Neutral Citation Number: [2019] EWHC 1077 (Fam)

Case No: FD19P00067

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2019

Before:

MR DARREN HOWE QC

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Between:

	JP	**Applicant**
	- and -	
	TP	**Respondent**

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- -

Ms Katy Chokowry (instructed by **Creighton and Partners Solicitors**) for the **Applicant**
Ms Indira Ramsahoye (instructed by **Shoosmiths Solicitors**) for the **Respondent**

Hearing dates: 9th and 11th April 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR DARREN HOWE QC

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 Darren Howe QC:

The Parties and the Application

1. This is an application made under The Hague Child Abduction Convention for the return of 1 child to New Zealand. The child concerned is a boy, now aged 10 years, who I shall refer to as D.

2. Over the Christmas and New Year holiday 2018/2019, D travelled to England to spend time with his father, who I shall refer to as F. D was due to return to New Zealand on 25 January 2019, where he has lived with his mother, who I shall refer to as M, since relocating to that jurisdiction with M in July 2017. That relocation had been opposed by F but he then, during the course of family court proceedings, relented and consented to an order granting M permission to permanently relocate D, and his older brother who is not a subject of these proceedings, who I shall refer to as K.

3. On 18 January 2019, M received a letter from solicitors instructed by F informing her that F would not be returning D on 25 January 2019. D has remained in F's care in England, has been registered at an English school and has had only such contact with M as has been achieved by reason of orders of this court.

The Background

4. I will summarise the background to this application in some detail as events that have taken place over the past 4 years or so are of relevance to the case put by F at this hearing.

5. M was born in New Zealand and holds dual New Zealand and British citizenship. The father is a British national. The parties met in 1996 and lived in New Zealand for some time with their oldest son, K, being born there. The parties relocated to England in 2003 and D was born in 2008. Both children hold dual citizenship.

6. The parties married in 2010 but separated in 2013/2014. Following that separation, and by agreement, M assumed the primary care role for the boys and they spent every second weekend from Friday evening to Sunday with their father.

7. In 2015, following the death of the maternal grandmother, the mother indicated her wish to move back to New Zealand. At that time M did not proceed with an application to the court and it was, in fact, F who made an application for Child Arrangements Orders in 2016. He alleged that the mother abused alcohol. F had made the same report to the local children's services, that found no evidence to support F's allegation.

8. In 2017, M applied to the family court for permission to relocate to New Zealand with the children. Eventually F agreed to that relocation. He now says that he was told that opposing M's plans would be expensive and was advised that he was unlikely to be successful in preventing M leaving England with the children.

9. The mother and the children moved to New Zealand in late July 2017. There was a detailed programme attached to the order prescribing when the children would spend

time with their father. The father travelled to New Zealand in December 2017 to spend time with the children. When there, he consulted New Zealand lawyers alleging "I separated from my wife in August 2014 on the grounds of irreconcilable differences over her excessive alcohol consumption, her appetite for men (some with criminal records) and parental styles…..I have grave concerns for my children's welfare as my wife's behaviour has continued since their return to New Zealand in July 2017. The boys' education has suffered too and D has behavioural issues (wetting, angry outbursts)".

10. It is M's case that this correspondence discloses F's aim as always having been to obtain the removal of the children from her care and to return to England with them. F's case is simply that he has retained the concerns he first raised in 2016 about M's ability to adequately parent their children.

11. The father chose not to pursue proceedings in New Zealand in early 2018 so, despite the safeguarding issues that F raised with his lawyers, but not it would seem with local children's services, the children remained in M's care.

12. D displaying challenging behaviours had arisen long before D and K relocated to New Zealand but the extent of D's difficulties has been a matter of dispute between the parents for an equivalent period of time. In an assessment report undertaken by a UK paediatrician in November 2015, the following is recorded:

"At home D needs prompts and help with self-care. He will not follow instruction. He will display temper tantrums and angry outbursts if he is asked to do something. On the other hand, D is an extremely loving child. He will not go to bed without being allowed to hold mum's hair at bedtime. D told Mum in clinic that "I need to look after your hair". Dad reports D sleeps in his own bed and there are no issues at bedtime at Dad's house. D does not have difficulties with his self-care tasks at his house but he does have to be reminded".

13. D was assessed by Action for Asperger's in February 2016. This was an assessment appointment attended by both parents. Under the heading 'Current Concerns" the assessment report records:

"D is very behind at school and parents aver that he has been behind from 'day one'. Parents said that 'he just didn't want to read' and was 'totally not interested'. He does not 'get' phonics and is consequently very slow at reading….D presents as well behaved at school, while at home he 'screams and shouts'…D is prone to having bad tantrums…D's brother will taunt him by taking his toys away from him; D lashes out. Parents said that their older child tends to take a parental role over D. In supermarkets D 'runs riot', although as this is discussed, father remarked that D is not 'like that' when he is with him, and that he has 'the odd tantrum'.

14. The author of the assessment sets out her view that "D has been more affected by his parents' separation than his older brother, though his parents think that he is perhaps more 'measured' in the way he shows his upset". The conclusions of assessment were that D's behaviours were not "unusual enough to warrant a diagnosis of autism". The recommendation was for counselling for all the family

15. Given the clearly documented history of M raising her concerns about D's presentation to professionals, some of which F is, in the documents before me, recorded to have accepted, it is in my judgment not unexpected that these difficulties, and M's reports of them, continued following D's relocation to New Zealand. During the 2016 assessment of D, both parents reported their own histories of, at times, poor mental health. M has suffered from depression for many years. These difficulties also continued following the move to New Zealand and, as we shall see, led to M taking overdoses of her prescribed medication on, it would seem, 2 occasions that came to the attention of New Zealand child protection services.

