Neutral Citation Number: [2025] EWHC 2219 (Fam)

Case No: FD 25 P 00231

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 August 2025

Before :

MR. NICHOLAS ALLEN KC

(Sitting as a Deputy High Court Judge)

BETWEEN

YM

Applicant

- and –

ML

Respondent

(Article 13(b): Behaviour: Mental Health: Immigration)

- -

Mr. Jonathan Evans (on 1st July 2025) and **Ms. Miriam Best** (on 6th and 7th August 2025)
(instructed by **Goodman Ray LLP**) for the Applicant

Ms. Indu Kumar
(instructed by **Ellis Jones LLP**) for the Respondent

Hearing dates: 1st July 2025 and 6th and 7th August 2025

Draft judgment circulated to the parties – 11th August 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26th August 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 dated 28th April 2025 brought pursuant to the Child Abduction and Custody Act 1985 (incorporating the Hague Convention 1980) for an order for the summary return to Australia of a child, A (aged 2 y 5 m).

2) The application is brought by the child's father ('YM'). It is resisted by the child's mother ('ML').

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

4) F was represented by Mr. Jonathan Evans (on 1st July 2025) and by Ms. Miriam Best (on 6th and 7th August 2025). M was represented by Ms. Indu Kumar (who appeared *pro bono* on the latter date for which I am particularly grateful).

5) I am grateful to all counsel for the quality of their position statements and for their clear and focused oral submissions.

Background

6) F is aged 37. He is a British national. He works as an Account Executive for Company X. M is aged 40. She is a British national. She works as a part-time Personal Assistant for Company Y.

7) The parties' relationship began when they met in London in August 2020. In July 2022 F secured employment in Melbourne from January 2023 and the parties moved to Australia on 6th December 2022. The parties disagree as to how willing (or otherwise) M was in relation to this move (with M stating she discovered she was pregnant with A on the same day that F received his job offer) but this is not an issue I need to resolve.

8) A was born in Australia on 28th February 2023 (aged 2 y 5 m). He is a British national. He does not have Australian citizenship.

9) On 3rd December 2023 M booked flights for herself and A to travel from Germany to Australia on 27th June 2024 (on the basis that F would then be in Germany to watch the UEFA European Football Championships) and on 3rd April 2024 she booked flights from Australia to England on 11th May 2024 to visit her family. At around the same time as M booked her outbound flights from Australia F booked his flight to Germany. M and A's flight from England to Germany - where they were to join F before all returning to Australia together on 27th June 2024 - were to be booked separately.

10) It appears to be common ground that by early 2024 the parties' relationship was under strain and may have been for some time. In March 2024 F lost his employment following a complaint of unwelcome and inappropriate behaviour towards a female work colleague that was upheld following an internal investigation. He did not secure work again until November 2024.

11) The parties separated on 15th April 2024 after M caught F taking cocaine in the family home. She and A left the family home, initially moving in with F's parents and then in with a friend.

12) On 17th April 2024 – and with F's agreement - M brought forward her flight from Australia to England with A from 11th May 2024 to 22nd April 2024 so she could spend more time with her family.

13) On 2nd June 2024 F travelled to England for a week during which he spent time with A. On 8th June 2024 – i.e. two days before F was due to leave England - M told him that that she had cancelled her flights on 27th June 2024 from Germany to Australia. M informed F she wished to remain in England for longer to undergo a period of counselling and also to celebrate her 40th birthday there in September 2024.

14) It is common ground that F agreed to this. However it is not common ground whether this agreement was conditional (as F asserts) on M confirming to him in writing that she would return to Australia with A thereafter (which was never forthcoming).

15) M states that at the end of September 2024 she realised she had to remain in England to protect herself and A from further emotional harm and that after multiple discussions with F, his actions indicated that he had accepted this. She relies *inter alia* on F having agreed with A's enrolment into a nursery at this time and financially contributing thereto. M also states F did not seem to be setting a date for return and that from September 2024 – April 2025 F's behaviour did not lead M to believe that he would be pursuing a return.

16) This is disputed by F. He states *inter alia* he agreed to A's enrolment in nursery purely from a child-focussed perspective.

17) At the outset of the hearing on 1st July 2025 I was informed by Ms. Kumar that M no longer pursued her defences of habitual residence (the argument that A's habitual residence transferred to England between April – September 2024) or acquiescence. These are therefore factual issues that I no longer need to determine.

18) F first contacted the Australian Central Authority in late November/early December 2024. His C67 Application for A's summary return to Australia was issued on 28th April 2025. On 13th May 2025 Sir Andrew McFarlane P gave directions. This included the listing of a pre-trial review. Regrettably (not least for reasons I set out below) a delay in

M filing her statement (with the consequential delay in F filing his) meant this was never listed.

19) On 16th May 2025 M applied for the instruction of a psychiatrist on an SJE basis. This application was granted on paper by Ms. Nicola Davey KC sitting as a Deputy High Court Judge on 20th May 2025.

20) M attended the final hearing in person. F attended via video-link from Australia.

21) 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 pleaded exceptions/defences

22) As recorded on the face of the order of 13th May 2025, and as confirmed in her Answer dated 6th June 2025, M raised three exceptions/defences:

a) Article 3/4: A was habitually resident in this jurisdiction at the relevant date and in any event immediately before F alleges that his contested rights of custody were breached;
b) Article 13(a): F acquiesced to A remaining in this jurisdiction; and
c) Article 13(b): a return to Australia would expose A to a grave risk of physical and/or psychological harm or would otherwise place him in an intolerable situation.

It was also said that M opposed the application on the basis that she had no legal basis upon which she could reside in Australia due to her immigration status.

23) The burden of proving there is an exception to an order for return lies with the party asserting it as a defence. The standard of proof is the balance of probabilities.

24) As noted above M no longer pursues the exceptions/defences of habitual residence and/or acquiescence.

25) As a result of this I have not had to determine whether the date of unlawful retention was 27th June 2024 (F's primary case) or one of 19th June 2024 or 6th September 2024 (F's secondary case) or late September 2024 (M's case). It was accepted by M that on whatever date the retention occurred it was unlawful and by both parties that the date has no direct bearing on M's Article 13(b) defence. In relation to the latter there was a recital to this effect at paragraph 11 of my order of 1st July 2025.

26) In her position statement for the hearing on 1st July 2025 Ms. Kumar stated at paragraph 52 that *"an important aspect"* of M's Article 13(b) defence was M's immigration position in Australia. The parties are not Australian citizens. They are therefore reliant on temporary visas to regulate their position in Australia. At paragraph 71 she stated that the immigration position *"would undoubtedly create an intolerable situation for [A] who*

could be made to stay in Australia without M, his primary carer. M has serious concerns and would be vehemently opposed to any suggestion that [A] be without her."

27) Ms. Kumar referred me to the letter of an Australian immigration lawyer, Mr. Michael Kah, dated 30th May 2025 which it was said "*has been obtained by M to illustrate to the court the precarious position M finds herself in, in respect of her immigration status in Australia"*. She stated that it was understood that F's solicitors had not objected to this report save that they asked for the documents which were sent to the lawyer, which were provided by M's solicitors.

