IN PRIVATE

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Case No: FD25P00573

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Queen's Building
Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 11 February 2026

BEFORE:

MRS JUSTICE LIEVEN DBE

BETWEEN:

AB

Applicant

- and -

CD

Respondent

MS GERALDINE MORE O'FERRALL (instructed by **Eskinazi & Co, of GT Stewart Ltd**) appeared on behalf of the **Applicant**
MS RUTH CABEZA (instructed by **Dawson Cornwell, Solicitors**) appeared on behalf of the **Respondent**

FINAL JUDGMENT

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(Official Shorthand Writers to the Court)

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IN PRIVATE

The Honourable Mrs Justice Lieven:

1. I am going to read out a judgment. It is going to be moderately long, and it obviously needs to be moderately detailed on the law. So, given particularly the mother's mental health issues, I am going to say at the beginning what I am going to decide. I am not going to make an order for return of the children on either basis. That does not mean anybody should not listen to the rest of the judgment, but I think it is only fair to make that clear at the outset.

2. This is an application under the 1980 Hague Convention for the return of two children to the United States of America, E aged eleven and a half and F, aged seven and three quarters. The application is brought by the father, AB, and is opposed by the mother CD. The mother opposes the return on two grounds- under article 13 of the convention: the child 's objections and grave risk. The father was represented before me by Ms More O'Ferrall and the mother by Ms Cabeza, and I am very grateful to both of them for their assistance.

3. In terms of the chronology, both parents were born in 1986. They met in 2005 in state X , USA and they married in 2011. The mother was born in the UK and is a UK citizen, the father was born in the USA and is a US citizen. Much of the detailed background facts is not particularly relevant, but I note at this point that the mother has a clearly documented history of severe mental health issues, a matter to which I will return.

4. E was born in 2014, and F was born in 2018. The parties separated in October 2019. The mother has at various points made allegations of domestic abuse against the father. However, no such allegations have ever been proved, and in my view they have no relevance to the issues that I need to decide. The divorce was finalised in September 2021, with at that stage a joint custody order, the mother having primary custody and the father having effectively alternate weekends. I am not going to trace precisely where in the United States each party lived at each point, but in terms of the consideration by the US family court system, the court that is seised of the matter is state Y family court in USA Despite the fact that one or both parents have at various times not lived in state Y by virtue of the Uniform Child-Custody Jurisdiction and Enforcement Act ("the UCCJEA"), state Y has retained jurisdiction. Pursuant to the 2021 orders of the state Y family court, the father was ordered to pay sums to the mother in respect of the children. I believe the relevant sum in 2021 was $321 per week. I do not believe that that sum has increased in the following four years. It does not appear to be index linked, as far as I could see.

5. In any event, by 2023 it is accepted that the father was in significant arrears of those sums. The father says in this court that he fell into arrears during a period of unemployment, and the mother promptly went to court. I arm not going to go into the detail of the various sums that were in arrears and the detailed history. However, by September 2023, the arrears were in the region of $9,000, with costs of something over $2,000 on top of that. On 19 September 2023 there was an order of the state Y family court, finding the father in wilful contempt, and sentencing him to 90 days' custody, suspended – this is British legal language, perhaps, rather than state Y– suspended if a portion of the arrears was paid off. There was then a further finding of contempt, and the matter seemed to continue until June 2024, when there was a further hearing before the state Y family court, where it was agreed that if the father paid $4,000 of the arrears off by the end of July, the bench warrant would be lifted. I understand that that sum was paid off. However, there were, of course, considerable arrears still outstanding.

6. At least through 2024, the mother, who was living with the children in rented accommodation, fell herself into arrears on the rent, and was given warning of eviction. On 22 November 2024, the mother and children were evicted from the family home in state Y . On 2 December 2024, the mother and the children flew to England, without informing the father. The mother had met her now husband in May 2024, and they had married in October 2024. I will refer to him as GH He is a US citizen. He left the US with the mother, and is now living in the UK.