16. At the end of F's visit to New Zealand in January 2018, the father sent an email to M's sister in the following terms:

> "We took the boys back this morning. M was there in bed, taken the day off due to the effects of alcohol and entertaining last night.
> She didn't speak to me but these pics are the state of the boys' rooms. K says they will be expected to tidy them up tomorrow night.
> L also stated that he definitely wants to come to the UK in July and may ask for your help.
> He wants to do it without M's permission".

17. F has filed a statement from M's sister. Within that statement the sister has little that is positive to say about M. M is described as putting her own needs above those of the children whereas F is described in almost glowing terms. The sister describes M as being a poor housekeeping and allowing the home to become unclean. M is also described as failing to impose routines, failing to meet the children's medical needs and failing to provide adequate healthy meals. The sister is critical of M introducing the children to a number of 'boyfriends'. The sister provides one example when she says that M became so intoxicated by alcohol that she vomited but she reports that the children have reported to her that M has drank to excess on other occasions. The sister provides no examples of what M does well with the children or in any way describes the children's relationship with their mother. There is, in my judgment, a complete lack of balance in the statement given the sister's descriptions of F as "always going above and beyond for the children". If conditions within the home were as bad as the sister describes, I would have expected this concerned retired school teacher to have reported her concerns to local safeguarding services. It appears, from the content of the sister's statement, that all she did was, on one occasion, to clean the bathrooms.

18. In April 2018, M suffered a significant deterioration in her mental health. That this occurred was not disclosed by M in her statements to the Court but came to light in a report prepared by an officer of the Ministry for Children that details the contacts that child protection services have had with M and the children since their arrival in New Zealand. In April 2018, M took an overdose of her medication and is reported to have been "struggling after their return to New Zealand a few months previously, after having lived 12 years in England…Both boys have behavioural issues. The children were referred to …child and youth mental health services. Following this referral, a child and family assessment was undertaken and no further action was taken by the Ministry.

19. In July 2018, the father requested that the children travel to England to spend time with him. Both K and D returned to M's care after this trip but K then travelled back

to the England in September 2018 on what was said to be a 2-week trip. K informed M that he wished to remain in the care of his father. K was 15 years old and M agreed to K remaining in England.

20. It was in July 2018 that D's school became concerned with D's attendance. In an email dated 6 March 2019, the head teacher of D's school says "As a school we became concerned around July 2018 when [D's] attendance dropped below 80%. We referred him to truancy services but unfortunately no action was taken at that time. Around this time it was also learned that D would refuse to leave home and would sometimes be left at home alone when M could not get him to school so that she could go to work. As soon as the school was aware of this we worked with M, so that she would contact us and we would escort him to school". This email concludes by saying the following:

> "We have been really very concerned for D's mental health and well being. Despite M's willingness to work with school there have been times when she has not been entirely truthful about D being home alone and I have had to involve the police, as I have feared for D's safety. I am not too sure of how stable M is emotionally and it is clear this has an effect on D".

21. The incident referred to by the Head teacher when she called the police occurred in November 2018. F had sent an email to the Head teacher informing her that D had been left home alone by M. The teacher visited the home and, to use the words of her own email, "was unable to get D to answer the door' so the teacher called the police. It seems that the teacher's concerns were not so great that she waited until the police arrived as she reports, in the same email, "I was called by the police with an update – when they got to the home the neighbour was there and I was told it was all a 'misunderstanding'." During the course of oral submissions, Ms Chokowry accepted that there were occasions when M would leave D in the home on his own, but with the neighbour watching out for him. It was clear from the description given, that came on instructions from M, that D was left in the property without adult supervision as the neighbour would not sit with D in M's home but would move between the 2 properties.

22. The Ministry for Children received referrals concerning D on 26 October 2018 and on 31 October 2018. Both these referrals appear to have come from M, who was expressing her concern for D's uncontrolled behaviour. Referrals were made to support services.

23. On 8 November 2018, the report from the Ministry for Children records that M took another overdose of her prescribed medication. This led to a further assessment by the Ministry for Children. The summary provided of that assessment [C266] records that:

    (a) M accepted that she struggled with D's behaviour;
    (b) M had engaged with adult mental health services;
    (c) M had engaged with a number of community support agencies;
    (d) M continued to seek a diagnosis of some condition in D and was of the view that pediatric services were not taking her concerns seriously;
    (e) M reported an argument with her current boyfriend that, when taken together with her frustration about a lack of diagnosis for D, led her to take an overdose;

(f) M accepted drinking wine with her neighbour but denied having a problem with alcohol.

24. M has produced a number of documents from the agencies that were commissioned to work. There are 2 reports of particular relevance. The first is from 'Steps Forward Family Services and Support Centre'. This report describes the work then being undertaken with M and D. It also records that the school had requested an "educational assessment in order to access further academic supports". The report concludes by saying "there were plans to continue our support with M in 2019, including ensuring that D is assessed by SPELT (educational assessment), M's continued engagement with Adapt, Rose Counseling, Eqip and myself…. we have agreed to re-engage with M and continue the 2018 action plan as soon as we have received confirmation that D has been returned to M".

25. As described in the aforementioned report, M had been working with 'aDapt Family Solutions". M has produced an email from the social worker from that agency that worked with M in November and December 2018. The worker describes that work undertaken with M and D as "M asked for some help from aDapt family solutions as D was showing some challenging behaviours that M wanted to learn some strategies to help out with these". Following the work undertaken in November and December 2018, the worker reports "this improved D's behaviour and he was respecting and listening to M more than before aDapt became involved. M was finding it increasingly difficult to get D to go to school. To address this matter M set up a reward system and by the end of the school year D was attending school 5 days per week with no fuss and was enjoying weekly rewards for attending school. Throughout the time I worked with M I saw a big improvement in D's behaviour. He was having less meltdowns at home and was listening to M. I believe this to have come about through the strategies M learnt and used on D and less friction happening in the household. We had a few sessions left with D went to England and M and I decided to leave them until D returned to New Zealand".