28) Ms. Kumar then summarised Mr. Kah's letter. Having done so she stated at paragraph 55 that *"F fails to address this properly, if at all, in his evidence, It presents a huge practical hurdle in this matter and the authorities in particular Re T (Abduction: Protective Measures: Agreement to Return) [2023] EWCA Civ 1415 are clear that the efficacy of protective measures and the 'situation on the ground' and in considering the position for a respondent and the child in 'concrete terms' is critical."*

29) Thereafter at paragraph 56 Ms. Kumar stated that "*The only option open to M is to enter Australia on a short term tourist visa which expires within 3 months. … The likelihood of M finding suitable employment within Australia within a 3 month period is extremely low if not impossible"* and at [57] *"[e]ffectively, if the court were to order M to return she would be living in limbo."*

30) In his position statement for the hearing on 1st July 2025 Mr. Evans submitted *inter alia* that (i) M currently has a valid immigration status in Australia and she and A can enter the country without issue; (ii) the extent of this defence in M's statement was less than half a page (paragraphs 51-53). M writes *"I have serious concerns that if [F] loses his employment as he has done in the past, [A] will have no right to reside in Australia"* and *"I have no right to return to Australia on a permanent basis*"; (iii) the issue was not whether M can return on a permanent basis – simply whether she can return whilst long-term decisions are made for A in the country of his habitual residence; (iv) M was seeking to rely on the letter attached to her statement from an immigration solicitor as expert evidence which it was not; (v) M had not made an application pursuant to FPR 2010 r25.4(2) for expert evidence in respect of her immigration status; and (vi) if the court had any concerns over this issue it would inevitably lead to an adjournment of the final hearing at this stage.

31) Having read what was said by counsel about this issue I drew their attention to *Re B (Children) (Abduction: Consent: Oral Evidence) (Art 13(b))* [2023] 1 FLR 911 and in particular the following paragraphs of the judgment of Moylan LJ:

> [85] On the issue of immigration, the mother's case was that she and the children were not entitled to live in Spain … I do not agree with the judge that he was entitled to assume that *'the (Spanish) judicial system will be in a position to deal with that issue in any proceedings'*. If the

mother has no right to reside in Spain, it is not clear to me what proceedings these would be nor, indeed, what the mother's position would be pending the resolution of any such proceedings.

[86] Immigration status was not an issue which featured significantly in intra-Europe abduction cases prior to the UK's leaving the European Union. It is, however, a factor which is now much more likely to be relevant and, I would add, to require expert evidence. The latter is demonstrated by a recent unreported decision in which the judge adjourned the final hearing in order to get expert evidence on the mother's immigration status, as it happens, in Spain. This led to some delay but the evidence enabled the issue to be definitively determined, namely that the mother had rights of residence in Spain. It also emphasises the importance of this issue being raised at the outset of the proceedings so that the need for evidence can be addressed at that stage.

[87] I acknowledge that this issue was raised very late. However, there was an issue as to the mother's residence rights which was also relevant to her entitlement to State benefits, as was made clear by the information provided by the Spanish authorities for these proceedings. In cases where the taking parent is a national of the requesting State or has residence rights, I accept that the court would generally be entitled, absent evidence to the contrary, to assume that they will be able to access State benefits. However, this was not such a case.

[88] I should make clear that I do not accept Mr Turner's submission that this issue was sufficiently addressed on the basis that the mother would be entitled to enter Spain for 90 days and could make a relocation application. The former appears to have been accepted but, even if it is right (and it may not be because the general entitlement applies to visitors and not to someone in the mother's position) there is no information about how long relocation proceedings might take, so the court would still have to deal with the mother's and the children's situation on a return to Spain.

[89] In my view, in the circumstances of this case, the court needs to know what rights the mother and the children would have in Spain in order to address what risks might arise in the event of their returning there. Might this lead to the mother being unable to meet their basic needs? Might it lead to the separation of the mother and the children? It would seem to me that a court might well conclude that the enforced separation of the children from their primary carer in this manner would establish an Art 13(b) risk. As referred to above, without further information, I do not consider that, as submitted by Mr Turner, the latter risk would necessarily be ameliorated by the mother being able to make a relocation application to the Spanish court.

32) In his oral submissions on 1st July 2025 Mr. Evans reemphasised M had a current visa to live and work in Australia but acknowledged this was now *"liable"* to cancellation as it had been granted on the basis that M was dependent on F and that the parties *"live as a family unit"* which was no longer the case. He submitted that the existence of the current visa should be sufficient for my purposes: M could return to Australia and it would then be for her to sort out the position if her visa was subsequently cancelled. He said there would probably be a long period of challenge/appeal but he acknowledged that the detail of M's status during such a time was unknown.

33) On M's behalf it was said that I should *"place significant weight"* on Mr. Kah's letter *"in the absence of other evidence"* and that the issue of immigration was *"intrinsic"* to M's Article 13(b) defence. F had made assumptions over what may happen on M's return that may well not be correct.

34) My view was that (i) F was right to say the letter from Mr. Kah was not admissible expert evidence; (ii) M ought not simply to have attached his letter to her statement; (iii) this was not solved by M providing F's solicitors with the letter of instruction and copies of her visas etc; (iv) this was now a single defence case and hence this aspect of M's evidence had assumed even greater importance; and (arguably most importantly and contrary to how her case had been put before) (v) as it was now being said that this issue was *"intrinsic"* to M's Article 13(b) defence, I had little alternative than to adjourn the final hearing for expert evidence to be obtained as otherwise this risked an evidential and procedural unfairness.

35) Mr. Evans did not disagree with this analysis and thereafter did not oppose the application then made on M's behalf to adjourn for such evidence to be obtained on an SJE basis. I therefore adjourned the hearing and relisted it on 6th and 7th August 2025.

36) In order to ensure there would be compliance with my directions and that there was no risk of the relisted hearing being ineffective I listed a directions hearing on 4th July 2025 on the basis this would be vacated if I was informed that the identity of the SJE and the letter of instruction had been agreed by that date. Both were agreed (the letter of instruction was sent on 3rd July 2025) and this hearing was vacated.

37) The parties subsequently obtained a joint report from Ms. Zefy Souvlakis, a partner at Ethos Migration Lawyers and accredited specialist in Australian immigration law, dated 17th July 2025. Ms. Souvlakis then provided answers to both parties' written questions on 29th July 2025.

38) In advance of the hearing on 1st July 2025 I was provided with (and read) an e-bundle running to 260 pages and detailed position statements from the parties' respective counsel. In advance of the adjourned hearing on 6th August 2025 I was provided with (and read) an updated e-bundle of 391 pages and updated position statements.

39) In reaching my decision I have had the benefit (in addition to the parties' respective statements) of a report from Dr. Lucja Kolkiewicz, Consultant Forensic Rehabilitation Psychiatrist dated 23rd June 2025 (who did not give oral evidence). On 1st July 2025 I directed that if either party sought for Ms. Souvlakis to attend the adjourned final hearing to give oral evidence then they were to make an application to me by 22nd July 2025 to be considered on the paper. Neither party did so.

Article 13(b)

40) 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.

41) 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 MacDonald J summarised at [31] 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).

MacDonald J summarised the law in similar terms (save for a minor amendment to vi)) in *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159 at [67], *G v D (Art 13(b): Absence of Protective Measures)* [2021] 1 FLR 36 at [35], and *E v D (Return Order)* [2022] EWHC 1216 (Fam) at [29].

42) 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 relevant 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.

43) At [32] of *MB v TB (Article 13: Alleged Risk of Oppressive Litigation)* 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.

MacDonald J said similarly in *Uhd v McKay (Abduction: Publicity)* at [68].

44) 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 …

45) In *Re C (A Child) (Abduction: Article 13(b))* [2021] EWCA Civ 1354 Moylan LJ emphasised at [48] and [49] that the risk to the child must be a future risk. At [50] he cited from the *Guide to Good Practice: Part VI, Article 13(1)(b),* published in 2020 by the Hague Conference on Private International Law as follows:

> [35] The wording of Article 13(1)(b) also indicates that the exception is "forward-looking" in that it focuses on the circumstances of the child upon return and on whether those circumstances would expose the child to a grave risk.
>
> [36] Therefore, whilst the examination of the grave risk exception will usually require an analysis of the information/evidence relied upon by the person, institution or other body which opposes the child's return (in most cases, the taking parent), it should not be confined to an analysis of the circumstances that existed prior to or at the time of the wrongful removal or retention. It instead requires a look to the future, i.e., at the circumstances as they would be if the child were to be returned forthwith. The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence.
>
> [37] However, forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That

said, past behaviours and incidents are not *per se* determinative of the fact that effective protective measures are not available to protect the child from the grave risk.

