Neutral Citation Number: [2022] EWHC 2610 (Fam)

Case No: FD22P00481

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF A and B (Children) born 25 June 2020

AND IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

AND IN THE MATTER OF THE SENIOR COURTS ACT 1981

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 October 2022

Before :

MR RICHARD TODD KC
(Sitting as a Deputy High Court Judge)

- -

Between :

ADK	**Applicant**
- and -	
ASI	**Respondent**

- -
- -

Mr Mani Basi (instructed by **Messrs Dawson Cornwell**) for the **Father-Applicant**
Mr Paul Hepher (instructed by **Messrs Footley LLP**) for the **Mother-Respondent**
Miss Katy Chokowy (instructed by **Messrs Goodman Ray**) for the **Non-subject child, N**

Hearing date: 14 October 2022

- -

Judgment Approved by the court
for handing down
(subject to editorial corrections)

This judgment was handed down in private on 17 October 2022. It consists of 86 paragraphs and has been signed and dated by the judge. The judge gives leave for it to be reported in this anonymised form as ADK v ASI**.**

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by his or her true name or actual location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Deputy High Court Judge Richard Todd KC:

1. Before the court, is an application brought under the 1980 Hague Convention. It was issued on the 6 July 2022. The application seeks the summary return from England to the Republic of Latvia of two 2-year-old twins, A and B born 25 June 2020. This matter was due to be heard on the 19th September 2022 but was adjourned due to the death of the late Queen Elizabeth II.

2. The applicant is the Father of the twins. The first respondent is the children's mother. She resists the father's application on the basis of the defence afforded to her by article 13(b) of the Hague Convention. She is joined in her resistance by a non-subject child from a previous relationship. He is referred to in this Judgment as N. N was joined as second respondent to the proceedings by order of HHJ Hess, sitting as a Deputy High Court Judge, on 26 September 2022. N is represented through his solicitor guardian, Kevin Skinner. N opposes the application. He does not wish to return to Latvia. He also does not wish to be separated from his mother and sisters. N was born on the 16 June 2010 and is therefore twelve.

3. The matter has been heard over 1 day but in view of the lateness of the finish of submissions, this Judgment was reserved over the weekend.

4. As is usual for such a case, no party gave oral evidence. The Court was assisted by comprehensive and excellent submissions from counsel on behalf of all parties. The Father attended remotely and plainly suffered no disadvantage by that. I am reminded of the recent dicta in *CSFK v HWH* [2020] HKFLR 318 where the internationally renowned Lam VP held:

   "It was permissible and lawful to conduct remote hearings through VCF [remote video hearings]*...there was no specific provision restricting the mode of receiving submissions and evidence of the parties. A judge could determine the mode of the hearing as a matter of case management. Subject to the requirements for fairness and openness, physical presence of the parties or their counsel in a courtroom for civil business was not indispensable. A VCF hearing would give parties through their counsel opportunity to address the Court as effectively as an ordinary hearing at which all the parties and lawyers were present in the same physical location…the court could readily and*

effectively control the conduct of a hearing and there was no risk of disruption occasioned by outside parties."

5. A Latvian interpreter attended the hearing to assist the father.

6. I have read all the papers filed in the 474-page bundle (except for those in Latvian). This includes the orders, the parties' statements, exhibits and decisions of the Latvian courts. I have also received a recent GP's report on the mother. I have considered all these matters even if I have not expressly referred to every detail in this Judgment.

BACKGROUND

7. The parents and children are Latvian nationals. The two subject children (A and B) and their parents were habitually resident in Latvia at the time the mother brought them to the UK on the 7th or 8th June 2022. They have remained here since living in the maternal family home in Portsmouth.

8. The parents were not married. They lived together January to August 2020 in Latvia. The parties lived together until in or around September 2020, when the mother moved out with the children. This was two months after the children were born. The mother then rented a flat in Latvia. Thereafter the brief chronology is:

28 August 2020 Restraining order made in favour of mother
5 November 2020. Restraining order discharged.
23 April 2021 Decision of Vidzeme District Court - restraining order was made in favour of mother.
9 September 2021 Decision of Vidzeme District Court determining the place of residence with mother and parents' joint custody over children.
1 October 2021 Vidzeme District Court decided to determine the place of the residence of the children with the mother at the declared address in Valmiera, Latvia. Restraining order made on 23 April was discharged.
November 2021 Mother removed children from Latvia, without father's knowledge or consent. It is the mother's position that she did not require the father's consent for removal for up to 3 months under Latvian Law. This is disputed by the father.

