasson KC observed:

> [91] … I also take into account that overall Dr Pickering's evidence was that the Mother's mental health would deteriorate on return to Poland. At one stage in her report Dr Pickering that *"If the Mother were to return, it is my opinion that her depression will persist and potentially worsen"*. Later in her report however she said that the Mother's mental health was *"highly likely"* to deteriorate further and confirmed that in her oral evidence. However, Dr Pickering said that the deterioration was most likely to occur in circumstances where the Mother returns to Poland and had to rely on the Father and was unable to have adequate distance from him. Living entirely separately would enable the Mother to *"process and cope with the end of the relationship and the impact she feels the relationship has had upon her"*.

67) Although, as Ms. Renton observed, Dr. Pickering had said that the deterioration was most likely to occur on M's return to Poland and she had to rely on F and was unable to have adequate distance from him whereas the deterioration had in fact happened *before* any return to Poland, I do not consider that this is sufficient to mean there has been a fundamental change in circumstances. The likelihood of a deterioration was a factor that was known and taken into account. The fact that Mr. Glasson KC dealt with the specific possibility means the risk/likelihood of a deterioration was part of the basis of his decision. The fact that it played out (albeit earlier than considered was likely) cannot therefore undermine the basis of it. Likewise the fact that Mr. Glasson KC considered that a deterioration, if it happened, would be caught by the protective measures that would have been in place.

68) Therefore, and bearing in mind that this is a high threshold, the decline in M's mental health after the original judgment does not amount to a fundamental change of circumstances which undermines the basis on which the original order was made. The fact that the evidence suggests a deterioration may well happen again if M is faced with another ordered return does not likewise.

M's non-return to Poland with the children

69) In *Re R (Child Abduction: Parent's Refusal to Accompany)* Peter Jackson LJ considered the approach to take to circumstances where a taking parent indicated that they did not intend to return with the child were a summary return ordered:

> [36] Drawing matters together, Article 13(b) requires the parent opposing a child's return to establish that there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Where that parent asserts that they will not accompany the child to return, the court will scrutinise the assertion closely, because it is an unusual one for a main carer of a young child to make. The court will therefore make a reasoned assessment of the degree of likelihood of the parent not returning. Relevant considerations will no doubt include the overall circumstances, the family history, any professional advice about the parent's health, the reasons given for not returning, the possibility that the refusal is tactical, and the chance of the position changing after an order is made. The court will then factor its conclusion on this issue into its overall assessment of the refusing parent's claim to have satisfied Article 13(b). By this means, it will seek to ensure that the operation of the Convention is neither neutralised by tactical manoeuvring nor insufficiently responsive to genuine vulnerability.
>
> [37] We were taken to instances where judges have grappled with this task. In *R v P* [2017] EWHC 1804 (Fam) at [129], Theis J concluded, having heard evidence, that it was more likely than not that the mother would not return with a five-year-old child, and she refused to make a return order. In *Re C (A Child) (Child Abduction: Parent's refusal to return with child)* [2021] EWCA Civ 123 ('Re C'), the trial judge, Cohen J, had asked himself what in reality the mother would do, and found (without hearing evidence) that the reality was that she would return. This court upheld his finding [22, 62]. In *NP v DP (Hague Convention; abducting parent refusing to return)* [2021] EWHC 3626 (Fam), Holman J heard oral evidence and found at [40-41] that there was a high degree of likelihood that the mother would not, in fact, return even if the child was required to return. In *Z v Z* [2023] EWHC 1673 (Fam), Peel J found at [30] after hearing evidence that a mother undergoing cancer treatment would not return with the children, and that this was based on a genuine decision and not on tactical manoeuvring. In *Re A (Retention: Article 13(b): Return to Israel)* [2024] EWHC 1879 (Fam) Mr Nicholas Allen KC declined to hear oral evidence and at [85] found on the balance of probabilities that a mother would return with the children.
>
> [38] The summary assessment of whether a parent is likely to return and how they will react to the court's decision will not always be easy, and a reasoned conclusion is unlikely to be disturbed on appeal. In some of the above cases, conclusions were expressed as findings of fact, made on a balance of probabilities. That was unobjectionable in the individual cases, but in assessing the likelihood of a parent not returning, the court is not addressing a binary issue of fact (such as consent: see *Re W* at [58]). Instead, it is asking whether, factoring its assessment on this issue into

the evidence as a whole, that parent has established an Article 13(b) grave risk to the child if a return order is made. In that context, the court is assessing likelihood on a summary basis, not finding facts.

