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No: FD20P00210

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2020

IN PRIVATE

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
IN THE MATTER OF A
AND IN THE MATTER OF B
AND IN THE MATTER OF C

Before:

MR DAVID REES QC
(Sitting as a Deputy Judge of the High Court)

(In Private)

B E T W E E N :

D

Applicant

And

E

Respondent

- -

Teertha Gupta QC and **Alistair G Perkins** (instructed by **Covent Garden Family Law**) for the **Applicant**
Eleri Jones (instructed by **Newton Kearns LLP**) for the **Respondent**

Hearing dates: 16 and 17 July 2020

APPROVED JUDGMENT

I direct that 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 QC 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 QC :

Introduction

1. This is an application under the Child Abduction and Custody Act 1985 incorporating the Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention").

2. It concerns three children who are full siblings. They are:
   (1) A who is nearly 13 and a half;
   (2) B who is 9;
   (3) C who is 4.

3. The application has been brought by their father D. He seeks the summary return of all three children to Australia on the footing that they have been wrongfully retained in England and Wales by their mother E.

4. The Mother opposes the Application on the basis:
   (1) That the children's retention in the UK was not in breach of the Father's rights of custody and so, she says, the retention (or their removal) was not "wrongful" within the meaning of Article 3 of the Convention; alternatively
   (2) That the Father consented to or acquiesced in the children's relocation to the UK;
   (3) That in relation to each child 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
   (4) That in relation to A and B they object to returning to Australia and are of an age and maturity for their views to be taken into account.

5. It was accepted by the Father at the conclusion of the evidence that A (but not B) objects to being returned to Australia and is of an age and maturity for his views to be taken into account.

6. The Father is represented by Mr Teertha Gupta QC and Mr Alistair Perkins. The Mother is represented by Ms Eleri Jones. I am grateful to all counsel for their detailed position statements and careful submissions.

7. This application was issued on 9 April 2020. There have been three interim hearings. The children are not separately represented. There appears to have been consideration being given at one stage to an application being made for A to be joined to these proceedings, but that was not ultimately pursued. The three children were seen by remote video-link by Ms Allison Baker a CAFCASS officer on 15 June 2020 and her report to the court following that meeting is dated 23 June 2020.

8. A has been diagnosed with developmental disabilities . I consider the consequences of this in greater detail later on in this judgment. He has attended mainstream schools in Australia and is presently attending a mainstream school in the UK.

9. On 29 June 2020 Francis J dismissed an application by the Mother to instruct a consultant clinical psychologist to report on the possible impact of a return to Australia of A and B. The judge did however direct Ms Baker to file additional evidence on this point and this was done by way of an updating letter dated 13 July 2020.

10. The matter came before me for a final hearing on 16 and 17 July. I heard oral evidence from Ms Baker and from both parents. Ms Jones did not seek to renew her application on behalf of the Mother to adduce expert evidence on the possible impact on the two boys of a return to Australia. However, as I was hearing oral evidence from the parents on the issues of consent and acquiescence she did invite me to permit the parents to be asked about the effect that the Father's proposals for the children's return could have on A's condition, given the Mother's current position that she cannot accompany the children if I order their return to Australia. I permitted brief oral evidence to be adduced on this point and I also allowed some limited further evidence to put into context text messages between A and the Mother dating from July 2019 which had been disclosed very shortly before the hearing.

11. I have read the entire court bundle including the parties' witness statements and the further documents disclosed by the Mother shortly before, and during the course of, the hearing.

Factual Background and Evidence

Background

12. The Father has US and British Citizenship. The Mother has Australian and British Citizenship. All three children hold dual British and Australian Citizenship.

13. The parents met in the UK in 2005. They have never married.

14. A was born in the UK in 2007. In 2008 the parents moved to Australia. The Mother's case is that this was always intended to be a temporary move; the Father's case is that it was a permanent relocation. The Mother owned a property in England which she retained and rented out when they moved to Australia.

15. In 2009, the parents briefly separately, but then reconciled.

16. B was born in 2011.

17. At the end of 2012, or in early 2013, the parents separated again. The precise date upon which this occurred is disputed but it has no bearing upon the matters I am called to decide.

18. The Father's case is that the parties reunited again in 2015. The Mother's case is that she approached him to facilitate her having another child, and whilst they lived in the same household for a period, they did not resume their relationship as partners. In any event C was born in 2016, and by June 2016 (at the very latest) the parents' relationship had permanently come to an end.

Contact between the Father and the Children

19. Thereafter the children lived with the Mother, but had direct contact with the Father. One of the issues in this case is the level of involvement which the Father has had in the children's lives. It is clear that the Mother considers that the Father has not shouldered his share of responsibility for the parenting of the children. Indeed in her original Answer to this application she asserted that the alleged retention should not be considered wrongful within the meaning of Art. 3 of the Convention because the Father was not actually exercising rights of custody in relation to the children. This point was, sensibly, in the light of the evidence, dropped by the Mother prior to the final hearing. However, the issue has coloured aspects of the Mother's evidence, and in particular her first witness statement in which she sought to minimise the role that the Father played in the children's lives referring to his "delinquency" as a parent.

20. The Father's case is that once he began his new relationship it became harder to organise his time with the children. He responded by providing a significant number of photographs demonstrating that he nonetheless had had regular contact with the children. The photographs exhibited cover the period from March 2019 to January 2020 and show him with all three children in a number of situations; sports matches, restaurant meals, a school awards ceremony and, in the case of C, a day out at a soft play centre. It is clear that the Father had regular contact with all three children and that this continued until the children left Australia in January this year.

21. It is common ground that the children have not stayed overnight at the Father's home, nor in the case of the two boys, have they met the Father's current partner. The Father describes staying over at the Mother's house with the children to look after them when they she was away and at other times staying with the children in hotels. The Mother states that this occurred only on a handful of occasions and that the children would not in fact stay overnight in hotels. I am not in a position to make any detailed findings about this on the summary evidence that I have received. However, it is clear from e-mails exhibited to the parties' statements, that the Father was asked to look after the children with some regularity (an e-mail of 30 October 2019 identified four evenings in November

when he was being asked to look after them). It is also clear from the tone of the e-mails that the Mother did not always find the Father to be co-operative in committing to arrangements.

Abuse

22. The Mother has made a number of allegations of abuse by the Father. She states that he has a problem with alcohol and this was a factor in the breakdown of their relationship. This is denied by the Father. The Mother has also referred to specific incidents, some of which were also reported by the children to Ms Baker. These included:
    (1) An occasion in 2016 upon which the Father broke a window to get into the house late at night after he had locked himself out;
    (2) An incident when he grabbed B's arm when B was trying to pull away from him
    (3) Incidents in 2018 and 2019 when the Father was abusive and swore at the Mother. The Mother accepts that on occasions she has also got angry and swore at the Father.

23. The Father for his part refers to an incident in April 2019 when the Mother's alleged abusive behaviour caused him to approach the Police and obtain a provisional Apprehended Violence Order ("AVO") against her initially in April 2019 without notice to her but continued at an *inter partes* hearing on 11 April 2019 pending consideration by the court. The incident that gave rise to this is disputed by the Mother and the order was eventually discharged in January 2020, which the Father says was with his consent and the application was withdrawn without any determination at any hearing or findings of fact being made. The Father also alleges that around this time the Mother let down the tyres on his car. The Mother's case is that it was in fact A who did this.

24. I am not in a position to make any detailed findings on these points either, although I accept:
    (1) That the specific incidents that I have set out at paragraph [22] above occurred; and
    (2) The Father obtained an AVO against the Mother.
    It is also clear to me (not least from the tone of some of the e-mails between them that have been disclosed) that the parents' relationship is sadly characterised by bitter arguments some of which have clearly taken place in front of the children.

