Neutral Citation Number: [2025] EWCA Civ 1119

Case No: CA-2025-001128

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
RECORDER WARSHAW KC sitting as a
DEPUTY HIGH COURT JUDGE
FD24P00524

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 August 2025

Before:

LORD JUSTICE MOYLAN
LADY JUSTICE ASPLIN
and
LADY JUSTICE ELISABETH LAING

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S (A Child) (Abduction: Article 13(b))

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- -

Mark Jarman KC and Jonathan Evans (instructed by **MSB Solicitors**) for the **Appellant**
Anna Mckenna KC and Andrea Watts (instructed by **Shepherd Harris & Co**) for the **Respondent**

Hearing date: 12 June 2025

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Approved Judgment

This judgment was handed down remotely at 14.00 on 22 August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The mother appeals from the order made on 22 April 2025 by Mr Warshaw KC, sitting as a Deputy High Court Judge, ("the judge") on the father's application for a summary return order under the 1980 Hague Child Abduction Convention ("the 1980 Convention"). The judge decided that the mother had not established the matters set out in Article 13(b) of the 1980 Convention and ordered the return of the parties' child, S aged 7, to Ireland.

2. It was accepted that the mother had wrongfully removed S from Ireland in June 2024. The mother also made clear that she would not return to Ireland for a number of reasons including because of the effect on her mental health. The judge accepted this and had "no doubt that whatever decision I make, M will remain here with [S's sibling"]. S has a sibling, aged 10, who is not subject to the application for legal reasons.

3. In opposing the father's application, the mother relied on Article 13(b), namely that there was a grave risk that S's return to Ireland would expose him to physical or psychological harm or otherwise place him in an intolerable situation, and on the fact that S objected to returning. In the light of the Cafcass Officer's evidence, the latter ground was withdrawn during the hearing below.

4. There are four Grounds of Appeal:

> "(1) The Judge was wrong to order that S be returned to Ireland, having accepted that the mother would not herself be returning, thereby placing S with his father, in circumstances where, as described by the judge, the mother had made "extremely serious allegations of abuse against" the father which were "of the very highest order";
>
> (2) The Judge was wrong to rely on the oral evidence of the Cafcass Officer in concluding that a return to his father's care would not place S at a grave risk of harm or otherwise in an intolerable situation, when the Cafcass Officer's role in proceedings had been to report on S's wishes and feelings in respect of a return;
>
> (3) The Judge was wrong to insert the test of 'immediate harm' into Article 13(b) which was an impermissible gloss on the wording of the Convention;
>
> (4) The Judge failed to consider the mother's Article 13(b) defence holistically and cumulatively and was wrong to find that separation of S from his mother was to 'wander into the territory of [S's] welfare and best interests'."

At the hearing of this appeal, Mr Jarman's essential challenge to the judge's decision was that he did not apply the approach set out *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 ("*Re E*") both in respect of considering whether there were risks within the scope of Article 13(b) and in

respect of whether there were any protective measures which might address or ameliorate those risks.

5. The mother is represented by Mr Jarman KC and Mr Evans. The father is represented by Ms McKenna KC and Ms Watts.

6. For the reasons set out below, I have concluded that the judge's decision is materially flawed and must be set aside. I have also decided that this court is in a position to determine the application for a summary return order and that, as explained below, the father's application should be dismissed, the mother having established that there is a grave risk that a return to Ireland would expose S to harm and/or would otherwise place him in an intolerable situation.

7. In my view, the application can be determined on the basis of the evidence before the judge. It is not, therefore, necessary to determine the mother's application to admit fresh evidence, namely a report from a Child and Educational Psychologist which is dated 14 April 2025, the day before the hearing below started, although it is said that the mother did not receive it until 23 April, the day after the judge gave judgment.

Background

8. This is taken from the judgment below with the quotations being largely from that judgment.

9. The mother and the father are both Irish nationals. They were born in Ireland and have lived there all their lives. They met in 2016 and lived together from late 2017 until they separated in the middle of 2022.

10. S has a sibling, A aged 10, who, as referred to above, is not included in the father's application for legal reasons. S has "significant behavioural issues and sensory issues". He has been attending school in England for part of the day and has one-to-one support. He also had a support plan in Ireland from October 2023. The judge described S as "a very troubled little boy, with very specific needs, whose troubles appear to have become exacerbated since leaving Ireland".

11. The father has a number (4) of criminal convictions including for assault causing harm and drug-related offences (possession for the purposes of supply). The most recent of these convictions was in July 2024 when he was convicted of four drug-related offences, including, again, possession for the purposes of supply.

12. The mother has two convictions for driving offences and one for unlawful possession of drugs. She has had longstanding mental health problems.

13. Following the parties' separation, S and A remained living with the mother. The father said that, initially, he "had regular contact with the children seeing them most days" but "after a few months this stopped and M refused contact".