7. In the decision of the state Y family court of 17 June 2024, there was an order that the mother had full custody of the children, and that she was permitted to take them out of the United States for 30 days, provided she kept the father fully informed of their whereabouts, where they would sleep each night and telephone contact information. Ms More O'Ferrall makes the point that it is clear, she suggests and I think that is probably right, that from at least June 2024, the father had been confirmed that the mother might remove the children, and that is why the state Y family court made such a specific order. The mother now accepts that when leaving the US on 2 December 2024, and coming to the UK, she did not inform the father and she was in breach of that order. There is a residual dispute about precisely when the father was told but again, I do not think I need to delve into the detail of that. In any event, by reason of the mother 's unlawful removal of the children, the father missed a considerable amount of contact, including Christmas contact that year. Plainly, the mother's actions have had a highly detrimental effect on the father's ability to continue his relationship with the children,

8. The father very promptly made an application in state Y for an order for return in January 2025. The state Y family court made such an order. However, perhaps unfortunately, and he says because he didn't receive the right advice, he did not make an application under the Hague Convention in England until 1 September 2025. So, at least technically, this is not a hot pursuit case, because the children have now been in England for over a year, although it is only fair to record that the father did make a very prompt application in the US. In any event, he made an application in this court on 1 September 2025. There have been various interlocutory hearings, and various experts have been instructed, to whom I will return below.

9. The only other relevant factor in the chronology is that since the June 2024 hearing, the father appears to have paid the maintenance sums for a period, and then stopped paying again, I believe he would say, that he stopped when the mother came to the United Kingdom. He then started again at some point. The current outstanding arrears are $16,642.

10. The mother's position is that she left the US because of impecuniosity and having lost her and the children's home, and that this was directly referable to the father's failure to pay maintenance for the children, and the impact of that on her ability to pay expenses, including rent and medical costs, both for her own mental health and medical costs for the children. I note, to make it entirely clear, that whatever excuse she felt she had for leaving is not relevant to the simple fact that she unlawfully removed the children, did not seek the father's consent, and was in plain breach of the order of the state Y family court.

11. I turn then to the expert evidence that was before the court. There were four experts, Ms Huntingdon from Cafcass on the children's wishes and feelings, Mr Lounsberry, who is an expert on state Y family law and the effect of court orders and enforcement of any English orders, Mr Ladd, who is an expert on US immigration law, and Dr Kolkiewicz , who is the psychiatrist who was instructed to assess the mother.

12. Before setting out their evidence, I need to deal with a key part of the expert evidence which is not challenged. Two days before this hearing commenced, Mr Ladd, the US immigration expert, filed his report. It came in at this late date because he had replaced another expert because of a dispute over fees. Mr Ladd said in terms that the mother would not be able to enter the United States either on the basis of her green card (by which she had been living in the US in the past) because her green card had expired once she moved to the UK and became domiciled here, nor as a visitor. Mr Ladd said in his report that if the mother tried to enter the US as a visitor, having got what is known as an ESTA online, she would be stopped at immigration control and not allowed to enter. His evidence in this regard was not challenged. This evidence puts a significantly different complexion on the case, because it meant that, subject to an issue I will return to below, it was extremely likely that if I ordered the return of the children, they would be returning to the US without the mother, and into the care of the father. I will deal with the impact of that when I assess the evidential position below.

13. I turn then to the evidence of Dr Kolkiewicz. Again, Dr Kolkiewicz evidence was not challenged, and she was not called to give oral evidence. She said that the mother had a clearly documented history of significant mental illness, including depressive illness. The mother was diagnosed as having emotionally unstable personality disorder ("EUPD") and she is currently receiving both medication and what I am going to colloquially describe as talking therapy on the NHS. There is some relevance to the fact that Dr Kolkiewicz records that EUPD does sometimes improve with age, particularly where somebody is over the age of 40.

14. The key passage from Dr Kolkiewicz's report is as follows. She says that if the mother returns with the children to the USA with no financial support package, and the children are removed from her care:

> *"the likely risk of triggering a worsening of symptoms of personality disorder is very high and is likely to result in a range of symptoms of personality disorder re-emerging, specifically symptoms of self-harm. In my opinion, in these circumstances any symptoms of personality disorder triggered are likely to be severe. CD, the mother, would be at very high risk of psychiatric admission, and her suicide risk would be very high."*

I should make clear that this is not simply based on Dr Kolkiewicz carrying out one assessment, but is based on a long history of mental health issues and a very clearly documented background case.

