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No: FD24P00469

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF D (A CHILD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 April 2025

Before:

MR DAVID REES KC

(Sitting as a Deputy Judge of the High Court)

(In Private)

B E T W E E N :

AF

Applicant

and

AM

Respondent

- -

Mr Graham Crosthwaite (instructed by Shepherd Harris & Co) for the **Applicant**
Mr Jonathan Evans (instructed by Duncan Lewis) for the **Respondent**

Hearing date: 1 April 2025

I direct no official shorthand note shall be taken of this Judgment and that copies of this Judgment as handed down may be treated as authentic
David Rees KC, Deputy High Court Judge

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr David Rees KC:

1. 1This is an application under the 1980 Hague Convention for the summary return of a child (D) to Australia.

2. D is currently 3 years old. He was born in Australia, but since February 2024 he has been living in the UK with his mother. The mother is British by birth but has lived in Australia since 2016 and has acquired Australian citizenship. The father is an Australian citizen, and I understand that D has dual British and Australian nationality.

3. In 2021 both parties were living in Australia. They met in March of that year and they had been in a relationship for only a few months when the mother became pregnant. The child, D, was born early in 2022. There are disputes about the nature of the relationship and the extent to which it was characterised by physical and emotional abuse of the mother by the father. I deal with these allegations in greater detail below.

4. However, matters came to a head at Christmas 2023 when the father threw a vacuum cleaner against a door in the presence of the mother and child. Again, the precise details of this incident are disputed. However, what is not in dispute is that on this occasion the Police were called and attended. Having spoken to the mother and attempted to speak to the father, what is described as a "Police Protection Notice" was issued against the father under the relevant State statute. From its terms I understand this notice to require the

respondent (that is to say the father) to be of good behaviour and not commit domestic violence against the aggrieved party, and to require the respondent to attend a court hearing for the court to consider making a domestic violence order against the father.

5. This led to court proceedings before the relevant State court and on 14 February 2024, a Domestic Violence Protection Order ("DVPO") was made under the relevant State statute against the father. The order was made by consent, and without the father making any admissions as to his conduct. The father was not legally represented on that occasion, although I understand that he had been represented an earlier hearing. The order requires the father to be of good behaviour and not commit domestic violence against both the mother and child, and he must not expose the child to domestic violence. The explanatory notes to the order make clear that the order is nationally recognised across Australia and that contravention will expose the father to penalty of up to three years imprisonment for the first offence and five years imprisonment for subsequent offences. The order lasts for a five year period.

The Removal

6. Prior to the incident at Christmas 2023, the parties had been in discussion about the mother travelling to England with the child for a trip to visit members of the mother's family who live here. As part of these discussions the mother had raised the possibility of their all relocating to the UK, but this had not been explored in detail. In November

2023 the father agreed in principle to the mother and child travelling to the UK for two or three months, although no formal written consent was given. The mother booked flights for her and the child to travel on 29 February 2024, although no return leg was booked.

7. The mother sought advice, which she shared with the father, about international travel with the child. Both the mother (and through her) the father were made aware of the 1980 Hague Convention at this time.

8. Following the incident on Christmas Day 2023 the parents separated and the father moved out of the property that he and the mother were jointly renting. A joint parenting agreement was reached with the mother being the primary carer and the father having the child every other weekend. The father also agreed to pay child support which has been deducted at source from his income.

9. There were then further discussions between the parents about the forthcoming trip. The father told the mother that he was no longer comfortable with the child travelling to England. The mother reiterated her intention to travel and told the father that if he was unhappy with that he should get legal advice and block the child's passport. The father made initial inquiries of lawyers in Australia but given the costs involved did not proceed further or issue an application.

10. By early February the father had ceased to pay his share of the rent on the jointly rented property and, as the mother could not afford to meet the rent on her own, she and the child had to move out of the property. The father had D on 9 February as he was unwell and unable to attend daycare. It was agreed that on 10 February (the father's statement suggests this was 12 February) the father would drop D off at daycare and the mother would collect him that afternoon. However, after collecting the child the mother flew with him to the UK. The father was unaware of this and had not provided consent to the trip. He first learnt of the trip when the mother emailed him on 14 February 2024, after their arrival in the UK. I deal with the email exchange that took place between the parents that day later in this judgment.

11. At that stage, the mother was representing to the father that this was to be a trip of a limited duration - some 4 to 6 months. However, at some point her plans changed, and she formed the intention that she and the child would remain in the UK permanently. She returned to Australia to order her affairs in May 2024, and it was at this stage that the father first became aware that she intended the move to the UK to be permanent.

12. The father submitted his application for a summary return of the child to Australia on 16 July 2024. This was transmitted to the UK Central Authority on 23 August 2024 and proceedings issued on 1 October.

13. Despite the summary nature of a return application under the 1980 Hague Convention here have been a number of hearings in this case. The matter had been listed for a final hearing before Judd J on 25 February 2025. However, on that occasion the hearing was adjourned following a successful application by the mother for permission to obtain an expert psychiatric report into her mental health. A report was obtained from Dr Una McDermott an expert in psychiatry and psychotherapy and the relisted matter came before me on 1 April 2025.

14. At this hearing the applicant father was represented by Mr Graham Crosthwaite of counsel and the mother by Mr Jonathan Evans. I am grateful to both counsel for their excellent and detailed written skeleton arguments and their careful oral submissions. Dr McDermott attended this hearing remotely and I gave permission for the parties to cross-examine her about her report. No other oral evidence was received.