The Events of 2018 and 2019

25. In 2018 the Father commenced a new relationship with a new partner. She is a teacher. They now live together and she has provided a brief witness statement in support of the Father's application. She has a teenage son and shares custody of him with his father. The existence of this new relationship is a matter which A and B have found difficult to accept.

26. At around the same time the Mother was considering the possibility of relocating herself and the children to England. She has produced e-mails that she sent in the second half of

2018 to the English local authority in whose area her house is situated in which she made initial inquiries about school places.

27. There is no suggestion that the Father was party to these e-mails. However, the Mother did produce a later e-mail dated 5 February 2019. Headed "For production in court" it was sent to two e-mail addresses belonging to the Father. It includes within it "links to the schools for the boys in [England]". In cross-examination, the Father said that he did not recall receiving or reading this message and said that he received many messages from the Mother and did not read them all.

28. In May 2019 the Mother and children came on a trip to the UK. The Father knew about this trip and consented to them travelling. The Father's case is that this was simply a holiday. The Mother's case is that it was also to enable her to explore work opportunities in England and for the older children to visit prospective schools.

29. Both boys have attended faith schools in Australia and in England. In July 2019 there was an incident when A got into trouble at school for turning up with a substantial amount of money, which it subsequently transpired he had withdrawn from his Mother's bank account without her knowledge. The afternoon that this occurred there was an exchange of text messages between A and his Mother, during the course of which A sent various messages which demonstrated that he was very upset and was ashamed of his actions. These texts were disclosed by the Mother shortly before, and during the course of, the hearing. A 's texts included the following:

> "I'm running away…"
> "You don't deserve this so goodbye"
> "I love you OK, but I don't deserve someone like you"
> "I need to go to confession…"
> "I should just kill myself, it would do you a favour"

Asked about these messages the Mother indicated that she did not think that A was going to kill himself, but that the making of the threat to kill himself was a serious matter. It does not appear however that there was any follow-up attempt to seek professional help or support in relation to these specific messages.

30. It is common ground that in August 2019 the parents had a conversation at the Mother's house. The Mother's case is that the during this conversation the Father agreed to the Mother and children relocating permanently to the UK. The Father denies that this was discussed or that he agreed to such a move.

31. The Father's case is that in November 2019 he was asked by the Mother if she could take the children on holiday to Europe (including the UK) for about three and half weeks in late January and early February 2020. He agreed to this, although the dates chosen would mean the children would miss the first few of weeks of term of the new school year in Australia. The Mother denies this version of events; as I have already mentioned her case is that the Father was aware that she planned to permanently relocate to the UK with the children and had consented to this.

32. During the latter part of 2019 the Mother made preparations for a move to the UK. This included purchasing one way plane tickets and enrolling the children in schools in the UK. Her evidence is that the arrangements were not made in any clandestine way. She says that the Father's parents were aware of them (although neither party sought to rely on any statement from the Father's parents) and the boys spoke openly to their Father about going to live in England. At no point, she says, did the Father withdraw his consent to the move.

33. The Mother arranged to take unpaid leave from her job in Australia to facilitate a handover. She did not cancel the children's school enrolment in Australia but spoke to A's teacher and B's school to say that if she secured employment and the children were happy they would not be returning. She explained that this meant that there would still be access to the school "portal" to gain access to information and the children's records. It also resulted in the school continuing to invoice the parents for the fees.

34. The Mother's tenancy of the property that she had been renting came to an end (the landlord wished to sell it) and she moved with the children to a property that she had inherited. At this time she disposed of some furniture to charity and the Father helped her move this furniture. The Mother relies upon this as evidence that the Father was aware of (and had agreed to) her plan to relocate the children. The Father's case is that all he knew was the Mother was disposing of some furniture she no longer wanted.

35. Among the documents that have been disclosed by the parties is an e-mail sent by the Mother to the Father on 9 January 2020 about arrangements for picking up C from nursery. It concludes:

> "I simply can't afford to send the children to holiday care every day so I need to work from home even though I WILL NOT get paid next week and week after in addition to the time we are in the UK as I HAVE NO LEAVE LEFT."

36. The Mother also relies upon the fact that the Father was invited to attend her house on 24 January 2020, the day that she had arranged for international movers to come and pack up hers and the children's belongings. However, when Ms Jones cross-examined the Father about this incident, it was not suggested to him that he had actually been there at the same

time as the movers or had seen them. Rather, the point that she sought to make was that it would have been unwise for the Mother to invite the Father round that day if the Mother was indeed relocating to England without his consent.

37. The Mother and children left Australia on 28 January 2020. Just before they did so the Father requested an itinerary for their journey. The Mother responded by forwarding details of an AirBNB reservation in England from 30 January to 27 February 2020. The Father's case is that the Mother was seeking to mislead him about the duration of their stay. The Mother's case is that she had booked an AirBNB for this period as there was a delay on obtaining vacant possession of her own property.

38. On 26 February the Mother e-mailed the Father asking for him to e-mail his consent to the closure of a UK bank account in their joint names. The e-mail began:

> "I am trying to tie up some admin matters on this trip…"

39. On 27 February the Father texted the Mother asking for details of when she and the children would be arriving back in Australia. The Mother's initial response to this was to ignore the Father's question and to ask him again for an e-mail consenting to the closure of their joint bank account.

40. The parents spoke by telephone on 28 February 2020 UK time (by when it was 29 February in Australia) and the Mother told the Father that she had an offer of employment and that she and the children would be staying permanently in the UK.

41. On 2 March 2020 the Father e-mailed the Mother stating that he had only given permission for the children to leave Australia for a holiday and that he did not consent to them staying in England. He asked her to return the children as soon as possible.

42. The Mother responded the same day. Her lengthy e-mail set out that there was an understanding between them, reached in August 2019, that she and the children would be returning to the UK to live. She makes a number of references to e-mails and records of discussions which "will confirm what you have said … is simply incorrect." She also asserted that she had taken legal advice and that she was not in breach of any law or court orders and that the Father had not exercised any parental or shared responsibility in relation to the children for over two years.

43. The Father repeated his demand for the children to be returned to Australia in a further e-mail the following day.

44. From about 8 March the Father resumed telephone contact with the Mother and the children. The Mother described him as having had "nice engaging chats" with all three of them about school and life in England. In one conversation the Mother suggested that because of the Covid-19 pandemic and the risk that a lockdown might be imposed (as eventually occurred on 23 March) the Father should travel to England and spend this time with the children. It appears that this request was made a number of times. The Father declined this invitation, wishing to be with his partner. The Mother's first witness statement describes the position thus:

> "The boys were upset and wanted to know why their father wanted to stay with his girlfriend rather than come to them at this time. As he refused, they told me they didn't want to speak to him."

45. This application was issued on 9 April 2020 and the Mother was served electronically on 27 April 2020. The Mother told the two boys about the proceedings and put A in touch with a lawyer.

Circumstances surrounding a return

46. In her first witness statement, the Mother set out a number of protective measures which she would require to be put in place if she and the children returned to Australia. These included:
    (1) An undertaking from the Father not to cause harm to her or the children;
    (2) An undertaking from the father not to introduce the children to his new partner or her son;
    (3) An undertaking not to consume alcohol when spending time with the children
    (4) An undertaking that the father follows all dietary and support requirements currently in place for the management of A's conditions;
    (5) An undertaking to support the children in their faith including weekly attendance at services
    (6) A requirement to put in place "significant funding" beyond child support.
    (7) A requirement to fund specialist advice from experts to put in place an appropriate and suitable plan for A.
    (8) A requirement that the Father undergoes a psychiatric assessment and parenting courses.

47. The Father agreed to all but the last of these measures. In his second witness statement he also offered the following further measures:
    (1) Not to attend at the airport if the Mother returns with the children; alternatively to collect the children from the UK if the Mother is not intending to return.
    (2) If the Mother returns with the children, not to try and remove the children from her care pending a court hearing in Australia;

(3) Not to pursue civil or criminal prosecutions against the Mother
(4) Not to cause harm to the Mother (but he would expect a similar undertaking in return)
(5) To help the Mother and children rent a property near to the school. In his statement he said he would pay $AUS 300 towards rent, one half of the school fees of $AUS 4000 per quarter and child support of $AUS 2,200 per month. In his oral evidence he told the court that he would pay the school fees in their entirety.