15. In terms of Mr Ladd, as I have said, he was instructed very late, given the withdrawal of the previous expert. As I have also said, his evidence was not challenged. He sets out in detail why he reaches the conclusion she would not be able to re-enter the US either under a green card or on a visitor visa with an ESTA. As I have said, his evidence was not challenged. The only point that Ms More O' Farrell raises on this evidence is in respect of the mother's husband's position. She says that if GH returns to the US, he could then sponsor the mother to obtain a green card and thus the mother could re-enter the US.

16. Although theoretically possible, it is apparent that he would have to return first and then start the process of obtaining the green card. At the present time, there is no evidence that he would be willing to do that, and I have no method of forcing him to do so. But even assuming he were prepared to do so, and I will return to that below when I do my balancing exercise, there is also the issue of the time that it would take; that he would have to be in the US before the mother could join him. It is clear from Mr Ladd's evidence that for GH to

sponsor the mother for a green card, he would have to be domiciled in the US. I am not going to speculate about how long it would take for that to happen, but plainly he would have to return to the US and then meet the test of domicile. Then he would have to apply for the mother's green card. In regard to that, Mr Ladd says:

"For marriage-based cases for overseas clients, I would estimate the overall processing time as in excess of two years, but it depends on actual processing times. I arm limiting this to the hypothetical situation of a US citizen sponsoring his or her spouse. There are two stages" – I am not going to set out the detail of the forms. He then says, "For the former, the current estimate is 17 months, processing of the immigrant visa could perhaps take as little as six months, leading up to scheduling the visa interview at the US embassy in London."

So, on that basis, if that course happened, according to Mr Ladd, it would take something in the region of two years or longer for the mother to be able to re-enter the US by that route.

17. The next expert is Mr Lounsberry, the expert on state Y and US family law. He produced two reports and did give oral evidence and was questioned. He said that the original divorce order in 2021 did not include alimony, which is still the US terminology, and therefore the mother would not be able to apply for an order in state Y that the father pay her alimony or, as we would describe it, financial maintenance, outside the support for the children. His evidence was that if this court required the father to enter into protective measures on return, then these would be incorporated into any order by the state Y court, by way of the UCCJEA. Although Ms Cabeza pressed him that it would be open to the father to apply in the state Y t family court for any such order to be set aside on the basis that he had been effectively forced into giving them by the English court, it was clear that Mr Lounsberry did not think that that scenario was at all likely or that the state Y family court would do anything other than take the rather conventional view that if the father had made offers on the terms of an order, he had done so of his own free will. However, I can deal with Mr Lounsberry's evidence quite lightly, because in the light of Mr Ladd's evidence, it became largely academic. If the mother cannot return to the US, then any protective measures are largely theoretical. In any event, it was clear from Mr Lounsberry's evidence that the kind of medium to long term financial security which Dr Kolkiewicz says the mother would need in order to preserve her mental health, is not something that the UK court on a return order with protective measures would be able to ensure.

18. Finally in terms of the expert evidence, I turn to that of Ms Huntingdon, the Cafcass officer who undertook a wishes and feelings report in respect of the children. She had met the children initially together and then both separately. She gave her evidence, as one would expect, in a highly professional, careful and well-balanced manner and I give it maximum weight. She said that from her understanding of the position with the school, and from talking to the children, the children are both very well settled at school in the UK and doing well.

19. She spoke to F first. He was positive about living in the United States. He said that time with his father was *"pretty good"*. He referred to father sometimes being angry *and "screaming a lot''*, but Ms Huntingdon's impression was that this did not fall outside the bounds of acceptable parenting. Many of F's answers were about his preference relating to food, and where he got the better food, which is not surprising for a seven-year-old, but does perhaps suggest he does not have very strong feelings about where he lives. It is worth noting that when asked to rate staying in the UK over going to the US, he gave going to the US a two out of ten. But I note that it seemed a relatively light-hearted two out of ten, as far as I could tell. All of this suggested that F did not strongly object in principle to returning to the US, albeit he would prefer to stay in the UK.

