Neutral Citation Number: [2024] EWCA Civ 1595

Case No: CA-2024-002141

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MS KATIE GOLLOP KC SITTING AS A DEPUTY HIGH COURT JUDGE
FD24P00117

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2024

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE LEWIS
and
LORD JUSTICE JEREMY BAKER

- -

Re: B (A Child) (Abduction: Article 13(b): Mental Health)

- -

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Mark Jarman KC and Michael Edwards (instructed by **RWK Goodman**) for the **Appellant**
Teertha Gupta KC, Indu Kumar and Nadia Campbell-Brunton (instructed by **MSB Solicitors**) for the **Respondent**

Hearing date: 26 November 2024

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Approved Judgment

This judgment was handed down remotely at 12.00 on 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The father appeals from the order made by Ms Katie Gollop KC, sitting as a Deputy High Court judge ("the judge"), on 1 September 2024 dismissing his application for a summary return order under the 1980 Hague Child Abduction Convention ("the 1980 Convention"). The father sought the return to Australia of the parties' child, aged 1 (who I will call A).

2. It was accepted that the mother had wrongfully removed A from Australia in December 2023 when she was 4 months old. The judge dismissed the father's application because she decided that the mother had established that there was a grave risk that returning A to Australia would expose A to psychological harm or otherwise place her in an intolerable situation (Article 13(b)). This was based, in summary, on the mother's mental health and the judge's assessment of the risk, on a return to Australia, of (a) "the mother not coping with daily life to the point that she is unable to provide safe care" because there was "a serious prospect" of her "being unable to meet A's daily needs whether physical, emotional or social"; and (b) of the consequences "of the mother's mental health deteriorating to the point that she experiences a crisis". Critical to both parts of this assessment was the evidence relating to the mother's mental health and in particular the expert evidence which had been obtained for the proceedings.

3. The father is represented by Mr Jarman KC (who appeared below) and Mr Edwards. The mother is represented by Mr Gupta KC (who appeared below) and Ms Kumar and Ms Campbell-Brunton. I am grateful to all counsel for their respective submissions.

4. The father's case on appeal is that the judge was wrong to find that Article 13(b) was established because, in particular, the evidence did not support her conclusions as to the likely nature or extent of the deterioration in the mother's mental health on returning to Australia and its likely impact on A. In essence, it was submitted that the evidence did not establish a grave risk as required by Article 13(b). He relied on the following Grounds of Appeal.

> "(a) The judge was wrong to elevate the concerns and opinions of Dr Ratnam to conclude the mother was at risk of such a deterioration in her mental health so as not to be emotionally and physically available for A, to the requisite threshold of a grave risk of harm or intolerable situation.
>
> (b) The judge was wrong to find the undertakings and protective measures did not sufficiently ameliorate the mother's Art 13(b) defence, particularly given the long-standing nature of her mental health and her ability to live independently in Australia for 13 years.
>
> (c) The judge was wrong to find that the mother's condition could only be supported by her immediate family, ignoring the close and supportive relationships the mother had in Australia and the range of support services the mother had accessed in Australia which continue to be available.

> (d) The judge was wrong in not evaluating the support the father could and would offer in Australia in the care of A despite the fact the parents were now separated. This failure includes the failure to recognise the inability of the father to travel to England having been refused a UK visa."

Background

5. The father is an Australian citizen and has always lived in Australia. The mother was born and brought up in England but moved to Australia in or before 2013 (various dates are given including 2011). Until December 2023, apart from short visits to England, she had lived and worked in Australia. She had also acquired Australian citizenship.

6. The parents met in Australia in 2021 and started living together in 2022. A was born there in 2023. Neither parent has any other children.

7. The mother's family all live in England. Her mother has visited Australia every year and spent nearly two months there following A's birth.

8. The judge summarised the background as follows:

> "7. The mother has a long history of mental ill health. The father thought it was of about five years' duration but in fact it goes back much further than that with GP records documenting symptoms of depression and anxiety since about age 15 years. The mother's own mother describes her as someone who has always been "a people pleaser" and who became anxious and worried if she felt approval being withheld. However, it seems that the mother has also always been an enterprising and independent person: from the age of 14 she has had a job as a hairdresser and she is qualified to teach hairdressing. She decided to travel to Australia alone and has always been self-supporting there.
>
> 8. Life so far from her family was not always easy and for some years in Australia she was alcohol dependent. From April 2019 she received therapy from a psychologist and she had medication prescribed by her GP. At the end of 2019 she attempted to take her own life whilst intoxicated and was admitted to hospital. She flew to England and recuperated with the care and love of her family. She gave up drinking and was able to rent her own flat, build her own business as a hairdresser, work a second job as a carer for people with mental health difficulties and disabilities, and maintain close friendships and a good support network."