The 1980 Convention

15. The application falls to be determined by reference to the provisions of the Convention. As Article 1 makes clear, one of the objects of the Convention is:

> "to secure the prompt return of children wrongfully removed to or retained in any Contracting State."

The wrongfulness of a removal or retention is governed by Article 3, which provides that: "The removal or the retention of a child is to be considered wrongful where –

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, or under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

16. It is accepted here that:

(1) Both parties enjoyed rights of custody in relation to D within the meaning of Art. 3 of the Convention;

(2) Immediately prior to his removal by the mother, D was habitually resident in Australia; and

(3) The removal of D to the UK was wrongful and in breach of the father's rights of custody under Australian law.

17. The substantive obligation to return is provided for by Article 12 of the Convention. This provides that:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or

administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

The Convention provides for a number of limited exceptions to the obligation to return. For the mother Mr Evans relies upon two of these exceptions namely Arts. 13(a) and (b). These provides as follows:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution, or other body which opposes its return establishes that:
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (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."

18. So far as the Art 13(a) exception is concerned, Mr Evans contends that the Father has acquiesced in the removal.

Art 13(a) - Acquiescence

19. Counsel are agreed that the relevant law on acquiescence can be found in the speech of Lord Browne-Wilkinson in the case of *Re H (Minors)(Abduction: Acquiescence)* [1998] AC 72 at 90.

> "(1) For the purposes of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in *In re S. (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819, 838:
>
> > "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact."
>
> (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.
>
> (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.
>
> (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to

> believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

20. Thus, generally, the abducting parent must show that the left-behind parent subjectively acquiesced in the abduction. However, Mr Evans also places weight on "the exception" identified by Lord Browne-Wilkinson in the final point of his summary, which provides that the defence may still be made out if the words and actions of the left-behind parent clearly and unequivocally show, and have led the abducting parent to believe, that the other parent is not asserting or is not going to assert his Convention rights. That being so, I consider it important to review what Lord Browne-Wilkinson said about this exception in a little more detail. The following passage can be found at page 89-90 of his judgment:

> "My Lords, in my judgment these exceptional circumstances can only arise where the words or actions of the wronged party show clearly and unequivocally that the wronged parent is not insisting on the summary return of the child: they must be wholly inconsistent with a request for the summary return of the child. Such clear and unequivocal conduct is not normally to be found in passing remarks or letters written by a parent who has recently suffered the trauma of the removal of his children. Still less is it to be found in a request for access showing the wronged

> parent's desire to preserve contact with the child, in negotiations for the voluntary return of the child, or in the parent pursuing the dictates of his religious beliefs.
>
> …
>
> The important factor to emphasise is that the wronged parent who has in fact never acquiesced is not to lose his right to the summary return of his children except by words or actions which unequivocally demonstrate that he was not insisting on the summary return of the child."

21. The factors that are said to have given rise to acquiescence on behalf of the father in this case can be briefly stated and largely arise from a somewhat heated e-mail exchange between the parents on 14 February 2024, that is to say a couple of days after the arrival of the mother and child in the UK, and a few hours after the 5 year DVPO was made by the Australian State court against the father.

(1) The exchange began with the mother informing the father that she and D were now in the UK. She stated:

"We are in the UK now, we flew Monday night and plan to stay 4-6 months"

(2) The father responded, pointing out that the mother had previously said that she would not take the child, and then making other accusations against her. That email finished "Goodbye"

(3) The mother's response was to say:

"I simply brought our trip forward by 2 weeks, the trip has been planned since November in which you agreed when I bought the tickets. The trip isn't a surprise." She then asked when the father would like video contact with D.

(4) The father responded

"I don't want contact with you period. I have the order placed and with your lies I am choosing my freedom."

(5) The mother (who did not pick up the reference to the DVPO) responded:

"What order are you talking about? The video-call isn't about me, it's about maintaining contact with your son over the next few months whilst we are in the UK."

(6) The father's response was:

"We can speak in 2029...

I am going no contact as I can never know what lies you will tell and that my freedom is always at threat.

I am done playing your sick game"

(7) To this the mother replied:

"You're kicking off because we went on holiday 2 weeks early?

It's your choice to not have contact with [D]. I'm encouraging you to video call to maintain the relationship with [D] until we come back in a few months and then can arrange contact. Are you not wanting to see him ever again? Just wanting to make sure I'm getting this all correct so our wires aren't crossed.

(8) A little later the mother, having worked out the significance of the 2029 date (the end of the DVPO) sent a further email:

"Just re-reading your email.

You said the order was placed. I didn't realise you meant the [DVPO]. It makes sense to 2029 now.

So you don't want contact with [D] for 5 years?"

22. The father did not reply to these emails. However, a few days later, he posted a message on a Family album app that he had access to which accused the mother of taking D without his knowledge or even having a chance to say goodbye. This led to a further brief round of communication between the parents which I do not need to set out, but which demonstrate an atmosphere of considerable hostility between the parents. Thereafter the father did not communicate with the mother or D until May 2024 when he discovered that the mother had returned to Australia. However, it was not until 4 June 2024 that the mother informed the father that it was her intention that her move to the UK should be a permanent one.