14. The father was arrested in April 2023 "for burgling M's home … and making threats to kill". During the course of his police interview, the father "admitted that he had said "*I'd love to kill her*" on his arrest but he denied threatening her directly saying he did not do so "*cos my kids were right there in the garden*". He made a number

of disparaging comments about M including saying, '… *she's an absolute compulsive liar and that's why I would like to get her sectioned. She's a narcissist*". He made another disparaging remark about the mother and said that he was "*going to try to take my kids full custody*". As set out in the judgment:

> "F was charged and was bailed with conditions. M alleges that F frequently broke his bail conditions and that she was told by the police that he would have to breach his bail conditions fifty times before they would take any action. F denies the breaches and [gave an explanation as to what might lie behind the alleged breaches]. *"*

Also during this interview, the father told the police that the mother had "attended his home and, intoxicated, deliberately rammed her car into his car". At "some point after July 2023, the police dropped the investigation into the allegations of burglary and threats to kill".

15. In early 2023, the father made an application for contact. At a hearing in June, at which both parties were represented, contact was agreed and an order was made providing for the father to have visiting contact every Thursday evening and fortnightly on Saturdays and Sundays. At a hearing in October 2023, the contact arrangements were changed, again by agreement. The father agreed to undertake a parenting course and visiting contact changed to Friday evenings and every Sunday.

16. In November 2023, the father complained to the police about the mother's "behaviour including threatening messages she had sent him". The judge listened to "recordings" but they "did little to help me decide this case".

17. In early 2024, the father made an application to enforce the October 2023 order because the mother has stopped all contact. At a hearing in February 2024, the court ordered the preparation of a welfare report and, by agreement, the order provided for the father to have visiting contact every Wednesday and Thursday evening and from 12pm to 7pm on Sundays and alternate Saturdays.

18. The parties "availed themselves of the provision for additional contact".

> "F has produced text messages from 29 March 2024, which show M initiating a request for F to have the children for a sleepover. He agreed. It is also clear that M had no concerns about F's long term partner being present at the sleepover. F has also produced texts in which M acknowledged that his partner 'is very good to [her] kids'. It was suggested to me by Ms McKenna that I should infer from this exchange that there was regular overnight contact. Mr Jarman said I should not draw such an inference. I am not finding facts at this hearing but reading those messages leaves me with the impression that, at that stage, the parties had a comparatively good relationship and that overnight contact did not appear to be in any way extraordinary."

19. A hearing in Ireland was adjourned in May 2024 because the welfare report had not been prepared.

20. Following an incident the mother alleged had taken place between her and a member of F's family, which caused her to feel "suicidal", the mother says that she was advised by her GP "to sign a voluntary section". The mother was admitted to a mental health unit in May 2024 for seven nights. She said that she told the father but he said "I was lying and sent me abuse". The father was on holiday abroad at this time and S was cared for by members of his family. The mother said that "after her discharge from hospital S did not leave her side and slept in her bed for weeks".

21. A "week after [her] discharge she received a message on Facebook threatening to blow up her house". The mother "says she was in fear for her life, looked for a refuge in Ireland but none had space" so decided to come to England with the children. She and the children travelled here at the end of June 2024. Since their arrival in England, the father has "had regular contact with the children by video and audio calls".

22. The father relied on text messages between himself and the mother. In these, the mother had initially suggested in January 2025 that the father could have staying contact in England before then withdrawing that proposal after speaking to her solicitors. In another, the mother said that she would like her passport to be released so that she could visit Ireland. Another aspect of the text messages in March 2025 was "a plan for S to go to Ireland to live with F". One of the messages sent by the mother to the father included "a picture of S's packed bags" and it was "clear from the text messages the following day … that S was saying … he wanted to go to Ireland but that M thought he had changed his mind". Later that day, when the Cafcass Officer was at the home, "M texted F and told him to book a flight to take S back". Then, the "following day M reported that S had changed his mind". She said that "S is fine now he's calm and back to himself".

Proceedings

23. The father commenced proceedings under the 1980 Convention on 23 October 2024. Both parties filed extensive witness statements.

24. The mother opposed the father's application, relying, as referred to above, on Article 13(b) and that S objected to returning to Ireland. She alleged that the father had "abused her throughout their relationship". Her case, as summarised in the judgment below, was as follows:

> "M alleges that F abused her throughout their relationship. The allegations are very serious including physical abuse, rape and coercive and controlling behaviour. She says the behaviour began in late 2016 and continued throughout the relationship. She describes being grabbed by her arm with force by F who was reminding her that he was powerful. She says he hid her car keys, checked her mileage and read her emails and texts. She alleges that he stole her money and would belittle her and make her feel worthless and that he would call her names

> everyday and ruin special occasions. She says some of this behaviour was in front of the children. She also recounts fights between the parties when she did not have sex with F. She says on a number of occasions she awoke being raped by F. These allegations are, as I have said, plainly very serious. They are denied by F."

The mother also alleged that the father "is a cocaine dealer".

25. The mother also referred to S's "significant behavioural issues and sensory issues" and asserted that it would be intolerable for S to be separated from her; "his emotional dysregulation and behaviour would significantly deteriorate". She also pointed to S and A having "a very strong sibling bond".

26. The father denied all the mother's allegations.

27. An order was made that a Cafcass Officer prepare a report on S's wishes and feelings for the purposes of addressing the mother's case that S objected to returning to Ireland. I deal with this further below.