9. The mother, maternal grandmother and A travelled together to England at the end of September 2023. The father was intending to travel with them but was unable to do so because his application for a visa had been refused as he has a criminal conviction with a sentence of more than 12 months. This dated from 2003.

10. The mother and A returned to Australia in early November 2023. The relationship between the parents worsened and, as set out in the judgment, "the mother felt her mental health was worsening and her thoughts growing darker". The mother had 5 consultations with her psychologist and was diagnosed with post-natal depression.

11. The precipitating event for the mother travelling to England was a visit by the police at the end of November "to perform a welfare check on A". This turned out to have been in response to the paternal grandmother reporting concerns that A might be unsafe in the mother's care. Quoting from the judgment:

> "The mother experienced a mental health crisis characterised by panic and overwhelming fear about the future for her and A in Australia. As she had done after self-harming in 2019, she felt a desperate need for the support of her family. She bought a plane ticket at lunchtime and flew out in the early evening. The maternal grandmother states that the mother immediately informed her that she had come home because she was worried the father would seek to rely on her mental health as a way of removing A from her. On 2 December, she phoned the father and told him that she and A were in England."

12. The mother and A have been living with the maternal grandmother since arriving in England. The judgment sets out the large family network available to the mother in England and the extensive support she receives from family members.

Proceedings

13. The mother's case at the hearing below was that "the protective measures [proposed by the father] will be ineffective on the ground, especially in view of the [father's] past behaviour and this will have the result of her mental health declining further and rendering the situation intolerable for the child, A, who is still effectively a babe in arms or otherwise placing her at a grave risk of harm". The mother asserted that "the father's behaviour towards her was controlling, emotionally and psychologically abusive and he undermined her and her mental health issues".

14. Her Skeleton Argument concluded as follows:

> "It is therefore submitted that in all the circumstances and taking a holistic view of the matter, the mother's mental illness, the impact on the mother of a return to Australia, the lack of practical protective measures on the ground and the cumulative effect of the mother being stripped away from her familial support network, will make it intolerable for A to be returned to Australia and expose her to a grave risk of harm. It is axiomatic that it would be contrary to his best interests. It is submitted that the Court should exercise its discretion not to return this child summarily. The Mother and A have a large maternal support network here that cannot be replicated in Australia and the Father can no doubt reapply for a visiting visa or appeal his refusal on the grounds, the Court is reminded that he did not give full information in his original application … and this no doubt

> counted against him. Had he been allowed to visit then it is assumed this application would never have been made (6 months after the Mother and child left Australia)."

15. In his Skeleton Argument for the hearing below, the father referred to the mother's "deep and long lasting relationship with Australia". She had told Dr Ratnam that she "loved Australia and enjoyed the way of life". It was said that the mother had "a close circle of friends" in Australia and had been planning to return to work at the end of 2023 or the beginning of 2024 and that A had been enrolled at an Early Learning Centre. The father offered a range of protective measures in terms of financial support and otherwise.

16. It was submitted in summary that:

> "24. The mother has clearly had a long standing mental health issue and depression. This did not prevent her travelling to Australia and remaining there for 13 years, where she had the insight to access GP and psychological services to support her and address her mental health.
>
> 25. Whilst in Australia, she accessed and attended all the support services Dr Ratnam is now advocating. She also continued to work, as she currently is in England. In fact the evidence demonstrates a certain robustness to the mother who has always managed independently in Australia.
>
> 26. As in any other case, where a return order is made to an objecting parent, that parent is likely to suffer an adverse impact on their mental health. However, whilst the return to Australia may be uncomfortable for the mother, it will be submitted that it does not amount to an intolerable situation or that as a consequence A would be at grave risk of harm."

Expert Evidence

17. Dr Ratnam, a Consultant Forensic Psychiatrist, provided a written report and also gave oral evidence of which we have a transcript.

18. In her report Dr Ratnam stated that the mother fulfilled the criteria for a diagnosis of recurrent depression having experienced episodes of depression over many years, with recurrent episodes since 2013. The mother had experienced antenatal and postnatal depression. The "medical records refer to an overdose in adolescence and [the mother] reported either an overdose or an episode of self-harm in November 2019" when she "had gone to A & E, but was discharged". Dr Ratnam also considered that the mother fulfilled the criteria for a diagnosis of generalised anxiety. She had "used alcohol as a coping mechanism for low mood" and in "August 2018 she was reported to be dependent on alcohol". She had been "abstinent since January 2020". In addition, the mother fulfilled the criteria for a diagnosis of post-traumatic stress disorder if the "trauma in her relationship with" the father had occurred as she recounted.

19. The report contained a detailed summary from the mother's Australian medical records. These showed that the mother had accessed extensive treatment in Australia which had included engaging in "extensive psychological intervention", with the same private clinical psychologist from 2019, and being prescribed antidepressants.