23. For the mother, Mr Evans argues that the father was well aware, prior to the mother and child's travel, as to his rights under the Convention as the mother had already advised him of this. This, coupled with the failure of the father to take steps to secure the child's return, the email exchange of the 14 February in which the father appeared to want to cut

off all contact until 2029 and the absence of any communication from him for nearly four months thereafter demonstrates clearly and unequivocally, Mr Evans argues, that the father was not asserting his right to the child's summary return to Australia and the mother was led to believe this was the case.

24. I do not consider that the facts when properly analysed can support this argument. The email exchange of 14 February took place in the context of the mother's assertion that she and the child had travelled to the UK for a limited trip of 4 to six months. Such a trip had been in both parents' contemplation at one stage (although the father had subsequently withdrawn his consent). Nonetheless, it seems to me that the email exchange has to be seen in the light of the mother's own unequivocal representation that this was to be a trip of a limited duration and the reassurance that she provided to the father that she and D would be returning to Australia.

25. Second, the exchange took place a matter of hours after the Australian State court had made the DVPO and it is clear that both parties, but in particular the father, were in an emotional state. Thus when the father says "We can speak again in 2029", I do not consider that this can sensibly be treated as a clear and unequivocal statement that he did not intend to assert his Convention right to seek D's return to Australia. It is clearly a remark written in the heat of the moment in the immediate aftermath of a court hearing.

26. Thereafter Mr Evans relies upon the father's silence and inaction in order to establish either that the father subjectively acquiesced or that Lord Browne-Wilkinson's "exception" is made out. I am not satisfied that this is sufficient for me to find that there was any subjective acquiescence on the part of the father.

27. Moreover, as the passage from page 89 of Lord Browne-Wilkinson's speech in *Re H* makes clear, the words and actions of the wronged parent "must be wholly inconsistent with a request for the summary return of the child." Here I am concerned not with words and actions but with silence and inaction, and moreover silence and inaction in the context of a clear representation from the mother that she and the child would be returning to Australia within a few months. The events of this case are a long way from the examples given by Lord Browne-Wilkinson in *Re H* and I do not consider that any aspect of the father's behaviour can be considered to be wholly inconsistent with him requesting D's summary return.

28. Accordingly, I find that the mother's defence under Art 13(a) fails.

Art 13(b) - Grave Risk of Harm or Intolerability

29. In relation to the Article 13(b) defence, there was again broad agreement at the Bar on the law and I do not understand there to be any issue between counsel as to the approach that I must adopt. For the mother, Mr Evans relied on the summary of the law contained in the decision of Cobb J in *W & E (Habitual Residence)* [2024] EWHC 2596 (Fam) at [66]

and [68]-[72] whilst for the father Mr Crosthwaite referred me to the decision of MacDonald J in the case of *E v D* [2022] EWHC 1216 (Fam). The extract set out below is from the latter case:

> "[29.] The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2012] 1 AC 144 The applicable principles may be summarised as follows:
>
> i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
>
> ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.
>
> iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.
>
> iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'.

'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.

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

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

[30.] In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process. Within the context of this tension between the

need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

[31.] The methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 WLR 721), and this process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.

[32.] In determining whether protective measures, including those available in the requesting State beyond the protective measures proposed by one or both parties, can meet the level of risk reasonably assumed to exist on the evidence, the

following principles can be drawn from the recent Court of Appeal decisions concerning protective measures in *Re P (A Child) (Abduction: Consideration of Evidence)* [2018] 4 WLR 16 , *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 and *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] 2 FLR 194 :

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

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

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

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

v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.

vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.

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

30. Given that this is a case where the impact of a return order on the mother's mental health is in issue I have had particular regard to the discussion by the Supreme Court in *Re S (A Child) (Abduction; Rights of Custody)* [2012] UKSC 10 of the approach to be taken where the grave risk of harm or intolerability is said to arise from the anxieties of the returning parent. There Lord Wilson, giving the judgment of the court held:

"[27.] In *In re E* [2012] 1 AC 144 this court considered the situation in which the anxieties of a respondent mother about a return with the child to the state of habitual residence were not based upon objective risk to her but nevertheless were of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to the point at which the child's situation would become intolerable. No doubt a

court will look very critically at an assertion of intense anxieties not based upon objective risk; and will, among other things, ask itself whether they can be dispelled. But in *In re E* it was this court's clear view that such anxieties could in principle found the defence. Thus, at para 34, it recorded, with approval, a concession by Mr Turner QC, who was counsel for the father in that case, that, if there was a grave risk that the child would be placed in an intolerable situation, "the source of it is irrelevant: eg, where a mother's subjective perception of events lead to a mental illness which could have intolerable consequences for the child". Furthermore, when, at para 49, the court turned its attention to the facts of that case, it said that it found:

> "… no reason to doubt that the risk to the mother's mental health, whether it be the result of objective reality or of the mother's subjective perception of reality, or a combination of the two, is very real"."

31. In response to a suggestion by the Court of Appeal that the "crucial question" had been whether "these asserted risk, insecurities and anxieties [were] realistically and reasonably held" by the mother and its dismissal of the mother's case founded on her "clearly subjective perception of risk" Lord Wilson continued:

> "[34.] In the light of these passages we must make clear the effect of what this court said in *In re E* [2012] 1 AC 144 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."