20. However, Ms Huntingdon did not ask him about the possibility of returning to the US without his mother. In my view she was right not to do so, as it could have been extremely worrying and upsetting for him to be contemplating that scenario, and it cannot be intended or allowed for the court process itself to inflict trauma on children. I note that when Ms Huntingdon met the children, Mr Ladd's report had not been produced, and everyone was proceeding on the basis that the mother could return to the US, if she was prepared to do so. The mother had made clear to Ms Huntingdon that if the children were ordered to return, she would go with them. Ms Huntingdon's view was that if F had been directly asked about his views on going to live in the US without his mother, he would have been strongly opposed. She has always been his primary carer, and they have a strong relationship, as one would hope and expect with a seven-year-old.

21. In relation to the father, F said he spoke to his father three times a week, which he described as "pretty boring'', but the father should not take that in any way personally. F appeared relatively untroubled about not seeing the father. To my mind, it demonstrates the difficulties, which I acknowledge will arise, with F maintaining a relationship with the father if he does not return to the US. In terms of maturity, Ms Huntingdon considered F to be an intelligent child who could discuss his views and was slightly more mature than his chronological age.

22. In terms of E's position, this was more clear cut. E identifies as being non-binary, and I will describe them as they. E described enjoying time with the father and with the paternal father. They said the best aspect of being in the US was lots of friends, and the worst was it being quite dangerous. As far as Ms Huntingdon could understand, this seems to relate to violence in US schools, rather than anything more specific. E said that they would not wish to return to the US, giving the strength of their feeling against a return as being eight out of ten. The conversation then turned to the possibility of them returning to the US without the mother, something which E appears to have realised for themselves was at least a possibility. At this point Ms Huntingdon said that E became so upset that she had to stop the conversation and Ms Huntingdon had to get the mother to come into the room to comfort E. E was clear they wanted to maintain the relationship with their father through him visiting the UK twice a year and through electronic contact. So, this is not a case where they are showing opposition or dislike to their father, they are simply of the very clear view that they want to live with their mother and do not want to be separated from her. E wrote a letter to the court, which I will read.

"I want to stay with my mother. A few reasons. The first one is that she gave birth to me and my brother, so it should be her choice. Another reason is that I believe I should be able to choose who I spend my life with. The final reason is that my mother supports me as my father doesn't. I am non-binary and lesbian, and my father says I don't know what I am talking about. My mother doesn't believe in God – I think that says nor I do. My mother supports me in anything I do. When I told her that I was non-binary, she immediately told everyone to start referring to me as they/them. Although sometimes she forgets, as soon as I remind her, she apologises. I hope you understand where I am coming from. E''

23. Miss Huntingdon said that she did not consider that the children had been influenced by the mother, and they were expressing their own genuine and authentic views. They both showed balance and thoughtfulness in their views and were unaware of the financial issues that had impacted on the mother. Miss Huntingdon said E was an intelligent young person who was articulate and capable of a quiet confidence. She conveyed a balanced view, emphasising their own wishes and feelings. It was Miss Huntingdon's assessment that E's level of maturity was somewhat above her chronological age.

24. I turn then to the law and the analysis. The mother, as I have said, opposes return on two grounds: child objections and grave risk. The parties agree, at least in principle, on the law that I should apply, and I therefore do not need to set out a comprehensive summary of the law. However, it is important to start by being clear about the purpose of the Hague Convention. I simply quote Baroness Hale in *Re E (Children: Abduction Custody Appeal)* [2012] 1 AC 144, paragraph 8:

"The first object of the Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result 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 dispute can be determined there. The left-behind parent should not be put to the trouble and expense of coming to the requested state in order for factual disputes to be resolved there. The abducting parent should not gain an unfair advantage by having that dispute determined in the place to which she has come."

I am going to take that as the policy of the Convention.

25. Article 13 in respect of children's objections states:

"The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

There are numerous summaries of the law in this area. I will refer to that of Williams J in *Re Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return)* [2019] EWHC 490 (Fam), at paragraph 50, where he summarised the previous *Re M* cases [2007] 1 AC 619 and [2015] 2 FLR 1074, and *Re F* [2015] EWCA Civ 1022. I simply choose this because it is relatively short.