48. In contrast to her first statement, where the possibility of returning with the children appeared to be under consideration, the Mother's position in her second witness statement and in her oral evidence to the court is that she "cannot" return to Australia. This is said to be for financial reasons. The Mother has given up her job in Australia and found a new one in England, which she would have to leave if she returned to Australia. Although she owns a house in Australia, this is not available as it is currently let out, rent free, to a builder who is renovating it in return for the right to live in it. The Mother also contended that the effect on A of a return would be so devastating that her presence or absence would make no difference to the position. She explained that in 2015 when he was 8 A had had a "breakdown" following the death of his maternal grandfather to whom he was close. She referred to him as having had hundreds of hours of support from professionals, including a psychiatrist and psychologist, in Australia and explained that she had been taught strategies to deal with aspects of A's behaviour.

49. The Father's preferred position is that if a return is ordered, the Mother should accompany the children. However, if that is not to be, he has proposed that all three children should live with him, his present partner and her son. Cross-examining the Father, Ms Jones asked him some questions about how he would cope with the challenges that may be thrown up by A's behaviour. He accepted that as a teenager A has what he referred to as "moments", but he referred to sitting down with A, showing patience and being there for him. He recognised that given A's current views a return could be challenging, but he did not feel that his relationship with his son was irreparable.

Ms Baker

50. Owing to the current Covid-19 restrictions Ms Baker was unable to meet with the children in person. Instead she spoke with all three children via a video-link on 15 June.

C

51. Understandably Ms Baker's meeting with C was short. She was with her Mother throughout the meeting. She was not able to express any particular views about Australia or her Father.

B

52. Both the boys however expressed themselves with greater clarity to Ms Baker and insisted that they did not want to go back to Australia, indicating that they would refuse to go. Both also expressed views of the Father in extremely negative terms; something which caused Ms Baker particular concern.

53. B had written down some notes in advance of the meeting. He told Ms Baker that school in England was "really good". By contrast he said that he had not really liked his school in Australia and said that he had got bullied there a lot and that he did not have friends. Asked by Ms Baker to give a score to the two schools he rated his school in the UK 8-9 and that in Australia as 3-4. He gave similar scores for his social life in both countries.

54. B referred to the Father using his first name in his conversation with Ms Baker and said that he had stopped calling him 'dad' two years ago "because he hasn't actually acted like a father, so I don't think we should call him father or dad." He was critical of his father's parenting in Australia saying that his father would not take him to karate or swimming classes, and all he was doing was "sitting at home". B was certain that the Father had been told about the plan to return to the UK before they left Australia in January 2020.

55. The Father's new relationship appeared to play a part in B's views about him. B told Ms Baker that that the Father had refused to come and visit them in England because "he wanted to spend time with his girlfriend". He was dismissive of the Father's attempts to send him a birthday present and also said to her:

> "I know this sounds really mean, but I wish he would die from Coronavirus"

B's view was that the Father wanted the children to return to Australia because he wanted revenge as the Mother had won the last court case (I take this to be a reference to the AVO application to which I have already referred).

56. B referred to "abuse" by the Father and referred to an incident when he had broken a window late at night. He also described the Father being "really mean" to the mother, yelling and swearing at her on one occasion when the boys had been in another room watching television. He also described an incident when the Father had grabbed him by the arm when B had not wanted to kiss him goodbye.

57. B told Ms Baker that he and A would not leave if the Court ordered a return telling her "Because the Police force can't physically take us, me and my brother would physically sit on the floor and play a game. We wouldn't move from that spot."

58. Ms Baker recorded what B wanted to tell the Court:

> "Dear Judge, I would like to stay in the UK because I've had a nice life here for the past six months. It's been very nice here, the weather for one thing and the friends and family I have. If you could tell D to stop doing this it would very nice. It would be very nice if you could tell D on the computer to stop doing this: stop making up lies and doing all this, how he's forcing us back to Australia where we do not want to go".

A

59. In advance of the meeting A had e-mailed Ms Baker her a document with "Notes for Case" which he said he had previously prepared for a meeting with a lawyer and that "this may be useful to you to understand my situation". In her meeting with A Ms Baker asked him what he understood about the proceedings, A replied at length, explaining:

> "I feel like my father is angry or has misguided something or he wants to get things done his own way or get revenge on my mum, and, and I don't thing he really feels comfortable about us now. In Australia I was commuting four hours each day. Now we're prospering he doesn't like this, just wants to make us feel like we need him or need him to be there for us and we don't need him now because we're doing fine by ourselves."

60. Ms Baker asked A to expand upon what he meant by revenge. He mentioned events two years ago, when he was suspended from school for nine days and he was having more problems with his condition. He said that his grandfather had been terminally ill at the time, so his mother was working and caring for him and as his father refused to take care of A. A said that the Father "showed no care whatsoever, saying he still has a job and can support them." He said that the Father then "started to make allegations, abused mum and called the Police on false grounds" and told Ms Baker that the proceedings were his Father's way of "getting back at mum". I pause to note that the maternal grandfather had in fact died in 2015 when A was aged 8, and this account appears to condense incidents which may have occurred over a longer period of time into a shorter narrative.

61. Like B, A referred to having been bullied at school. Her told Ms Baker that he did not want to live in Australia because of the death of his grandfather and aunt. A said "Australia is a place of bad events. I want to leave it all behind and start again in England." He described his relationship with the Mother as a 10 and that with the Father as 0. Asked by Ms Baker why he called the Father by his first name, A said "he stopped acting like a father a long time ago. He lost the right of dad around 2-3 years ago. A dad treats and respects their children rather than treating them as just objects, and devotes all their time and love to them, rather than showing this to their work or another purpose." A explained this "new purpose" as the Father's new girlfriend and her son. He told Ms Baker: "When he got them, I felt really sad as his stepson is the same age as me so I felt

like he'd replaced me. His stepson doesn't have anything wrong with him so it feels like he got a replacement so he could feel like he was a normal dad and he had normal kids."

62. A told Ms Baker that he and the other children had known since May 2019 that they were thinking of moving to the UK. He said that he recalled overhearing a conversation between his parents in August 2019 when the boys had been playing football. "Mum told him [the Father] she had found a school and I saw him nodding his head. He literally gave his verbal consent".

63. A's e-mail notes included the following under "What do I want?"
- "I want to live and stay in England
- I want to feel I am free and an I not being forced to do things against my will
- I want to be heard
- I want [the Father] to stop this and start thinking about what is best for us and not just about himself."

In these notes and in his conversation with Ms Baker, A stated that he will not go back to Australia even if there is a Court order to that effect.

64. Ms Baker also recorded A's direct comments to the Court:

> "Dear Judge, I feel like I want to stay in England because the life that I have here now is so much better than the life I was living back in Australia. The life I was living in Australia included so many things that I've listed in my Notes, such as bullying at my old school, the loss of two of the most important people in my life, racist comments, my father never being there for me, my father never supporting me emotionally or physically and the hot weather. I find it hard to function in hot weather, it just throws my concentration out completely. I want this because I want to feel like I am free, like no one can control me or force me do anything I don't want to do. I want this because the opportunities that come in England are not available to me in Australia and would disadvantage me completely if I was to return."

Ms Baker's Assessment

65. Ms Baker's assessment was that the maturity of both boys was in line with their chronological ages but that neither had the maturity to consider the long-term impact of not having a balanced relationship with each of their parents. Neither boy showed any real sense of having missed their father or having a sense of loss given his absence in their lives. She considered neither was able to appreciate the role a father or father-figure plays during a child's minority and was concerned that their country of residence might be determined by them on what appears to be a rejection of the Father.