46) With regards to protective measures, in *E v D (Return Order)* MacDonald J at [32] drew the following principles from *Re GP (A Child: Abduction)* [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:

i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.
ii) In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.
iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.
iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.
v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.
vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.

47) Further at [33] MacDonald J stated:

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

48) In *H v O; and Others (Secretary of State for the Home Department Intervening)* [2025] EWHC 114 (Fam) MacDonald J at [45] summarised the principles that will guide the court's evaluation as to whether protective measures are capable of meeting the level of risk reasonably assumed to exist on the evidence before the court in similar terms.

49) In *Re T (Abduction: Protective Measures: Agreement to Return)* [2024] 1 FLR 1279, Cobb J (as he then was) quoted at [49] from the President's *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings* (1st March 2023):

> 3.10. With respect to protective measures (including orders that may be subject to a declaration of enforceability or registration under Art 26 of the 1996 Hague Convention or, where appropriate, undertakings) the court is required to examine in concrete terms the situation that would face a child on a return being ordered. …

He continued as follows [original emphasis]:

> [50] (iii) Protective measures: Effective measures. The guidance and the authorities referred to above are clear. Protective Measures need to be what they say they are, namely, *protective*. To be protective, they need to be *effective.*

50) 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'*

51) Further, as was stated in *G v D (Art 13(b): Absence of Protective Measures)* per MacDonald J at [39] *"it is well established that courts should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting State are equally as adept in protecting children as they are in the requested State".*

52) 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 (Children) (Abduction: Consent: Oral Evidence) (Art 13(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"*.

53) I also remind myself that as stated in *Re B (Children) (Abduction: Consent: Oral Evidence) (Art 13(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).

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

55) There are three core strands to M's Article 13(b) defence:

a) F's behaviour which is said to have been controlling, coercive, verbally abusive, and emotionally abusive;
b) M's mental health issues which it is said would be exacerbated upon a return to Australia; and
c) the uncertainties in relation to M's immigration position.

56) I shall consider these in turn albeit conscious that I also need to evaluate their cumulative effect. The need to consider the issues cumulatively is particularly important in this case given (on M's case) the negative impact the uncertainty over her immigration position has had (and will continue to have) on her mental health.

Domestic abuse

57) M asserts that the parties' relationship was one categorised by verbal and emotional abuse. It is said she felt constantly criticised, that F's alcohol dependency exacerbated the behaviours, and that F has been unable to control himself and exposed A to very harmful behaviours by snorting cocaine on the sofa whilst A and M were in the home. It led to M feeling utterly isolated and unsupported. M fears F and fears his aggression towards her, and he has exposed A to this. M is also concerned that she may (or will) have to be financially reliant on him. She is concerned he will use this against her as he has in the past.

58) In her first statement M refers to the particulars of the domestic abuse she was exposed to by F. She describes F's harmful behaviours towards A whilst inebriated. I was referred to the various derogatory messages from F to M. It is said that were the court to order M's return, she would be in a country on the other side of the world, parenting a young child, with no support network and no employment experience in that country. Like many victims of abuse, M was frightened to tell her General Practitioner about this as she feared the implications but she did seek support from a domestic abuse charity. There are also a number of messages where it is said F demonstrates financially controlling behaviour and speaks to M in a deeply derogatory manner.

59) M's allegations against F are serious ones. Any and all forms of domestic abuse are pernicious and are not to be tolerated. However, notwithstanding this, I do not agree that the allegations made by M of F's abusive behaviour *"taken at their highest"* lead to the possibility of a grave risk to A. Many of M's allegations against F are situational to their

relationship which has now come to an end. M also asserts that the risk of harm to A is emotional harm; she does not assert that there is any risk of physical harm to A. Article 13(b) is forward looking and I made it clear during the course of the hearing that contact between A and F on any return to Australia would be as offered by M/agreed between the parties pending any order of the Australian courts who (per *G v D (Art 13(b): Absence of Protective Measures)* per MacDonald J at [39]) I accept are as equally adept in protecting children as they are in this country (as the contrary was neither alleged nor proved). A would thereby be protected from these harmful behaviours. I also consider that there is some (albeit not perhaps great) force in the observation made on F's behalf that when he travelled to England in June 2024 he stayed close by and saw A both with and without M present (if correct as M disputes this asserting that F's parents who travelled and stayed with F were present when he saw A) and that this puts into perspective M's assertion that A would be at a grave risk of harm upon a return.

60) As the authorities make clear by its very nature Article 13(b) is of *"restricted application"* with a *"high threshold"* and the focus is on the risk to the child. In my view M's allegations, taken at their highest, are not within its scope.

Mental health

61) Dr. Kolkiewicz's report dated 23rd June 2025 notes that M took an overdose in 2007 in response to ending a relationship and has taken the antidepressant citalopram (20mg dosage) daily since 2014 and on and off during her pregnancy. M had counselling in 2022, via the employee assistance programme linked to F's health insurance.

62) Dr. Kolkiewicz assessed M to fulfil the diagnostic criteria for a Moderate Depressive Episode Without Somatic Syndrome. Her current functioning was in keeping with a Mild to Moderate Depressive Episode *"because she is continuing to meet the parenting needs of her son and is (sic) the obligations of her employment."* This chronic depressive disorder *"is generally well managed"* with treatment with antidepressant medication. She concludes that M's prognosis *"will be good as long as she continues to take antidepressants long-term at a dose that can control her symptoms"*. The report goes onto state that *"a return to Australia will act as an additional stressor that will maintain or worsen [M's] anxiety and depression because she will be returning to a country in which her current immigration status does not provide the opportunity to work"* and that *"this will place her at an increased risk of worsening depression including a lack of recovery, until matters relating to [A's] long-term care are resolved".* Dr. Kolkiewicz therefore concluded that "*in my opinion a return to Australia will have a detrimental psychological impact on [M's] mental health and is likely to result in increased levels of anxiety and depression including somatisation*". Dr. Kolkiewicz recorded that on a screening tool Post Traumatic Stress Disorder (PTSD) should be *"suspected"* but her opinion was that M did not fulfil the ICD 10 criteria for PTSD because the stressors she has been exposed to could not be described as events of an exceptionally threatening or catastrophic nature which are likely to cause pervasive stress in almost anyone.

63) Dr. Kolkiewicz further stated that if M was to return to Australia the psychological stress *"could be partially mitigated and managed"* by M:

a) being provided with stable accommodation for herself and A in Australia;
b) being given access to a regular income so that she can maintain herself and A;
c) immediately registering with a GP who can continue to prescribe citalopram, monitor her mental state and develop a plan for managing physical symptoms that are likely to worsen when M is exposed to overwhelming stress;
d) being referred to a local psychological/counselling service for CBT to enable her to build psychological resilience and reduce the risk of relapse and provide the psychological support she will require;
e) being supported to develop a predictable timetable of activities for her and A because she will no long have the support of her local nursery or her father and sister who she currently lives with; and
f) being provided with clear boundaries about F's contact with A.