28. A report on the mother was obtained from a consultant psychiatrist. I also deal with this below.

29. The hearing of the application took place on 15 and 16 April 2025. The judge heard oral evidence from the Cafcass Officer and the consultant psychiatrist. He gave judgment on 22 April 2025 and made a summary return order on the basis of certain undertakings offered by the father.

30. Permission to appeal was given by Peter Jackson LJ on 21 May 2025.

The Expert Evidence

31. A report was obtained from Dr Ratnam, a Consultant Forensic Psychiatrist. In her opinion the mother fulfilled the criteria for a diagnosis of "generalised anxiety with panic disorder", the mother having reported "that the onset was when she was a teenager". The mother had been prescribed antidepressants since March 2023. She also fulfilled the criteria for "recurrent depression" and "post-traumatic stress disorder", the latter being "related to her childhood experience and also alleged experiences in the relationship with [the father]".

32. Dr Ratnam considered that "it is likely that [the mother's] mental health will deteriorate" if she returned to Ireland and referred to a number of factors which would contribute to this. She had not seen the mother's complete medical records but, although she had been commenced on antidepressants in March 2023, subsequently "her mental state was unstable". The medical records also referred to "suicidal thoughts" and self-harm in 2023 and 2024. If the mother returned to Ireland, there was a risk, which "it is not possible to quantify", of "her mental health deteriorating to the extent where she experiences suicidal thoughts, which she might act on".

33. In her oral evidence, Dr Ratnam said that if the mother were to return to Ireland, "at best M's mental health would not improve and at worst it might decline with

suicidal ideation". She also said that there would be "a significant risk ... of a deterioration in her mental health" if the mother were to return to Ireland.

34. The Cafcass Officer, Ms Demery, visited the mother and S at their home in March 2024. This was instead of the normal practice that a child would be seen at Cafcass' office in London because the mother considered that S would not be able to cope with travelling to London.

35. When Ms Demery arrived at the home, S refused to speak to her. The mother told her that "he had been acting out since Sunday when he spoke to his father and was expressing the wish to return to Ireland". In her report, she described S as being "extremely agitated and dysregulated". While she was at the house, S expressed, in vocal, adamant terms, that he wanted to go back to Ireland and live with his father. He dictated a letter for the judge to that effect. Ms Demery did not think that S would benefit from seeing the judge "given [S's] vulnerabilities".

36. Ms Demery later spoke to the family's social worker. She said that "what [Ms Demery] saw when [she] visited was not the true reflection of how [S] usually responds to his mother". The social worker described how S takes something belonging to his mother to school "for reassurance" and considered that "the behaviour [Ms Demery] saw S exhibiting appears to stem from his contact with his father" with there having been "some suggestion that S's father and aunt were coming to collect him on" 21 March 2025. The social worker later told Ms Demery that when she visited the home the day after Ms Demery's visit that "was the first time she saw S angry and that he usually presented as being happy with his mother".

37. Ms Demery set out information which she had obtained from the school S has been attending in England. S is on a reduced timetable due to "violent and aggressive episodes". He has "the support of a full time 1-1" and was "working at a stage that would be considered typical" for a significantly younger child. S would get "anxious when he doesn't know what time his mother is coming for him and this escalates his behaviour". The mother "has engaged very well with school since S started" and it is "clear that [the mother] is able to meet all S's basic needs". When he "is regulated, S can have lovely conversations with his trusted adults and enjoys chatting about his likes, wants and needs".

38. Ms Demery considered, based on information from a number of sources, that neither S's "cognitive nor his emotional maturity [were] commensurate with his chronological age". She described him as having a number of "vulnerabilities" and as having had "unsettled and traumatic early life experiences". In her opinion,

> "The combination of mental health, reported domestic abuse and substance misuse of both parents of alcohol and drugs, places the children in the highest category of risk of emotional harm. There has been professional involvement from children services since the family arrived in England there is ongoing support for the family from children's services and for the mother."

39. She also referred to domestic abuse as being "effectively child abuse" and considered that S "would find separation from his mother and [A] difficult given that he has not lived with his father since he was 5 years old". Ms Demery added that:

> "[The father] has offered the standard protective measures, he appears to underestimate the impact on S of a return to Ireland, and does not appear to appreciate the scale of S's difficulties and the support that S would need if he were to live with him."

40. Ms Demery questioned how much weight could be given to S's views. It would, she said, "be some time before he is able to develop and articulate views as an autonomous young person". The views he expressed about returning to Ireland were "in stark contrast to his need, for example, to take [something belonging to his mother] to school for reassurance". She also considered it possible that S "has an idealised version of what he might expect should he return to Ireland and live with his father".

41. Ms Demery concluded her written report by saying:

> "If S is returned to Ireland the Court would need to be satisfied that it is a safe return and that the identified risks to S's emotional well-being would be recognised by the courts, the police, and children's services in that country. While I appreciate there have been no adverse findings found against [the father], to ensure the safety of S should he return, I would recommend a referral through the Central Authority to the Irish Child Protection Services and for there to be a full risk and welfare assessment of S and his father. The court may also wish to be assured that there are alternative interim care arrangements for S pending a welfare investigation."