32. Mr Evans for the mother also referred me to the further guidance from Moylan LJ in *Re(B) (A Child), Re (Abduction: Article 13(b): Mental Health)* [2024] EWCA 1595 at [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."

33. It is important also to recognise that in a case such as this where the mother relies on both of domestic abuse and mental health issues that I must look at the allegations cumulatively and not independently of each other. In *Re B (Children)* [2022] 3 WLR 1315 at [70] Moylan LJ stated:

> "[70] The authorities make clear that the court is evaluating whether there is a grave risk based on the allegations relied on by the taking parent as a whole, not individually. There may, of course, be distinct strands which have to be analysed separately but the court must not overlook the need to consider the cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk(s) that might potentially be established as well as the protective measures available to address such risk(s)."

Art 13(b) - The Parties' Cases

34. For the mother, Mr Evans has four strands to his Art 13(b) defence namely:

(1) The domestic abuse that he says has been perpetrated by the father towards the mother and D;

(2) The risk of a detrimental impact upon the mother's mental health of a return;

(3) The risk of a potential separation of the mother and child if there is a return; and

(4) The mother's own complicated family situation in England, particularly the terminal illness of her own mother.

Looking at these cumulatively he argues that they present a grave risk of harm or intolerability to D which cannot be overcome by the protective measures that are being offered by the father.

35. For the father Mr Crosthwaite contends that these risks do not arise, or to the extent that they do, they can be addressed by the protective measures that the father is offering. He contends that the mother's allegations, both in relation to the abuse that she says that she has suffered and her mental health, are exaggerated.

Domestic Abuse

36. As I have already indicated there is a significant degree of dispute about the nature of the parties' relationship and the father has sought on a number of occasions to categorise the allegations of domestic abuse that have been made against him as lies. In the context of summary proceedings such as these, I am not in a position to engage in any form of detailed fact-finding exercise. Instead, for the purpose of determining the mother's Art. 13(b) defence I must assess what would be the risk to the child if the allegations made were true, unless I am able to confidently discount the possibility that the allegations would give rise to such a risk (see *Re A (Children)(Abduction: Article 13(b)* [2021] EWCA Civ 939 per Moylan LJ at [92]).

37. However, although there is a degree of dispute about specifics of various incidents, there is sufficient evidence here such that I cannot confidently discount the possibility that on a return the mother and child would be at risk of domestic abuse perpetrated towards them. On both parties' accounts, their relationship has been characterised by arguments. The father's evidence is that the problems only began in early 2023, although I note that in late 2023 the mother informed a psychological counsellor that there was "lots of conflict in the relationship", and that there was a "lack of trust", that she had "always felt insecure in the relationship" and that she felt that the father played "mind games".

38. There was clearly an incident on a holiday in Bali in August 2023. Again, the parties' account differ. However, common to them is the fact that there were significant arguments and there was an incident where the father put his hand on the mother's shoulder. In her statement in these proceedings the mother describes the father as "grabbing her aggressively by the shoulder". In her earlier statement to the Australian Police she describes the father putting his hand on her shoulder but stated "I felt that he was escalating in his aggression towards me". In his statement, the father does not deny putting his hand on his shoulder although he provided an explanation that it occurred as they were passing each other on a narrow footpath on a busy road. I do not see why this should have caused him to make physical contact with the mother in this way, and whether his gesture is properly described as "grabbing her shoulder" or "putting his hand

on her shoulder", there appears to have been an element of physical control or aggression associated with the gesture.

39. The next substantial incident is that of Christmas 2023. Neither parent had done shopping for their Christmas meal and this led to the argument that I have already described. In the immediate aftermath of that incident the mother told the Police that the argument had escalated with the father pushing her out of a room and then throwing a vacuum cleaner "at" the mother which damaged the door. In her statement to this court the mother describes the father pushing her out of the door and picking up D to walk away from the shouting. However the father, in anger, "grabbed the hoover and threw it against the wall in the hallway, damaging a door just slightly away from where [D] and I were stood".

40. In his submissions Mr Crosthwaite sought to make a point about the inconsistencies in these accounts and suggested that the mother was now seeking to exaggerate what had occurred. However, it seems to me that it is in fact the father's accounts of this incident which have changed the most. In a text exchange which appears to have been sent immediately after the incident the father stated "I never hit you I pushed you out of the room as you would not leave". In his first statement to this court the father makes no mention of having pushed the mother but accepted that "following the argument I threw the vacuum cleaner out of the way. [The mother and D] were in another part of the house

but I did not realise that I was in their line of sight.". However, by the time of his third statement, he was seeking to downplay the incident claiming that he simply "moved the vacuum cleaner between my legs with my feet hitting the wall" whilst the mother and D were in another part of the house.

41. Given what the father accepted that he did in his contemporaneous text message and first witness statement, I do not consider his subsequent attempts to downplay this incident to be reliable. This appears to have been a serious incident of aggression expressed by both physical pushing of the mother and the uncontrolled throwing of a heavy object against a wall in the presence of both the mother and the child. Unsurprisingly, this was taken seriously by both the Australian Police and courts and led to the imposition of the DVPO against the father. That order was made with the father's consent. Whilst I accept that he did not make any admissions whilst agreeing to that order, the fact that he chose not to give an account of his behaviour on that evening to either the Police or to the court does nothing to persuade me that I can now confidently discount the possibility that the mother and child would be at risk of domestic abuse perpetrated towards them were a return to be directed.