64) When considering the impact of a return on a respondent's mental health, I bear in the mind the *"critical question"* to be considered as per Lord Wilson in *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 FLR 442 at [34]:

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

65) In *Re B (A Child) (Abduction: Article 13(b): Mental Health)* [2024] EWCA Civ 1595 Moylan LJ stated:

> [51] It can be seen, therefore, that the court has to consider both the likelihood of the risk arising and the nature or gravity of that risk if it does occur. As I noted in *Re S (A Child) (Abduction: Article 13(b): Mental Health)* [2023] 2 FLR 439, at [90]:
>
> > "There is a connection between the nature of the risk and the assessment of whether it is a grave risk within the scope of Art 13(b). The more serious or significant the character of the risk, the lower the level of the risk which 'might properly be qualified as "grave"', and vice-versa."
>
> The effect of this approach, as noted by Lewis LJ during the hearing, is that the court must assess the nature of the risk, the likelihood of the risk materialising and the consequences of the risk materialising for the child. In a case such as the present, for the purposes of determining

whether the circumstances set out in Article 13(b) have been established, this will involve consideration of the nature or extent of any potential deterioration or relapse in the mother's mental health and the nature or extent of any potential impact on A.

66) Thereafter at [54] he reiterated that the *"key question"* is:

> … what is likely to happen if the mother and A were to return … Is the likely effect on the mother's mental health sufficient to establish a grave risk that A would be exposed to physical or psychological harm or otherwise placed in an intolerable situation? As referred to above, this requires consideration of the nature of the risk; the likelihood of the risk materialising; and the consequences of the risk materialising for A. These are for the purposes of answering the ultimate question, namely whether there is a grave risk that returning A … would expose her to psychological harm or otherwise place her in an intolerable situation

67) I am very mindful of all that is said in Dr. Kolkiewicz's report and indeed in M's two statements. I am not however satisfied that the likely effect on M's mental health is sufficient to establish a grave risk that A would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. The nature of the risk is clear: at best maintaining and at worst worsening M's anxiety and depression including a lack of recovery. I accept that this risk may materialise given that a return will act as an additional stressor although the expert evidence is that M's condition can be appropriately managed by medication and that if she is compliant with medication (which she has always been to date) her prognosis is good. The consequences of the risk are increased levels of anxiety and depression including somatisation.

68) However in my view the evidence does not support a conclusion that there is a risk of such a significant deterioration in M's mental health on a return, or of M becoming so psychologically disabled, so as to mean that she would not be emotionally and physically available to A. Ms. Kumar accepted during the course of her submissions that the only evidence about an impact on A in Dr. Kolkiewicz's report was that on any return to Australia M's *"current immigration status precludes her from working and living independently in Australia which would be a significant limitation to her parenting ability*". As I say below I am unsure whether this is an accurate statement as to the limitations on M's immigration status but, in any event, this sole reference to the impact on M's parenting ability is insufficient to satisfy Article 13(b). Further, M does not say that she will not or cannot return.

69) In reaching this conclusion I take into account that the psychological stress *"could be partially mitigated and managed"* (I accept not eliminated) if M benefits from what I have set out at paragraph 63) above. I made it clear during the hearing that if I ordered a return M would be returning to independent accommodation for herself and A (not a property owned by members of F's family), she would receive regular payments from F, she would have the benefit of private medical/health insurance funded by F (F having offered to fund such insurance if M is unable or willing to be covered under the terms of

his employer's employee assistance program or his own private medical insurance policy) and F's contact with A would be as offered by M/agreed by the parties pending any order of the Australian courts to the contrary. Therefore all of the matters listed by Dr. Kolkiewicz that I am able to ensure are put in place to mitigate and manage a worsening in M's mental health would be put in place.

70) I also bear in mind that Dr. Kolkiewicz observed that a return to Australia "*will place [M] at an increased risk of worsening depression including a lack of recovery, until matters relating to [A's] long-term care are resolved."* However, it is regrettably inevitable, as Ms. Best observed, that the current proceedings will not resolve matters relating to A's long-term care and there will be further proceedings either in Australia or in England if M established a defence to this application.

71) There is also I believe one inaccuracy in Dr. Kolkiewicz's report when she stated that M's current immigration status *"precludes her from working and living independently in Australia which would be a significant limitation to her parenting ability"*. I understand that M can work in Australia and also live independently of F (by which I mean separate from) notwithstanding that she was a secondary applicant on the current Skills in Demand visa. As such the *"limitation"* on M's parenting ability may (but I accept it is no more than may) be less than Dr. Kolkiewicz considered was likely to be the case.

72) Therefore in applying the *Re B (A Child), Re (Abduction: Article 13(b): Mental Health)* test although there is a likelihood of the identified risk of *"increased levels of anxiety and depression including somatisation"* occurring on a return to Australia the evidence (which includes what will be in place to manage and mitigate the same) does not lead to a conclusion that this will create a situation that is intolerable for A.

<u>Immigration</u>

73) It is clear from a number of authorities (including *Re T (Abduction: Protective Measures: Agreement to Return*) per Cobb J (as he then was) at [47]) that at final hearing the court is required to examine *"in concrete terms"* the situation which would face a child on a return being ordered.

74) As. Ms. Kumar emphasised this is an unusual (if not a novel) case in that neither party (nor A) is an Australian citizen. They are both British citizens, as is A. They are reliant on temporary visas to regulate their position in Australia. F does not have permanent residency.

75) The key parts of Ms. Souvlakis' report dated 17th July 2025 (and her answer to the parties' written questions) can be summarised as follows:

a) in January 2023 F commenced employment in Australia as a holder of a Skills-in-Demand (sub-class 482) visa;
b) in January 2025 F applied for a new SC 382 visa for himself, M and A. This was granted

to all three applicants on 20th April 2025 and expires on 30th April 2029;

c) at the time the visa was applied for and granted the parties were not '*de facto* partners' in a '*de facto* relationship' as defined by the Migration Act 1958 s5CB. As such the parties did not satisfy the criteria for the grant of the visa;
d) this does not, however, affect the visa which is *"likely in effect and valid as at present"* (quotation taken from the *"key findings"*) and this can be confirmed online at any time. As is stated later in the report *"[t]he visa cannot be deemed invalid after it has been granted, it can only be cancelled if specific grounds for cancellation are found to exist"*;
e) M and A can therefore enter Australia on this visa now;
f) however there is *"likelihood"* that M and A could be stopped at the airport upon entry in Australia for further questioning. This is *"particularly relevant"* if the Australian Federal Police and/or the Department of Home Affairs have been informed of the proceedings, the breakdown of the parties' relationship, and/or if M and/or A is included in an airport watch list at the time of arrival. In her answers to written questions, Ms. Souvlakis noted the risk of M and A being detained at the airport was *"somewhat higher"* given they had not entered Australia since April 2024 (although this was qualified by Ms. Souvlakis stating that *"this could also be affected by other facts, such as specific information available to the ABF at time of arrival"*);
g) there is also *"likelihood"* that if the Department of Home Affairs do not presently have any information on record M may be able to enter Australia with no issues and remain onshore for the remainder of the visa period;
h) the circumstances leading to the application for and grant of the visa *"are relevant in determining the risk associated with this visa being cancelled"* (quotation taken from the *"key findings"*) either before or after M enters Australia;
i) there is *"moderate risk"* (as above) of visa cancellation should the Department of Home Affairs determine that the information provided in the application as to the parties' relationship status was incorrect; and
j) M has "*reasonable grounds"* (as above) to challenge any cancellation of her visa.