20. Dr Ratnam noted that depression can impact on a person's "ability to attend to daily activities" and recorded:

> "The GP notes refer to [the mother] having difficulty coping on 22 November 2023.
>
> From [the mother's] account, her mental health has impacted upon her functioning and she reported that her mother supported her significantly in daily tasks. Most of her activities outside the home involve family members.
>
> She has started working one day a week and although it helps distract her from her circumstances, she finds it difficult to concentrate."

When asked to "comment on the impact of any diagnosed condition or disorder on the mother's ability to parent the child", Dr Ratnam said:

> "Depression can impact on a mother's emotional availability to a child due to preoccupation with negative thoughts. However [the mother] denied difficulties attending to [A's] emotional needs and the GP notes do not raise concerns regarding this.
>
> It appears that she has significant practical support from her mother, which allows her to focus on [A]."

21. Dr Ratnam was asked:

> "What impact, if any, would a return to Australia have on the mother's (a) current mental health (b) future mental health and (c) ability to parent [A]."

She replied:

> "*It is likely that a return to Australia would impact adversely on [the mother's] current and future mental health*. She was depressed at the time of assessment and reported passive suicidal thoughts with expressions of hopelessness should she return to Australia. She also reported symptoms of anxiety.
>
> Whilst adequate treatment is available in Australia, other factors are also important in recovery and maintaining stability of mental health.
>
> Social support is important in recovery and although [the mother] reported that she had some friends in Australia, she has a more extensive support system in the UK."

> On-going stress, including relationship discord will impact adversely on recovery and can also be a relapse trigger.
>
> She admitted that she had had thoughts of consuming alcohol twice, which were triggered by writing her statement and receiving [the father's] statement. Despite being in recovery, there is a possibility of [the mother] consuming alcohol as a coping strategy should her mood deteriorate further.
>
> *It is not possible to predict the extent of impact on parenting but as stated above depression can impact on the ability to emotionally and physically respond to a child consistently*." (emphasis added)

22. I propose to set out some parts of Dr Ratnam's oral evidence.

23. Dr Ratnam described the mother as "significantly vulnerable", later explaining that this was "in terms of her mental health, so she's vulnerable to current (inaudible) of depression and also when she's depressed at the current time she's vulnerable to further deterioration of her mental health".

24. As to the risk of deterioration, Dr Ratnam first said, in response to Mr Gupta suggesting that there was "a significant risk of deterioration", that "in my clinical opinion there is *a* risk of deterioration in her mental health" (emphasis added). Mr Gupta then asked whether this "could lead to suicide, suicidal ideation and maybe her acting that out", Dr Ratnam replied:

> "So she does have a history of suicidal ideation and thoughts of self-harm when depressed so they're – there is a risk of that. But what I would be concerned about particularly if there were further deterioration in [the mother's] mental health with a lack of significant support is the impact of that on parenting and the impact of depression on parenting".

Beyond expressing concern, Dr Ratnam did not expand on what the nature of that "impact" might be.

25. This was, perhaps, why, when the judge asked a number of questions at the end of Dr Ratnam's evidence, one of these was to seek further assistance from Dr Ratnam on the potential impact on the mother's parenting. The judge asked:

> "whether the risk … of a deterioration in the mother's health on a return is going to pose a grave risk, not just a risk but a grave risk, to [A] or [whether] the risk of psychological deterioration in the mother's mental health is such that … there's a risk of [A] experiencing a situation which she shouldn't be asked to tolerate".

The judge then added:

> "One of the answers that, I think the final answer that you gave to Mr Gupta was about suicidal ideation when depressed and you

> said that your concern was about a deterioration with no support and the impact on parenting. So can you tell me a little bit more about the future as you see it for [A] if the mother was asked to return with [A] to Australia":

26. I set out Dr Ratnam's answer in full because I agree with Mr Jarman's submission that this encapsulates the effect of Dr Ratnam's evidence as to the nature of the risk to A:

> "I think it really depends on what is put in place for mother should she return to Australia. So if the mother is to return to Australia with her mother as a form of support but that would be limited, the medication is optimised, that there is psychological support, those are some mitigating factors regarding further deterioration in her mental health. If I can (inaudible) it that might be that even in those circumstances she will [not] achieve a full remission from her mental health problems given that she's – that's not occurred whilst she's even been in this country and there's been ongoing support (inaudible). But her mental health has not affected her ability to respond emotionally to [A]. She's not presented as an emotional event trigger. She's been able to pick up on [A's] issues, at home [A's] emotional and day to day needs albeit with a lot of support regarding practical tasks such as cooking, shopping and washing. *My concern would be if and when her mother leaves Australia* and she is in Australia with a few friends but very little consistent support from what I could understand, and this is a mother who has a long history of mental health difficulties which dates back to her adolescence, so she is vulnerable to relapses. We know that individuals with (inaudible) episodes of depression the vulnerability – the risk of relapse can be between 70 and 90 per cent of depression. So *there is a significant risk of deterioration or relapse*. In that context and with ongoing stressors which might include court proceedings and there will be – it would be difficult to avoid [the father] for sure because they have a child together so that will be an ongoing part of [the mother's] life in this country and in Australia but it needs support structures around that and should her mental health deteriorate further which is likely to happen if she feels isolated with her past history of depression then *there is a risk of her becoming emotional about [A] and [A's] experiences of a mother who is not able to consistently respond to her which can affect attachment with [A]* although it's likely that [the father] will be a significant attachment factor – figure and so she will have that consistency. *But for [A] having a mum who is not always emotionally available or emotionally distressed could impact on her own emotional wellbeing*." (emphasis added)