"i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before article 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.

iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.

iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.

v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general,

children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

vi) Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations."

Various versions of that summary arise in various different cases.

26. I think the only two other cases I need to refer to are Black LJ (as she then was) in *Re F (Child's Objections)* [2015] EWCA Civ 1022, at paragraph 35, where she was critical of the glosses on the meaning of "objection" and said:

"Whether a child objects is a question of fact, and the word 'objects' is sufficient on its own to convey to a judge hearing a Hague Convention case what has to be established; further definition may be more likely to mislead or to generate debate than to assist."

27. It is clear from the various judgments summarised by Williams J above that discretion is at large. I should refer to one other case that Ms More O'Ferrall placed considerable weight on. That is the judgment of the President and Mr Mandalia, sitting as a Deputy High Court Judge, in a case reported as *A v B & C & D* [2024] EWHC 1626. I will return to this case under "grave risk" and explain its factual position there, but there is one paragraph in respect of "child's objection" which Ms More O'Ferrall relies on. That is paragraph 58, where the President said:

"The law on the exercise of discretion is well settled. The leading authority is Re M (Children) (Abduction: Rights of Custody) [2007] UKHL 55. The test does not require a finding of exceptionality. It is different from an ordinary 'welfare test', where the welfare of the child is the paramount consideration; welfare is a factor, but not paramount. Regard must be had to the policy of the convention. The range of factors to be considered may be even wider than in other exceptions to the making of a return order."

28. Applying that law to the facts of this case, the initial question is whether the gateway is passed in respect of E's objection. Ms More O'Ferrall accepts that it is passed for both children. In my view that concession, certainly in respect of E, is correctly made. Both in their letter to me and in their assessment by Ms Huntingdon, it is apparent that E has a clearly formed objection to returning to the US. The fact that they express that in fairly calm terms, and that they can very much see the positives in retaining a relationship with the father, should not diminish the clarity of E's view. It is to the mother's credit that this is not a case where she appears to have tried to influence the children, or put them in a position where they feel they have to express vehement dislike of their father or of the US. But E's objection to return is very clear. E is eleven and a half years' old; they are intelligent and articulate and fairly mature for their age. Although their views are certainly not determinative, they are in my judgment worthy of significant weight. As I often say in this type of case, it is E's future I am deciding upon, and as such, E's clear and articulate views are worthy of very considerable respect. However, further than that, it is apparent that E is particularly strongly opposed to returning to the US without their mother. That is hardly surprising, given that

their mother has been their primary carer throughout their life. E views the mother as their primary and particular support in respect of their current identity. This is obviously a particularly sensitive time for E, and being removed from the mother at this time would be particularly difficult.

29. F's position is less clear cut. He is seven years old, and in terms of what he articulates, he refers to where he will get the best food, and be allowed to play more computer games. However, he was also clear that he wished to stay in the UK. Alone, this might not cross the gateway test. But in my judgment the position is changed when it is clear that if he returns to the US, he would do so without his mother. This would be likely, in my judgment and I find, to be a very much stronger objection. However, for the reasons that I will explain below, it is not necessary to found any decision that F should not return to the US on his objections.

30. Having found that the gateway is passed, I then have to consider the broad discretion. There is a broad range of relevant factors in this discretion. First, and in no particular order, the policy of the Convention, as it is explained above. It is important not to effectively reward those who abduct children and who do not go through the proper processes. Where possible, it is important to facilitate a speedy return to the country the child is habitually resident in, and where the court in that country is best placed to make decisions. But having said all of that, in the policy of the Convention, the child's best interests remain an important consideration: see Baroness Hale.

31. One factor that is relevant here is that this is not a hot pursuit case. The children have been in the UK now for over a year, so although the habitual residence test is not met, they have put down some roots here. Secondly is the strength of the children's objections. I have explained those in detail above. They are strong, but not at the absolute extreme that one sometimes sees in these cases. It is however important that both children are happy and well settled here and doing well in school. It is also important, trying to be child-focused, that E obviously feels more relaxed in their identity here than they think they would do in the US. Thirdly – and this refers back to F position – nobody suggests that one child should be returned without the other. The father, to do him absolute credit, made clear during oral argument that he was not submitting that one child should go without the other. In my view that is clearly correct. In a situation of parental conflict, siblings are often a particularly important source of support to each other. I would not contemplate separating the siblings in this case.