26. In my judgment, what is abundantly clear from the documentation produced is that, upon arriving in New Zealand, M continued to have difficulties managing D's behaviour. She believes, as can many parents, that their child suffers from some as yet undiagnosed condition that explains why the child is difficult to parent. Services working with M and D have not accepted M's view that D is likely to suffer from ADHD or ASD. There is now a suggestion in the papers that D may have some rare genetic condition that could explain his presentation. Whatever the cause of D's at times defiant behaviour, the work undertaken with M and D prior to D travelling to England in December appeared to have made significant improvements in M's ability to parent D and this produced a perhaps inevitable improvement in D's presentation.

27. During the course of closing submissions, Ms Ramsahoye submitted that the aDapt report was inaccurate in so far as it reported that D was attending school every day before he came in England in December. A school register has been produced that shows, between 28 November and 12 December, D missed just a half day at school, that on any view was a significant improvement on his attendance prior to aDapt's intervention.

28. On 12 December 2018 D travelled to England to visit F. M travelled to the UK between 26 December 2018 to 9 January 2018 with a view to spending time with the

children. The father declined to facilitate contact save for one overnight stay between 7 to 8 January 2019. It is M's case that during this contact, D asked her if he could return to New Zealand with her and her partner. M says she told D that she had an agreement with F and that D would be returning to New Zealand on 25 January 2019.

29. By 18 January 2019, the father had instructed solicitors who wrote to the mother to inform her that the father had concerns and would not be returning D to New Zealand. D had himself informed M that he would not be returning to New Zealand as he sent her a text saying: **"***Mum I won't see you next. Sunday dad will not let me come back to New Zealand do not tell him…* ". In the same exchange of text messages, D is asking M not to tell F that D has told her of F's plan, D being fearful of F's reaction.

30. Following F's retention of D in England, there was some correspondence between M's New Zealand based lawyers and F's English solicitors. F did not agree to return D to New Zealand and M's application under The Hague Convention was issued on 13 February 2019. The first inter partes hearing took place on 26 February 2019 before Her Honour Judge Hillier who gave evidence-gathering directions and listed the matter for final hearing.

31. A further hearing took place before the Honourable Mr Justice Newton on 20 March 2019 as a result of K consulting solicitors and an application being made for K to be joined as a party to the proceedings. Newton J adjourned that application to be heard following the receipt of the CAFCASS report, which had been ordered by Her Honour Judge Hillier. The CAFCASS officer, Ms Huntington, met with K and has reported his views with her detailed report. She also expressed a clear opinion that K should not be joined as a party to the proceedings. K did not persist in his application to be joined and at the commencement of this hearing I granted permission for that application to be withdrawn.

32. F continues to oppose M's application for D to be returned to the jurisdiction of New Zealand. It is F's case that:

(a) D objects to being returned to New Zealand, and
(b) Given the poor care provided to D by M, were he to be returned to New Zealand D would be exposed to a grave risk of physical or psychological harm or otherwise placed in an intolerable situation as a return to New Zealand means a return to the harmful care provided by the mother as there are no other care givers available to D in that jurisdiction.

The Law

33. Article 1 of The Hague Convention states that its objects as:

"(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

34. Article 3 prescribes that the removal of a child is to be considered wrongful where:

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

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

35. Article 12 of the Convention requires a wrongfully removed child, who has been in the country to which he or she has been abducted for less than 1 year, to be returned to his or her home country 'forthwith'. That mandatory requirement applies unless a defence to a return is available under Article 13.

36. Article 13 provides, amongst other things:

"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 …"

(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 … 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.

37. In this application, F relies on Article 13(b) and on D's objections. With regard to the 'child's objections' defence, both Counsel have referred me to the judgment of Black LJ in Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal) [2015] 2 FLR 1074 (and endorsed by the Court of Appeal in Re F (Child's Objections) [20151 EWCA Civ 1022). The principles to be drawn from Re M were helpfully summarized by MacDonald J in *H v K, B, M* [2017] EWHC 1141 (Fam):

> "i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.
>
> ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.
>
> iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.

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

v) At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

47 Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations (Re M [2007] 1 AC 619)."

38. When considering F's article 13(b) defence, both Counsel have referred me to the decision of the Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, and the principles may be summarised as follows:

i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.

iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.

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

39. As M has offered undertakings in response to F's allegation that article 13(b) is satisfied, I have also considered the recent decision of Williams J in A (A Child) (Hague Abduction: Art 13(b) Protective Measures [2019] EWHC 649. At paragraph 17 of his judgment, Williams J summaries the law relating to Article 13(b) in the following way:

"The House of Lords and the Supreme Court of the United Kingdom have considered how that article works in a series of cases:

a. *Re D (Abduction: Rights of Custody*) [2006] UKHL51
b. *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2011] 2 FLR 758
c. *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442

From those cases, the following principles can be derived.

Article 13(b) is of restricted application; the words are plain and need no further elaboration or gloss. The burden lies on the person 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 has to be mindful of the limits on its ability to assess evidence within a summary hearing of this sort. The courts usually will not hear oral evidence from the parties, and usually documentary material before the court will be fairly limited. …

So looking at the risk to the child, it must be a grave risk. It is not enough just for the risk to be real, it must have reached such a level of seriousness that it can be characterised as grave. The word "grave" characterises the risk, not the harm, but there is a link between the two. The words "physical or psychological harm" are not qualified, but they 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.