In the last sentence I have emphasised, Dr Ratnam repeats what she said in her written report, namely that the deterioration in the mother's mental health "can" or "could" impact on A's own emotional wellbeing.

27. Following the judge's questions, Mr Gupta asked Dr Ratnam to clarify what she had meant when she said that "augmentation of medication … could possibly ameliorate the position" and whether this was possible but not probable. Dr Ratnam replied:

> "the thing about psychiatry is that we're not a clear science so individuals' responses will vary. I think it's – whilst there might be some improvement in symptoms I think it is very unlikely that even with amelioration, sorry, even with augmentation there would be a complete resolution of symptoms."

Judgment

28. The judgment set out that:

> "the mother is convinced that she would not be able to cope on her own in Australia without in person support from her family there. The written evidence indicated that in the event of a return order being made, the plan was that the maternal grandmother would accompany the mother and A to Australia and stay for around a month before returning to England. During submissions, it was indicated that there had been a change. The grandparents have had to juggle their caring responsibilities and to accommodate these and other commitments, it was the grandfather who would fly out and he would be able to stay for around three weeks."

29. The judge referred to the protective measures offered by the father. These included "non-financial protective measures of a conventional type" and making all his savings of AUS60,000 available to the mother. He did not offer separately to pay for the cost of the maternal grandmother's or grandfather's flight to Australia nor for the cost of a car. The judge noted that the mother "would have to use some of the lump sum to buy" a car which "would leave the rent and bills covered for fewer than 6 months".

30. The judge summarised Dr Ratnam's evidence:

> "32. Dr Ratnam's evidence was that currently, the mother fulfils the criteria for a diagnosis of recurrent depression, generalised anxiety and PTSD. A diagnosis of that last condition would depend on the trauma having occurred. If the nature of the relationship was as the mother had described, her experience of it could lead to symptoms of PTSD. The mother had been distressed when assessed. She reported feeling she would be under threat from the father in Australia. In her opinion, the mother's baseline was low, depression was impacting her ability to function, and she was only able to manage with significant help from her own mother, sisters, father and wider family. Upon leaving England, she would lose the familial support system on which she depends. In Dr Ratnam's view, a return to Australia in those circumstances would be a significant trigger for further deterioration in her mental health conditions.

> 33. She considered that the mother's medication could be optimised: the existing dose could be increased and another medication added. However, she explained that when a person is taking antidepressants and receiving therapy but continues to be subject to significant stressors, the treatment effect is limited. Dr Ratnam's opinion was that as the mother had not experienced remission whilst in England, remission in Australia was unlikely. Continuation of the present support provided by family members was very important to the prospects of recovery.
>
> 34. In response to questions from Mr Gupta, Dr Ratnam did not appear concerned that there was a significant risk of alcohol abuse recurring or repetition of suicidal ideation that would cause a risk of harm to A. The mother was four years into recovery from alcohol dependence and five years was considered advanced. A vulnerability remained but the mother had good insight into her mental health and could identify when she was tempted to have a drink. She would know how to manage those risks. Dr Ratnam was unable to predict the extent of the impact on the mother's parenting of A if her current depression and symptoms deteriorated, save to say that depression can impact on a parent's ability to respond to a child's emotional and physical needs consistently.
>
> 35. When asked about that further, she said that the impact on A would depend on the availability of support. If the mother returned to Australia with her own mother, medication was optimised, and psychotherapy was delivered, the risk of A coming to harm as a result of the mother's impaired mental health would be mitigated. The concern would increase if or when that in person family support was no longer available. If the mother then felt isolated, there was a risk of deterioration and her becoming emotionally remote and unable to respond to A. When Mr Jarman reminded Dr Ratnam that there was no evidence that the mother had ever been emotionally unavailable to A, her response was that in this case, the past was not a reliable guide to the future."

31. The judge set out the law, referring to *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 ("*"Re E*"), *In re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257 ("*Re S*"), *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159, and *Re IG (A Child) (Child Abduction Habitual Residence Article 13(b))* ("*Re IG*") [2021] EWCA Civ 1123.