32. Fourthly, it is very important that the children do have a good relationship with the father, and that there are no significant allegations against the father in terms of how he treats them. Fifthly, if the children remain in the UK, I accept it will be more difficult to retain a full relationship with the father. This may be less problematic for E, because they are older, but for F to maintain a meaningful relationship will be difficult. That has to be acknowledged. It is not easy for a seven-year-old to maintain meaningful relationships through electronic communication alone. I do say at this point, given that I have already said what my decision is going to be, that the burden is on the mother to do her utmost to ensure that F does maintain a relationship with his father. That relationship is a really important part of who F is, going forward. F is in the happy position where he will, effectively feel he has two fathers, which should be seen as a benefit, not a dis-benefit. Sixthly, it must also be of some relevance, although I accept quite limited relevance in the Hague Convention, that the children are happy and well settled in school here and doing well.

33. In holistic terms, the most important factor in my judgment is the position of the mother. First, the evidence is clear that she cannot return to the US, absent action by GH . Mr Ladd's evidence is clear and unchallenged. That situation may be of her own making, by leaving the US and becoming domiciled in the UK, but the role of the Convention is not to punish

a parent, but rather to focus on the interests of the child. In terms of whether the mother could go back to the US if GH went back first, the position is somewhat unclear. GH manifests no intention to do so, but I accept that it might be open to the mother to persuade him, if the children were ordered to return. But even then, on the evidence of Mr Ladd, he would have to return to the US to re-establish domicile before applying for the mother to be able to join him. The evidence suggests that that process would take at least two years. That was the evidence in Mr Ladd's report and although Ms More O'Ferrall now, I think, seeks to doubt that, she did not challenge Mr Ladd on it. In my judgment, there are too many unknowns on this issue for me to place much weight upon the possibility that the mother may be able to re-enter the US at some point in the future. GH is a third party, and I cannot force him to return to the US. There is then the question of whether he would actually evince the necessary intention to regain domicile and there is the significant and uncertain period whilst any application is processed. On any analysis on this evidence, there would be a significant period when the children would be in the US without their mother, and it is clear that is something they would be extremely unhappy about.

34. Taking all those factors into consideration, I have no doubt that the discretion falls in favour of the children remaining in the UK with their mother, but having frequent electronic contact and hopefully direct contact in the UK as often as the father can manage. I take this decision with full consideration of both of the policy of the Convention and the impact on the father's relationship and the children's identity.

35. I turn then to the issue of grave risk. Article 13(b) of the Convention provides that the defence is established in respect of a child if the court finds that:

"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."

Both parties refer to the Supreme Court decision of *Re E (Children)* [2011] UKSC 207, the speech of Lady Hale and Lord Wilson. I am not going to set out very long passages from this speech, and what is below is not intended to be a gloss upon it, or even a comprehensive summary. Critically, the judgment of the Supreme Court needs to be read and applied as a whole. The particular passages to which I have been referred include paragraph 15, where the court sets out its analysis of the objectives of the Convention:

"Nowhere does the Convention state that its objective is to serve the best interests of the adult person, institution or other body whose custody rights have been infringed by the abduction (although this is sometimes how it may appear to the abducting parent). The premise is that there is a left-behind person who also has a legitimate interest in the future welfare of the child: without the existence of such a person the removal is not wrongful. The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution. Hence the next assumption is that the best interests of the child will be served by a prompt return to the country where she is habitually resident. Restoring a child to her familiar surroundings is seen as likely to be a good thing in its own right. As our own Children Act 1989 makes clear, in section 1(3)I, the likely effect upon a child of any change in her circumstances is always a relevant factor in deciding what will be best. But it is also seen as likely to promote the best resolution for her of any dispute about her future, for the courts and the public authorities in her own country will have access to the best evidence and information about what that will be."

However, it is clear that that assumption about return can be rebutted, and return is by no means automatic.