It is relevant to note the significance of these last observations. They highlight the nature of Ms Demery's concerns in respect of S's "safety" if he was returned to Ireland without the mother. She specifically recommended that there should be a referral to the Irish Child Protection Services and a "full *risk* and welfare assessment" with a further suggestion that the court might "wish to be assured" of alternative interim care arrangements being available for S pending that assessment. I have emphasised the word risk because in England and Wales, in the circumstances of this case, it would be very unlikely that a welfare assessment could take place without a fact-finding hearing in respect of the mother's allegations as it would be difficult to see how any welfare recommendations could be made before that had been undertaken.

42. Ms Demery also gave oral evidence. She had been "shocked" by S's behaviour towards her and said it was "very difficult to ascertain how S was feeling [when she saw him] because his presentation was so dysregulated" but "reiterated that he was obviously missing F and Ireland". She "made the point that S and [A] were particularly close as siblings" and that S "would likely find a move to Ireland without his mother difficult".

43. As referred to in Mr Jarman's submissions, Ms Demery also gave the following evidence: S's "views are 'idealised' and the reality is that 'without the mother and A, if a return order was made and A did not accompany, the reality for S may be very different to what he has in his mind'. That 'mother has clearly been his main carer since separation; were his mother not to return, he is likely to find it difficult, he takes his mother's … to school, he is agitated at separation from her'".

44. The judge referred to what he considered to be "a very significant exchange" during the course of Ms Demery's oral evidence. In response to a question from Mr Jarman, in which he suggested that Ms Demery was "not advocating separation of S from M or placement with F", Ms Demery replied that she was "not making a recommendation … it would need a welfare assessment". She was saying that "if S were to move to F's care, there would need to be an assessment" and that it would be "preferable if M and A accompany him [as] they are his main sources of emotional security".

45. The judge then asked whether Ms Demery would "have any concerns" if S "returned to live with F and the court is investigating". The Judge considered Ms Demery's answer to be "very significant" because he took from it "that there is no immediate risk to S if he is returned to Ireland in circumstances where M refuses to return and he is thereby separated from [A] and living with F *so long as* a welfare assessment is begun immediately" (emphasis in original).

46. What Ms Demery had said was as follows:

> "I would have some concerns given the history that has been reported, although obviously there is a lot more to the situation. There doesn't appear to be any treatment, nowhere suggested S was ill-treated by F. It seems the major issue has been the relationship between the parents and I appreciate there hasn't been a fact-finding hearing on domestic abuse that has been reported. But obviously that has an impact on children whether they are aware of it or not. It is difficult to know, I have not conducted that much of a welfare assessment. There would need to be an immediate welfare assessment of him. I don't think he would be at risk immediately if at all, but to be sure his needs are being met in that environment, that there is an assessment, as otherwise he would be living with F for the first time, without his M and with his partner who he may not be altogether familiar with. I am not saying he doesn't know her, but it would be a major change for him if M and [A] do not go. I am just speculating that given how much disruption he has experienced, there could be a reaction if/when he goes to Ireland, even if it is in accordance with what he says he wants." (emphasis in original)

I deal with this evidence and its effect on the judge's approach and decision further below.

The Judgment

47. The judge referred to *Re E* and set out that the "risk must be grave". He noted that both parties had said that he could "proceed to determine this case and reach the outcome each suggests by taking [the mother's] allegations at their highest". He also said that "[e]ven if the requirements of Article 13(b) are proved, I must carefully consider whether sufficient measures exist and/or can be put in place to ameliorate any grave risk that has been identified".

48. The judge summarised the matters relied on by the mother in support of her case under Article 13(b) as follows:

> "a. Abuse perpetrated by F towards M;
>
> b. The deleterious impact on M's mental health of a return to Ireland;
>
> c. The intolerability of a return for S given his particular needs;
>
> d. The intolerability of S being separated from M; and
>
> e. The intolerability of S being separated from [A]."

It can be seen that the judge did not directly identify a key aspect of the mother's case, namely the risks to S from being in the care of his father, based on the mother's allegations as to the father's abusive behaviour.

49. The judge dealt with each of the above matters in turn. In respect of the mother's allegations as to the father's abusive behaviour, he said that they "are of the very highest order and include physical violence and rape. They also include examples of egregious coercive and controlling behaviour".

50. In respect of (b), the judge accepted Dr Ratnam's evidence as to the likely effect on the mother's mental health if she returned to Ireland and determined, as referred to above, that the mother would not return to Ireland.

51. In respect of (c), the judge "struggled[d] with [the] submission" that "the effect on S of a return to Ireland is further exacerbated by his own needs". He referred to the fact that S had "access to additional help in Ireland", that there was a family social worker, that a court welfare office had been appointed and that S had "access to two one to one support staff at school". He concluded that "on proper analysis this submission may be intertwined with the submission that it is intolerable for S to be removed from M". The judge did not, therefore, consider this issue in conjunction with the other matters on which the mother relied.