32. The judge said that she had "not found this an easy decision" but she had "come to the clear conclusion that the mother has made out the Art 13(b) defence and that the available protective measures will not ameliorate the risk of A suffering grave psychological harm if returned to Australia, nor ensure that she will not be called upon to face an intolerable situation there". It could be argued that this reverses the effect of Article 13(b) which requires, in short, a grave risk of harm to be established and not, for example, ensuring "that A will not be called upon to face an intolerable situation".

However, looking at the judgment as a whole, it seems clear that the judge was considering whether the requisite grave risk had been established.

33. Before setting out her reasons, the judge said that she agreed with many of Mr Jarman's submissions:

> "I agree about the efficacy of the coping strategies the mother had put in place to manage her anxiety and recurrent depression between her arrival in Australia in 2013 and A's birth ten years later. I also agree with his assessment that during that decade she demonstrated considerable independence, drive and resilience and she functioned to a high level. I accept too that to date she has met all of A's needs and has not been unavailable to her emotionally. The submission I am unable to accept is that because she has managed her mental health symptoms well in Australia, the possibility, if she returns, of her not coping to an extent that exposes A to the risk of grave harm can be excluded with confidence."

34. She then went on:

> "The suggestion that the issue of the extent of the effect on A of any deterioration in her mother's mental health must be a matter of speculation is not wholly wrong. A is not a child who has already been exposed to the situation that she will experience upon summary return because her mother has never lived alone with her in Australia for more than a few days. But what the 1980 Convention requires is an assessment of the future risks, whether or not they have already been run. In making that assessment, I have looked holistically at the mother's past prior to A's birth, her life with A to date, and the expert evidence."

35. The judge's reasons for deciding that Article 13(b) was established are contained in the following paragraphs from her judgment:

> "53. If the mother returns to Australia with A, for at least the first three months they will be adequately housed, will have enough money to live modestly, and the mother will have a car and access to medication, therapy and support to stay sober. For the first three weeks, she will have the live in support of a family member. After that, she will be on her own and in continuous sole charge of a 14 month old child, unless A goes to nursery two or three days a week which respite will depend on the mother's ability to earn.
>
> 54. At present, the mother is suffering from insomnia, weight loss, poor motivation, impaired ability to concentrate, and anxiety. It is highly foreseeable, if not likely, that all of these symptoms will worsen once she and A are living on their own in Australia. Dr Ratnam's evidence was that neither optimal medication nor therapy will provide remission for as long as

maintaining stressors persist. Life in Australia will undoubtedly be difficult and tiring for the mother. At the moment she experiences a subjective sense of being under threat from the father which will be increased if she has to return to living in the same neighbourhood as him. Money will be in short supply and a source of worry. There will be welfare proceedings which she will have to manage whilst living alone. The continuing requirement to facilitate A's video contact with the father, which the mother already finds overwhelming, will be a recurrent trigger for anxiety which she will have to manage without help.

55. Dr Ratnam's view was that the risks of a relapse of alcohol dependence or binge drinking, and of a further attempt at serious self-harm were small, though she did not say nil. If either risk eventuated, the possibility of A coming to serious harm or being placed in an intolerable situation would be present. However, in my judgment, *the greater grave risk is that of the mother not coping with daily life to the point that she is unable to provide safe care. There is a serious prospect of her losing more weight and becoming so depleted, exhausted, lacking in confidence as a parent, and overcome by anxiety and negative thoughts once her father goes home, that she is unable to meet A's daily needs whether physical, emotional, or social (the mother already finds it extremely difficult to go out with A without another adult present) so that the situation for the child is intolerable*.

56. *I also consider that there is a grave risk of the mother's mental health deteriorating to the point that she experiences a crisis.* On the two occasions when that happened, she avoided a complete mental health breakdown by immediately flying to England to seek family help. In the event of an order for A's summary return, she has agreed to provide undertakings to lodge her passport with a lawyer and not to remove her. Therefore, if she has a further crisis in Australia, the mother will not be able to come back to England without leaving A behind. Separation of this very young child from her mother who has been a constant presence since birth would expose A to a grave risk of psychological harm. For the mother, knowing that once in Australia she cannot leave with A, even if psychologically paralysed or overwhelmed, is likely to exacerbate her feelings of threat and anxiety and increase the risk of the child of being placed in a situation of intolerability.

57. The protective measures offered by the father are necessary but not sufficient to address the Art 13(b) risks to A. What would ameliorate those risks, and in my judgment the only measure that would effectively prevent A from experiencing psychological harm or an intolerable situation, would be the presence of a family member living with or close to the mother for a period of months not weeks. Regrettably but understandably, that is not on

> offer. I do not lose sight of the fact that the mother has friends in Australia who knew A as a baby and who understand the history of the relationship from the mother's point of view. They would be likely to help but they have their own lives and one has moved away. They will not be able to replicate the significant support upon which the mother's safe care of A currently depends." (my emphasis)

Submissions

36. The parties' respective submissions were commendably focused on the key issues, namely the nature of the impact on the mother's mental health on returning to Australia and whether this established a grave risk of harm to A or that she would otherwise be placed in an intolerable situation.