23 December 2021 Latvian Civil Court made an order preventing the children from being removed from Latvia. Children had already been removed and mother was not aware of this order. The father's position is that the mother was aware of the above order. The Applicant subsequently withdrew his request.
2 to 3 January 2022 Mother and children returned to Latvia.
22 March 2022 Order of Valmiera Municipality Koceni proving for sole custody for mother and rights of access to father once a fortnight, no overnights.
7 June 2022 Final Judgment in Civil Court of Vidzeme Regional Court overturning decision re sole custody.
8 June 2022 Father found out that children and mother left to go to England.
8 June 2022 Father submitted his application to Latvian Central Authority.
22 June 2022 Final Judgment in Civil Court of Vidzeme Regional Court setting out arrangements for contact between the Applicant and children.
6 July 2022 Father's solicitors issued C67, C1A.

9. From 2008 to 2017, the mother had previously been living in England. N was born in Portsmouth and brought up living in the South of England. His father lives in Andover. He is now at school near to the maternal family home. The mother describes how she returned to Latvia in 2017. She says she planned to be there for a couple of years wanting N to experience something of his Latvian heritage.

The Mother

10. The mother has always been primary carer to her three children. There is no suggestion that she is anything other than a loving and devoted mother to her children. By contrast, the mother describes her relationship with the father as being one of enduring violence and abuse. He strongly denies that. She says his abusive behaviour caused her to flee Latvia. The Mother says the abuse continued after the parents' separation. She says this application is motivated by his wish for revenge or a further manifestation of his coercive and controlling behaviour. She is frightened of him.

11. Initially captivated by the father whom she met online, the mother describes how the relationship changed when she became pregnant with the twins. The mother's account of the violence and abuse she has suffered is detailed within her statement (from page 149

onwards). She attaches corroborating evidence including photographs of the injuries inflicted on her:

i. She says that on discovering the mother was pregnant (with the twins), the father insisted that she terminate the pregnancy, proposing that he inject her with steroids. She refused. The Father says this is a pure fiction and that he and his family were pleased with the pregnancy and rejects the allegation of

ii. She says she suffered daily (a) emotional abuse, (b) weekly sexual, (c) weekly physical abuse, and (d) monthly financial abuse. She says the father would call her names such as "a bitch," "a slut," and described her as ugly.

iii. The mother says that the father threatened to kill her and bury her in the forest.

iv. He told the mother the police would not help her.

v. He forced her to engage in oral sex with him.

vi. He refused to buy food on occasion and punished the family, turning off the water and electricity and keeping N's lap top from him.

vii. Around April 2020, the mother then 5 months pregnant, he tried to strangle her: she blacked out.

viii. In another incident the same month he pushed her from the bed onto her belly. He held her mouth open and dripped blood in. He said, "this is what you deserve bitch."

ix. He has kicked and pulled her by the hair and slapped her across the face until she has lost consciousness. He has pushed her head to the floor. He has beaten her on the floor next to the room where the children were sleeping.

x. In May/June 2020 the father smashed a cup at the mother's feet, cutting her toes.

xi. He would rub her nose hard and raw and spit in her face and mouth.

12. All of these allegations are denied. If any one were established it would be a cause of the most profound concern for both the mother and any child who might see such an incident or be affected by the distress the mother would suffer and inevitably show.

13. The mother's case is that the children were exposed to the abuse. N has told his solicitor guardian of his fear of the father, the emotional abuse he suffered from him (in particular taunting about his pet rabbit, whom the mother has stated she believes the father killed). Again the father denies this saying that N lost interest in the rabbit and the rabbit was quietly removed from N. N says his stepfather called him an idiot and a bastard; he

would clench his fist at him as if to hit him. All this, the father says, is lies. N describes how he has directly witnessed his father shouting at his mother and has hid in his bedroom whilst the father assaulted his mother. Mr Skinner has described how upset N was when telling him of the occasion when he witnessed the father holding his mother by the throat.

14. The Mother says the father has continued to threaten, harass, and look to exert control over the mother even after separation. The mother describes how the father would park outside her property at least once a week for at least thirty minutes outside any arrangements for contact. He has made obscene sexual overtures, buying a remote controlled vibrator to tell her he wanted her to insert it for him then to control it remotely on his phone.