52. As for (d), the judge considered that this part of the mother's case "seems to wander into the territory of S's welfare and best interests. I am being asked to make a return order. I am not deciding where S will live in the future".

53. As for (e), the judge accepted that the siblings "have a very close bond".

54. The judge recorded the "protective measures" offered by the father. These comprised: (i) funding return fares; (ii) to provide accommodation for S if the

mother did not return; (iii) not to molest M; (iv) not to pursue civil or criminal proceedings against M for abduction; and (v) to arrange regular video contact.

55. At the start of the "decision" section of the judgment, the judge said that there "are two beacons which guide my decision".

> "The first is Ms Demery's evidence that there would be no immediate risk to S were he to be returned to Ireland and into F's care in the context of a welfare enquiry. F offers an undertaking to begin the process of that enquiry by making an appropriate application to the Irish court. This would presumably be an application for custody. No doubt M could achieve the same outcome by applying immediately for a relocation order."

The judge noted Mr Jarman's submission that a welfare enquiry might take "many months" and acknowledged that he did "not know how long such an enquiry will take". His response was that he was "quite sure the time it takes will be proportionate" adding that "I consider, given Ms Demery's evidence that there will be no risk to S pending that enquiry".

56. The "second beacon" was that, because the mother would not be returning to Ireland, there was "no possibility of a grave risk of harm to S arising from M's mental health. Any deterioration in M's mental health will be managed, because she will be staying in England".

57. The judge then concluded:

> "[110] How do these beacons help me? I must look holistically at all the strands of M's defence but I must guard against applying a quasi-welfare test. The outcome I determine may not seem to me to be in S's best interests but I remind myself that if I send S back to Ireland, the Irish court will evaluate and protect S's best interests.
>
> [111] The allegations of abuse made by M are of the highest severity. Ms Demery was alive to those allegations and their potential impact in any welfare enquiry. Nonetheless she was satisfied that there was no immediate risk in the context of a welfare enquiry. I am satisfied that M will stay in England if S is returned to Ireland. Therefore there are no concerns which arise as to M's mental health which could be described as presenting a grave risk of harm to S.
>
> [112] As to S's particular educational and other needs, I do not believe that his removal to Ireland will put him in an intolerable position. There are clearly state resources which will be available to him.
>
> [113] Separation of S from M and [A] is far from ideal. Were I applying a welfare standard, I would probably come to a

> different conclusion. I note that when M was admitted to hospital in May 2024, she looked to F to look after S. I accept that those were very different circumstances but I do not think that placing S with his father temporarily will put S in an intolerable position. It is clear that he has spent overnight time with F since separation albeit only on very few occasions. It is also clear from the texts that M has a high regard for F's partner and there is no reason to believe that F's home is in any way inadequate nor that F will be unable to provide adequate care."

58. The judge's ultimate conclusion was:

> "[114] My conclusion is that looking at the defence holistically and bearing in mind the protective measures offered, I have no doubt that the high bar set by the defence is not reached."

I would note that there is no analysis of how the proposed "protective measures" would address the matters relied on by the mother.

Submissions

59. The mother challenges the Judge's approach to and conclusions in respect of Article 13(b).

60. The mother relied on three matters in support of her case under Article 13(b): (a) S being placed in the care of his father against whom the mother had made serious allegations of abusive and other criminal behaviour; (b) S being separated from his primary carer; and (c) S being separated from A. The allegations made by the mother against the father, as summarised by Mr Jarman, were as follows:

> "The mother makes extremely serious allegations against the father. These include physical and emotional abuse, controlling and coercive behaviour, threats to kill and sexual abuse, including rape. The mother alleges that the father is a serious cocaine dealer and that S has been in his car whilst he has sold drugs."

61. Mr Jarman submitted that the judge had failed to apply the approach set out in *Re E* in that he did not ask whether the matters relied on by the mother were such that, if true, they would establish a grave risk or risks within the scope of Article 13(b). He also submitted that the judge failed to take into account that S has "significant behavioural issues and sensory issues" and is "a very troubled little boy, with very specific needs".

62. If he had properly applied *Re E*, Mr Jarman submitted that the judge would inevitably have concluded that, on a return to Ireland, S would be placed at a grave risk of harm and/or would be placed in an intolerable situation because he would be living with the alleged perpetrator of, what the judge had rightly described as, "abuse … of the highest severity".

63. Mr Jarman submitted that the judge was wrong to rely on one aspect of Ms Demery's oral evidence in the way that he did having regard to her evidence overall and to the proper scope of her role in the proceedings. She had not undertaken any safeguarding or risk assessment and, in accordance with the nature of her report, had only conducted very limited enquiries. It was not clear, therefore, what she had meant when she said she did not "think [S] would be at risk immediately". Further, in any event, it was for the judge to determine whether Article 13(b) was established and this was not limited to an assessment of immediate risk. As set out in *Re E*, at [35], "if the risk is serious enough to fall within art 13(b) the court is not only concerned with the child's immediate future". The judge had, therefore, been wrong to elevate this single response as a "beacon" guiding his decision.