76) Ms. Souvlakis' report then goes on to detail the various processes for cancellation of the visa (i) by the Department of Home Affairs before entering Australia (including cancellation without notice or the issue of a Notice of Intention to Consider Cancellation ('NOICC'), the relevant timescales (so far as they can be known) and the grounds that can be taken into account in any request that a cancellation be reconsidered); (ii) by Border Force officials at the airport; and (iii) by the Department of Home Affairs after entering Australia (including the use of the NOICC and timescales (again so far as known)). If cancelled under s116 Ms. Souvlakis states that M *"will have moderate strength arguments"* in favour of revocation of the cancelation and if A is either living with M in Australia or intends to do so *"his interests as a minor child will be given considerable weight"* in favour of revocation but that the weighing of the above considerations is subjective, and the final decision will rest with the delegate conducting the assessment. In her supplementary report Ms. Souvlakis clarifies that the time period varies significantly, from 5-10 working days to 1-3 months depending on the grounds

provided in response and various other factors. Her report also sets out the appeal process that may be invoked following cancellation and the applicable timescales which are considerably longer (10-18 months).

77) Ms. Souvlakis' report also states that before a decision to cancel the visa is made, M will have work rights as the SC 482 visa will be in effect including during the NOICC period. Thereafter if she seeks to review the decision to cancel, she may be eligible for a Bridging Visa E (subclass 050) which can be granted with no work limitations but it will be at the discretion of the delegate to grant work rights.

78) Ms. Souvlakis also sets out the availability of visitor visas which includes the subclass 600 visa (Tourist Stream) which can be granted with an approved stay period of up to three, six or twelve months but to be granted the Department of Home Affairs will need to be satisfied that *M "is genuinely entering Australia on a temporary basis and has incentive to return to the United Kingdom"* and also cautions that M may not be eligible to be granted a visitor visa for a period of three years following the cancellation of the SC 482 visa due to non-compliance (although this exclusion period may be waived in certain circumstances). The process for applying for a visitor visa takes 6-12 weeks (if granted).

79) Ms. Souvlakis also set out the potential availability of other visas but it was seemingly common ground that M was unlikely to be eligible for the same and/or they would be expensive, require sponsorship, were for particular occupations/roles for which M is not currently qualified/suitable, and take extensive time to apply for.

80) In terms of access to medical services (noted by Dr. Kolkiewicz to be important to maintain stability of M's mental health), M is *"required to maintain adequate private health insurance"* imposed on the current SC 482 visa. As a British citizen she may be eligible to enrol to Medicare through a Reciprocal Health Care Agreement (RHCA) between Australia and the United Kingdom, which may allow her to access psychological and counselling services. However any uncertainties in this regard are ameliorated by F's offer to fund a free-standing private health/medical policy for M.

81) In her answers to written questions, Ms. Souvlakis confirms the fees to be represented by an immigration lawyer whilst seeking to challenge the cancellation would be from A$6,600 to A$9,900 and the fees to appeal the cancellation of a visa would range from A$8,000 to A$12,000.

82) On M's behalf it is said that:

a) the uncertainty of the immigration position for M presents a huge practical hurdle in this matter;

b) as M notes in her second statement, the advice within Ms. Souvlakis' reports fills her

with dread. There is no certainty at all to her immigration position or status of her visa. If she remains on the current visa which is based upon a lie, she will constantly be living in fear that this could be cancelled and she would have to then engage in an appeal process which is expensive, has no certain timeframes and the entire process is completely discretionary. The prospect of her visa being cancelled and her having to be separated from A, plainly creates an intolerable situation for A who knows nothing other than M as his primary carer;

c) F fails to acknowledge the impact all of this uncertainty would have upon M's mental health. He does not refer to Dr. Kolkiewicz's report in this regard;

d) M is unwilling to lie to the authorities and constantly be looking over her shoulder. This is precisely the scenario which could lead to serious deterioration in her mental health;

e) if M's visa is cancelled she cannot depart or re-enter Australia throughout the period of any appeal unless granted a bridging visa (which may not grant her any work rights) and is discretionary. She would feel *"imprisoned"* as described in her statement, on the other side of the world and away from her family and support network who remain in England;

f) M does not wish to have any legal association with F or to be reliant on him for her immigration status. She asserts that he has behaved in a controlling and coercive manner. M does not wish to be legally or financially reliant on him;

g) M notes that F's immediate response to this issue following the adjourned hearing on 1st July 2025 was to ask M to return to Australia, lie to the Australian authorities that the parties were still in a relationship, register herself at his address despite being separated and also suggested to M that she should not inform anyone in Australia they have separated. This is not something M should be expected to or would be willing to do and demonstrates an unfortunate lack of insight from F as to the reality of the position. Notably, F does not refer to any of this in his latest statement, however given that his position is that M should simply remain on this visa and can return to live in his parents' flat, it is plain that he would expect M to lie about their relationship; and

h) M fears A is highly likely to be on a watch list in Australia, he was reported to the Australian Central Authority and is therefore known as an abducted child. M has extreme fear about being questioned at the airport. It is causing her extreme distress and anxiety which is entirely understandable in the circumstances. The thought of this is giving M nightmares as set out in her statement. F relies upon a fact sheet and states there were no orders in place and therefore M has not committed any criminal offence. He states that A is not on any watchlist and therefore he does not believe she would be questioned at the airport. There is however no absolute certainty to this.

83) I cannot make findings of fact (and was not asked to do so) as to whether M will be denied entry to Australia and/or what may happen in relation to her visa prior to or after any return. I can only make a reasoned assessment of the degree of likelihood (a phrase I have deliberately taken from *Re R (Child Abduction: Parent's Refusal to Accompany*) [2025] 1 FLR 1225 albeit used by Peter Jackson LJ at [36] in the different context of considering whether a parent with care will not accompany the child on their return). At [38] he emphasised the court is *"assessing likelihood on a summary basis, not finding facts".* In my view this formulation aptly summarises the court's task.

84) Against this background my analysis as to the position prior to any return to Australia or on entry to Australia is as follows:

a) M and A have valid visas to enter and live in Australia and for M to work until April 2029;
b) neither party has received any correspondence stating M's visa has been cancelled or is under consideration of cancellation. The visa is therefore still in effect and valid (which can be confirmed online);
c) given the time period before any return order would take effect my assessment it that it is unlikely that M's visa will be cancelled or be under consideration of cancellation before then;
d) there is no evidence that the Australian Federal Police and/or the Department of Home Affairs have been informed of the proceedings and/or the breakdown of the relationship between the parties and therefore no reason to believe and no evidence to demonstrate that the police or authorities have any reason to question M and A returning to Australia. They are British citizens with a valid Australian visa. The police have never been involved with the family, nor have the Department of Home Affairs; and
e) there is no evidence that A is included in an airport watch list at time of arrival. As I understand the position for a child to be placed on a Family Law Watchlist an application for parental orders would need to be made by someone with parental responsibility for the child and that application must be granted by the Federal Circuit and Family Court of Australia (FCFCOA). There are no current or past proceedings in the FCFCOA regarding A, so he will not be on a watchlist. M's unlawful removal of A is also not a criminal offence in Australia as there is no parenting order in place and no family court proceedings ongoing in Australia; and
f) my assessment of likelihood on a summary basis is therefore M and A will be permitted entry into Australia.

85) F however accepts that:

a) if M's visa was cancelled before returning to Australia, the parties would need to look at options to either contest this cancellation or apply for a different visa. F would not expect M and A to travel to Australia until they knew what visa they would be entering on; and
b) if M is denied entry into Australia, A will need to return to England with M.

86) An assessment of likelihood after any return to Australia is more difficult as it not known when (if ever) any cancellation may be sought. However, even if this process were begun it is clear from Ms. Souvlakis' report that (i) commencement of the cancellation process does not mean cancellation is guaranteed; (ii) M would have *"moderate strength"* arguments to put forward in favour of revoking the cancellation and the fact that A would be living with M would be given *"considerable weight"* in favour of revoking the cancellation. M would continue to have work rights on her existing visa pending any final decision to cancel (including during any NOICC period); and (iii) even if the visa were to be cancelled, M could be eligible for a bridging visa, which can be granted with no work limitations (F is offering a A$15,000 visa fund to be used by M to resolve any visa problems/make new applications).