15. The mother says this is nothing new and that the father has behaved similarly with previous partners. She exhibits exchanges she has had with previous partners of the father, who have referred to his violence and abuse. The family doctor in Latvia has provided a letter dated 29 June 2022. She writes that "[the Father] *is a psychotic personality who is unable to accept the fact that his family has broken down and to take joint care of the children. Other people are always to blame – the ex-wife, the family doctor, and the social services. He can allow himself any kind of behaviour towards others* (p.464)."

16. In summary, the Mother's case is that the father is a dangerous and violent man who presents a grave risk to the mother, and *indirectly*, the children. It is not suggested that he is a *direct* threat to the twins.

The impact on the mother

17. The mother says she has suffered emotionally and psychologically on account of the father's abuse of her. Her medical records describe a diagnosis of anxiety/PTSD (p.219). In Latvia she accessed counselling where she was noted in March 2021 to have low self-esteem, being extremely emotional, with evidence of fear (p.454). Dr Monnery, of the Portsdown GP Practice, seeing the mother this year in England, noted as of 30 August 2022, her reports of high levels of anxiety and symptoms of PTSD, with past thoughts of self-harm or suicide in Latvia. He concludes that "*the available entries would support*

the impression of a traumatized woman who has significant fears should she return to Latvia (p.453)." Dr Monnery writes as of 12 September 2022 that "*on the balance of probabilities the diagnosis is depression and anxiety; the symptoms include low mood and anxiety* (p.455)."

The Father

18. The father is a senior instructor, enjoying the rank of Non-Commissioned Officer, in the armed forces of the Republic of Latvia. The mother alleges that he holds influence with the police by virtue of their esteem for their armed forces.

Allegations by the Mother in respect of the Latvian authorities

19. The Mother says that there is a poor history of the Latvian authorities protecting victims of domestic violence and abuse. She states that bribery and corruption are rife.

Proceedings in Latvia

20. The mother has very actively engaged in proceedings in Latvia. She has unquestionably submitted to that jurisdiction not just at first instance but also on appeal. She sought restraining orders against the father which have twice been granted and four times sought; the first injunction was granted on the 28 August 2020, and again on the 23 April 2021. On each occasion they were discharged a few months later. The mother does not feel that the Latvian courts are able or willing to put in place protective orders that might endure. She does not give any examples of where she says (a) the Father breached any such order and (b) the Latvian state then failed to render her assistance – either at police or court level. Despite this lack of empirical evidence and her failure to advance her own case before those courts (which I shall return to) she maintains that domestic violence and abuse is not taken seriously by the courts and authorities in Latvia.

21. In addition to domestic violence protection, the parents have also litigated in Latvia in respect of the children. The orders and judgments disclosed make it clear that the father has always accepted that the twins are to live by way of primary care with their mother. He has not sought by judicial process to remove them. This has to be noted in the context of the mother's over-arching allegation that the father's whole litigation strategy is part of his controlling and coercive behaviour; it is surprising therefore that he has not sought

to put the mother under the threat that primary care might be removed from her and given to her alleged antagonist, him.

22. The mother's case is that as the primary carer, she is permitted to take the twins out of Latvia for 3 months without the father's permission. She did this for a holiday November 2021 to January 2022, having informed the father. She told him when she would be back. He did not like the fact she had gone to England. He obtained an order against her once she had left on the holiday, to prohibit her from leaving, which causes me to doubt whether such automatic permission (akin to the English permission under s. 8 of the Children Act 1989) does apply or if it does whether it is for 3 months. But that is not central to this decision and I merely note it in passing.

23. In Latvia, the mother wished to secure a sole custody order in her favour. In January 2022, she left N in England with her mother. The Valmiera Municipality granted the mother sole custody with access rights to the father on 22 March 2022. The case was then appealed to the Civil Court of Vidzeme Regional Court, which on 7 June 2022 overturned the decision. Its judgment is important and I will return to it. But essentially it allowed the father's appeal and provided for joint custody between the parents. The Latvian Court of Appeal dismissed the father's complaint of perjury and violation of the children's rights. There were some inconsequential administrative costs of the appeal which the father was ordered to pay to the mother (a total of €72.02) and a legal aid contribution of €110. The mother unhelpfully exaggerates this as her obtaining the "costs of the proceedings;" as if he had been condemned in costs with all that that entails by indication of the Court's disapproval of an unsuccessful litigant.