70) As Ms. Renton submitted, both of M's grounds are linked (or, as she put it the deterioration in M's mental health and decision not to return are *"knotted together"* and elsewhere that her decision not to return *"sits on the edifice"* of the decline in her mental health).

71) Professor George also accepted that both grounds were linked in that he submitted that if I *"discounted"* the medical evidence then this raised *"serious questions about M's non-return"*. He also submitted that M may believe now that she would not return but the question was whether the position may be different *"when push comes to shove"*. Professor George accepted however (having taken a moment to consider the same) that if, contrary to F's case that M was not genuine in her assertion that she would not return and I decided that M's change of mind was genuine and that M would *really* (his emphasis) not go back, then it was conceded that this would be a fundamental change of circumstances and stage (c) would therefore be made out.

72) It is clear from *Re W (Abduction: Setting Aside Return Order)* per Moylan LJ at [66] that the bar is set high as *"otherwise … there would clearly be a risk of a party seeking to take advantage of any change of circumstances such as a simple change of mind"*.

73) A further reason that the bar is set high is due to the fact that otherwise a refusal of a summary return based on an assertion by an abducting parent that they would not accompany a young child on return could open the floodgates for such claims and undermine the entire purpose of the Convention. As Peter Jackson LJ observed in *Re R (Child Abduction: Parent's Refusal to Accompany)* at [33] that apprehension was felt in *C v C (Minor: Abduction: Rights of Custody)* [1989] 1WLR 654 per Butler-Sloss LJ (as she then was) at p661B-E:

> The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation, if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create a psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent.

74) Peter Jackson LJ at [34] then cited from *S v B (Abduction: Human Rights)* [2005] 2 FLR 878 per Sir Mark Potter P:

> [48] … In that passage, Butler-Sloss LJ was drawing attention in forcible terms to the undesirability of permitting a situation where the mother, as Thorpe LJ put it:
>
> *'is in reality relying upon her own wrongdoing in order to build up the statutory defence.'*
>
> However, I am satisfied she did not intend that, in relation to the risk of psychological harm or an intolerable situation arising in respect of the child, the court must ignore the effect on the mother's psychological health in a case where it is clear that her health might become such that the mother as primary carer would face real and severe difficulty in providing for the child's needs on return: cf. *TB v JB (Abduction, Grave Risk of Harm)* [2001] 2 FLR 515 at [44] and [95] per Hale LJ. So to hold would be to place a gloss on the words of the Art 13(b) defence which they do not bear.
>
> [49] The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation which she has herself created by her own conduct is born of the proposition that it would drive a coach and horses through the 1985 Act if that were not accepted as the broad and instinctive approach to a defence raised under Art 13(b) of the Convention. However, it is not a principle articulated in the Convention or the Act and should not be applied to the effective exclusion of the very defence itself, which is in terms directed to the question of risk of harm to the child and not the wrongful conduct of the abducting parent. By reason of the provisions of Arts 3 and 12, such wrongful conduct is a *'given'*, in the context of which the defence is nonetheless made available if its constituents can be established.

75) Further at [35] Peter Jackson LJ stated:

> In *Re E* at [34], the Supreme Court endorsed the proposition that, if a grave risk exists, its source is irrelevant, and in *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 WLR 721 at [34], that a parent's subjective perception of risks must be taken into account. This court has confirmed that the effect of the separation of a child from the taking parent can in itself satisfy the terms of Article 13(b). In *Re W (Children) (Abduction: Intolerable Situation)* [2018] EWCA Civ 664, [2018] 3 WLR 1819, the mother had created a situation where she was unable to return with the children, while in *Re A*, the mother had expressed herself as unwilling to return.

76) Further per Peter Jackson LJ at [36] where a parent asserts that they will not accompany the child to return, the court *"will scrutinise the assertion closely, because it is an unusual one for a main carer of a young child to make"*. I must make *"a reasoned assessment of the degree of likelihood of the parent not returning"* and that relevant considerations include *"the overall circumstances, the family history, any professional advice about the parent's health, the reasons given for not returning, the possibility that the refusal is tactical, and the chance of the position changing after an order is made"*.

77) As Peter Jackson LJ further observed at [38] a summary assessment of the likelihood as to whether a parent will return *"will not always be easy"*. It is not easy in this case.

78) I start from the premise that, as Professor George observed, at the hearing before Mr. Glasson KC M's Article 13(b) case was centred on her mental health, and on the allegations she made of domestic abuse by F against herself and the children. Notwithstanding this background it formed no part of M's case that she would not return with the children were a return to Poland ordered. However, after careful consideration, and despite my conclusion that the decline in M's mental health does not amount to a fundamental change in circumstances, my assessment is that M will not return to Poland with the children.