66. She described them in her report as "articulate children with strong feelings against their father". Both spoke to her about the Father in extremely negative terms and both alleged

that he was abusive to the Mother. She felt that both expressed clear objections about a return to Australia, but Ms Baker considered these to be based on negativity towards the Father, something which appeared to be based upon his separation and his new partner and stepson. She felt that they appeared to have been exposed to a great deal of information about the dispute and was not confident that their views can be seen as authentically their own.

67. Ms Baker identified that there appeared to be a history of cross-allegations of domestic abuse. The Mother had contacted the police in 2008 whilst still in UK. More recently there had been cross-allegations in Australia. None of the allegations have been adjudicated in court but the information reflected significant and ongoing problems in this regard.

68. In a supplemental report of 13 July Ms Baker commented on the impact on both boys of various matters:

(1) Returning to Australia against their wishes.
Ms Baker considered this was likely to compromise the boys' emotional wellbeing and could manifest itself through internalised or externalised behaviours including emotional and mental health difficulties and rule breaking / reacting against authority. She identified that there is a risk that this will manifest itself as a greater decline in A's behaviour due to his additional support needs which impact on his ability to manage change. However, she also identified that the children staying in the UK could send a message that they are in a position to determine how significant family decisions are made and that this too could impact on their future behaviour.

(2) Being separated from the Mother if she refuses to return to Australia.
Ms Baker felt that this would have a significant impact on both boys' emotional and psychological wellbeing, at least in the short to medium term. She indicated that both boys are close to the Mother. She felt that a separation could lead to the boys feeling abandoned by the Mother and that this could have implications for their future mental health, emotional stability and ability to trust in relationships. She considered this was likely to be a more significant developmental event for them than an enforced return to Australia with their Mother.

(3) Being separated from sister.
Ms Baker felt that this too would be difficult for the boys and that any risk centred around the loss of their experience of growing up together as siblings.

(4) What support or adjustments would be needed to alleviate these issues?
Ms Baker suggested that each boy would benefit from some therapeutic input commencing with individual sessions. These could be pursued through Child and Adolescent Mental Health Service if they remained here. If the boys return to Australia Ms Baker recommended that they receive individual therapy sessions

and then either separate dyadic sessions with each of their parents, or family therapy.

69. Ms Baker was cross-examined by both counsel. She told Mr Gupta for the Father that she was concerned that the boys were being influenced by the Mother and that they should have been (and had not been) protected from adult dynamics and from information relating to these proceedings. She also accepted Mr Gupta's characterisation of B's views regarding a return as a preference. However, when cross-examined by Miss Jones she stated that she felt that both boys were objecting to a return to Australia, rather than just expressing a preference. Ms Baker accepted Ms Jones's contentions that A has additional needs arising from his condition; that he has difficulties dealing with sudden or unplanned change; that he has in the past had meltdowns over trivial matters and that he would need support on a return. Ms Baker agreed that it was unknown how A would respond emotionally to a forced return but that it was likely that he would struggle. She accepted Ms Jones's characterisation that A was at a "grave risk" of harm.

70. As to the boys generally Ms Baker she accepted that there would be a significant impact upon them both if the Mother didn't return with them, and that other matters, including living in a new home with the Father's partner and stepson, and going to new schools would also be significant changes for them, especially for A. Ms Baker also agreed with Ms Jones's characterisation that it would be "intolerable" for C to be returned to Australia on her own without her Mother or brothers.

The Convention

71. 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."

72. 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."

73. 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."

74. There are limited exceptions to the obligation to return. These are set out at Article 13, which provides that:

> "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.
>
> 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."

All three of these exceptions are relied upon by the Mother in this case.

Wrongful Removal, Consent and Acquiescence

Wrongful Removal

75. As I have already indicated, the Mother's original position was that the removal / retention of the children in England was not "wrongful" on the basis that the Father was not exercising rights of custody in relation to the children at that time. However, she has not pursued that point and it is now common ground between the parties that immediately before the children were brought to England in January 2020:

(1) They were habitually resident in Australia; and

(2) That the Father shared rights of custody with the Mother and was exercising these rights.

76. Nonetheless, the Mother continues to argue that her removal / retention of the children was not wrongful. Her current position is that there was no agreement between the parents that the children would be returned to Australia and that their retention in England was not therefore in breach of the Father's rights of custody. In this regard she referred me to the decision of the Court of Appeal in *Re NY (1980 Hague Abduction Convention)(Inherent Jurisdiction)* [2019] FLR 1266 at [58] and [59]. She argued that, independently of the issue of the Father's consent to the issue of removal / retention, I needed to determine what agreement had been reached between the parties regarding the children's travel to the UK in order to determine whether the removal / retention had been "wrongful" within the meaning or Art 3.

77. For the Father Mr Gupta and Mr Perkins take issue with this approach and argue that this issue falls to be determined as part of the wider question of consent raised by the Mother's argument under Art 13a. They referred me to the decision of the Court of Appeal in *Re PJ (Children) (Abduction: Consent)* [2009] EWCA Civ 588 and in particular to paragraph [53] in the judgment of Wilson LJ:

> "If a left-behind parent with rights of custody gave consent, by which I therefore mean prior consent, to the child's removal, how can he successfully complain that it was in breach of his rights within the meaning of article 3 of the Convention? There is no good answer to this question. So the poor draftsmanship of the Convention gives rise to a conundrum: although Art 13 expressly suggests that the consent of the left-behind parent is something which the removing parent may seek to establish by way of defence, is not its absence, rather, something which the left-behind parent must establish as part of his case under Art 3 that the removal was in breach of his rights of custody and thus, in effect, wrongful? But the conundrum is an old chestnut and I would not wish to say anything which might prompt resurrection of it, even if such were possible. *In re P (A Child) (Abduction: Consent)* [2005] Fam 293 this court decided that the specificity of the reference to consent in Art 13 sufficed to draw all issues of consent into it and out of Art 3; as it happens, I also consider that the decision was correct."

78. In the light of the findings that I make below as to the discussions between the parties and what was agreed between them, this issue makes no difference to my conclusions. However, my view is that in a case such as this where the sole issue between the parties is whether the left-behind parent had consented to:
(1) A trip for a limited purpose and limited period of time; or
(2) A permanent relocation

then issues of that parent's consent to the retention fall to be considered in the context of Art 13 rather than Art 3. In that regard I note the specific comments of the Court of Appeal in *Re NY* at para [50] that its judgment in that case was not intended to depart from the approach to the issue of consent as set out in *Re PJ* and *Re P*.

Consent and Acquiescence

79. On these issues the parties are agreed on the key authorities to which I need to have regard. On the issue of consent, I was referred to the decision of the Court of Appeal in *Re PJ* [2009] EWCA Civ 588 and to and the points that Ward LJ identified at para [48] of his judgment namely that:
    (1) Consent to the removal of the child must be clear and unequivocal.
    (2) Consent can be given to the removal at some future but unspecified time or upon the happening of some future event.
    (3) Such advance consent must, however, still be operative and in force at the time of the actual removal.
    (4) The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party, for example, "Whatever you may think, I have concluded that the marriage has broken down and so I am free to leave with the child". The event must be objectively verifiable.
    (5) Consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract.
    (6) Consequently, consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.
    (7) The burden of proving the consent rests on him or her who asserts it.
    (8) The inquiry is inevitably fact-specific and the facts and circumstances will vary infinitely from case to case.
    (9) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?

80. Likewise, on the question of acquiescence the parties are agreed that the relevant principles are to be found in the speech of Lord Browne-Wilkinson in *Re H (Abduction: Acquiescence)* [1998] AC 72 at 884
    "(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 LJ 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."