24. By a further judgment handed down on the 22 June 2022, the court ordered that the father was not to have overnight stays with the children until 25 June 2023 (when they are three).

Move to England

25. The mother says she was supported in Latvia by her doctor, health visitor and Crisis Support. She says they advised her, for her own safety and the safety of the children, that she needed to leave Latvia.

26. Back in England, the mother has felt unable to return to Latvia. She says she believes she is at risk of being killed by the father. (I note that most would-be murderers are unlikely to be constrained by the limited distances between England and Latvia; if he really wanted to murder her, then it would not be difficult for him to travel to the south coast of England to carry out such a threat – so, if she is at such risk then whilst it is greater in Latvia, it is not eliminated by staying in England).

27. The Mother does not have anywhere to live in Latvia. The father has therefore offered €350 per month for her rent. There appears to be no dispute that this would be sufficient. In addition, the father will pay the first three months as a lump sum to enable her to accommodate herself. She will also receive €400 per month as child support.

28. The mother does not believe that any protective measures would be sufficient to protect her from the father. I will return to this later in the Judgment.

N

29. N is twelve years' old. He is firmly allied to his mother against his stepfather. He does not allege that the father has been violent to him but instead has been threatening (such as waving a clenched fist at him) and cruel (such as saying that he had eaten N's pet rabbit (nobody alleges that the rabbit was killed or prepared for the table in front of N). He is capable of instructing his own solicitor guardian and was given leave to join the proceedings. I have listened to the submissions on his behalf with particular care. I agree with his counsel that N's concerns about such matters as the break-up of the sibling group are part of a culmination of the factors which might make out a Article 13 (b) defence. I am told that given the choice he will not return to Latvia. He speaks English albeit he has been in the Latvian school system. He says that he and his sisters are a close sibling group but I treat that with some caution in circumstances where he is a 12-year old boy whose twin sisters are only two and have been apart from him for substantial periods of their short lives.

30. I accept that N does not want to be parted from his sisters and his mother. That begged the question of what he would do if his mother were required to return to Latvia and she said to him that it was her wish (and her command) that he should go with her and the

sisters. In other words that he should travel to be with the people he can scarce bare to be parted from. In submissions it appeared that this scenario had not been canvassed with him. I was surprised. I was surprised as this scenario is a highly probable one. If a return were ordered, the Mother would probably not simply surrender their care to a man whom she believes to be something of a monster. (For completeness, her case was that she simply did not know what she would do if this Court made a Hague Convention return order; she said she simply could not contemplate this).

31. Instead N's opening gambit was to say (through his counsel), "N will stay here come what may." In the scenario posited above, he would need the active co-operation of his grandparents who would then act with him to defy the wishes of his mother and their daughter. When pressed counsel for N said, "*I cannot answer the question as to what happens if the Mother requires N to go to Latvia and in support of her wishes her extended family do not offer* N *an alternative.*" I am therefore left with having to discern what is most likely. What is most likely is that the Mother will not want to be apart from the twins and so will travel to Latvia to be with them. She is more likely than not to want her son to be with her, too. Her family are unlikely to act in concert with N to thwart that wish. This would be the position for the relatively short time that it takes for the Latvian court to consider the merits of a permission to remove permanently application.

32. The Mother says (through her counsel) that an order for the return of the twins "*would lead to the splitting up of the sibling group with grave ramifications for all. It would also put the mother in an impossible situation of having to choose between her children, something she cannot face. She is wracked with terror at what she would face on a return, and how she could leave any of her children behind?"* The answer is that it is not an impossible situation. It is one that demands careful safeguards but it is possible. I note that her attitude of "*I don't know what I would* do" does not rule out the possibility that she would go back with the twins and probably N. This is unlike the Mother in *Re A (Children) (Abduction: Article 13(b))* [2021] EWCA Civ 939 who definitively said she would not return.

33. I remind myself that I am concerned with the relatively short period that it will take for the Latvian court to decide whether the Mother should have permission to remove permanently the twins. It may be that that is sufficiently short that N does not need to

travel back to Latvia. That he can be looked after by his greater Portsmouth family just as he was when the Mother previously went to Latvia leaving him behind. Such a hiatus in the return, would justify a short suspension in the return order. I keep in mind that it would be exceptional for a return to be ordered later than three weeks after the order but the position of N does make this case exceptional.