42. There have been a number of other incidents since the mother's move to the UK which have concerned her, and which Mr Evans sought to categorise as further exercise of coercive control by the father over the mother. These include:

(1) The recording of the father's video contact with the child without the mother's knowledge or consent. This led to a cessation of contact for a period and the father only ceased to record the sessions when ordered to do so by the court. The father's position is that recording was necessary to protect him against unfounded allegations by the mother.

(2) An unsuccessful attempt that was made on 23 January 2025 to access the mother's Microsoft account. The automatic notification of the attempt received by the mother suggests that the attempt was made via an IP address in Brazil. The mother suspects that this was the father, perhaps using a VPN.

(3) An anonymous referral made to UK police and social services on 14 February 2025 which resulted in a welfare visit being made to the mother's property.

(4) A letter dated 20 February 2025 received by the mother from Australian Child Support investigating her financial circumstances ; and

(5) A letter dated 2 January 2025 reviewing the mother's entitlement to council tax / housing benefit.

The fact that these last four matters all occurred within a short period of time may be a co-incidence, although it could be suggestive of a more systematic attempt to apply pressure to the mother. The father denies any involvement in these matters stating that he is not aware of the mother's address in the UK and lacks the computer skills to "hack" her account.

43. What is clear is that the father had been recording his video contact with D without the mother's knowledge or consent, and I note that among the examples of potential domestic abuse identified in the DVPO is the "unauthorised surveillance" of a person. It appeared to me that this could potentially amount to a breach by the father of the DVPO, and I put this to counsel in the course of argument. Mr Crosthwaite argued that the recording of contact sessions did not fall within the definition. I do not consider that I need formally to resolve this point, although I consider the surreptitious recording of a person may indeed be a form of controlling behaviour.

44. As to the other matters, I do not have the evidence to make a finding that the father was responsible for the chain of interventions in the mother's life that have occurred over the past couple of months. That said I do not consider that I can confidently discount the possibility that the mother and child would be at risk of similar events occurring if I ordered their return to Australia. Further, whether or not these interventions were the result of actions by the father, it is clear that the mother sincerely believes them to have been and, as I set out below, that has implications for her mental health.

45. Mr Evans also sought to rely upon the fact that the father stopped paying the rent on the parties' jointly rented property after he moved out as a form of economic coercion. It is certainly clear from their text messages that the father took this step unilaterally, and without informing the mother that he was going to do so. For the father Mr Crosthwaite

sought to present this as an inevitable consequence of the parties' financial position post separation. Nonetheless, it seems to me that the fact that the father took this step without making any prior attempt to communicate with the mother, can fairly be seen as a further example of controlling behaviour on his part.

46. Therefore, when considering the protective measures offered by the father, I consider that I will need to assess them against the risk that the mother and child will be at risk of both physical abuse and controlling behaviour from him should I order the child's return.

The Mother's Mental Health

47. I turn now to consider the evidence that has been presented in relation to the mother's mental health. In this regard I have the benefit of the report of Dr McDermott dated 26 March 2025. The key parts of Dr McDermott's conclusions are as follows:

(1) "[The mother] has a complex and difficult background history. Based on her given history, she has shown resilience, determination, generosity, liveliness, competence and has developed some sense of acceptance/forgiveness towards her parents and family which is consistent with a maturity (emotional) not always achieved in the context of unfavourable upbringings. At the time of assessment she reported; feeling overwhelmed, needing help, on some days feeling she can't cope, and that she is not being listened to. Her history and presentation would, according to the International Classification of Diseases (ICD11), be consistent

with a diagnosis of; (i) 6B43 Adjustment Disorder and (ii) 6C41.11 Harmful pattern of use of cannabis, continuous."

(2) The father's application for a return order has "triggered a shocked and anxiously stressed response in [the mother]. The hacking of her e-mail and Facebook accounts, the anonymous reports to social services and to the police, and the contacts from the Australian and English Benefits Agencies, triggered an intensification of her anxiousness and fearfulness in respect of [the father], because she believes "100%" that he is, probably indirectly, responsible for each of those happenings."

(3) The mother's fearfulness "extends to a dread of how it would be to have to return to Australia, without a place to live, without money, without a job, without childcare, and without any family to hand for support. Further, she fears that [the father] would not abide by the rules of any Court Order, and she said she has fears of him "stabbing me, or killing me"."

(4) The mother's adjustment disorder has been "precipitated, aggravated, perpetuated, and intensified by the above series of events over the last six months."

(5) "Each of these upsetting and critical intrusions into her life have induced, not surprisingly, a sense of a lack of privacy, and safety in her ordinary life. The matter is, more likely than not, aggravated by [the mother's] strong belief that the person behind each of these intrusions, probably indirectly, is [the father]. Whoever the perpetrator may be, the fact remains that these experiences have

been seriously detrimental to the stability of [the mother's] anxiously disordered mental health, and she has not recovered from them."

(6) The mother "is particularly supported by her oldest sister... and by her father, both of whom live locally, are in regular telephone and face-to-face social contact, and offer respite care for [D]. Additionally, [the mother] has three, or four, close friends who are also single parents, who live close by, are aware of her predicament, and are available "to hang out with," together with the children.

(7) The mother has experienced transient episodes of feeling suicidal.