81. Both parties also referred me to additional authorities on the point. Ms Jones for the Mother referred me to the decision of Holman J in *Re C (Abduction : Consent)* [1996] 1 FLR 414 and to his comment at 419:

> "If it is clear, viewing a parent's words and actions as a whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgment that is sufficient to satisfy the requirements of Art 13. It is not necessary that there is an express statement that 'I consent'. In my judgment it is possible in an appropriate case to infer consent from conduct."

For the Father I was referred to the decision of Charles J in *D v S (Abduction: Acquiescence)* [2008] 2 FLR 293 that consent must not be "based on a misunderstanding or non-disclosure, which would vitiate it".

Discussion

82. I accept that from at least 2018 the Mother was considering a relocation with the children to the UK and that in early 2019 there were some discussions about such a move between the parents. This is apparent from the e-mail of 5 February 2019 in which the Mother sent the Father links to prospective schools in England. I am satisfied that this e-mail was sent and received by the Father and I do not consider that the Mother would have sent an e-mail in these terms to the Father unless there was a wider context in which a possible move to England was at least under discussion.

83. However, I am unable to accept the Mother's evidence that the Father gave express consent at a meeting on 3 August 2019 to the children permanently relocating to the UK;

or that in January 2020 the Father was aware that the Mother and children leaving Australia for good. I find that the Father had only consented to the children travelling to the UK for a short holiday.

84. In reaching this conclusion I have paid particular attention to the contemporaneous evidence of the parties' discussions and the texts, e-mails and other documents that have been disclosed. I make clear that I have kept firmly in my mind Ward LJ's injunction that consent (or the lack of it) must be viewed in the context of the realities of the disintegration of family life.

85. Nonetheless it is very surprising that the Mother has produced no documentary evidence to support her contention that the Father had consented to a permanent relocation. This is particularly so given her assertion in her e-mail of 2 March 2020 that her e-mails and records of discussions with the Father would confirm that his claim that he had not agreed to a relocation was incorrect.

86. Although the Mother is able to document the steps that she took to prepare for the move (purchasing plane tickets, contacting UK schools, taking steps to end the tenancy of her English property, booking removal companies), at no stage does it appear (with the single exception of the e-mail of 5 February 2019) that any of this information was provided to the Father. It seems to me wholly improbable that if such an agreement was reached there was not a single text or e-mail exchanged with the Father over the next six months that made any reference to their agreed plan. There is nothing providing the Father with the final details of the children's schools or the arrangements for their long-term accommodation. There are no details of any discussions about the arrangements for the Father to have contact with the children directly or indirectly.

87. In this context I note that the Mother has legal training and that her e-mail of 5 February 2019 had been prefaced "for production in court". Whilst I do not expect the parties to have drawn up a formal agreement, the lack of any supporting documentary evidence to corroborate the Mother's contention that the Father had consented to a permanent relocation points away from there having been such an agreement. I have no doubt that if such documentary evidence did exist, it would have been provided by the Mother to the Court.

88. Moreover, the exchanges between the parties that have been disclosed support the Father's case that (so far as he was aware) this was to be a short trip to the UK and not a permanent relocation. The following matters appear to me to be of particular relevance:

    (1) The Mother's e-mail of 9 January 2020 which indicated that she would not be paid during the time that she and the children would be in the UK as she had no leave left.

(2) The Mother forwarding to the Father the AirBNB reservation which, on its face, suggested that they had accommodation in England arranged only for a finite limited period.
(3) The Mother's e-mail of 26 February in which she stated "I am trying to tie up some admin matters on this trip…"
(4) Her response to the Father's text message of 27 February asking for details of their return flights. She did not reply "What do you mean? You know this is a permanent relocation". Instead she ignored the question and replied that she wanted to close the joint account "so I can finalise my affairs". This response makes no sense if the Father had genuinely consented to the Mother and children permanently relocating to England.

89. Equally important are the things which did not take place.
(1) The Mother did not cancel the children's school places in Australia. I am unconvinced by her explanation that this was simply to retain access to the school portal as a consequence appears to have been the issuing of substantial invoices for fees.
(2) There is no evidence of any farewell parties being held in Australia with the children's friends. The Mother gave evidence of a final meeting between C and one of her friends but given the integration of the children (and especially the two boys) in their schools and sporting clubs the lack of any farewell arrangements is surprising. No cards, letters, texts or e-mails wishing them well in the UK have been produced. Nor (and perhaps most surprisingly) is there any evidence of any farewell meeting or event being held with the Father.

90. The Mother's evidence was that A was part of the conversation in August 2019 between her and the Father, and that the Father told A that he agreed to a permanent move. I note that A's own account, as told to Ms Baker, is rather different. Whilst he appears to have understood that his Father had agreed to a permanent move he told Ms Baker that he was playing football with B at the time and overheard part of a conversation between his parents and saw his Father nod his head.

91. Taking this evidence as a whole I find that although there had been discussions between the parties as to a possible relocation of the Mother and children to the UK, the Father did not provide consent to a permanent move and that as at 28 January 2020 all he had agreed to was for the children to travel to the UK on holiday. To the extent that I am required to consider these issues in the context of Art 3 of the Convention, I find that the Mother has wrongfully retained the children in the UK. In any event I also find that the Father has not consented to the children's retention in the UK for the purposes of Art 13a.

92. Nor do I consider that the discussions which took place between the parents between the Father becoming aware of the Mother's position at the end of February 2020 and his

bringing these proceedings in April could amount to acquiescence within the test propounded by Lord Browne-Wilkinson in *Re H*. The Father swore his affidavit for the Australian Central Authority on 11 March, less than a fortnight after it had become clear to him that the children were not returning. The fact that the Father sought to have regular telephone and video contact with the children and maintain friendly discussions with them is not in my view inconsistent with an intention on his part to assert his right to the summary return of the children.

93. Accordingly, the Mother's defence under Art 13a fails

Child's Objections

94. In relation to the child's objections exception, the parties are agreed that the key authority is the decision of the Court of Appeal in the case of *Re M (Children) (Abduction: Child's Objections)* [2016] Fam 1. It is a two-step test. Firstly, there is a gateway stage which requires me to consider in relation to each of A and B whether they are objecting to a return to Australia and whether they have attained an age and degree of maturity at which it is appropriate to take account of their views. This is a "fairly low threshold requirement" (*Re M* at [56]) and as the Court of Appeal recognised in that case there may be difficulty in separating out an objection to a return to a country or to a return to a set of circumstances in that country. It is not necessary to establish that the child has 'a wholesale objection' to returning to the country of habitual residence and 'cannot think of anything positive to say about that other country'. The exception is established if the court concludes, simply, that the child objects to returning to the country of habitual residence (*Re F (Child's Objections)* [2016] 1 FCR 168 at [35]).

95. If this gateway is passed, a discretion, which is at large, arises as to whether I should order a return. I discuss the exercise of that discretion in greater detail at [125] *et seq* below.

96. Lady Justice Black, in *Re M* described the test thus (at [76]):

> "I now turn to how the law will work in practice. I do not intend to say a great deal on this score. The judges who try these cases do so regularly and build up huge experience in dealing with them, as do the CAFCASS officers who interview the children involved. I do not think that they need (or will be assisted by) an analysis of how to go about this part of their task. In making his or her findings and evaluation, the judge will be able to draw upon the entirety of the material that has been assembled in relation to the child's objections exception and to pick from it those features which are relevant to his or her determination. The starting point is the wording of Article 13 which requires, as the authorities which I would choose to

follow confirm, a determination of whether the child objects, whether he or she has attained an age and degree of maturity at which it is appropriate to take account of his or her views, and what order should be made in all the circumstances."

97. At the conclusion of the evidence Mr Gupta, on behalf of the Father, accepted that this gateway had been met in respect of A. I agree.

98. In respect of B Mr Gupta argued that:
(1) B's views did not properly amount to an objection and;
(2) Even if they did, he was not of an age or maturity where it is appropriate to take account of them.