79) I reach this conclusion for several reasons:

a) although this is a summary process and I am not making findings of fact I am satisfied there is a likelihood (I use that word deliberately in light of the observation made by Peter Jackson LJ in *Re R (Child Abduction: Parent's Refusal to Accompany)* at [38]) that M was a victim of domestic abuse. I am fortified in this view by the fact that (i) Dr. Pickering felt able to state at paragraph 3.1 of her report of 22nd November 2024 that "*[w]hilst I cannot comment on matters of fact, it appears that the relationship has caused [M] persistent stress, unhappiness and led to severe depression"*; and (ii) Mr. Glasson KC noted at paragraph [85] of his judgment *"there is a range of documentary evidence that supports [M's] allegations of coercive and controlling behaviour as well as on occasion physical abuse. They are documented in the extracts from her diary and in the 2021 letter prepared on behalf by lawyers at the CPK centre [the Centrum Praw Kobiet (CPK) Women's Centre in Poland which is an organisation that supports women's rights and the prevention of violence against women]. 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"* and at paragraph [86] that *"these allegations cannot be discounted as lacking validity or cogency on their face"*. In my view this is sufficient for me to conclude that M is a highly vulnerable individual;

b) this provides context for what I consider has been an agonising and incredibly difficult decision for M not to return to Poland with the children;

c) whilst the decline in M's mental health after the making of the original order may not be a fundamental change in circumstances I am satisfied that having experienced the same it is linked to M's conclusion that she cannot cope now with idea of returning and all that entails;

d) although M's case at the final hearing had been that she would return notwithstanding her mental health, it is of note that Dr. Pickering noted in her first report of 22nd November 2024 at paragraph 2.67 that M had told that *"if she had to return to Poland she would not manage. She said she immediately thinks about being homeless in Poland. She said if she returned, she would be isolated and said she has no friends or*

family there. [M] said she feels [F] would take over and said she cannot speak Polish and would not be able to do basic things for herself. [M] referred to difficulty accessing schools and doctors by herself." This paragraph (which is also one that Mr. Glasson KC cited at paragraph [42] of his judgment) suggests to me that (from her perspective) the prospective difficulties of a return were something M was conscious of even if at that time she remained committed to doing so. This therefore militates against this being a *"simple"* and/or tactical change of mind seeking to force a reconsideration after the return order had been made;

e) it is of note that Dr. Pickering recorded in her report of 22nd November 2024 (in the fifth bullet point of her summary) that M *"presented with an unusual manner and characteristics. She was somewhat uncomfortable with social interaction and she appeared withdrawn and detached. [M] presented with thought disorder with incoherence of speech, disorganised thinking, a lack of clarity, providing vague and unrelated responses, confusion in her discussion, poor recall and poverty of speech … it is likely that her thought disorder is associated with her acute level of stress and severe depression"*. This provides further context for her position;

f) I do not consider M to be (to adopt Ms. Renton's words) a *"cunning, sophisticated litigant"* who has adopted this position as a litigation tactic. In my view she can be more properly characterised as a desperate individual;

g) the reasons M gave to Dr. Pickering as set out at 2.3 and following of her report of 18th March 2025 have the tenor of reasoned beliefs. In particular I was struck by the following in paragraph 2.10:

> [M] said she was in communication with her solicitor constantly and said they were trying to help with securing an apartment. She said the father sent her the money and she booked the flights for her and the children to Poland. [M] said the looking for the apartment was impossible and she then started thinking about the wider implications. She said she was not going to put the children into the situation of being in a random apartment where she was not going to cope. [M] said if she was refusing to go back, the children would be taken and put with their father. She said she felt the end result would be the same if she returned and believed the children would eventually be taken by the father, so she feels the children would have been put through all that stress of moving to a random apartment but with the same outcome.