37. Mr Jarman pointed to the high threshold required to establish Article 13(b) as set out in, for example, *Re E* and *Re IG*. He submitted that the evidence did not establish any significant risk of the mother becoming so psychologically disabled as not to be able to care for A. There was, he submitted, no evidence that a return would lead to the mother being unable to care for A or of her being emotionally unavailable to A. Or, to put it another way, that the evidence was not such as to establish that the mother was at risk of such a deterioration in her mental health so as not to be emotionally and physically available for A to the requisite threshold of a grave risk of harm or intolerable situation. Indeed, he submitted that there was no evidence at all that the mother would be psychologically impacted in her care of A. The judge's conclusions were not supported by the evidence; she had failed to evaluate the nature and extent of the risk to A; and had failed to evaluate the mitigating consequences of protective factors.

38. In summary, therefore, Mr Jarman submitted, that the effect of the mother's diagnosis and prognosis did not reach the high threshold required by Article 13(b). He pointed to the difference in the level and degree of the prospective mental health issues in other cases in which a return had not be ordered to "that experienced and diagnosed by the mother in this case". For example, in *Re S* the expert, at [18], had been "concerned that [the mother's] anxiety will become crippling" and, at [25], had said that the "likely psychiatric and psychological impact on [the mother] of a return to Australia is significant and severe".

39. Mr Jarman also submitted that the "raft of protective measures" offered by the father and available to the mother in Australia, including "adequate treatment" as referred to by Dr Ratnam (medication and access to her previous clinical psychologist), meant that any deterioration in the mother's mental health would be sufficiently ameliorated so that Article 13(b) was not established.

40. Mr Gupta submitted that the judge had been entitled to decide that Article 13(b) was established. He acknowledged that the use of the words "grave" and "intolerable" "mean that the threshold that the party asserting Article 13(b) … must cross is high" but submitted that the judge had correctly directed herself as to the law and had applied it correctly to the facts in this case. Looking at the judgment as a whole and the evidence the judge had been entitled to make the findings and reach the conclusions which she did. The judgment "carefully details the likely impact on the mother and by extension on [A] if a return were to be ordered".

41. In response to Ground 1, Mr Gupta submitted that the "judge's considered and detailed determination that the mother's mental health issues met the threshold required under Article 13(b) is unassailable". He relied on Dr Ratnam's evidence and submitted that the judge had been "right to build on [that] evidence" when reaching her conclusions.

42. In respect of Ground 2, Mr Gupta submitted that the judge had given "due consideration to the efficacy of the protective measures offered by the father and properly concluded [at paragraph 57] that they would not be able to ameliorate the risk to" A. Those measures were inadequate to address the likely "significant risk of deterioration or relapse" in the mother's mental health on a return to Australia as referred to by Dr Ratnam. They would not prevent, he submitted, the mother's "mental health declining to such an extent as to render the situation intolerable for the child or placing her at grave risk of harm".

43. Mr Gupta also made submissions in respect of the other Grounds of Appeal, which I do not propose to set out in this judgment.

44. The final issue he addressed was under the heading "Proportionality". This ranged quite widely but it became clear during the course of the hearing before us that Mr Gupta rightly accepted that this issue did not add substantively to the core submissions he made as summarised above.

45. Mr Gupta submitted that, if the appeal was allowed, we should remit the matter for rehearing so that up to date and fuller evidence, including expert evidence, could be obtained. This was, he submitted, necessary to enable a proper determination of the application.

Law

46. Article 13(b) of the 1980 Convention provides, as an exception to the obligation under Article 12 to order the return "forthwith" of a child who has been wrongfully removed or retained, that the court "is not bound to order the return of the child if the person … [who] opposes [the child's] return establishes that":

> "b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

47. The proper approach to this provision has been considered in a number of decisions. In *Re E*, the judgment of the court was given by Lady Hale and Lord Wilson. In agreement with the High Court of Australia, they said, at [31]:

> "there is no need for the article to be "narrowly construed". By its very terms, it is of restricted application. The words of article 13 are quite plain and need no further elaboration or "gloss"."

They went on to explain the "level of seriousness" required to establish Article 13(b):

> "[33] Second, the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk

> rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.
>
> [34] Third, the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or *otherwise*" placed "in an intolerable situation" (emphasis supplied). As was said in In re D [2007] 1 AC 619, para 52, "Intolerable" is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e g, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.
>
> [35] Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home."