99. I have concluded that B is indeed objecting to a return to Australia. Although I accept Mr Gupta's submission that the language of B's "letter to the judge" which I have set out at [58] above is phrased as a preference for England rather than an objection to Australia, I consider that when one looks at the totality of what Ms Baker has reported about B's views, including his description of the plan that he and A have formulated for refusing to leave, his views do amount to a genuine objection to return.

100. As to B's age and maturity. He is nine. He provided Ms Baker with reasons for objecting to a return to Australia. These went beyond his relationship with his father and included a reference to having been bullied at school there. This is supported by contemporaneous e-mails that have been disclosed by the Mother.

101. Whilst I note Ms Baker's view that neither B nor A has the maturity to consider the long-term impact of not having a balanced relationship with each of their parents, this is in my view different from the test I need to consider under Art 13 namely whether they are of an age and degree of maturity to take account of their views. I consider that the point that Ms Baker makes is an issue that I should rather consider at the discretion stage, along with the extent to which the boys' views have been formed or influenced by the Mother. Having regard to Black LJ's dicta in *Re M* that the court's approach to the gateway stage should be "straightforward and robust" (para [77]), and her acceptance that the test could be met in the case of a child as young as six (para [67]) I am satisfied that that the gateway is met in respect of B as well.

Grave Risk of Harm / Intolerability

102. I am therefore satisfied that the Mother has made out an Art 13 exception in relation to both A's and B's objections. However, before I consider the exercise of my discretion in this regard I turn to the Mother's final ground of defence; Art 13b.

103. In relation to this ground both parties referred me to the decision of the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2011] 2 FLR 758 (UKSC) and to the summary of that approach set out by MacDonald J in *Peter Stewart Uhd v Victoria McKay* [2019] EWHC 1239 (Fam); [2019] 2 FLR 1159. At [67] the judge held:

> "[67] 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)* [2011] UKSC 27, [2012] 1 AC 144, [2011] 2 WLR 1326, [2011] 2 FLR 758. 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) Article 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)."

104. At [68] the judge continued:

> "[68] 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 (which include the fact that it will rarely be the case that the court will hear oral evidence and, accordingly, rare that the allegations or their rebuttal will be tested in cross-examination). 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"

105. At [69] the judge referred to the further decision of the Court of Appeal in *Re C (Children) (Abduction: Article 13(b)*) [2018] EWCA Civ 2834, [2019] 1 FLR 1045 as follows:

> "[69] However, as I have had cause to note in a number of cases recently, the methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon to establish the exception under Art 13(b) at its highest is not an exercise that is undertaken in the abstract. The requirement, made clear in *Re E*, for the court to evaluate the evidence against the civil standard of proof whilst taking account of the summary nature of the proceedings, must also mean that the analytical methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon at its highest is not an exercise that excludes consideration of relevant evidence before the court. Indeed, in *Re C (Children) (Abduction: Article 13(b))* [2018] EWCA Civ 2834, [2019] 1 FLR 1045, Moylan LJ held as follows by reference to the judgment of Black LJ (as she then was) in *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720 (unreported) 14 July 2015:
>
> > '[39] In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course, a judge has to be careful when conducting a paper evaluation, but this does not mean that there should be no assessment at all about the credibility or substance of the allegations. *In Re W (Abduction: Intolerable Situation)* [2018] EWCA Civ 664, [2018] 2 FLR 748, I referred to what Black LJ (as she then was) had said in *Re K (1980 Hague Convention:*

Lithuania) [2015] EWCA Civ 720, (unreported) 14 July 2015 when rejecting an argument that the court was "bound" to follow the approach set out in *Re E*. On this occasion, I propose to set out what she said in full:

> *"*[52] The judge's rejection of the Article 13b argument was also criticised by the appellant. She was said wrongly to have rejected it without adequate explanation and to have failed to follow the test set out in para [36] of *Re E* in her treatment of the mother's allegations. In summary, the argument was that she should have adopted the 'sensible and pragmatic solution' referred to in para [36] of *Re E* and asked herself whether, if the allegations were true, there would be a grave risk within Article 13b and then, whether appropriate protective measures could be put in place to obviate this risk. That would have required evidence as to what protective steps would be possible in Lithuania, the submission went.
>
> [53] I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Article 13b exception (see *Re E* supra para [32]) and for the court to evaluate the evidence within the confines of the summary process. Hogg J found the mother's evidence about what had happened to be inconsistent with her actions in that she had continued her relationship with the father and allowed him to have the care of E, see for example what she said in para [37] about the mother not having done anything to corroborate her evidence. She also put the allegations in context, bearing in mind what Mr Power had said about something good having happened in E's parenting, which she took as a demonstration that E would not be at risk if returned to Lithuania (para [36]). The Article 13b argument had therefore not got off the ground in the judge's view. The judgment about the level of risk was a judgment which fell to be made by Hogg J and we should not overturn her judgment on it unless it was not open to her (see the important observations of the Supreme Court on this subject at para [35] of *Re S*, supra). Nothing has been said in argument to demonstrate that the view Hogg J took was not open to her; in the light of it, it was unnecessary for her to look further at the question of protective measures. She would have taken the same view even if the child had been going back to the father's care, but the Article 13b case was weakened further by the fact that the mother had ultimately agreed to return with E.*"*

'[40] As was made clear in *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257, [2012] 2 WLR 721, [2012] 2 FLR 442, at para [22], the approach "commended in Re E should form part of the court's general process of reasoning in its appraisal of a defence under the Article".

> This appraisal is, itself, general in that it has to take into account all relevant matters which can include measures available in the home state which might ameliorate or obviate the matters relied on in support of the defence. As referred to in *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, at para [52], the English courts have sought to address the alleged risk by "extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient" (my emphasis).
> [41] I would also note that the measures being considered are, potentially, anything which might impact on the matters relied upon in support of the Art 13(b) defence and, for example, can include general features of the home State such as access to courts and other State services. The expression "protective measures" is a broad concept and is not confined to specific measures such as the father proposed in this case. It can include, as I have said, any "measure" which might address the risk being advanced by the respondent, including "relying on the courts of the requesting state'. Accordingly, the general right to seek the assistance of the court or other State authorities might in some cases be sufficient to persuade a court that there was not a grave risk within Art 13(b).'

106. At para [70] MacDonald J summarised the position thus:

> "[70] In the circumstances, the methodology articulated in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, [2011] 2 WLR 1326, [2011] 2 FLR 758 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] UKSC 10, [2012] 2 AC 257, [2012] 2 WLR 721, [2012] 2 FLR 442), which 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."

107. Both parties also provided me with authority in relation to the position where the source of the risk arises from the fact that a parent is refusing to return with the children. I was referred by Ms Jones to the decision of Williams J in *Re Q & V (1980 Hague Convention and Inherent Jurisdiction Summary Return)* [2019] EWHC 490 (Fam) and to his comments at [48(vi)] which I adopt.

> "The source of the risk is irrelevant. I do not agree with Ms Papazian's assertion that a self-created risk (i.e. a mother refusing to return with the children or conflict created by the mother) cannot form the foundation of an Article 13(b) defence. The 'coach and four' doctrine deriving from *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654 has been substantially ameliorated following the judgment of Hale LJ in *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515 and Potter P in *S v B (Abduction: Human Rights)* [2005] 2 FLR 878 and the Supreme Court decisions in *Re E* and *Re S*. Of course the court will evaluate carefully any assertion that a primary carer cannot return or any other alleged risk to the children arising out of some matter control over which is in the hands of the Respondent but ultimately the court must consider whether the grave risk of harm exists or not, whatever its source."