64. The effect of the judge's order was that S would be placed with the father *without* any risk or welfare assessment having been undertaken, as recommended by Ms Demery, and when there was no information as to how long such an assessment might take place. In addition, the prospect of a such an assessment being undertaken did not address the fact that S *would* be living with the father.

65. Mr Jarman also submitted that the judge also failed properly to analyse the other aspects of the mother's case, namely the fact that, if returned to Ireland, S would be separated from his mother and A. The judge wrongly considered that this part of her case digressed into welfare and he did not, therefore, properly consider the risks for S of being returned to Ireland. This would have included that S has heightened needs; that he has always lived with the mother and A; and that they are "his main sources of emotional security".

66. Ms McKenna pointed to the fact that the mother had agreed to the father having unsupervised contact including holiday and staying contact. She took us to positive messages the mother had sent the father in early 2024 about contact, including in which she had asked the father whether he could have the children for a "sleepover", and to the messages in 2025 in which the mother had proposed that S should return to Ireland with the father. She also pointed to S's situation in England, including that the family had had to move homes a number of times, his "emotional and behavioural difficulties" and the "stark contrast" between the positive nature of his school reports from Ireland, which he had attended full-time, compared to the unhappy situation disclosed by his reports in England.

67. The parties had been engaged in proceedings in Ireland since early in 2023 and which "involved allegation and counter allegation and protective measures being made as applicable to <u>both</u> parents". There had been consent orders for contact and the parents' relationship appeared to be "cooperative and uneventful" with the mother saying that the father's partner was "very good to [the] kids". No application had been made to extend the protective orders when they expired.

68. Ms McKenna submitted that it was a "careful judgment" in which the judge had given detailed consideration to the evidence. His decision could not be said to be wrong. The nature of the harm alleged by the mother "could not be said to amount to a situation which was 'intolerable'". She repeated that the mother had agreed to unsupervised visiting and staying contact in Ireland and had agreed to S returning to Ireland as referred to above. There were ongoing proceedings in the courts in Ireland which were fully engaged with considering the children's welfare.

69. The judge had been entitled to rely on the evidence from Ms Demery. The judge "identified all of the factors and pieces of evidence which he took into account" and did not rely "on any single piece of material or perspective".

70. In respect of the judge's reference to "immediate harm", Ms McKenna submitted that the "very nature of an article 13(b) defence requires a court to look into the foreseeable or immediate future". When evaluating the risk of harm, "the issue of 'immediate harm' is implicit".

71. As for Ground 3, Ms McKenna submitted that the judge was well aware, as he had said, that he "must look holistically at all the strands of M's defence". This included "the impact of the separation of S from his primary carer", which the judge had analysed in his judgment at [113].

72. Ms McKenna submitted that, if contrary to her primary case, the judge's decision was set aside, the matter should be remitted for rehearing.

Law

73. Article 13(b) of the 1980 Convention provides:

> "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."

74. The summary nature of the process and the approach the court should adopt are set out in *Re E*. In the course of their judgment, Lady Hale and Lord Wilson said, at [32]:

> "… in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination."

This was followed by them proposing the approach the court should adopt:

> "[36] There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, *the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or*

> *psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk.* The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues." (emphasis added)

75. The first element in what Lord Wilson called, "the court's general process of reasoning", in *In re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257, at [22], is to consider whether, *if* the allegations are true, they are of such a nature that one or more of the elements within the Article 13(b) would potentially be established. If the court determines that they are of such a nature, the court has to consider whether and how those risks can be addressed or sufficiently ameliorated so that the threshold set out in Article 13(b) is not met.

76. It is well-established that the court will typically have to consider the potential effect of the matters relied on by the taking parent cumulatively and not individually because they will often overlap: see, for example, *In re B (Children)* [2023] Fam 77 at [70]. It is also well-established that the nature of the risk is relevant because, as set out in *Re E*, at [33], "a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm". In the same vein, "the clearer the need for protection, the more effective the measures will have to be", *Re E*, at [52].

77. The meaning of "intolerable" was considered by Lady Hale in *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 ("*Re D*"), at [52]:

> "On this case, it is argued that the delay has been such that the return of this child to Romania would place him in an intolerable situation. "Intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so. In Hague Convention cases within the European Union, article 11.4 of the Brussels II Revised Regulation (Council Regulation (EC) No 2201/2003) expressly provides that a court cannot refuse to return a child on the basis of article 13(b) "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return". Thus it has to be

> shown that those arrangements will be effective to secure the protection of the child. With the best will in the world, this will not always be the case. No one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm."

78. It is recognised that both physical and emotional abuse can establish the existence of a grave risk within Article 13(b). This applies both when the abusive behaviour has been directed against the child and when it has been directed against the taking parent. As was said in *Re E*, at [34]:

> "As was said in *In re D* [2007] 1 AC 619, para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent."

79. It is also clear that the effect of the separation of a child from the taking parent can establish the required grave risk; see, for example, *In re A (Children) (Abduction: Article 13(b))* [2021] 4 WLR 99 ("*Re A*"), at [88], and *In re R (Children)* [2025] Fam 67, at [35].