48. Shortly after the decision in *Re E*, the Supreme Court returned to the issue of mental health in the context of Article 13(b) in *Re S*. In the latter case, the mother was also relying on the impact on her mental health of returning to Australia. Charles J's determination that Article 13(b) had been established was overturned by the Court of Appeal. The mother's appeal to the Supreme Court succeeded. The Supreme Court, in a judgment given by Lord Wilson, considered that the Court of Appeal had misunderstood the effect of *Re E* and, as a result, had, at [31],

> "made an entirely inadequate address of the mother's case. Instead they treated the foundation of her defence as being merely her subjective perception of risks which might lack any foundation in reality."

49. Lord Wilson explained the effect of *Re E*, at [27]:

> "this court considered the situation in which the anxieties of a respondent mother about a return with the child to the state of habitual residence were not based upon objective risk to her but nevertheless were of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to the point at which the child's situation would become intolerable. No doubt a court will look very critically at an assertion of intense anxieties not based upon objective risk; and will, among other things, ask itself whether they can be dispelled. But in *In re E* it was this court's clear view that such anxieties could in principle found the defence. Thus, at para 34, it recorded, with approval, a concession by Mr Turner QC, who was counsel for the father in that case, that, if there was a grave risk that the child would be placed in an intolerable situation, "the source of it is irrelevant: e g, where a mother's subjective perception of events lead to a mental illness which could have intolerable consequences for the child". Furthermore, when, at para 49, the court turned its attention to the facts of that case, it said that it found
>
> > "no reason to doubt that the risk to the mother's mental health, whether it be the result of objective reality or of the mother's subjective perception of reality, or a combination of the two, is very real"."

This passage made clear the nature of the court's assessment. In that case, it was whether the mother's "anxieties" were "of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to the point at which the child's situation would become intolerable".

50. This was further encapsulated, at [34], when Lord Wilson said:

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

51. It can be seen, therefore, that the court has to consider both the likelihood of the risk arising and the nature or gravity of that risk if it does occur. As I noted in *Re S (A Child) (Abduction: Article 13(b): Mental Health*) [2023] 2 FLR 439, at [90]:

> "There is a connection between the nature of the risk and the assessment of whether it is a grave risk within the scope of Art 13(b). The more serious or significant the character of the risk, the lower the level of the risk which 'might properly be qualified as "grave"', and vice-versa."

The effect of this approach, as noted by Lewis LJ during the hearing, is that the court must assess the nature of the risk, the likelihood of the risk materialising and the consequences of the risk materialising for the child. In a case such as the present, for the purposes of determining whether the circumstances set out in Article 13(b) have been established, this will involve consideration of the nature or extent of any potential deterioration or relapse in the mother's mental health and the nature or extent of any potential impact on A.

Determination

52. The issue at the centre of this appeal is whether, as Mr Jarman submitted, the judge's conclusion that Article 13(b) was established is not supported by the evidence. In determining this appeal I recognise, of course, the limited circumstances in which an appellate court can interfere with a trial judge's evaluation. For example, as Lord Reed said in *In Re R (Children) (Reunite International Child Abduction Centre intervening)* [2016] AC 76, at [18]:

> "it is relevant to note the limited function of an appellate court … . Where the lower court has applied the correct legal principles to the relevant facts, its evaluation is not generally open to challenge unless the conclusion which it reached was not one which was reasonably open to it".

53. I consider that, regrettably, the judge's conclusion that Article 13(b) was established in this case was wrong in that it was not one reasonably open to her. As explained below, it is clear to me that the judge's analysis was materially flawed and her ultimate conclusion was wrong. Further, I do not consider that a rehearing is required because we are in a position properly to determine the application. Dr Ratnam's evidence is the key evidence in determining whether Article 13(b) is established in this case. We have a full transcript of her oral evidence and, beyond a general submission, Mr Gupta did not identify any justification for any further or "fuller" enquiry. There has been a full, and sufficient, enquiry in the context of an application under the 1980 Convention.

54. As Mr Gupta submitted, the key question, not in abstract but in real terms and adopting what Lord Wilson said in *Re S*, is what is likely to happen if the mother and A were to return to Australia. Is the likely effect on the mother's mental health sufficient to establish a grave risk that A would be exposed to physical or psychological harm or otherwise placed in an intolerable situation? As referred to above, this requires consideration of the nature of the risk; the likelihood of the risk materialising; and the consequences of the risk materialising for A. These are for the purposes of answering the ultimate question, namely whether there is a grave risk that returning A to Australia would expose her to psychological harm or otherwise place her in an intolerable situation.

55. Mr Gupta is right when he submitted that the judge was aware, as she set out in paragraph 50, that "the 1980 Convention requires an assessment of the future risks". However, the question raised in this appeal is whether the judge's analysis of the nature of the risk of a deterioration in the mother's mental health and the extent of the potential impact on A is supported by the evidence and, accordingly, whether her conclusion that Article 13(b) is established is sustainable.