(8) "When under great stress and anxiously overwhelmed [the mother] is aware that she has a marked tendency to withdraw and hide, and in so doing she does not make full use of the supports that could be available to her."

(9) "It is inconceivable to [the mother] that she would be separated from [D]. She is fearful; of her own mental health deteriorating, of her parenting of [D] suffering as a consequence, and fearful for her mortal safety in the event of she and [D] returning to Australia. She is fearful that [the father] – in blaming her for his lack of contact with [D] – could "stab or kill her." She does not trust that [the father] would abide by Court Orders."

(10) "In the event of [the mother] having to return to Australia, more likely than not, her currently fragile state of mental health would suffer a significant deterioration, and her Adjustment disorder could, more likely than not, develop into a clinical depression of at least moderate degree."

(11) "In the event of a significant deterioration in [the mother's] mental health, and the development of a state of clinical depression her parenting functioning could be negatively impacted in the following ways;

[a] Her low / depressed mood would, more likely than not, impact her emotional responsiveness would be likely to be reduced, she might be irritable, her energy levels and motivation could be lowered, and her general level of functioning and reactivity could be reduced.

[b] [The mother] being taken up with / taken over by their own intense, overwhelming emotional states of anxiety and fearfulness would, more likely than not, negatively impact her available mental space to attend to / prioritise [D's] needs.

[c] There could well be an increase in [the mother's] suicidal states of mind, were she to return to Australia. Such states of mind in a parent, more likely than not, are disturbing, frightening, and more likely than not hinder development in a child."

(12) "Based on [the mother's] presentation, and if there were not realistically, readily available; adequate housing, adequate financial resources to ensure adequate food, travel costs, and ordinary services (e.g. gas and electricity), and a nursery placement for [D], more likely than not, [the mother's] mental health would further deteriorate, and probably quite rapidly."

48. The mother told Dr McDermott that she would not feel safe in Australia and that she would not have support there. She also told Dr McDermott that in the light of the recent interventions she no longer felt safe in England and she had taken steps to protect her privacy such as putting Blue Tac over the spy hole on her front door and Sellotaping shut her letterbox at night.

49. She described her mood to Dr McDermott as "generally very up-and down and on some days I feel really bad, and the next day I can be fine. It waxes and wanes. I cry, when I really feel shit", and Dr McDermott described the mother as presenting "as rather intrusively preoccupied with her worries about her safety and her distress about her feared loss of [D]".

50. Dr McDermott was challenged in cross-examination by Mr Crosthwaite. He sought to explore with Dr McDermott whether her diagnosis would be affected if the mother had been exaggerating her evidence. Dr McDermott considered that the mother had been honest with her and had tried to give a fair account of her relationship with the father, for example accepting that they had both argued a lot and had perhaps both been as difficult to live with as each other. Dr McDermott explained that had she considered the account provided by the mother in her interviews not to be credible she would have commented upon this in her report.

51. Dr McDermott made the point that even if the recent interventions from the authorities in the UK and Australia had not been prompted by the father, what was important was their impact on the mother's mental health which had increased her anxiety.

52. Other points put to Dr McDermott by Mr Crosthwaite included:

(1) A reference in Dr McDermott's report to the mother being prescribed an antidepressant in March 2024 was not borne out by the disclosed medical records. Dr McDermott could not immediately identify where she had obtained this information, but considered that it would have come from the records provided to her. It appears that the GP records provided to Dr McDermott were more extensive than those contained in the hearing bundle.

(2) An inconsistency as to whether the mother had reported thoughts of suicide to a GP on 28 February 2025. The GP notes record that no self-harm thoughts were expressed. Dr McDermott took the view that this was a matter on which it was important for the mother to have her voice heard.

(3) Asked about previous instances of anxiety disclosed in the mother's Australian medical records and the fact that she appeared to have responded well to counselling at that time, Dr McDermott commented that the mother was not on those occasions suffering from an adjustment disorder. Dr McDermott explained that everybody has a point beyond which they cannot manage stress. It was previously the case that the mother was able to manage stress, however in Dr McDermott's view the mother has now reached the point where she cannot.

53. In her interview with Dr McDermott, the mother had accepted that she was a regular cannabis user smoking one joint a night (although she stated that she did not smoke it in front of D). Mr Crosthwaite asked Dr McDermott about the mother's cannabis use and the extent to which this may impact on her mental health. Dr McDermott's evidence was less helpful on this point, in that she admitted that she did not have much expertise in relation to substance abuse, and was unaware of academic research in this area. However, she thought that if the use of cannabis was helping the mother to manage her anxiety it may possible be having a protective effect.

54. Dr McDermott indicated that she considered that it was more likely than not that a return would lead to the mother developing a depression, and that was more likely than not to have an effect on her parenting, leading to her becoming less available, less responsive and less kind to [D]. Her view was that if a parent is significantly depressed the child will notice and this will have an impact on the child.

55. Asked questions by Mr Evans, Dr McDermott opined that she considered that it would be "crucial" for the mother to have immediate support upon a return to Australia and that any gap in the provision of support would risk matters deteriorating. Dr McDermott could not comment in any detail on the support that would be provided to the mother in Australia. She did however consider that prolonged uncertainty caused by further legal

proceedings would also pose a significant risk to the mother's mental health.