80. The focus of the exercise is, of course, the child. The court is considering the potential impact on the child if the allegations are true and has to address the specific situation which the child will face on his or her return. As referred to above, as set out in *Re E*, at [52], this is not limited to the immediate situation which the child will face, but can include the longer-term situation "because the need for effective protection may persist". This is a critical part of the process because it provides the context for the court considering whether there are protective measures which might address or ameliorate any potential risks.

81. Finally, to repeat what I said in *Re A*, at [96]:

> "If the judge concludes that the allegations would potentially establish the existence of a grave risk within the scope of Article 13(b), then, as set out in *Re E*, at [36], the court must "ask how the child can be protected against the risk". This is a broad analysis because, for example, the situation faced by the child on returning to their home state might be different because the parents will be living apart. But, the court must carefully consider whether and how the risk can be addressed

> or sufficiently ameliorated so that the child will not exposed to a grave risk within the scope of Article 13(b)."

Determination

82. As referred to above, the judge's ultimate conclusion was that "looking at the defence holistically and bearing in mind the protective measures offered, I have no doubt that the high bar set by (Article 13(b)) is not reached". I recognise that this was not a straightforward case but, for the reasons set out below, I have regrettably come to the conclusion that, as submitted by Mr Jarman, the judge did not properly apply the approach as set out in *Re E* and that his analysis is flawed in a number of respects. The result is that the judge's decision must be set aside. I do not consider it necessary to remit the matter for rehearing because this court is able, fairly and properly, to determine the application.

83. The judge had to consider the cumulative effect of the matters relied on by the mother and decide whether, if they were true, there would, at least potentially, be a grave risk that S would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. Nowhere in his judgment did the judge address this question.

84. The judge might well have been deflected from this issue by his reliance on one part of Ms Demery's evidence. He seemed to consider that her evidence meant that S was at no risk in Article 13(b) terms. There are a number of problems with the manner in which the judge relied on this evidence in his judgment.

85. First, it was for the judge to determine the issue as set out above. The judge appeared to consider that Ms Demery's evidence effectively provided the answer to the case. This, with all due respect, was wrong, because Ms Demery was not suggesting that she was undertaking the exercise required by *Re E*. She was undoubtedly not intending to seek to answer that issue including because she would have recognised that she was not in a position to do so. As she said in her oral evidence, she was *not* making a recommendation as to the outcome of the application. She had already recommended, as referred to above, that a "full risk and welfare assessment" would be required "to ensure the safety of S should he return".

86. Secondly, it is not at all clear what risk Ms Demery was addressing. She referred to it not having been "suggested that S was ill-treated by F". In one sense that might be true but as Ms Demery said in her written report, "Domestic abuse is effectively child abuse, irrespective of whether a child directly witnesses it" or, I would add, is the direct object of abuse. It is, in any event, clear that Ms Demery would not have been addressing the various elements of the mother's case which included her "extremely serious allegations of abuse against F [which were] of the very highest order", the impact of S's "vulnerabilities" and the impact of separation from the mother and A because she was not in a position to do so.

87. Further, the judge's reliance on this evidence was flawed in that it led him only to consider the "immediate" position. As referred to above, the court's assessment is not confined to what will happen immediately on the child's return. The judge seemed to seek to distance himself from the effect of his proposed order when he said that he was "not deciding where S will live in the future" and by suggesting

that he was only "placing S with his father temporarily". The judge was right that he was not making a welfare decision as to where S would live in the long-term but the effect of his order was that S would be living with his father for an indeterminate period of time. The judge linked this to the completion of a welfare enquiry in Ireland but, as he recognised, he did not know how long this would take. Further, in any event, S would be living with the father for this indeterminate period without any "risk and welfare assessment" having been undertaken as referred to by Ms Demery and without any information about, as suggested by Ms Demery, what "alternative interim care arrangements" there were pending such an assessment. If the mother's allegations were true, it would seem, at least, very likely that alternative care arrangements would be required.

88. Additionally, the judge, in my view wrongly, discounted the relevance of S's "vulnerabilities" (as described by Ms Demery) and of his being "a very troubled little boy, with very specific needs" (as described by the judge). The judge rejected this because S "had access to additional help in Ireland" and because a welfare report had been ordered in Ireland. The problem with this is that neither of these addressed the issue which the judge had to consider, namely the potential effect *on* S of the matters relied on by the mother. They did not address the effect of S living with the father if her allegations were true nor the effect of separation from her. As Ms Demery had said, S was "in the highest category of risk of emotional harm". This was undoubtedly a factor which needed to be included in the analysis.

89. I also agree with Mr Jarman that the judge was wrong when he said that the mother's case on the effect on S of being separated from her was "to wander into the territory of S's welfare and best interests". As referred to above, separation from a parent *can* "itself" satisfy the terms of Article 13(b) and needed to be considered as part of the mother's case. The judge did consider it (in paragraph 113) but as a discrete issue and, with all due respect, insufficiently. An important element, especially having regard to S's vulnerabilities, and not referred to by the judge, was the evidence that the mother and A were "his main sources of emotional security".