Article 13(b) looks at the future, the situation as it would be if the child were returned forthwith to her home country. The situation which the child will face on return may depend on the protective measures which can be put in place to ensure that the child will not be placed in an intolerable situation or grave risk of harm when 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.

Where allegations of domestic abuse are made, the courts would ask if, whether they were true, there would be a grave risk that the child would be exposed to physical or psychological harm, or whether the child would be placed in an intolerable situation. If they would, then the court must ask how the child can be protected from such risk. If the protective measures could not ameliorate the risk, the court might have to try to resolve disputed issues of fact.

Article 11.4 of BIIA rules out a non-return where it is established that adequate protective measures are available. The Practice Guide makes clear that this is intended to address the situation where authorities have made or are prepared to make such arrangements. The Court of Appeal has recently confirmed that protective measures

include all steps that can be taken, including housing, financial support, as well as more traditional measures such as non-molestation injunctions (see *Re C* [2018] EWCA Civ 2834).

Protective measures may include undertakings, and undertakings accepted by this court or orders made by this court pursuant to Article 11 of the 1996 Hague Child Protection Convention are automatically recognised by operation of Article 23 in another Convention state (see *Re Y (A Child) (Abduction: Undertakings Given for Return of Child*). To be enforceable they must be declared enforceable pursuant to Article 26. The 1996 Hague Convention Practical Operation handbook provides examples of measures which might be covered by Article 11. European Regulation 606/2013 on the Mutual Recognition of Protection Measures in Civil Matters sets up a mechanism allowing for direct recognition of protection orders issued as a civil law measure between member states, thus a civil law protection order such as a non-molestation order or undertaking issued in one member state, can be invoked directly in another member state without the need for a declaration of enforceability but simply by producing a copy of the protection measure, an Article 5 certificate and where necessary a transliteration or translation.

A protection measure within that is defined as any decision, whatever it is called, ordered by an issuing authority of the member state of origin. It includes an obligation imposed to protect another person from physical or psychological harm. Our domestic law provides this court can accept an undertaking where the court has the power to make a non-molestation order. Thus, it seems that a non-molestation undertaking given to this court could qualify as a protection measure within the European Regulation on protection measures.

40. Finally, Ms Chokowry relies on the decision of the Court of Appeal in *Re C (Children) (Abduction Article 13 (B))* [2018] EWCA Civ 2834 and specifically the judgment of Lord Justice Moylan where, at paragraph 38, Moylan LJ referred to paragraphs 35 and 36 of *Re E* (above):

> "At [35] the point was made that "art 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". The judgment then returned to the approach the court should take to factual disputes.
>
> "36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective

measures, the court may have no option but to do the best it can to resolve the disputed issues."

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] 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 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 §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 §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 §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 §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 (§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 §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.

41. As was made clear in Re S, at [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, at [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).

42. I would also note that the measures being considered are, potentially, anything which might impact on the matters relied upon in support of the Article 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 Article 13(b).

43. In reliance upon the decision in Re C, Ms Chokowry invites me to undertake an evaluation of the allegations made by F in the context of the interventions and supports that were in place with M and D immediately before D left New Zealand. Ms Cokowry argues that the allegations made by F should not simply be accepted at their highest but should be evaluated alongside the information provided by the Ministry for Children and the conclusions of the assessments referred to therein.

Conduct of this hearing

44. Ms Huntington of CAFCASS attended this hearing in the expectation that she would give oral evidence concerning D's alleged objections to returning to New Zealand. On behalf of F, Ms Ramsahoye did not press for Ms Huntington to give oral evidence as, although F did not agree with Ms Huntington's conclusions, Ms Ramsahoye was able to make the points she wished to make in submissions rather than in cross-examination. Therefore, the hearing proceeded on the basis of submissions only and I have heard no oral evidence. I have, of course, considered the content of the court bundle, which now contains over 400 pages of material.

The Evidence concerning D's Objections

45. In his statement dated 21 February 2019, F says "D has progressed really well since he has been living with me in the UK. He has told me, my partner and K that he would like to stay here with us". That is all that F says about D's objections in his written evidence. F's partner does not address D's wishes in any way within her statement.

46. D was interviewed by Ms Huntington on 27 March 2019. Unfortunately, she did not see him on his own. F and his partner attended at the CAFCAS officer with D and K. Ms Huntington had planned to see D alone but says this was 'queried' by F so she interviewed D with K present and then spoke to K without D present. Ms Huntington describes D as being somewhat inhibited when interviewed and that he required some

prompting to describe his family. Of note is D's remark to Ms Huntington, when being prompted to speak about his family, that "his dad had decided that he is living here now so he is not going back to New Zealand". This comment to Ms Huntington mirrors the content of the text message sent to M by D upon learning that F had decided that he was not to return to his mother.

47. D described not liking M's boyfriend and of being unable to sleep if M was out of the home, although Ms Huntington is of the opinion that D was referring to a period when K was still living in New Zealand. At a point in their conversation when Ms Huntington was asking D if he had always got on well with K, K then interjected in the conversation and said that he had not felt safe at home and that has affected his bond with D. Ms Huntington reports that this comment appeared to encourage D to be more vocal and D then "embellished" comments that K made, examples being that D said M had had 10 boyfriends when K said she had 7 and K said M and her boyfriend would get drunk together and D said this was pretty much all the time. K said M's boyfriend would be aggressive when he was drunk whereas D said he was aggressive also when he was sober.

48. D said to Ms Huntington that he had told M that he did not want to return to New Zealand and said she did not believe him. He said that he had wanted to return but had now changed his mind, saying he preferred it here because "it's nicer and more relaxed".