Whether or not this is a likely end result, this paragraph struck me as representative of a genuine feeling and not tactical. Importantly it also provides an explanation as to why M, who has always been the children's primary carer, considers that is consistent with *their* interests for her not to return.

h) it is of note that, as Ms. Renton observed, F did not address M's allegations as to his behaviour since the return order was made in his statement of 6th May 2025. Professor George acknowledged that there was little more than what he described as a *"broad*

denial" when F said at paragraph 2 that M's allegations were *"simply not true"* and at paragraph 3 "*I continue to deny the allegations made by [M]"*. There is no more detail than this;

i) in her statement of 17th April 2025 M gives examples of how F continues to behave such as his calls with the children which (she states) trigger her mental health. She states (at paragraph 13) that she is *"in pieces"* after his calls to the children and that if she feels like this now she is terrified of how she would feel in a situation where she does not have her family (and in particular her mother) and friends to support her. If she is in the same country as F, she stated that even if there is an order for no contact *"the pressure will be unbearable. He will not leave me alone ..."*. F does not deny that he has pressurised M and, again, this provides a further explanation as to why M will not return; and

j) at paragraph 29 of their Position Statement Professor George and Mr. Bennett stated that little weight should be ascribed to M's assertions that she would not return to Poland herself if the return order for the children remained in force as they were *"made in a context where M's approach to this litigation has been both opportunistic and tactical"*. Six reasons were given in support of this submission:

   i) *M had exaggerated the concerns about her mental health, and the evidence she had provided in support has not been sustained by the expert evidence* - however, no-one has said M's symptoms were either made up or exaggerated;
   ii) *M has taken no steps to even attempt to implement the return order. Her whole focus has been on resisting it* – this is not correct. M did not completely ignore the terms of the return order and/or obfuscated. She was engaging with the return, whilst at the same time experiencing a significant deterioration in her mental health. She booked the return flights after F sent her the money to do so. She started to look for apartments in Poland;
   iii) *M has raised the threat of non-return in a context where her mental state is as it was prior to the return order (indeed, while still broadly the same, in fact slightly improved), where she was clear that she would return with the children previously* – as I have said above although decline in M's mental health may not be a fundamental change in circumstances her experience of the same is linked to her conclusion that she could not cope now with the idea of returning;
   iv) *by raising the threat of non-return at the 'set aside' stage, M has tactically left F at a substantial disadvantage, as the whole basis of his initial approach to Article 13(b) was predicated on her returning. If her position had been different at the earlier final hearing, F would have inevitably subjected M's wider case on Article 13(b) to far greater evidential scrutiny than he needed to where she was indicating she would return* – as Ms. Renton stated, this point was raised when the case first came to court and the possible need for a fact-find if M decided not to return but this was not taken up by F's counsel on that occasion;

v) *M has inexplicitly declined to follow through on her own concession to facilitate even supervised contact. She has hidden behind the Cafcass recommendation, given in the context of a wishes and feelings report, that there should be no contact absent Polish social services assessments being done on the F. Such a recommendation did not touch on professionally supervised contact taking place here* – in light of the Cafcass Report M is entitled to wish for a risk assessment to take place but is not against contact in principle after one has been undertaken; and

vi) *M has neither adduced, nor, importantly, sought to adduce, any evidence as to what she alleges has been F's unreasonable behaviour since the return order was made. She has had ample opportunity to seek permission to do so, represented by an experienced legal team, yet she asserts this on numerous occasions in vague and unparticularised ways* – I do not consider this to be correct. In her statement M sets out many examples of F's behaviour since the return order was made but F does not engage with the same in his response.

80) I accept what M says in her witness statement of not being able to "*survive*" if she returns to Poland, having been placed in an "*impossible position*" and that the decision to not return is "*the most difficult decision*" she has ever had to make and that she never thought it would come to this point. I therefore conclude she a highly vulnerable and desperate mother who has made a heartbreaking decision, but one that is not altogether surprising given what she has experienced to date and the hopelessness that she currently feels.

81) In *Re C (A Child) (Child Abduction: Parent's Refusal to Return with Child)* Cohen J observed (as set out at [22]) that the court must assess the mother's evidence *"and seek to determine the reality of what she will do. Will she return to France or not? The test is not what it is reasonable for her to do. Secondly, what protective measures can be put in place to ameliorate the situation? I have to look at that, not so as to determine whether objectively the mother's expressed refusal to return to France is reasonable, but to determine what impact those measures will have on her reasoning, and whether they are likely to lead to her returning."* Framing the question in this way was said by Sir Andrew McFarlane P at [63] to be the *"clear and correct setting of the question"*.

82) M is obviously aware of the protective measures that F has proposed. She continues to express concerns in relation to them (see paragraph 111 b) below). I therefore do not consider that those measures will have any (further) impact on her reasoning and hence are unlikely to lead to her returning.