90. The final concern I have about the judgment is the judge's apparent reliance on protective measures. I have set out his conclusion above which was based in part on "the protective measures offered" by the father. If the judge had found that the matters relied on by the mother potentially brought the case within the scope of Article 13(b), he would have had to consider the issue of protective measures. I return to this issue but, as explained below, I do not consider that the measures offered by the father were such as would mitigate the matters relied on by the mother as to take the case outside the scope of Article 13(b). They were not such as would protect S "against the risk", to quote *Re E*, at [36], because they did not engage with them in any substantive manner.

91. Ms McKenna sought to answer some of these issues by suggesting that returning S to Ireland would create "stability" and that S's removal from the father by the Irish authorities was available as a protective measure. Rather than answering these concerns, these submissions seemed to me further to highlight the flaws in the judge's evaluation because it demonstrated that the judge had not sufficiently addressed the potential impact of his order including because of considerable

uncertainties about the future. The prospect of S's removal from his father would compound the risks consequent on a return order, not ameliorate or address them.

92. For those reasons, I consider that the judge's decision must be set aside and this court should remake the decision.

93. I first consider whether, if the mother's allegations are true, there could or would (subject to protective measures) be a grave risk that the S's return to Ireland would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

94. As referred to above, I consider it important, when answering this question, to include within the analysis who S is because, as was said in *Re D*, at [52], the court has to consider "this particular child in these particular circumstances". By that I mean, in summary, that neither his cognitive nor his emotional maturity are commensurate with his age (the school noted that he "working at a stage" typical of a much younger child); that he is a child who has very specific and challenging needs; that he is "in the highest category of risk of emotional harm"; and that he has always lived with the mother and A, since the middle of 2022 with them alone with visiting and occasional overnight stays with the father.

95. The mother's allegations, to repeat Mr Jarman's summary are as follows:

> "The mother makes extremely serious allegations against the father. These include physical and emotional abuse, controlling and coercive behaviour, threats to kill and sexual abuse, including rape. The mother alleges that the father is a serious cocaine dealer and that S has been in his car whilst he has sold drugs."

I consider that, on the basis of these allegations alone, returning S to Ireland to live with his father would, if they are true, establish a grave risk of psychological harm to S or of otherwise placing him in an intolerable situation. The judge was right when he said these were "extremely serious allegations of abuse" which were "of the very highest order". As Ms Demery said, "[d]omestic abuse is effectively child abuse". This was, no doubt, why she suggested that the "court may also wish to be assured that there are alternative interim care arrangements for S" and why she recommended that a "full risk and welfare assessment of S and his father" would be required in order "to ensure the safety of S should he return". I consider that this is compounded by the fact that S is a vulnerable child who is at risk of emotional harm.

96. It is then necessary to consider that, in addition, S would be separated from the mother and A, who are "his main sources of emotional security" and when he "is agitated at separation from" his mother. This is clearly an additional factor which adds to the risks associated with a summary return of S to Ireland. It also has to be considered in conjunction with S's vulnerabilities and his "very specific needs" which can lead to him becoming "extremely agitated and dysregulated". Ms Demery also noted that the father did "not appear to appreciate the scale of S's difficulties and the support that S would need".

97. The risk of significant emotional instability and emotional harm are clear and, again, compounded by the fact that S is in "the highest category of risk of emotional harm". The effect of returning him to Ireland would be abruptly to remove him from his primary carer and A without any expectation of significant contact including, in particular, face to face contact and without any proper understanding of what will happen in the future.

98. Accordingly, applying the *Re E* approach, subject to the issue of protective measures, the requirements of Article 13(b) would be established in that there is a grave risk that a return to Ireland would expose S to psychological harm and/or would otherwise place him in an intolerable situation.

99. The protective measures proposed by the father were in respect of flights; accommodation; non-molestation; not to pursue proceedings against the mother for abduction; and video contact. None of these would address the mother's allegations in respect of the father's behaviour. None, save possibly for the last, would address the impact of S's separation from the mother and A. However, I do not consider that this limited proposal would, in any meaningful way, ameliorate or address the risks arising from immediate separation from the mother and A.

100. The only other remaining factor is the prospective preparation of a welfare report. I also do not consider this to be an effective protective measure. First, it is only a welfare report and not a risk assessment. Secondly it will not be prepared until after S has been separated from the mother and A and until after S has been living with the father for an indeterminate period of time. Self-evidently, it cannot address or ameliorate the effect of these having already occurred. The only remedial response would be, as submitted by Ms McKenna, to remove S from the father. As referred to above, in my view this would compound rather than ameliorate the risks caused by S's summary return to Ireland.

101. Finally, there is the issue of the court's discretion under Article 13. As Baroness Hale observed in *Re D*, at [55]:

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

There is nothing in the circumstances of this case which could conceivably justify the court exercising its discretion other than by declining to order the S's return.

Conclusion

102. For the reasons set out above, I have concluded that this appeal must be allowed and the father's application dismissed on the basis that the mother has established that Article 13(b) applies and there is no justification for exercising the court's discretion by making a return order.

Lady Justice Asplin:

103. I agree that this appeal must be allowed and the father's application dismissed for the reasons set out by Lord Justice Moylan.

Lady Justice Elisabeth Laing:

104. I also agree.