49. In her report, Ms Huntington describes how D could not recollect any good memories of New Zealand and repeatedly described it as boring. When asked what had worried him in New Zealand, D said that M and her boyfriend being drunk had worried him. D said that, if M was drunk, she would go to bed and leave him in the lounge. D said he liked England better as there was no "drunkenness" and that F had told him he should stay in England after D had told F what it had been like living with M. When asked about F's decision that he would not return, D said he was a "bit upset and a bit ok". He said that he also felt happy as he would be away from M's drunken behaviour.

50. It is Ms Huntington's opinion that D is aware of F's views of New Zealand as D said F thinks that New Zealand is not a good place for him. When asked about his feelings for M, D accepted that he was initially upset when he found out he was not to return but said he now wanted to stay in England.

51. D told Ms Huntington that he wanted the Judge to let him stay in England and, if sent back, he would not like it as New Zealand was as "advanced as the UK" a response that Ms Huntington describes as 'arbitrary'. When expressing her professional judgment, Ms Huntington is of the opinion that D's account of his reasons for not wanting to return to New Zealand lacked a clear sense of strength or feeling. She says "this ambivalence highlighted D's difficulties in fully articulating his wishes and feelings, and could potentially signify his own internal conflict or experience of divided loyalties. It also reflected a lack of maturity inherent in his age. However, he was consistent in conveying a sense of disquiet about his mother's behaviour relating to alcohol use and of relief to have been afforded some distance from it".

52. Ms Huntington assessed D to be less mature than other children of his age, to a degree that leads her to say "it is difficult to conclude that his views can be given significant

weight". Ms Huntington is also of the opinion that D's account will have been influenced by the adults around him. In her report Ms Huntington described how K reported to her that F had, since 2016, encouraged K to gather evidence in support of his own wish not to live in New Zealand. K also told Ms Huntington that F discussed the proceedings with her. Ms Huntington is of the opinion that D is likely to have been influenced by F in a similar was to the influence described by K.

53. Despite her view that F has successfully influenced K's views, Ms Huntington describes K as a mature and articulate young man who gave coherent and reasoned accounts of his experiences of M's care. Ms Huntington is concerned that K's involvement in adult issues is harmful to him and will have a negative impact on his ability to rebuild his relationship with M. Ms Huntington says "whilst it may be said that K is mature and has expressed a wish to help, any choice he has should be viewed within the prism of his dependency upon and alignment to his father". I have read carefully the note provided by the solicitor who met with K for the purposes of his application to be joined as a party. I recognize that in that statement, what K is described as reporting mirrors the complaints that F has made about M's care since before M's relocation to New Zealand.

54. In her written evidence, M does not accept that D is opposed to a return to New Zealand and believes that D has been heavily influenced by F in what he now says to Ms Huntington. M points to F's failure to promote, and obstructiveness towards, her contact with D as evidence of F's influence on D at this time. M describes D not wanting to attend for the direct contact ordered by HHJ Hillier but once they had met, D presented as happy and enjoying his mother's company.

<u>Discussion and Decision concerning the 'Child's Objections' Defence</u>

55. As set out above, I first have to undertake a "straightforward and fairly robust examination of whether the simple terms of The Hague Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views".

56. Turning first to D's age and degree of maturity, it is Ms Huntington's evidence that D's understanding and maturity was below that she expected for his age. As a 10 year-old, D does not, in my judgment, have sufficient understanding to decide for himself where he should live but I remind myself that I am simply considering whether his views should be taken into account, not that they are in any way determinative. I accept Ms Huntington's evidence that D's views cannot be given significant weight but I am satisfied that he has attained an age and degree of maturity at which is it appropriate for me to his views into account.

57. D has given reasons for not wanting to return to New Zealand. He said that New Zealand was boring, that the UK is more advanced and that he did not want to be next to "all that weird stuff", meaning M's drunken behaviour. What D did not describe to Ms Huntingdon is any real detail of events when it is said that M was arguing with her boyfriend or when M is said to be drunk and ignoring him. I accept Ms Ramsahoye's submission that I must look at all the evidence and not just take Ms Huntington's

opinion as conclusive. Ms Ramsahoye points me to a recording from April 2018 when D is reported to say that he does not like New Zealand and does not like his school. We know that he did not like his school in New Zealand as he refused to attend at regular times since his arrival in that jurisdiction.

58. However, I have to consider the wishes D expressed to Ms Huntington within the context of D being happy to return when wrongfully retained by F. He was expecting to return on 25 January and had, on M's account, asked M if he could return with her early that month. D accepted that he felt upset when F had told him that he would not be returning and his text messages to M, that I have already referred to, demonstrate that D was fearful of F's reaction to him informing M of F's decision. There was no expression of any objection to a return to New Zealand at that time.

59. D has now expressed a wish not to return but I consider Ms Huntington's opinion that there was no strength of feeling being the expression of those views to be important. D is a child who, on the evidence before me, has a demonstrable history of expressing his wishes forcibly. He has, on the accounts relied upon by both M and F, been known to shout and display defiant behaviour to 'get his own way'. In his conversations with Ms Huntington, he demonstrated no vigour at all when describing his wish to remain in England. I accept that for D, a return to New Zealand may be indistinguishable to a return to M's care. Taking that into account, in my judgment, were conditions in his M's care so intolerable, I would have expected this child to have given clear descriptions of M's unacceptable care rather than just 'embellish' the accounts given by K, as is described by Ms Huntington in her report. When asked by Ms Huntingdon what he would be most worried about if he returned to New Zealand, he simply said he would be worried about staying there as he did not like it but gave no further detail.