83) In light of my conclusion as to likelihood, F's response is striking. He does not accept that M's decision not to return is genuine, and says (at paragraph 7 of his statement of 6th May 2025) it is *"tactical and calculated*". This chimes with M's evidence where she stated to Dr. Pickering (at paragraph 2.20 of her addendum report of 18th March 2025)

that *"[F] has said she is using her acting skills to 'make it about her'"*. F does not deny he said these things in his statement. I therefore accept, as Ms. Renton submitted, that F's behaviour has only compounded M's feelings of hopelessness and anxiety and solidified her view that it is impossible for her to return.

84) I have also considered the *Child Abduction Convention - Guide to Good Practice Part VI Article 13(1)(b)* published in 2020 by the Hague Conference on Private International Law. At paragraph 72 the Guide deals with the *"unequivocal refusal to return"* of the abducting parent as follows:

> In some situations, the taking parent unequivocally asserts that they will not go back to the State of the habitual residence, and that the child's separation from the taking parent, if returned, is inevitable. In such cases, even though the taking parent's return with the child would in most cases protect the child from the grave risk, any efforts to introduce measures of protection or arrangements to facilitate the return of the parent may prove to be ineffectual since the court cannot, in general, force the parent to go back. It needs to be emphasised that, as a rule, the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child.

85) As Sir Andrew McFarlane P observed in *Re C (A Child) (Child Abduction: Parent's Refusal to Return with Child)* at [51] *"[t]he Guide is an important resource and the task of a judge in these difficult and complicated cases may well be supported by reference to it"* and at paragraph [72] *"is cast in carefully balanced terms"* which *"include[s] the … note of caution that "It needs to be emphasised that, as a rule, the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child.""* I am alive to the prospect of M attempting to achieve precisely this situation but do not consider that she is seeking to do so.

86) In reaching this conclusion I have therefore taken into account considerations including (per Peter Jackson LJ in *Re R (Child Abduction: Parent's Refusal to Accompany)* at [36]) *"the overall circumstances, the family history, any professional advice about the parent's health, the reasons given for not returning, the possibility that the refusal is tactical, and the chance of the position changing after an order is made"*. I acknowledge changes of mind – or at least genuine changes of mind - are rare. I am satisfied that this one of those rare occasions. M is not *"seeking to take advantage of any change of circumstances such as a simple change of mind"*. This is not *"simple"* in the sense of being tactical as F asserts. I do not consider M is (to adopt the words of Moylan LJ in *Re B (A Child: Abduction: Article 13(b))* at [91]) *"taking steps designed to support or create an alleged change of circumstances"* or is otherwise seeking to the hold the court 'to ransom'. M's decision not to return is a serious one and one that has not been made lightly. It arises in the context of the likelihood of domestic abuse, M's fragile mental health, and its decline after the return order was made. This is not an assertion by an abducting parent that she would not accompany a young child on return

which could open the floodgates for such claims and undermine the entire purpose of the Convention.

87) In reaching this decision I specifically discount, however, Ms. Renton's submission that people who *"pretend"* are more likely say that will not return from the beginning rather than first saying so after a return order has been made. It would not be appropriate for me to take into account what is in effect little more than anecdotal evidence (at best).

88) Having reached my conclusion as to the likelihood of M returning to Poland with the children it is common ground that this is a fundamental change of circumstances that satisfies stage (c) of the four-stage test. I therefore now go on to consider stage (d).

Redetermination of the substantive application

89) Article 13(b) states:

> 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 -
> ...
> (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.

90) The burden of proving, on a balance of probabilities, that there is an exception lies with the party asserting it as a defence. The standard of proof is the ordinary balance of probabilities.

91) The Supreme Court examined the law in respect of the harm exception in *Re E (Children) (Abduction: Custody Appeal)* [2011] 2 FLR 758 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 FLR 442. More recently in *MB v TB (Article 13: Alleged Risk of Oppressive Litigation)* [2019] 2 FLR 866 at [31] MacDonald J summarised the applicable principles derived from the authorities 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 the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).

92) At [32] MacDonald J further stated:

The Supreme Court 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 ground the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures.

93) In *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 Moylan LJ made clear that it is not the case that the court has to accept allegations made without conducting an assessment of the credibility or substance of the allegations:

[39] In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations …

94) Article 13(b) was also considered in *Re IG (A Child) (Child Abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123 per Baker LJ in which he summarised at [47] the applicable principles to be as follows:

1. The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".

2. The focus is on the child. The issue is the risk to the child in the event of his or her return.

3. The separation of the child from the abducting parent can establish the required grave risk.

4. When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish 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 establish how the child can be protected from the risk.

5. In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.

6. That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on 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.

7. If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

8. In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.

9. In deciding what weight can be placed on undertakings, 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 for enforcement in the requesting State, in the absence of compliance.