56. I have some concerns about Dr McDermott's report. I note that she records a fear on behalf of the mother than the father will stab or kill her, which does not appear to have a basis in the father's behaviour to date. I am also concerned by Dr McDermott's lack of knowledge about the impact of the mother's cannabis use on her mental health issues. Nonetheless taking the report as a whole, I consider that I must accept the main thrust of Dr McDermott's evidence. She did not consider that the mother had exaggerated her presentation, and her view was that the mother genuinely held the fears that she had outlined in her interviews. Nor was Dr McDermott swayed in her conclusions by Mr Crosthwaite's challenge in cross-examination and she remained clear that a return to Australia would have a negative impact on the mother's mental health and upon her consequent ability to care for D.

57. I have concluded that even if the mother's cannabis use were to be a contributory factor to her current adjustment disorder (and I have no evidence either way on this point), I should nevertheless accept Dr McDermott's conclusions that:

(1) The mother is suffering from an adjustment disorder;

(2) It is more likely than not that a forced return would cause a significant deterioration in her mental health, and that on the balance of probabilities she would develop a clinical depression of at least a moderate degree.

(3) Were she to do so, her functioning as a parent would be negatively impacted by depressed mood, preoccupation with her own emotional state and potential suicidal thoughts.

(4) This in turn would be likely to affect D as she would be less available and less responsive as a parent.

(5) That if appropriate resources (adequate housing and financial support) were not readily available the mother's mental health would further deteriorate.

(6) That should a return be ordered it is crucial that immediate support should be available to the mother.

Other Matters

58. Mr Evans raises two further matters in support of his Art 13(b) defence. These can perhaps be taken a little more briefly.

59. The first of these concerns the mother's family position in England. Here Mr Evans identifies a number of features:

(1) The maternal grandmother has been diagnosed with terminal cancer. The relationship between the mother and grandmother has not always been close, but the recent time that the mother has spent in the UK has allowed this relationship to be rekindled.

(2) Were a return to be ordered the mother would be placed in an invidious position of either having to leave her mother (to return to Australia with D) or to be separated from D if she wished to spend time with her mother.

(3) The mother's sister is looking after two of her brother's children under a Special Guardianship Order, and the mother is providing her sister with support in this regard.

(4) The mother has identified in her evidence that being unable to be in the UK to provide support to her mother and her sister would take a further toll on her mental health.

(5) It is further suggested that because many members of the mother's family have criminal convictions it would not be possible for them to obtain visas to visit the mother should she return to Australia. However, I have not been provided with any evidence on Australian visa policies and I place no weight on this point.

60. The second matter raised by Mr Evans relates to the potential risk that the mother and D will be separated. The maternal grandmother's terminal illness may require the mother to return to the UK to provide support to her or her close family. The father's position is that if she were to do so, he would be willing to care for D in Australia. I am told that at the last hearing Judd J invited the father to provide his consent for D to return to the UK for a visit if the mother needed to make such a trip; however, he has not done so. Mr Evans therefore argues that there is a risk that if the mother needed to return to the UK to

see the maternal grandmother, this would lead to D being separated from his primary carer.

61. I consider that the circumstances of the maternal grandmother's terminal diagnosis do mean that a return order would pose additional risks to D, both from a possible further deterioration in the mother's mental health, were she required to making the invidious choice between caring for D or returning to the UK to spend time with her dying mother and from the likelihood that (in the light of the father's position) a trip by the mother to see the maternal grandmother would lead to an extended separation of D from his primary carer. These are matters that I must consider cumulatively alongside the other risks identified above.

62. I should record that I am not persuaded by Mr Evans' argument that the mother's inability to assist her sister with caring for their brother's children is, of itself, likely to contribute in any meaningful way to any deterioration in her mental health.

Conclusions on Risk

63. As set out above, there are a number of risks that arise in this case. Namely:

(1) The potential for the mother and child to be at risk of domestic violence and abuse from the father. If the mother's evidence is true there is clearly a genuine and real

risk that (absent adequate protective measures) she and the child will be at risk of controlling, aggressive and violent behaviour from the father.

(2) The risk that (absent adequate protective measures) a forced return will lead to a significant deterioration in the mother's mental health and a consequent impairment in her ability to parent D. In the light of my conclusions as to Dr McDermott's evidence I am satisfied that this risk arises.

(3) Requiring the mother to make the invidious choice between spending time with her dying mother or returning to Australia with D presents the double risk of a further deterioration in the mother's mental health (with its consequent impact on her parenting of D) and the possibility of D being separated from his primary carer (and being looked after by the father, who is the subject of a DVPO).

64. I consider that (absent adequate protective measures being put in place) all of these risks are, on the balance of probabilities, likely to arise were I to order D's return to Australia. I also consider that the consequences for D of these risks arising would be extremely serious. The consequences for a child of witnessing domestic abuse can be serious and D has already witnessed many quarrels between his parents and was in a position to see the Christmas 2023 incident when his father threw a vacuum cleaner. Likewise, the effects that Dr McDermott identified on his mother's ability to parent him, should her mental capacity deteriorate are likely to be serious too. Similar considerations would apply to any prolonged separation of D from the mother, his primary carer.

65. I am of course required to view matters cumulatively. Taking all of these matters into account I have no hesitation in concluding that unless adequate protective measures can be put in place, there is a grave risk that a return to Australia would expose D to physical or psychological harm or otherwise place him in an intolerable situation.