60. I have carefully considered whether D's expressed wishes breach the gateway by reason of being actual objections to a return to New Zealand rather than a mere preference or wish. I have reached the conclusion that D's wishes, as expressed to Ms Huntington but also taking into account all the of the other evidence, cannot properly be described as objections. As Ms Huntington records at paragraph 28 of her report, D said to her that he "preferred it here because its nicer and more relaxed". In my judgment D is expressing a preference that does not meet the threshold of an objection. Therefore, this defence fails.

61. In my judgment, the gateway to the discretionary stage has not been met. However, had I been satisfied that an objection was being expressed, I would not have exercised my discretion in favour of giving weight to those objections. I have significant concerns about the influence that F's own views have had on D's expression of his wishes. I echo Ms Huntington's concerns about K having been dragged into the dispute between the parents and been advised by F to gather evidence. I accept Ms Huntingdon's evidence that D is likely to have been influenced by his exposure to and knowledge of F's views about M and about life in New Zealand. In my judgment, the text message sent to M by D when he learned that F would prevent him from returning to New Zealand demonstrates D's fear of F's reaction to him having shared that information with M. Events then demonstrate that D complied with F's decision, even becoming resistant to contact with M despite having told Ms Huntington that he had been upset at not going

back to New Zealand. In my judgment, F is clearly a powerful influence on D and, when taken together with Ms Huntington's evidence concerning D's maturity and the weight that should be given to the views expressed by D, although I am of the view that D's views should be heard and taken into account, I would not have exercised my discretion against an order for return on the basis of D's objections.

Discussion and Decision concerning the Article 13(b) Defence

62. In her submissions, Ms Ramsahoye relies on what she describes as 'a large amount of independent evidence in addition to the father's statement which demonstrates that it is intolerable for D to return to the circumstances in which he found himself prior to coming to England on 12 December 2018'. I have summarized much of the evidence concerning M's difficulty in parenting D in the early paragraphs of this judgment. In her submissions, Ms Chokowry accepted that there were clear welfare concerns for D when in M's care. What I have to decide is whether those welfare issues produce a grave risk of harm to D or would place him in an otherwise intolerable situation if returned.

63. The welfare concerns raised can be grouped into 2 categories. There are those concerns that are supported by some independent evidence and those that are voiced by F or the children alone. I recognize that Ms Ramsahoye submits that it is the cumulative effect of all the welfare issues that create the intolerable situation but in my judgment it is necessary to look at each issue in isolation to assess whether, when put together and looking at all of the circumstances, they amount to the intolerable situation relied upon by F. Further, I have been provided with a great deal of evidence in this case within which an evaluation of F's allegations can take place, mindful as I must be of the limits on my ability to assess evidence within a summary hearing of this sort.

64. In my judgment, given the quantity of evidence that has been filed for this hearing, this is not a case where I must simply take all the allegations made by F at their highest, accept them and then look at what protective measures are in place. At paragraph 39 of the judgment of Moylan LJ in Re C, his Lordship held that the decision in Re E did not prohibit the court undertaking any assessment of the allegations. On the facts of this case it is in my judgment possible, and indeed necessary, to undertake an evaluation of the allegations raised by F in the context of all the evidence that has been produced by both parties.

65. The safeguarding/welfare issues relied upon by F that find some support in evidence from independent sources are:
    (a) M failing to ensure that D has attended school consistently;
    (b) M being unable to impose boundaries or manage D's behaviour that has, on occasions, led to D using household knives to threaten M and threatening to kill himself;
    (c) M has failed to ensure that D has always been adequately supervised, I take the view given D's challenging behaviours that having a neighbour keep a watchful eye from afar was inadequate supervision of this child;
    (d) M failing to ensure that D has a balanced an healthy diet to address his unhealthy weight gain;

(e) M has suffered from poor mental health for a number of years that has, on occasion, led to M taking overdoses of medication and being unable to exercise parental responsibility;
(f) M has, at times, had a conflictual relationship with her current partner that has increased the likelihood of a deterioration in her emotional stability;
(g) M's continuing campaign to have D diagnosed with some medical condition exposes D to a risk of emotional harm as he will view himself as a sick child when he is not.

66. The safeguarding/welfare issues relied upon by F that find no support in evidence from independent sources are:
(a) M's alleged failure to provide a clean and hygienic home to such a degree that this exposes D to a risk of harm;
(b) M's partner having exposed his genitals to D;
(c) M and her partner's relationship being of such a conflictual nature that arguments are frequent;
(d) M's partner being threatening and aggressive to D;
(e) M and her partner regularly drinking alcohol to excess;
(f) M having such a difficulty controlling her alcohol intake that, on at least 1 occasions, K was required to perform 'mouth to mouth' on her;

67. When I consider the safeguarding issues listed at §64 and §65 above, I must ask myself if these matters expose D to a grave risk of harm. I also remind myself that I am in this application not making a long-term welfare decision for D but am simply deciding which jurisdiction will hear the dispute between the parents as to where and with who D will reside. In my judgment, I must consider the situation as it was at the time when D left New Zealand, as much of what has been raised against M is historic, in that F relies on issues that he says were experienced by the children when they resided in England prior to July 2017 and issues that are raised by K, who left New Zealand in September 2018 and prior to the interventions accepted by M following the October and November referrals to the Ministry for Children. Of course, where issues are long-standing, they are more likely to sustain and expose a child the risk of their reoccurrence. However, in my judgment I must assess F's allegations within the context of the work undertaken by M with support services in November and December 2018, not just to consider whether those services can in the future provide sufficient safeguards to prevent a 'grave risk' arising but also to assess whether on the evidence before me F has established that a grave risk currently exists.