10. As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks.

95) I also remind myself that the section is referring to the harm likely to be caused to the child, not the adults. It is, however, clear from *Re S (A Child) (Abduction: Rights of*

Custody) [2012] 2 FLR 442 at [34] that the subjective anxieties of a respondent whether reasonable or unreasonable will amount to an Article 13(b) defence if the court concludes that on return the respondent will suffer such anxieties that their effect on their mental health will create a situation that is intolerable for the child.

96) I am also entitled to have regard to the purpose and policy aims of the Hague Convention. In *Re W (Abduction: Intolerable Situation)* [2018] 2 FLR 748 Moylan LJ stated:

> [46] Child abduction is well-recognised as being harmful to children. As was noted in *Re E (Children) (Abduction: Custody Appeal)* [2011] 2 FLR 758, the *'first object of the Convention is to deter either parent … from taking the law into their own hands and pre-empting the results of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any disputes can be determined there'*.

97) I shall take M's allegations against F (and the consequent risk of harm) at their highest and thereafter if satisfied that the risk threshold is crossed go on to consider whether protective measures sufficient to mitigate the harm can be identified. Although it was made clear in *Re B* per Moylan LJ at [71] that it is not *necessary* (original emphasis) for a judge to undertake the *Re E* approach as a two-stage process (because the question of whether Article 13(b) has been established requires a consideration of all the relevant matters including protective measures), absent the court being able confidently to discount the possibility that the allegations give rise to an Article 13(b) risk, conflating the *Re E* process creates the risk that the judge will fail properly to evaluate the nature and level of the risk(s) if the allegations are true and/or will fail properly to evaluate the sufficiency and efficacy of any protective measures. In other words the judge may fall *"between two stools"*.

98) I also remind myself that as stated in *Re B* per Moylan LJ at [70] 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).

99) I also bear in mind that as cited in *The Mother v The Father* [2023] EWHC 2617 (Fam) per Henke J at [57] (b) when summarising the father's submissions:

> (b) The exception in Art 13 (b) is concerned with situations which went beyond what a child might reasonably be expected to bear. It is interpreted strictly, and harm cannot arise solely from separation from the responsible parents - *X v Latvia* (27853/09). In *NM v SM* [2023] EWHC 2209, separation of a child from an abducting parent who was refusing to return and who had

cared for that child for 15 months did not establish the Art13(b) defence. Equally if the fact the abducting parent will not return means that the children concerned are placed in foster care, that does not establish an Art13(b) defence; the central issue is whether the child will be adequately protected on return - *Re S (Abduction: Return to Care)* [1999] 1 FLR 843.

100) If I find Article 13(b) satisfied, I retain a residual discretion to return.

101) When considering these children in this case I am satisfied that they would be placed at grave risk of emotional/psychological harm or otherwise placed in an intolerable situation if they do not return with M.

102) First, as Ms. Renton submitted, the Article 13(b) defence is assessed from the perspective of the children. If, as I must and do, I take M's allegations of domestic abuse at their highest, the children have been subjected to domestic abuse. As Ms Veitch observed at paragraph 37 of her the Cafcass Report of 19th November 2024 if M's allegations are true *"[T] and [H] have lived with the verbal and psychological abuse and coercive control of their mother, by their father."* They have also been witness to, and experienced to date, M's vulnerability and her mental health difficulties, including the deterioration in December 2024. It would be fanciful to suggest that they have not been aware of M's mental health difficulties given that she is their primary carer and they have a close and loving relationship with her. They have also not been fully shielded from the conflict. The children's lived experience of domestic abuse is clear from the Cafcass report. This is the context with which I am concerned.

103) In *Re A (Children) (Abduction: Article 13(b))* [2022] 1 FLR 1 Moylan LJ observed at [88] that *"the effect of the separation of a child from the taking parent can establish the required grave risk"*. I have already concluded that the likelihood is that M will not return. M has always been the children's primary carer. They have been in her sole care for last nine months. They have never had more than two two nights away from M since they have been in England. Separation from M in this context would be completely different from anything they have ever experienced whether in Poland or in England. I accept that they are likely in such circumstances to be incredibly concerned as to what was happening, why M was not returning to Poland with them, and whether (and if so when) they would see F. In my view this would be sufficient to establish the required grave risk of harm. In this context it is relevant that, as fully set out in the Cafcass Report, T has aphasia (a language disorder) which causes difficulties with communication and which makes her more vulnerable.