87) I also take into account that F wants nothing more than for A to be returned to Australia and therefore he will not do anything to undermine M's immigration status. F would have everything to lose if he were to undermine or destabilise M's immigration status. F also accepts that A should continue to live with M and does not seek for them to be separated.

88) I asked counsel to address me on any authorities in which uncertainty as to immigration status was considered of (potential) relevance to an Article 13(b) defence and in particular whether the ability or likelihood of being able to return to the country of the child's habitual residence just needs to be (in Ms. Best's words) *"secure enough"* to allow long-term decisions for the child to be made. I was referred to authorities including the following:

a) *Re W (Abduction: Intolerable Situation)* [2018] 2 FLR 748 – the mother asserted that the children would be in an intolerable situation if they returned to the USA because she would be unable to accompany them by reason of her compromised immigration status. Pursuant to the order made at first instance by Gwynneth Knowles J, the children were to return with the mother if she could obtain a visa, and without the mother if she could not. The mother's appeal was allowed to the extent of discharging the order for return in the event her visa application was refused. As separation of M and A is not sought (nor foreseen) in this case this authority – which held on appeal that for the two children, aged 5 and 3, leaving their lifelong main carer without anyone being able to tell them when they will see her again was a situation they should not be expected to tolerate – provides me with no assistance;

b) *H v O and D, Y and B and Secretary of State for the Home Department* [2025] EWHC 114 (Fam) - per MacDonald J which concerned the mother and the children's immigration status in the Netherlands. However (as is clear from paragraph [68] of the judgment) (i) the Dutch immigration authorities had already put in place steps to revoke the mother and children's present immigration status in the Netherlands; and (ii) were the mother to reinstate her immigration status and that of the children, the timescales for

this were indeterminate and if seeking to do so by way of her own asylum permit, subject to an application to reside with close family members, the mother would have to return to the Netherlands and remain in the asylum seekers centre pending the determination. I do not consider (contrary to what Ms. Kumar submitted) that this case establishes a principle that a precarious immigration status with indeterminate timescales cannot be ameliorated by protective measures and hence such measures cannot ameliorate the 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. Further, in this case no steps have been taken by the Australian authorities to date to cancel M's permit and this is not a refugee/asylum case (which often raise very different issues to non-such cases);

c) *HZ v GA* [2024] EWHC 489 (Fam) per Mr. David Rees KC (sitting as a Deputy High Court Judge) – in considering one aspect of the mother's Article 13 (b) defence the court was satisfied from the expert evidence of a New Zealand immigration lawyer that if a return was ordered the mother would be entitled to enter New Zealand on a tourist visa and remain there for a period of six months, with the possibility of a discretionary extension thereafter. In the judge's view (at [30] (1)) this was *"clearly sufficient time for the mother's application before the New Zealand court to relocate to be properly considered by that court."* I agree with Ms. Best that this provides some support for the proposition that the court need only be satisfied that M can return to Australia for sufficient time for long-term decisions to be made for A in the country of his habitual residence. However, I note that in this case the New Zealand court was already seized of proceedings and by its orders to date (which require steps to be taken within 10 days of any decision of this court to order a return) it had made clear an intention to progress that application expeditiously. No doubt this was something to which the judge gave weight. It is also of note that at [30] (2) the judge did not accept the mother's argument that a grave risk of harm or intolerability arose as a result of the fact that her application before the New Zealand court to relocate with the child to the UK may fail and that if it did she would (absent a new visa being granted) be required to leave the country without the child after six months. He considered that this was a matter for the New Zealand court to consider as part of the overall welfare assessment which it will need to perform within the relocation application and did not assist the mother in establishing a defence to a return order under Art 13(b). In this case F has made it clear that if M has to leave Australia A will do so too; and

d) *K v M* [2024] EWHC 3081 (Fam) per Ms. Naomi Davies KC (sitting as a Deputy High Court Judge) – the expert evidence was that it was highly likely that the US government would facilitate the mother's travel to the US but there was no certainty in this regard now or in the future. The mother relied on this uncertainty as part of her Article 13(b) defence but a return order was made notwithstanding this provided she was granted entry into the USA. I accept that this is authority for the proposition that uncertainty about immigration status may not satisfy Article 13(b) if any order is made (as mine would be) on the basis that the parent and child are both granted entry and are not separated by a refusal at the point of entry.

89) For completeness I was also referred by Ms. Best to *Kent County Council v (1) EK (2) SK (3) MIK and (4) MAK (By Their Children's Guardian) the Secretary of State for the Home Department* [2025] EWHC 450 (Fam) per Garrido J in which the court determined that the operation of immigration and asylum law no longer prevented the High Court from implementing a decision to return a child to another State before their asylum claim has been determined by the Secretary of State, provided that the general principle of non-refoulement is upheld. I do not consider this authority to be of relevance to the issues that arise in this case.

90) I remind myself in this context that the issue for the court is not whether M can return to Australia on a permanent basis – simply whether she can return whilst long-term decisions are made for A in the country of his habitual residence. As Mostyn J observed in *B v B* [2014] EWHC 1804 at [3]:

> All the Convention provides is that the child should be returned for the specific purpose and limited period to enable the court of her homeland to decide on her long-term future. That is all it decides.

91) In saying this I remain very conscious of what Moylan LJ stated in *Re B (Children) (Abduction: Consent: Oral Evidence) (Art 13(b))* - to which I have referred above – when considering the difficulties of a mother who could return to Spain via a 90-day tourist visa. I have cited the relevant paragraphs above. In particular I bear in mind the observations at [89] that "*the court needs to know what rights the mother and the children would have in Spain in order to address what risks night arise in the event of her returning there"* and "*without further information, I do not consider that [the risk of enforced separation] would necessarily be ameliorated by the mother being able to make a relocation application to the Spanish court"*. However, (i) unlike the first instance judge in *Re B (Children) (Abduction: Consent: Oral Evidence) (Art 13(b))* I adjourned the final hearing to obtain detailed expert evidence on M's immigration status; (ii) a visitor's visa is not the only option available to M in this case; and (iii) F is willing to give an undertaking not to separate M and A. I do not consider that this undertaking is undermined by Ms. Kumar's statement (at paragraph 42 of her Position Statement for the hearing on 6th August 2025) that *"it is difficult to really understand what would happen on the ground in this situation"* as I do not read Ms. Souvlakis' report or her answers to written questions as suggesting there is any real likelihood of M and A being separated by the Australian authorities (whether on arrival into Australia or subsequently) and a submission to this effect was not made by Ms. Kumar during the hearing.

92) In making my best assessment of likelihood on a summary basis, not finding facts, and taking into account in particular the decisions in *HZ v GA* and *K v M* (but acknowledging where they differ factually) I am satisfied that it is likely that M will be able to return to and remain in Australia for sufficient time whilst long-term decisions are made for A in the

country of his habitual residence.

93) In reaching this decision I have not given any weight to F's arguments that:

a) the issue of immigration was not raised squarely until Ms. Kumar's Position Statement for the hearing on 1st July 2025 and in her subsequent oral submissions. It is expressly stated in M's Answer of 6th June 2025 that she opposed the application on the basis that she had no legal basis upon which she could reside in Australia due to her immigration status;

b) the extent of M's immigration concerns is set out in less than half a page in her first statement and therefore (as said by Ms. Best) is *"almost certainly"* an afterthought to the M's '*scattergun*' approach to seeking to defend this application, that she did not initially think immigration was a significant issue as she only sought for an immigration expert to be instructed once her other defences had fallen away. In my view a submission such as this gives way to a detailed consideration of the available evidence; and

c) M provided her personal documents (passport and birth certificate) and consented to criminal checks after the parties' separation which she knew would provide her with immigration status in Australia, she did not have any concerns about potentially returning to Australia on this visa when she did this, and she knew that it was a visa in respect of which she was a secondary applicant. I accept (as Ms. Kumar submitted) that M was unaware that *de facto* partnership was required, and this was the visa that had secured F's employment in the past and it was one that was required to secure his employment in the future. I do not go so far as accepting the submission that this was an example of F engaging in controlling behaviour towards M after the end of the parties' relationship.