36. At paragraph 32, the burden of proof is on the person resisting return. At paragraph 33, *"the risk to the child must be 'grave'."* In paragraph 34: *"the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'."* At paragraph 35, effective protective measures may be critical. I emphasise that I have read and carefully considered the entirety of that judgment.

37. There are copious other judgments on what article 13(b) means, but ultimately, its application is one of fact on this specific case. Ms More O'Ferrall, as I alluded to above, places considerable reliance on the first instance decision of the President and Mr Mandalia in the case that is reported as *A v B*, a decision where the first instance court decided that the children should return to the US. The case has a considerable history, because after that decision, the mother then applied to set aside the return order. The court refused to so set aside, and that refusal was then appealed to the Court of Appeal in a judgment which is reported as *Re R* [2025] EWCA Civ 1426. The Court of Appeal set aside the first instance's court refusal to set aside the return order. The central issue in the court of appeal was that the President had assumed that the children would be placed in foster care in the United States, because they could not, on the English court's analysis, be placed with the father. However, the United States court disagreed and rejected the possibility of foster care. In those circumstances the Court of Appeal held that the High Court had been wrong in respect of the set aside application. However, Ms More O'Ferrall relies on the first instance decision to return the children, and the court's approach to both child objections and grave risks. In respect of child objections and discretion, I have dealt with the matter above.

38. In my view, this judgment is of only limited assistance, because ultimately, even where the first instance judgment is that of the President, it necessarily turns on its own facts. The facts of *A v B* were significantly different from the present case, because in that case both mother and father were United States citizens. The mother's allegations against the father had been expressly rejected, both in the United States court and by the first-tier tribunal here. There was therefore extremely clear evidence of parental alienation (to use a much-disputed term) by the mother. In terms of the children's best interests or discretion or balance or however one wants to put it, the mother's asylum application in the UK had been refused, so her immigration status here was extremely precarious.

39. At paragraph 30 of the judgment, the President quotes the decision of Baker LJ in *Re IG (Child Abduction: Habitual Residence: article 13(b))* [2021] EWCA Civ 1123 at paragraph 47. That says, in part:

"The relevant principles are, in summary, as follows.

[(1) repeats the test.]

(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."

I do not think it is necessary to read the rest, although I have taken it into account.

40. Ms More O'Ferrall also relies on paragraph 52, where the President said:

"We have also taken some supportive account of the fact that, in contrast to a case where a grave risk of physical or psychological harm is established on the basis that the children are returning to a situation which will bring them back into contact with an abusive parent, no aspect of what is said to be intolerable in the children's situation arises from any action or risk of harm relating to their father. The difficult situation that the children are currently in has been entirely generated by their mother's actions."

I note that, similarly in this case, there is no suggestion that returning the children to the father places them at any risk from him as to physical or psychological harm.

41. Ms Cabeza relies on the case of *Re W* [2018] EWCA Civ 664, a case where Gwynneth Knowles J had ordered the return of young children aged five and three, to the US, potentially without their mother, and her judgment was overturned by the Court of Appeal, on the basis that she had not properly considered the issue of intolerability. The issue at the heart of the case before the Court of Appeal was whether the children could be expected to return to the US without their mother. Ms Cabeza relies on paragraph 57:

"Putting it simply but, in my view, starkly, if the children were to be returned to the USA without the mother, the court would be enforcing their separation from their primary carer for an indeterminate period of time. It would be indeterminate because the court has no information as to when or how the mother and the children would be together again. These children, aged 5 and 3, would be leaving their lifelong main carer without anyone being able to tell them when they will see her again. In my view it is not difficult to describe that situation, in the circumstances of this case, as one which they should not be expected to tolerate. I acknowledge that the current situation has been caused by the mother's actions, and that she was herself responsible for severing the children from their father but, as referred to above, the court's focus must be on the children's situation and not the source of the risk."

I note some slight tension between what Moylan LJ says there and what the President says, but I leave that for that be considered in another case.