68. The evidence provided by M suggests that D's school attendance had improved considerably following the intervention of aDapt and Steps Forward. F disputes that school attendance rose to 100%. However, a failure to ensure that D attends should does not, in my judgment, raise a grave risk of harm that, on its own, would satisfy the requirements of Article 13(b).

69. Similarly, the evidence from aDapt demonstrates that, prior to D's retention in England, M had learned and was successfully employing strategies with D that enable her to impose boundaries and manage his behaviour with a degree of success that she had not, in the immediate past at least, achieved. It is also the case that there is no evidence before me that, since support services became involved with M and D in October,

November and December 2018, D had been left unsupervised at home. D's weight gain is a matter of dispute between the parents. F very much lays the blame for this with M's parenting. M refers me to F's complaints about D's weight in the past and prior to D's relocation to New Zealand. In my judgment, tackling D's obesity is a long-term issue that does not raise a grave risk of harm that satisfies Article 13(b).

70. M's poor mental health, that has led her to take at least 1 overdose of her prescribed medication when she had care of D is, in my judgment, a matter that could expose D to a grave risk of harm. However, prior to D's retention in England, M was engaged with support services and was making positive changes to her parenting of D. She was also engaged with mental health services for herself and those professionals working with her, who had an overarching safeguarding duty to D, have expressed no reservations about M's emotional presentation or her ability to cope with the challenging work that was being undertaken, particularly in terms of the behavioural management intervention that was being implemented to ensure that D attended school. In my judgment, F has failed to discharge the burden on his of proving that, at the time of D's retention or at the current time, the possibility of M's mental health deteriorating places D at grave risk of harm.

71. M accepts that she has had one argument with her partner that, when taken together with her dissatisfaction with the advice she was receiving from paediatric staff (that D did not suffer from ADHD or ADS or any other condition that explained his defiant behaviour), led her to take an overdose of her medication. M does not accept that her relationship with her partner is generally conflictual. I have been provided with no evidence that referrals have been made to Children's Services or the police due to conflict with M's home with her partner but when considering this alleged area of harm, in my judgment I must take into account what has been said by D and by K. In his meeting with Ms Huntington, K said that M's partner was aggressive and swore at D. D agreed with K's description, saying that the partner used the 'F' word but was unable to give Ms Huntington examples of when this would happen. K also told Ms Huntington that the partner would become aggressive when drinking but D said he was aggressive most of the time.

72. I am unable, in these summary proceedings, to make a determination of where the truth lies. Domestic abuse and conflict takes place behind closed doors and may not, indeed often does not, come to the attention of the authorities. I am mindful of the views I have already expressed concerning the influence of F on both K and D but, concerning their relationship with M's partner, both K and D have been consistent and until such time as another tribunal is able to hear evidence and make a determination, I must proceed on the basis that there is conflict in M's relationship that exposes D to a risk of harm.

73. Whether that is a grave or actual risk is dependent on whether D will be having any contact with M's partner should he be returned to New Zealand. M offers to give an undertaking that D will have no contact with her partner and, goes further, in offering an undertaking that her partner will not come to the home even when D is not present.

74. Ms Ramsahoye points to M's failure to disclose the times when she took overdoses of medication as evidence that M cannot be relied upon to be entirely honest and Ms

Ramsahoye questions how such an undertaking could be monitored or enforced. I will return to this issue of enforcement later in this judgment but, given that M has no history of failing to respect the terms of court orders, I take the view that M's assurance that D will have no contact with her partner is adequate protection and removes or reduces any risk of harm to a level that cannot be described as grave. Acceptance of M's undertaking addresses the other risks said to be posed by M's partner that I have set out in §65(b), (c), (d) and (e).

75. F has for some time been concerned with M's determination to have D diagnosed with any condition that might explain why she has difficulty in parenting him. As I have already described, it is F's case that he does not have all the same problems that M says she encounters and, therefore, he rejects M's claims that there must be something wrong with D. As I said during the course of the hearing, this is the type of dispute that I have encountered reasonably regularly in my work in the Family Courts, particularly when parents are in conflict and unable to communicate. I accept that M has been told, on a number of occasions by different professionals, that D does not have any medical condition that explains the behaviours that M reports. However, I also have to take into account the evidence produced by M that D might have some chromosomal anomaly that could be of some relevance. In my judgment, now it has been identified, the exploration (or not) of the relevance of this chromosomal condition must be a decision made jointly by the parents who share parental responsibility. In my judgment, it is not a matter that exposes D to a risk of harm of a nature that satisfies Article 13(b) but ongoing parental conflict is clearly not in D's best interests. I fully recognize F's concern about M's pursuant of a diagnosis for D, something that he would then carry with him in his medical history for the rest of his life, in circumstances where F says M's difficulties in parenting D are due to her inadequacies, but given that this genetic issue has now been identified, I hope F will be able to cooperate with M and follow whatever medical advice is given to investigate and, hopefully, exclude any condition that may cause D long-term difficulties.

76. Of the safeguarding issues raised, the issue of concern to F that he has pressed now for a number of years, and on which there is no independent evidence, is his allegation that M consumes alcohol to excess and to the detriment of her care for D. Both K and D describe M being drunk but, in my judgment, D's own descriptions lack detail and the frequency with which he says this occurs is not at all clear. K gave more detail to his solicitor in a statement that I have at page B(i)11 of the bundle. K links M's use of alcohol to the poor condition of the home but there is no support in the evidence produced from agencies working with M that they observed unsatisfactory home conditions to at all, let alone to a degree that would prompt child protection interventions.