Protective Measures

66. I therefore turn to consider the protective measures that have offered by the father in this case. His evidence is that he is impecunious and this limits the financial assistance that he can provide for the mother and child. He therefore offers:

(1) $6,000 to meet the costs of the air fares and initial financial support on arrival; and

(2) A continuation of child support in the sum of $224 per week.

67. The father is not able to offer separate accommodation, and says he is unable to move out of the property that he is currently renting so as to let the mother live there. However, he has identified a number of individuals who, he says, would be willing to provide accommodation for the mother within their home. He also points to the fact that as an Australian Citizen, the mother, upon returning to Australia would be able to make applications for benefits and financial support. It is also pointed out that the mother and

D will both be entitled to free medical care (in the mother's case for both physical and mental health) under the Australian health system.

68. The father offers other standard protective measures, including:

(1) Not pursuing civil or criminal proceedings against the mother in relation to the abduction;

(3) Not attending the airport on the mother's return;

(3) Not going within 200m of the mother's address (save by agreement for contact); and

(4) Without admissions, not to use or threaten violence against the mother or harass or pester her.

69. I have considered carefully the protective measures that have been offered by the father and have concluded that they do not adequately protect D against the risks that I have identified above.

(1) The total sum that the father is able to make available to the mother is $6,000. There is a dispute between the parties as to the costs of flights, with the father pointing out that the flight can be cheaper if two stopovers are made. Given this will be a flight taken by a mother with mental health issues and a three year old child, I do not consider this is a realistic proposal. A sensible flight duration with

a single stopover would in my view me more appropriate, and this would place the costs at around a minimum of $2,000 and in all likelihood rather more.

(2) This would leave the mother with the weekly child support and lump sum of perhaps $3,000 to $3,500 to meet accommodation and other costs for the period until she was able to obtain access to state benefits in Australia, I have no evidence as to how long such a process may take, but it seems unlikely that the process would be immediate.

(3) I do not consider the accommodation proposals put forward by the father to be realistic. Little or no detail has been provided about the individuals with whom he proposes the mother should live or the accommodation that they can provide and in some instances the mother does not event know who they are. Dr McDermott did not consider that it would be appropriate to require the mother (given her anxieties and diagnoses) to stay with friends of the father, and I share this concern.

(4) As such, the limited funds that would remain after the air fares have been purchased would need to be used in obtaining short term accommodation. It is far from clear that these funds would be sufficient to meet the mother's needs, even until the first hearing of proceedings relating to D before the Australian court or until the mother was able to obtain state benefits. As Dr McDermott indicated, without adequate housing and adequate financial resources, the mother's mental state would be likely to deteriorate further and rapidly.

(5) Equally, it is unclear how long it would take for the mother to be able to obtain access to appropriate mental health services. I note that Dr McDermott considered that it would be "crucial" for the mother to have immediate access to proper support, and she identified that a deterioration in the mother's condition was likely to cause her to withdraw, making it less likely that she would seek it.

70. For the father, Mr Crosthwaite sought to argue that the court should not seek to impose a barrier that would prevent an impecunious applicant who could not afford to pay for accommodation for a returning parent from obtaining a return order. I am clear that I am not doing so. In other cases an offer of accommodation from a friend or relative might suffice to remove the risks to the child that the court had identified in that case. However, here I am looking at the specific risks that are posed to D as a result of his mother's mental health condition as identified by Dr McDermott. On the specific facts of this case I am not satisfied that the accommodation offered by the father, the limited financial support that he proposes or the need for the mother to obtain and rely on state benefits are adequate to meet the risks that I have identified above.

71. As to the risk of the mother and child being exposed to further domestic violence, the fact that it is not suggested that the parents should live in the same household and that D would be living with his mother, would reduce the risk of such incidents occurring. Mr Evans sought to argue that comments made by the father in text messages that he would

not abide by the mother's "made up rules" meant that he would simply not abide by the DVPO. I do not accept that this was the meaning of these texts, which I consider were referring to conditions that the mother was seeking to impose in relation to contact.

72. In any event, I consider that the undertakings offered by the father, coupled with the remedies available to the mother before the Australian courts for a breach of DVPO means that the mother and child could be protected against these risks for so long as the mother herself remains in Australia. I recognise that the mother has lived in Australia for some period of time and has in the past sought to bring a complaint about a breach of the DVPO to the attention of the police.

73. However, I am concerned about the practical situation which could arise should the mother wish to return to the UK to visit her mother. In those circumstances, the father proposes that D should be returned to his care. Of course, I have no doubt that the Australian courts will act promptly to protect D's welfare, but am concerned that the mother could still be placed in the invidious position of having to choose between returning to the UK to see her mother and placing D in the father's care for a significant period of time in circumstances where the domestic abuse allegations have not been properly tested before any court, but there is *prima facie* evidence (from both parties) that D has previously witnessed at least one violent incident.

Conclusion

74. Looking at the identified risks cumulatively, I am not satisfied that the protective measures offered by the father are sufficient to protect D from the grave risk of harm and intolerability that I have found that he would face on a return. Therefore, and taking all matters into account, I am satisfied that the mother has established her defence under Art 13(b). In the circumstances I exercise my discretion under the Convention to refuse to order D's return to Australia and dismiss the father's application.

75. That is my judgment.