94) I understand that there were some direct conversations between the parties (including a proposal and counter-proposal) about arrangements for a return between the two hearings in this case. I queried with Ms. Best when she raised the same whether the parties may have considered them to have been 'without prejudice' and was told by Ms. Kumar that the parties may have been at cross-purposes in their discussions in any event. In such circumstances, I did not permit further submissions on this issue and take no account of the fact that any conversations took place as it would be unfair for me to do so.

95) I have observed above that I must also consider the various strands of M's case cumulatively that this is particularly important in this case given (on M's case) the uncertainty over her immigration position has had (and will continue to have) a negative impact on her mental health. I am particularly aware that this is made more acute by the fact that M will remain on F's visa which will no doubt increase this impact. I also acknowledge the potential impact on M's mental health if her visa is cancelled, she is unsuccessful in revoking this, and she therefore has a 10 - 18 month period when the appeal process timescales are underway. It is in context that I consider it of particular importance that (i) F accepts that if M is not admitted to Australia on her arrival (or

indeed if her visa is subsequently cancelled and she is not permitted to remain in Australia and subject to any order of the Australian court) M and A should not be separated and should return to England and that he consents to my making an order to this effect. M's acute - and understandable - concerns in relation to a potential separation from A are (subject to any order of the Australian court) therefore ameliorated; and (ii) M has the full access to the necessary psychological support services which she will have as result of F funding private medical/health insurance on her behalf.

96) I also accept that during the period of any appeal M would be unable to depart Australia at all but this is subject to the discretionary grant of a bridging visa and I would hope that the Australian authorities would look sympathetically upon any such request given M is the primary (if not sole) carer of a young child and in such circumstances is likely to benefit from the support of her English family. However, as I have set out above, I consider the likelihood is M will be able to bring and conclude any application for permission to return permanently to England with A within this timescale.

97) I also acknowledge that if F loses his current employment and is unable to find new employment (and therefore a sponsor) within a period of 180-day period his visa may be subject to cancellation due to non-compliance with his visa conditions and if this happens it will trigger the consequential cancellation of M and A's visa. However, again, I consider M is likely to be able to bring and conclude any application for permission to return permanently to England with A within this timescale.

98) Therefore even taking the various strands of M's Article 13(b) defence cumulatively, bearing in mind that the Article has a high threshold, demonstrated by the use of the words *"grave"* and *"intolerable"*, I am satisfied that there is not such a risk in this case.

99) If, however, I am wrong in this conclusion and M's allegations, at their highest and considered cumulatively, would constitute a grave risk of harm to A or otherwise place him in an intolerable situation, I would be satisfied that (subject to what I say below) the protective measures that are offered are sufficient to mitigate the harm.

100) At paragraph 23 of the statement of Ms. Broadley (F's solicitor) various protective measures were offered. In her second statement M set out the protective measures which she sought to which F responded in his second statement in which he set out the revised protective measures (including so-called 'soft landing' provisions) that he is willing to offer as undertakings:

a) F will fund M and A's return flights to Australia. The paternal grandfather has offered to travel to England to help M with the return leg;
b) F will pay A$15,000 in a dedicated account for M to deal with fees for any visa issues and/or applying for a visa in her own right;
c) A and M can have exclusive use of the Z Street apartment for up to six months upon their return. The family resided in this property prior to A's removal. M would not need

to pay any rent or utility bills during this time (with Ms. Best's position statement confirming that F would fund the same);

d) F will pay a lump sum payment of A$75,000 to M upon her return to Australia. This would be a global figure (inclusive of child maintenance) for M to resettle in Melbourne and help with living costs in the first year. This figure would remain the same irrespective of whether M wanted to stay in the Z Street apartment or not;
e) F will fund A's kindergarten fees up to A$22,000 a year. The kindergarten previously planned by the parties in Melbourne have confirmed they would have a space for A to attend three days per week;
f) F will fund a further A$75,000 for the second year M is in Australia and A$100,000 for the third year (when the family would be eligible to apply for permanent residency). After this, F would continue to fund child maintenance;
g) the paternal grandparents are able and willing to assist with childcare if desired;
h) F will undertake the following (on the basis of no admissions or findings):
    i) not to remove A from M's care save for any agreed or court ordered contact upon their return to Australia;
    ii) not to prevent A travelling outside of Australia with M temporarily for the purpose of renewing, extending or resolving any visa issues;
    iii) not to attend the Z Street property unless agreed with M or ordered by the court;
    iv) not to contact M save through a parenting app for the purpose of child arrangements and matters of parental responsibility;
    v) not to harass or pester M or verbally abuse M;
    vi) not to attend M's address or place of work;
    vii) not to cause damage to any of M's property;
    viii) not to pursue any civil or criminal proceedings against M in Australia associated with A's wrongful removal; and
    ix) not to consume drugs or alcohol before or during any contact with A.
i) in the unlikely event M and A are refused entry upon arriving in Australia, A should return to England with M.

101) I do not consider it is appropriate for M to have to return to the Z Street apartment. I made this clear during the hearing when hearing submissions as to the appropriate protective measures should I order a return. F therefore modified his position to offer payment of a bond for upto six weeks rent on a rental property and pay the first month's rent upfront upto a combined figure of A$10,000 which would be deducted from the A$75,000 offered. I believe this figure is offered as a consequence of the three properties in Melbourne that M exhibited to her second statement which evidence a cost of A$5,200 pm rent/A$5,200 bond, A$7,150 pm rent/A$9,900 bond, and A$7,150 pm rent/A$1,950 pm respectively.

102) I make it a condition of my order that (i) F is to make payment of the bond/deposit and initial month's rent (upto a combined figure of A$10,000) prior to M's return to Australia so that a suitable property is available for immediate occupation by her; (ii) F is to make payment to M of a further A$25,000 so that she has funds available to meet the balance

of six months' rent (i.e. A$5,000 pm and therefore a total of $35,000 inclusive of the bond); (iii) these sums are to be paid in addition to (i.e. not deducted from) the A$75,000 which is to be paid to cover M's other living costs inclusive of child maintenance for the next 12 months (I am satisfied that F has the means to fund M's rent in addition to rather than as part of his offer of a payment for living costs as he has evidenced that he holds funds in one bank account of A$279,811.80 and he is employed in what he describes in his second statement as a *"well paying job"*). He had also offered to fund the bills (and I assume also rent if charged by his parents) in addition to the A$75,000 had M returned to the Z Street apartment). The total of A$132,000 (i.e. A$35,000 and A$75,000 and nursery fees of upto A$22,000) compares to the A$136,000 which M sought to cover living expenses (including rent) and nursery fees for the next 12 months and the A$97,000 (i.e. A$75,000 and A$22,000) offered; (iv) the living expenses and rental monies are not to be held in any form of escrow account which I consider to be unnecessarily controlling; (v) F will pay the lump sum payment of A$75,000 to M so that these are cleared funds in M's bank account by the date of her return to Australia; (vi) F will pay upto A$22,000 towards the costs of an immigration lawyer/visa-related costs rather than the A$15,000 offered (i.e. the upper end of the range referenced within the immigration report rather than the lower end of the range – and it should be noted that M sought only the lower sum); (vii) F will make payment of such proportion of the A$22,000 as M may evidence as being required in advance of any return if M wishes to take any steps in respect of visa issues (including applying for a visa in her own right) prior to her return; and (viii) F will fund an independent private health/medical policy for M.