77. M's misuse of alcohol did feature in the referral made to the Ministry for Children in November 2018 but it appears that no supporting evidence was found as the Ministry concluded that it need have no ongoing role in the family on the basis of the supports then in place that did not, on my reading of the evidence, include any drug or alcohol services. I also note that that there is no evidence that M has been seen by professionals to be intoxicated and the school head teacher, who visited the home and had contact with M, has not reported observing M under the influence of alcohol. Had M misused

alcohol to such an extent that K had to perform some kind of rescue first aid, I would have expected such an event to have triggered child protection investigations, particularly if this had occurred in an airport. I am unable to determine the truth of that allegation, as I have not heard oral evidence.

78. As with domestic abuse, the misuse of alcohol often takes place in private and away from the gaze of neighbours and statutory services. I take into account the evidence filed by M that there has never been any concern about her being under the influence of alcohol at work but that evidence does not exclude the possibility of alcohol misuse at other times of the day.

79. Prior to D's retention in England, M was engaged with a number of services, both to improve her parenting and support M's own mental health. I have no evidence before me that M misused alcohol during this period and it is not mentioned in the reports from those professionals who were working with the family. I accept that F presents this as a chronic problem with a risk that this will, if it is currently in remission, resurface and expose D to harm. However, when assessing whether a grave risk arises from the possibility of M misusing alcohol when D is in her care, I am entitled to take into account the monitoring and safeguarding services in New Zealand who can be alerted to the possibility that M's alcohol misuse might cause harm to D should he be returned to New Zealand. That jurisdiction has sophisticated child protection services that Ms Ramsahoye accepts are comparable to this in this jurisdiction. F is able to bring his own application in the courts of New Zealand to press his case that D's welfare is best served by a move back to England and, no doubt, alcohol testing could be undertaking in Family Court proceedings in New Zealand as it is in Family Court proceedings here.

80. M offers undertakings in the following terms:
    a. To make available to the Ministry for Children and any other relevant agency that may be identified, the CAFCASS report with a view to statutory welfare and risk assessments being conducted;
    b. To undertake that D will not come in contact with her partner pending the outcome of any statutory assessment;
    c. To refrain from consuming alcohol pending the conclusion of the statutory assessments.

81. During the course of the hearing, M also agreed to her partner not attending at her home at any time.

82. I have already referred to my acceptance of an undertaking from M to prevent contact between D and M's partner. As M's other child K, lives in England and has expressed to Ms Huntington his wish to re-establish a relationship with M, I consider that the acceptance of undertakings is a significant safeguard as, if M was to breach the terms of the undertakings she gives, she would then face the prospect of enforcement action against her in this jurisdiction should she come to England to visit K. If it is a choice between complying with the terms of her undertaking or not being able to travel to England to see K, I consider it very likely that M will comply with the requirements of her undertakings.

83. In my judgment, whilst alcohol misuse by M carries with it some risk of harm to D, in my judgment the risk of harm cannot be said to be grave given M's previous engagement with support services, the readiness of those same services to re-engage should D return to New Zealand, the ability of F to alert those who will be working with M to his concerns about M's alcohol misuse and M's undertaking not to consume alcohol.

84. Having carefully considered all the safeguarding matters raised by F, for the reasons given above, I find that F has not proved a grave risk of harm or an otherwise intolerable situation for D and this defence therefore fails.

Conclusions and Order

85. I have found neither of the defences relied upon by F to be established. Article 12 of the Convention requires me to make an order for D to return to New Zealand 'forthwith'. How and when that return is to take place will need to be discussed between the parties, and I will hear further submissions should agreement not be reached.

86. That is my judgment.

Request for Additional Reasons

87. Following the delivery of this judgment in draft, Ms Ramsahoye made a request for additional reasons to be given as she submitted I had not adequately addressed F's case that D is at risk of harm by reason of himself harming when in M's care. I was also asked to give additional reasons why I considered the giving of undertakings by M to be protective measures, when in F's submission, those undertakings would have limited effect as it is not possible for F to monitor whether or not the terms have been breached.

88. I have addressed in some detail the improvements made in M's parenting of D following the intervention by aDapt, and there is no evidence before me that D threatened to harm himself during the period of the work undertaken with the family prior to D's departure for what was to be a holiday with F in England. In her interview with D, Ms Huntington raised with D what he would be worried about were he to be returned to New Zealand and D did not indicate that he would be so upset by being returned that he would harm himself. I have already set out Ms Huntington's opinion that D's desire not to be returned lacked any strength of feeling.

89. In the absence of any recent evidence of D attempting to self harm, and with the involvement of the services that I have already described, I am not persuaded that there is any grave risk that D will self harm when returned to New Zealand.

90. Given the many complaints that F has raised about M's care of D, that he presents as being honestly held and I have no doubt that he believes in the truth of the concerns that he raises, it would be strange indeed if he then failed to engage with Child Protection services in New Zealand should D be returned to that jurisdiction. F has shown himself adept at engaging with D's school staff, to such a degree that the Head teacher was prepared to visit M's home to investigate F's report that D had been left alone. As I have set out above, the services that were supporting M prior to D's wrongful retention

have confirmed that they are ready to re-engage should D return. In my judgment, should M breach the terms of her undertaking, an undertaking that should be provided by F to those services working with the family, any breaches would soon become clear either by D's own report or by reason of professional observation when working with the family. Should F issue proceedings in New Zealand he can, as I have already explained, seek an order that M submits to alcohol testing if he is of the view that she has broken that aspect of the undertakings that she has offered.

91. In my judgment, there is no evidence before me to suggest that M would breach the terms of her undertakings and for the reasons I have given, I consider the undertakings to be protective measures for D. However, I do not see them in isolation from the other services that were being provided to M and D prior to D's wrongful retention that will re-engage upon D's return. Further, those safeguards can, if F disagrees with my assessment and believes them to be inadequate, be supported by F issuing court proceedings in New Zealand upon D's return to that jurisdiction.