42. Turning to my conclusions, there is in my view a close relationship on the facts of this case between the discretion under article 13(2) and the grave risk of intolerability under article 13(b). The risk here is, as in *Re W*, on an alternative basis of whether the mother returns or does not return. First, if the mother does not return, then the children are being removed from their primary carer. Although they have a good relationship with the father, and he is not in any sense a risk to them, they would be placed in the United States in a situation where they were both not living with their mother and could not see her directly because she could not get into the United States. This would be a massive change for them, and one that, for the reasons I have explained above, it is clear that E in particular would find deeply upsetting. I am going to assume that would also be the case for F. In my view this is a grave risk to their wellbeing. I accept that remaining in the UK may have long-term impacts on their relationship with their father, and perhaps with their identity, although that is much more nebulous. But removing them from their mother's care will have an immediate and significantly adverse impact on them. Such an upheaval is likely itself to have long-term impacts on them, including in their trust of adults. That is, in my view, an intolerable situation.

43. I note at this point, in case it is argued elsewhere, that it is not for this court to consider the long-term position. My reference to it is because the evidence is that the mother would not be able to join the children in the US for upwards of two years. Although the matter, I anticipate, would go back before the state Y court in short order, it is perfectly clear from the father's application to this court, that he would seek to retain the children in the US in the long term. Therefore I have to contemplate either the situation where the children do return, and do remain in the US in the long term, and the impact that has upon them, or they return to the US for an unknown period, and then potentially return back to the UK, which appears to me plainly to be an intolerable situation, given their attitude to being separated from their mother. Given all those factors, this is a case where, in my view, intolerability is not just the intolerability of the very short term, but also of where that leaves the children if they do go back to the US.

44. In saying this, I have had close regard to the policy of the Convention, and to the fact that, to some degree, this situation is of the mother's own making. But, as explained by Moylan LJ in *Re W*, the purpose of the Convention is not to punish the abducting parent, but rather to focus on the children's situation.

45. If, on the other hand, the mother does manage to return, presumably on the back of GH's doing so, there is still a finding of grave risk. As I have explained above by reference to Dr Kolkiewicz's evidence, the mother's mental health is highly fragile. If she returns to the same situation she left in December 2024, with the threat of homelessness and extreme impecuniosity, there is a very real risk that her mental health will become very poor and potentially disastrous. That would pose a very grave risk to the children. Ms More O'Ferrall says that the court can rely on the protective measures that the father has offered, including that of a month's rent, help with medical insurance for the children, assistance with furniture and other short-term financial support, as well as agreeing not to enforce the custody order in his favour. However, in my judgment there is a very real risk of the mother's situation reverting to how it was when she left. One month's rent and accommodation will solve very little in terms of the pressures upon the mother that are likely, in Dr Kolkiewicz's judgment, to lead to severe deterioration in her mental health.

46. Secondly, the father says he will now pay the maintenance due, and therefore the mother should not be impecunious. However, his past record does not speak well for reliance that I can place on this. Not merely did very significant arrears occur, but the court in state Y had to issue a suspended sentence before he paid anything off the arrears. The father claims that the non-payment only occurred when he lost his job, but he seems to have had a well-paid job since at least 2023, but made very little effort to pay off the arrears owing in respect of the care of his own children, until forced to do so by a suspended sentence. In my view there is a real risk that he will stop paying again, if he so chooses. Thirdly, Ms More O'Ferrall has submitted that the father has shown respect for the court in the United States. I have to say that the record of non-payment, and the need for contempt proceedings, does not support that submission.

47. There is also the issue that there are significant challenges in obtaining full mental health support in the United States, unless fully insured. I am not going to try to get to the bottom of what support is available for the mother's mental health in state Y , but what is plain is that the mother's mental health is a great deal more at risk in the United States than it is in the UK with the benefit of the NHS. Further, Ms More O'Ferrall submits that the mother's position in the UK is itself not stable because she is reliant on state benefits. However, again the evidence is clear that the mother's financial position, as well as her mental health, is significantly better in the UK than in the US. Therefore, in terms of grave risk, the grave risk

to the children lies in the mother returning to the US if she could, a risk that does not arise in the UK.

48. Overall, I take the view that there are grave risks to the children, whether the mother returns or not to the US, and I therefore decline to make a return order on either basis.

(Order: Application refused)

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This transcript has been approved by the Judge