103) I consider that it is appropriate for the rental monies and the living costs to be paid upfront to M given that I wish to minimise her (perceived) dependence on F so far as I can in the hope that this is beneficial for her mental health. Payment of a minimum of six months upfront (i.e. $35,000 including the bond) was also what was sought by Ms. Kumar on M's behalf as a secondary case if I was to order a return (her primary case was for a payment of 12 months upfront). I also hope that payment of the higher rather than the lower sum for immigration-related issues will provide M with some further assurance.

104) I shall not make any orders in respect of a second or third year in Australia as I do not consider it appropriate for this court to do so.

105) As I also stated during the hearing I do not consider that it is appropriate for this court to deal with interim contact arrangements and therefore do not adjudicate between the parties' respective positions. If F does not consider that the proposals put forward by M (or on her behalf) to be consistent with A's welfare then this will need to be the subject of an application by him to the Australian courts.

106) I will accept these undertakings as offered with the above amendments (and also as amended by the order as to non-separation that I make below).

107) My return order is conditional upon all the foregoing being put in place.

108) The maintenance and similar obligations will be subject to any order varying the same that may be made by the Australian courts.

109) I am conscious of the importance of the issue as to the extent to which the Australian courts would enforce undertakings given to the English court or mirror those undertakings with orders of its own as discussed in *Re T (Abduction: Protective Measures: Agreement to Return)* per Cobb J (as he then was). I therefore asked counsel to provide me with further detail of what the process is in Australia for recognition and enforcement under the 1996 Hague Convention of any English orders made or undertakings given as part of a return order (for instance non-molestation or financial provision for M on return) and whether the parties' positions as to what they sought differed in this regard.

110) In light of the information that there was thereafter provided to F's solicitors from an Australian lawyer and ICACU it was agreed between counsel that the undertakings/protective measures should be orders.

111) On M's behalf it was sought for the order to be registered prior to M and A's return to Australia. It was said to be essential that the order is recognised and enforceable to provide her with the necessary protection should the court order a return. On F's behalf it was said he was not opposed to registration of the order prior to a return but that this was not necessary. F did not want anything potentially to impact entry (although it was accepted there no evidence about this either way). F would also not wish the registration process to delay any return.

112) In my view it is appropriate for the order to be registered prior to M and A's return to Australia so that it is recognised and enforceable to provide M with the necessary protection. This is particularly so because it was common ground that undertakings given to foreign courts are not inherently enforceable in Australia. Therefore although undertakings constitute 'measures' for the purpose of Article 23 of the Hague Convention 1996 I consider this additional protection is required.

113) I also asked counsel to consider the wording of an agreed order regarding separation. Having reviewed their respective drafts and reasoning I shall order that subject to any decision of the Australian court F shall not:

a) remove A from M's care save for any court ordered or agreed contact upon their return to Australia; nor
b) prevent A travelling outside of Australia with M temporarily for the purpose of renewing, extending, or resolving any visa issues provided M supplies full details of the proposed trip in writing to F prior to departure.

In the event of any issues relating to M's visa, F shall not:

a) separate M and A in the event that M is denied entry to Australia at the airport and consents to A remaining M's care if she has to be removed from Australia and returned to England; nor
b) remove A from M's care in the event that her visa is subsequently cancelled and she is not permitted to remain in Australia (subject to any order to the contrary made by the Australian court).

114) As to the date of A's return F proposes M returns with A within one month (this being M's notice period at work). M proposes 12 weeks (i.e. 31st October 2025) to allow her to apply for a visitor's visa if she wishes.

115) This is not a straightforward issue to determine: on the one hand there is force in M's position that she should be able to determine whether to seek to travel to Australia on the existing visa or a visitor's visa and an order for return within a short period would prevent her from being able to apply for and obtain the latter. Likewise there is force in F's position that a further three months delay in what are meant to be summary proceedings is too lengthy (the obligation under the Convention is to order the return *"forthwith"*) and disproportionate and that an application for a visitor's visa could trigger consideration of the current visa and therefore risk its cancellation after which an applicant may not apply for a visitor's visa for another three years (subject to the discretion of the authorities).

116) Given my assessment as to likelihood of M's inability to enter Australia on the existing visa to be less rather than more likely, in my view the appropriate time for the return order to take effect is six weeks after the making of my order or seven days after the registration of the order in the Australian courts (whichever is the later). In my view this balances the summary nature of these proceedings and the requisite protection for M and A which I consider to be necessary in this case. It will also give M a period of time (albeit not as long as she sought) to seek to secure a visitor's visa if she wishes to do so. It is at the lower end of the *"average processing times"* for such a visa.

117) Having found the Article 13(b) defence is not satisfied, the residual discretion to order a return (as considered in *Re M (Abduction: Zimbabwe)* [2008] 1 FLR 251) does not arise. If I had considered this defence to have been made out then (as was accepted on F's behalf) for the reasons given by Baroness Hale of Richmond in *Re D (A Child) (Abduction: Custody Rights)* [2007] 1 FLR 961 at [55] I would not have done so.

Conclusion

118) For the foregoing reasons I am satisfied that (i) M has a valid visa to enter and live in Australia (or may apply for an alternative visa if she wishes) and it is likely she will be able to enter Australia on the same; (ii) any process for cancelling her visa once in Australia would be lengthy and she would have reasonable prospects of challenging the same; (iii) this would allow sufficient time for M to make an application in Australia for relocation back to England if she wanted to do so; (iv) the three strands (domestic abuse,

mental health, and immigration) do not satisfy Article 13(b) taken at their highest individually or cumulatively; (v) in any event the package of protective measures/soft landing provisions offered by F (as amended by me) are sufficient to ameliorate the Article 13(b) risk if they form part of a court order that is registered in Australia prior to M's return.

119) I acknowledge (as Ms. Kumar emphasised at the conclusion of her submissions at M's express request) the importance of M's current support network (which includes her father (with whom she and A live) and sister) and how she fears being isolated on any return to Australia. I acknowledge the particular importance of this given that Dr. Kolkiewicz stated that whether M is in England or Australia *"she will need to ensure that she maintains a network of family and friends so that she has emotional and practical support to further reduce the risk of relapse and worsening of her anxiety and depression"*. I have taken this fully into account. However, whilst I accept that M's father in now in his 70s, as recently as May 2023 he flew from the UK to Australia and spent (*per* F) about three months (and *per* M about five/six weeks) in Australia and there is no evidence that he is no longer fit enough to travel and/or that he cannot afford to do so. Further M does have some extended family in Australia (her father's cousins, their children, and one of his aunts) who live in Brisbane, Queensland which (like Melbourne) is on the Eastern side of Australia although M asserts she has only visited them once and currently has no communication or relationship with them. Further, M's argument that she lacks a support network will be a relevant factor in her application in Australia for relocation back to England if she chooses to so apply.

120) I also acknowledge (as Ms. Kumar also emphasised at the conclusion of her submissions at M's express request) the bond that A has with his maternal grandfather and aunt and have taken this fully into account as part of my assessment of the Article 13(b) defence but this does not lead me to reach a different conclusion.

121) I therefore dismiss the defence raised by M and order a summary return of A to Australia. Such order is to take effect on the later of six weeks after the making of my order or seven days after the registration of the order in the Australian courts.

Addendum

122) On 22nd August 2025 I received a note of proposed corrections to my draft judgment. I am grateful for its preparation. I have accepted both those agreed and those not agreed but (principally in relation to the latter) not necessarily in the exact form suggested.

123) That is my judgment.