108. Here, the Mother has identified a number of matters which she contends give rise to a grave risk of physical or psychological harm to the children, and specifically A as well as other matters which mean that a return to Australia would place them in an intolerable situation. In summary these are:
    (1) To force A and B to return to Australia against their wishes would expose them to psychological harm;
    (2) This is particularly the case in relation to A, given his condition and would risk the internalised behaviours identified by Ms Baker in her addendum report of 13 July 2020. The Mother's case is that A will have a breakdown if he is forced to return and there are no protective measures that can be put in place to ameliorate this situation. The Mother points to the fact that under cross-examination Ms Baker agreed with Ms Jones that a return would present "a grave risk" of harm.
    (3) The Father has no real understanding of, or insight into, the likely effect on A of what he is proposing and the Father's plans for the children's return propose nothing to help support A.
    (4) The children would have to return to Australia without their Mother (whose evidence as I have set out above is that she "cannot" return)
    (5) To return C without her Mother or her siblings would place her in an "intolerable situation"
    (6) To force the boys to live with their Father would be to place them in an "intolerable situation". The Mother's case is that they do not have an acceptable relationship with him; they have not shared a home with him since 2013 and they would have to live with "strangers", namely his new partner and her son.
    (7) The circumstances to which the children would also be intolerable. The Father's home does not have sufficient space for them to live and there would be insufficient funds to provide alternative accommodation or to pay their schools fees. In particular there would be insufficient funds to support A or meet his needs.
    (8) The children would be returning to be returning to an unknown situation, most likely (in the case of the boys) to brand-new non-faith schools. In the case of C,

she would have to go back a step as she would return to day care, rather than go to school as she does in England.

(9) The fact that the children would be likely to be required to quarantine in a hotel in Australia for two weeks upon their return (as a result of Covid-19 regulations) would add a further level of intolerability.

109. For the Father Mr Gupta and Mr Perkins argue that the Art 13b defence is not made out. They argue that I must focus on the impact on the children of a return and whether that would expose them to physical or psychological harm or otherwise place them in an intolerable situation. They point to the fact that the court must assume that the Australian administrative, judicial and social services are as adept as the English equivalent in protecting the children. Specific points that they identify include the following:

(1) Evidence from A's UK school describes him as possessing "very good social skills" and that he appears to have made the most of his short time in an English school. It is said that this speaks well of his robustness, particularly given the stresses that lockdown will have imposed.

(2) Ms Baker's addendum report of 13 July which concluded that a return would impact upon A and B's "emotional well-being" fell significantly short of crossing the threshold for the Art 13b exception.

(3) Ms Baker has identified that that the boys would benefit from "some therapeutic input" and the Court must assume that this is readily available in Australia and is equivalent to the support that may be available in the UK.

(4) The court is only concerned with the period before the Australian courts become seized of the welfare issues in relation to the children. The Father has provided evidence of the protective measures that will ameliorate the loss the children will suffer being separated from their mother. He points to the fact that he will be supported by his partner, a childcare professional with first-hand experience of parenting teenage boys.

Overall, it is argued by the father that the support available means that the children's return to Australia, even without their mother, does not amount to an intolerable situation or place them at risk of physical or emotional harm within the strictures of Art 13b.

110. At the conclusion of the hearing I identified that it would be helpful if the father was able to provide further details of the assistance that would be available in Australia to support the children (and specifically A) should I order their return. I have been provided with a number of texts and e-mails in this regard. Some are from paternal relatives and merely confirm that they would be willing to assist the Father. I have not placed any weight on these. Of greater relevance to the decision that I have to make are the following:

(1) An e-mail from an organisation which had assessed A in 2015. It confirmed that it offered its expertise through consultancy and professional development services to

schools to support students with A's condition. It also indicated that it provides a range of therapy services in this area.

(2) An e-mail from a psychologist who treated A between July 2015 and March 2017, confirming that she would be very happy to see him again at any time.

(3) Confirmation from B's former school that he could be re-enrolled and restart his education there this year.

(4) An e-mail confirming a discussion that the Father had with A's former school that a decision whether to readmit him would be made within 24 hours of completing an enrolment form.

The Mother has provided a response to these documents. Particular points that she makes are:

(1) Processes involving the particular organisation providing the email referred to above take a long time to arrange.

(2) The therapist is no longer based in the locality that the children would be returning to and thus the question of how she would meet with A would need to be resolved.

(3) No place is available at C's former day care.

(4) The Father has not provided details of how he would meet the children's school fees or the cost of any additional support required by A.

Discussion

111. Having considered all of the arguments that have been put to me by both parties I have concluded that, subject to the one caveat that I identify below, the Mother has not made out the Art 13b defence.

112. As matters stand it appears that the Mother does not intend to accompany the children if I order their return to Australia and I make clear that I have assessed her Art 13b defence on this footing. Given that the protective measures outlined in the Mother's first witness appear to have been put forward on the assumption that she would accompany the children, I do not accept her current evidence that she "cannot" accompany the children if I order their return. I accept that for her to do so would involve an upheaval in her life; would place her in a difficult position with her current employer; and could leave her in financial difficulties (notwithstanding the assistance offered by the Father) whilst the Australian courts determined an application by her to relocate the children to England. However, I consider that she could return to Australia should she chose to do so. Nonetheless, I recognise that the likelihood is that the Mother will not return with the children. I must therefore consider the risks that are presented to the children by a return in those circumstances and the extent to which those risks are obviated by the available protective measures.

113. If the Mother refuses to accompany them, the children will need to live with their Father. They will be moving to a new house and a new set of circumstances. They will be living with two individuals, the father's new partner and her son, whom they have not

previously met. They will also be being parted from their Mother who has been their primary carer. However, their Father is by no means an unfamiliar figure. Although they have not recently lived with him, he has been a regular presence in their lives as the photographs that he has produced demonstrate. It is highly likely that the two boys will be able to return to their previous school (given the evidence produced by the Father about school places and his oral evidence that he would pay the fees). The siblings would also remain together as a group.

114. Although, as I have outlined above, both parents have made allegations of abuse against each other, there have been no reports to the Police or social services in Australia of any physical abuse against the children. The Mother and B (through Ms Baker) have both provided evidence, which I accept, of an incident when the Father grabbed B's arm. However, I do not consider that there is any evidence upon which I could properly conclude that any of the children were at risk (let alone grave risk) of physical harm from their Father. I therefore focus my consideration of Art 13b on the risk of psychological harm and intolerability.

115. I will begin my consideration of these issues with A. My starting point is Ms Baker's addendum report of 13 July. Her evidence, which I accept, is that ordering a return of B and A to Australia presents a risk of internalised and externalised behaviours which could include emotional and mental health difficulties and rule breaking and rebelling against authority and that this could present itself more severely in the case of A's externalised behaviour due to his additional support needs. I also accept her evidence that the impact upon them may be greater if the Mother does not accompany them. I note also that she considered in her addendum report that support and adjustments through individual therapy sessions could be put into place to ameliorate these issues if the Court ordered a return.

116. In the course of cross-examination by Ms Jones, Ms Baker accepted her characterisation of the risk to A as a "grave risk". However it seems to me that the ultimate decision about the level of risk is a matter for my assessment rather than Ms Baker and that I am entitled to look at the totality of Ms Baker's evidence (and the other material before me) rather than have my decision governed by an answer to a particular question which was carefully phrased to introduce the language of Art 13b into Ms Baker's evidence.

117. I have within the bundle a number of assessments regarding A as well as his school reports. An assessment carried out in May 2015 (when A was 8) refers to him as a "lively, very intelligent but highly anxious boy who has crucial communication and behavioural support needs". It describes his behaviour in school as "an emotional and sensory roller-coaster ride – one over which he currently has little control". The report also refers to him having extreme emotional meltdowns over seemingly trivial triggers. I

note that 2015 was the year in which A suffered a "breakdown" following his grandfather's death

118. A has been in mainstream education. A Learning Development Plan for his final year at school in Australia makes similar comments to the 2015 Assessment about his anxiety and the fact that he can have a "meltdown" over a trivial trigger (it is unclear to what extent this plan is derived from the earlier document). His school report for his final year in Australia shows him doing well academically, attaining As and Bs in the majority of his subjects. E-mail exchanges between the school and the Mother from 2019 showed that he was distracted by games on his laptop computer, and the Mother gave evidence of some other difficulties that he had experienced, including the incident of July 2019 when he sent the chain of text-messages that I have set out at para [29] above. Whilst this incident was obviously worrying, I note that at no time did the Mother think that A was genuinely running away or intending to kill himself. It does not appear that A required any further professional support or input in the light of this incident.