104) If the children return to Poland they could not be returned to F's care given the Cafcass recommendation that there are no spending time arrangements between the children and F until a risk assessment is undertaken by the Polish authorities to determine whether this is safe.

105) It is F's case that the children could return into the care of F's relatives who could look after them pending any social services investigation. F has suggested (in his statement of 6th May 2025 at paragraph 10) that his sister "*is able to collect the children and bring them back. I have spoken to my sister and my parents who are incredibly supportive of us and are willing to care for the children subject to assessments being undertaken in Poland before they return to my care".* However, I have no evidence as to the children's relationship with F's sister or her proposals in respect of looking after them. I have no statement from her. Ms. Renton and Ms. Halliday submitted in their Position Statement that:

a) F's sister is not an important figure in the children's lives. They see her once or twice a year for brief visits of a few days. She has spent very little time alone with them. She has never spent an overnight alone with H and last had one overnight with T either at Easter 2023 or Easter 2024 in Vienna; and

b) F's sister lives in Vienna, she is a single woman who lives in a one-bedroom flat and who works as an artist. Her work means that she often travels, including abroad. She also suffers from depression and anxiety, and a thyroid issue which means she often feels very tired. When she has visited the family in Krakow, she has not wanted to get up early to see the children. Ultimately, her lifestyle is not conducive to being the primary carer of the two children, and it is entirely unclear as to how the placement would work logistically given that she lives in Vienna and travels for work.

106) I also accept that any placement of the children with a member of the paternal family would, in all likelihood, be a placement with F by the backdoor. The paternal family are not subject to orders of this court and there is no way of regulating F's involvement with the children if such a placement is endorsed. M alleges (and I accept for these purposes) that, even during a recent call between F's parents and the children, F took over and controlled the phone call, placing pressure on T.

107) The reality therefore is that the children would have to be returned into the care of Polish social services. In my view that these children would now be returned to Poland, into the care of social services the specifics of which are completely unknown to this court (identity of placement, timescales and so on), whilst the children know that their M stays behind in England in the vulnerable state that she is currently in and there is then future litigation about what happens to them, is a state of affairs that meets the Article 13(b) threshold.

108) I should record that in this context Professor George submitted that at this stage of my analysis that I should adjourn the proceedings in order for F to obtain further information as to the potential alternative placements for the children (including with his sister as what was asserted on M's behalf at paragraph 105 above is not accepted by him). In relation to the potential involvement of social services he stressed that these were private law proceedings and there was therefore a limit to the information F could

obtain as a private citizen and where Polish social services are not yet concerned with the children as they are not living in that country. All that is known at present is as set out in paragraph 36 of his and Mr. Bennett's position statement namely "*F's Polish family lawyer has advised that private law proceedings could be issued two weeks prior to the children's return, and that the court could direct the appointment of a Kurator, a court appointed social worker, to supervise contact and, in due time, to provide risk assessments re F and other aspects of the family dynamic"*.

109) However, I agree with Ms. Renton that it has been clear that I would be tasked with stages (c) and (d) of the four-stage process as set out in *Re B (A Child: Abduction: Article 13(b))* since mid-January 2025. Professor George's position is in effect an acknowledgment that there as a lacuna in F's own evidence. Given F stated in paragraph 10 of his statement of 6th May 2025 that *"I am also very aware of the serious consequence of the children being taken into social services if [M] maintains that she will not return to Poland"* he should have put in evidence proper placement alternatives which could have been the subject of case-management even if F thought the likelihood of M's non-return was not genuine.

110) Further, these are summary proceedings that are meant to be resolved within a short time-scale. As Moylan LJ observed in *Re B (A Child: Abduction: Article 13(b))* at [90] there is a need for applications under the Hague Convention 1980 to be *"determined expeditiously"*. As such it is preferable they be brought to a final resolution based on the evidence that I have as to placement rather than adjourned for further evidence to be obtained and thereafter relisted.