56. (i) Dr Ratnam was clear that it is "likely that a return to Australia would impact adversely on [the mother's] current and future mental health" (her written report). In her oral evidence, she said that there were "mitigating factors regarding further deterioration in [the mother's] mental health", including the presence of a parent, medication being optimised and psychological support, but that, following her mother (or father) leaving Australia there is "a significant risk of deterioration and relapse".

57. (ii) The next issue is the nature of the risk which means in this case the extent of any deterioration or relapse in the mother's mental health. The judge concluded, as set out in paragraphs 55 and 56, that the nature of the risks were: (a) "of the mother not coping with daily life to the point that she is unable to provide safe care. There is a serious prospect of her losing more weight and becoming so depleted, exhausted, lacking in confidence as a parent, and overcome by anxiety and negative thoughts once her father goes home, that she is unable to meet A's daily needs whether physical, emotional, or social"; and (b) "of the mother's mental health deteriorating to the point that she experiences a crisis".

58. With all due respect to the judge, I agree with Mr Jarman's submission that these conclusions are not supported by the evidence. The judge rightly "looked holistically at the mother's past prior to A's birth, her life with A to date and the expert evidence". However, the critical question is whether these conclusions were supported by the expert evidence because, if they were not, the other evidence would not by itself justify these conclusions.

59. I would first note that Dr Ratnam's evidence was that there is a significant risk of deterioration and not a risk of significant deterioration. This is not a semantic distinction but an important substantive distinction. I would, for example, refer again to *Re S* in which the expert said, at [25]: "the likely psychiatric and psychological impact on [the mother] of a return to Australia is significant and severe" and *In re B (A Child)* [2021] 1 WLR 517 in which, at [111], "Dr Ratnam's evidence … established that the mother's mental health would be likely significantly to deteriorate" on a return to Bosnia. Dr Ratnam's evidence, that there was a significant risk, does not, therefore, support the judge's conclusions that there was a risk of, what would clearly be, a very significant deterioration. I would also reject Mr Gupta's submission that when Dr Ratnam said that there was a "significant" risk of deterioration this "can be equated with 'grave'". Her evidence was directed to the level of the risk not the nature of the deterioration.

60. Secondly, Dr Ratnam's evidence does not support the judge's specific conclusions of "the mother not coping with daily life" or of "deteriorating to the point that she experiences a crisis". In reaching these conclusions, the judge was indeed, building on the evidence, as Mr Gupta submitted, but, contrary to his submission, not in a way which was justified.

61. Thirdly, Dr Ratnam did not suggest anywhere in her evidence that there was a risk of the mother's mental health deteriorating to the extent of her being "unable to provide safe care" or being "unable to meet A's daily needs". In her written report she said that a return will "impact adversely" on the mother's mental health; that depression "*can* impact on a mother's emotional availability to a child"; and that it "is not possible to predict the extent of impact on parenting but as stated above depression *can impact on*

the ability to emotionally and physically respond to a child consistently" (emphasis added). In her oral evidence she said, I repeat:

> *there is a risk of her becoming emotional about [A] and [A's] experiences of a mother who is not able to consistently respond to her which can affect attachment with [A]* although it's likely that [the father] will be a significant attachment factor – figure and so she will have that consistency. *But for [A] having a mum who is not always emotionally available or emotionally distressed could impact on her own emotional wellbeing*." (emphasis added)

Dr Ratnam said that there was "a risk of [the mother] becoming emotional" and used the words "can" and "could" in respect of attachment with A and A's emotional wellbeing. These are, with respect, some distance from the judge's conclusions.

62. In summary, the evidence undoubtedly establishes that "there is a significant risk of deterioration or relapse" in the mother's mental health but it does not establish that the nature or extent of any such deterioration or relapse would be likely to expose A to a *grave* risk of psychological harm or otherwise place her in an *intolerable* situation. The nature of the risk to A, as expressed in Dr Ratnam's evidence, is that depression *can* impact on the ability of a parent to respond "consistently" and *can* affect attachment with A which *could* impact on A's own emotional wellbeing. In these terms, the nature and extent of the potential impact on A are not such as to bring this case within Article 13(b).

63. I know, of course, that the mother will be distressed by the outcome of this appeal. I would just point out to her and to the father that, as referred to by Mr Gupta during the hearing, we are not making any long-term welfare decisions. Those decisions, in the absence of agreement between the parents, must be resolved by application to the court in Australia, which is best placed to determine what is in A's best interests including in respect of any relocation application the mother may make.

Conclusion

64. For the reasons set out above, I have concluded that the father's appeal should be allowed and that we should make a summary return order under the 1980 Convention.

Lord Justice Lewis:

65. I agree.

Lord Justice Jeremy Baker:

66. I also agree.