119. Overall, the general picture presented by the evidence of A's school reports is positive and he was clearly doing well at school in Australia. Ms Baker also reports positive comments from A's school in England about his work and the progress that he has made despite lockdown. A appears to have coped well with the move from Australia to England, and there is no suggestion that he has required any professional support (beyond the general support available through his school) to cope with the changes that have arisen from this move and from the additional uncertainty that has been engendered by the Covid-19 pandemic.

120. I have no doubt that A will find a return to Australia challenging and I consider that it is likely that both he and the Father will require professional support to help him cope with his return. However, it is apparent that with appropriate professional support he has been able to meet the challenges presented by his condition in the past. I accept the evidence that appropriate professional support (such as he has received in the past) would be available for A in Australia, through organisations and through individuals such as the therapist identified by the father. Whilst I note what the Mother has said about the immediate availability of the organisation and individual therapist, I must assume that appropriate professional support will be available for A upon his return should he require it. In the circumstances, and taking account of all of the matters that I set out above, including the availability of this professional support, I do not consider that a return to Australia will a grave risk of physical or psychological harm to A even if his Mother does not accompany him.

121. I take the same view in relation to B and C. Neither share A's condition and the additional vulnerability that this presents. They too may find a return to Australia challenging, but I do not consider that either is at a grave risk of psychological harm. To

the extent that they also need support to deal with any issues presented by a return to Australia without their mother, then I am satisfied that this will be available.

122. Nor do I consider that a return in the circumstances outlined above would be intolerable for any of the children, provided that they return as a sibling group (to avoid the risks of sibling separation identified by Ms Baker). The children had regular direct contact with the Father until he left Australia. They have had indirect contact since then. Whilst the current proceedings have clearly strained their relationship, it is noteworthy that as recently as April telephone contact between the Father and children was (in the Mother's words) "amicable". I do not accept that it would be intolerable for the children to live with the Father whilst the Australian courts determined issues of their welfare. Indeed one of the issues which appears to have led to A and B's negative views of the Father appear to have arisen from the fact that the Father has not spent enough time with them and declined to come to England to be with them during the pandemic. Nor do I consider that the lack of a place at C's previous day-care would render her return intolerable.

123. Ms Jones has also argued that it would be intolerable for the children to have to undergo the present quarantine arrangements that are imposed by the Australian Government. I do not accept this. I understand that there is a requirement that persons arriving in Australia should undertake 14 days quarantine in a hotel paid for by the Australian Government. For the Father, Mr Gupta suggested that it might be possible for the requirement to be waived and for the Father and children to quarantine at his home. I cannot reach any conclusion as to whether such waiver would be possible (although if it is, then it would be preferable). However, I do not consider that a quarantine requirement such as this is capable of founding an Art 13b defence under the Convention.

124. There is one further matter which I must now raise. I do consider that it would be intolerable if I were to separate the siblings and require one of them to return alone. Specifically I have in mind C, given that I have found that A and B are objecting to a return. Were I to exercise my discretion and refuse to return A and B as a result of their objections, I consider that it would be intolerable to expect C to return to Australia with her Father whilst leaving her brothers and her Mother behind in England. However, and to make the position clear, for the reasons that I have explained at para [122] above, I do not consider that it would be intolerable for C to return to Australia without her Mother, provided that her brothers accompany her so that the children remain together as a sibling group. In his submissions Mr Gupta made clear that the Father was not, in any event, seeking to separate the three children.

Discretion

125. Finally, I therefore turn to consider the exercise of my discretion in this case. As I have set out above, the Mother has established, in relation to A and B, that they object to being returned and that they are of an age and maturity for their views to be taken into account.

126. Guidance on the exercise of this discretion can be found in the speech of Baroness Hale in *Re M (Abduction: Rights of Custody)* [2008] 1 AC 1288 at paras [42]-[44]:

> "[42] In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states.
> [43] My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word "overriding" if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.
> [44] That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be."

Specifically in relation to the child's objection exception Baroness Hale continued at [46]:

> "[46] In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take

> account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. 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 her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

127. Further guidance on the factors that should be taken into account in such cases can be found in the decision of the Court of Appeal in *Re M (Republic of Ireland) Black LJ* [2016] Fam 1 at [73] approving the dicta of Ward LJ in *Re T* (Abduction: Child's Objections to Return) [2000] 2 FLR 192. Matters to be taken into account include:
    (1) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important because it is *her* views which have to be judged appropriate.
    (2) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?
    (3) To what extent have those views been shaped or even coloured by undue influence and pressure, directly, or indirectly exerted by the abducting parent?
    (4) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?"

128. I have concluded that I should exercise my discretion to direct the return of the children to Australia. In reaching this decision I have taken into account the totality of the evidence before me. However the following points appear to me to be of particular relevance:
    (1) As I have set out above, I have found that the Father did not agree to the children relocating to England. The policy of the Convention and the need to secure the prompt return of children who have been wrongfully retained are matters which I consider, on the facts of this particular case, to carry particular weight.
    (2) A was 19 months old when he moved to Australia. B and C were both born there. Until earlier this year it is the only country where they have lived. The Father is rooted there and they have other family there. I consider the Australian courts to be better suited to determine the children's long-term future in substantive proceedings.
    (3) A and B's objections to returning, whilst no doubt sincerely held by them, appear to me to have been significantly influenced or coloured by the views of the Mother about the Father's parenting and by her actions in providing them with detail about these proceedings.

(4) Specifically their objections to a return to Australia and to spending time with their Father seem, in part, to be rooted in upset at the fact that the Father has formed a new relationship and this has (in their eyes) prevented him from spending time with them.
(5) Overall the vehemence with which A and B have expressed their opposition to a return to Australia and the lack of nuance or balance in their assessment of the advantages and disadvantages of each country and, in my view, indicates that their objections reflect the views of their Mother and a rejection of their Father. I accept Ms Baker's assessment that their views should not be seen as authentically their own.
(6) I also accept Ms Baker's assessment that the boys lack the maturity to consider the long-term impact upon them of not having a balanced relationship with both of their parents.
(7) Whilst I have fully taken the objections of the two boys into consideration in the exercise of my discretion, I have concluded that they should carry less weight than the other factors that I have identified above.

Conclusions

129. In the circumstances I will make an order for the return of the children to Australia. I will hear argument from counsel when I hand down this judgment on the precise terms of my order and the extent to which the undertakings offered by the Father should be incorporated into orders made under Art 11 of the 1996 Hague Convention. I note that the proposed undertaking that the children should not be introduced to the Father's new partner or her child cannot be offered if the children are to return to live with the Father as is currently proposed.

130. There is one concluding point that I wish to make. As I have set out above, I do not consider that Art 13b is satisfied, even if the Mother refuses to return to Australia with the children. Nonetheless it seems to me that the children would find the return significantly easier if their Mother were to accompany them. As I have indicated, the protective measures sought in Mother's first witness statement appear to have been proposed on the basis that the Mother would accompany the children, and I would ask her to reconsider her current opposition to doing so.

Postscript

131. This judgment was originally handed down in a form that identified the parties. Following submissions from counsel, I agreed to make available for publication an anonymised version of the judgment, and I am grateful for the assistance that I have received from counsel in that task. I am told that my order has not been carried into effect as proceedings are now on foot in Australia and that on an interim basis the Australian courts have permitted the children to remain in England with the Mother.