111) I also consider that M's Article 13(b) defence is established on the basis that (when taken in combination):

a) as Moylan LJ observed in *Re B (A Child: Abduction: Article 13(b))* at [105] Article 13(b) is *"looking to the future"*. M's mental health will in all likelihood deteriorate if she returns to Poland with the children in such a way that will negatively impact on them and lead to them being placed at grave risk of emotional/psychological harm and otherwise placed in an intolerable situation. As Moylan LJ stated in *Re B* at [114] *"[t]o adopt what Lord Wilson JSC said in In re S [2012] 2 AC 257, the "effect on [the mother's] mental health will create a situation that is intolerable for" B"*; and

b) I do not consider F can be trusted to comply with his undertakings. The undertakings may therefore well not be effective as protective measures. In her witness statement of 17th April 2025 M sets out her reasons for why she has no confidence that F would adhere to any of the terms of the order from paragraph 15 onwards. They include (i) F having said to M that in Poland the Order *"is just a piece of paper*"; (ii) F having put M under considerable pressure to return to the family home even after the December 2024 order was finalised; (iii) since being in England F has threatened her, placed her under considerable pressure and not complied with court orders, often telling the

children during indirect contact that they will be returning to Poland soon, insisting on seeing M's face on camera, threatening to report M in front the of the children if they are not fully focussed and, despite it being previously stipulated that phone calls will take place at 6 pm every day, F overwhelming M with calls, messages and voice notes throughout the day demanding to speak to the children.

The order of 15th October 2024 (at paragraph 5) records the parties' agreement that they will both do their best to keep the children out of the proceedings not to put them under pressure or expose them to adult issues. The order of 16th December 2024 provides (at paragraph 15 c) for F not to intimate, harass or, pester M. M states that F has therefore disregarded both orders which demonstrates his lack of regard for the same and M states that if he does this when M lives in another country F would not comply with the protective measures as set out in order if she did return.

It is of note that F does not engage with any of these points in his statement in response and of course I must take them at their highest in any event. I also agree as submitted on M's behalf that that F's conduct and M's reaction to has to be set in the context of her allegations of domestic abuse and feelings of control by F for many years.

I therefore have the advantage over Mr. Glasson KC as to how F has acted since the making of the return order. As a result I do not share his confidence that F would abide by the protective measures offered which are summarised in paragraph [54] of his judgment and which include not to intimidate, harass, or pester M and which at paragraph [94] he said *"contain a number of important features that meet the cumulative risks"* and at paragraph [102] that *"taking into account these protective measures, I am satisfied that the risks on return to the children can be addressed and sufficiently ameliorated so that the children will not be exposed to a grave risk within the scope of Article 13(b)"*. F proposes materially the same set of protective measures at paragraph 12 of his statement of 6th May 2025 (save he offers to vacate the family home for six months as an alternative to funding rented accommodation for M but given the family home is in a block owned by F's parents who live in another apartment in the block Professor George (rightly) accepted this was unlikely to be an attractive option for M). Put simply, as Ms. Renton submitted, F's actions since December 2024 calls his *bona fides* into question.

In reaching this decision as to effectiveness I bear in mind the guidance in *E v D* [2022] EWHC 1216 (Fam) per MacDonald J where at [32] he stated that in determining whether protective measures can meet the level of risk reasonably assumed to exist on the evidence, a number of principles can be drawn from *Re P (A Child) (Abduction: Consideration of Evidence)* [2018] 1 FLR 892, *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 including (i) 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; and (ii) 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.

112) In light of the foregoing I do not need to go on and consider Ms. Renton's and Ms. Halliday's further submission that if M was to return *"there are real difficulties with the current protective measures package"* save to observe that I would be concerned that this was tantamount to a disguised attempt to appeal against the original order.

113) I agree in this context with what Professor George and Mr. Bennett state at paragraph 32 of their Position Statement namely *"part of M's stated opposition to a return amounts to no more than disagreeing with Mr. Glasson's unappealed conclusions that the extensive protective measures offered by F, would be sufficient to address the alleged risks to her and the children, assuming those risks at their highest.*". As Moylan LJ observed in *Re B (A Child: Abduction: Article 13(b))* at [91] *"[t]he court will clearly be astute to prevent what, in essence, are attempts to re-argue a case which has already been determined …".*

114) Having found Article 13(b) satisfied, in light of all that I have said above there is no basis for me to exercise my residual discretion to order a return.

Conclusion

115) I accept (as Ms. Renton and Ms. Halliday began their Position Statement and as Ms. Renton concluded her oral submissions) that as Baroness Hale stated in *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 FLR 961 stated at [52]:

> No one ever intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm.

116) In *Re T (Abduction: Protective Measures: Agreement to Return*) [2024] 1 FLR 1279 Cobb J (giving the judgment of the Court of Appeal) having referred at [76] to *Re D (A Child) (Abduction: Rights of Custody)* at [52] reiterated that *"The 1980 Hague Convention should not itself become an instrument of harm."*

117) In my view this risks being one of those cases. I therefore (i) grant M's set aside application; (ii) determine that M's Article 13(b) defence is established and order a non-return; and (iii) refuse F's enforcement application.

118) That is my judgment.