34. It seems to me that I have three stages to consider:

i. Does an issue estoppel arise in respect of the Latvian proceedings to which the Mother willingly submitted? If so to what findings does this apply? In this regard I note that the Court of Appeal delivered their Judgment on the 7 June and within a matter of hours of that decision the Mother had unlawfully removed the twins to England.

ii. Next, is the Art 13 (b) defence made out. I will deal with the decisions of the Latvian courts and the extent to which they constitute an issue estoppel under the section marked "the Law."

iii. Are there protective measures which can be put in place to ameliorate the risks to the children (whether directly or indirectly through the impact on the mother).?

Before I deal with each of these, it might be helpful to set out here a summary of the law.

THE LAW

Wrongful removal/retention

35. **Article 3 of the 1980 Hague Convention** states:

The removal or the retention of a child is to be considered wrongful where -

a. It is in breach of rights of custody attributed to a person …. under the law of the State in which the child was habitually resident immediately before the removal or retention; and

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

36. **Article 5** goes on to state that:

i. *"rights of custody shall include rights relating to the care of the person of the child, and, in particular, the right to determine the child's place of residence;*

ii. *'rights of access" shall include the right to take a child form a limited period of time to a place other than the child's habitual residence.*

37. The mother cannot take issue that the father has the requisite rights of custody in respect of the twins. Further to article 3 of the Hague Convention, the mother's retention of the children in England was wrongful. This is not contentious.

38. **Article 12** provides that in the event that a period of less than one year has elapsed from the date of the wrongful retention, the authority shall order the return of the child forthwith. The court is bound to order the return of the children, subject to any defence the mother raises.

39. **Article 13** provides (with emphasis supplied) that:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

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

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 13(b) defence - legal framework

40. The proper approach to the determination of the Article 13(b) is found in the decisions of the Supreme Court in *In re E (Children: Custody Appeal) [2011]* UKSC 27, [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442. Caselaw since then and the publication of the Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part IV, Article 13(1)(b) have provided further aids to the interpretation of the treaty.

41. The Art 13 (b) defence must now be considered as follows:

i. Article 13(b) contains three different types of risk:

   a. A grave risk that the return would expose the child to physical harm;

   b. A grave risk that the return would expose the child to psychological harm; or

   c. A grave risk that the return would otherwise place the child in an intolerable situation.[1]

ii. The three different types of risk set out above can be raised independently, or employed together[2]; in this case I will consider them together for what Moylan LJ has described as a holistic approach.

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1 Part IV of the Practice Guide at p. 25§30

2 Ibid. at §31

iii. Article 13(b) does not require that the child be the direct or primary victim of harm if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child[3];

iv. The term 'grave' qualifies the risk and not the harm to the child. The risk must be real and reach such a level of seriousness to be characterised as grave[4];

v. The level of harm must be such as to amount to an "intolerable situation", which is a situation that an individual child should not be expected to tolerate.[5] In *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, Baroness Hale held that the word, 'intolerable' used in this context, must mean "*a situation which this particular child in these particular circumstances should not be expected to tolerate"*;

vi. The Article 13(b) defence focuses upon the circumstances of the child upon return. It should not, therefore, be confined to an analysis of the circumstances that existed prior to or at the time of the removal or retention, but instead requires consideration of the circumstances as they would be if the child were to be returned forthwith[6];

vii. The forward-looking nature of the exception does not, however, mean that past behaviour and incidents cannot be relevant to the assessment of a grave risk upon return – for example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists[7];

viii. All assertions of risk are to be evaluated on the same standard or threshold and step-by-step analysis. As a first step, the court should consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk;

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3 Ibid. at p. 26§33
4 Ibid. at §34, drawn from the decision of the Supreme Court in *Re E* (*supra*) at §33 thereof
5 Ibid.
6 Ibid. at p. 27§36
7 Ibid. at §37

42. If it proceeds to the second step, the court determines whether it is satisfied that the grave risk exception to the child's return has been established by examining and evaluating the evidence presented by the person opposing the child's return / information gathered, and by taking into account the evidence / information pertaining to protective measures available in the State of habitual residence[8].

43. The Court of Appeal in **Re A (Children)(Abduction: Article 13(b)) [2021] EWCA Civ 939** considered a case where the judge at first instance had ordered the return of two young children (aged 3 & 4) to their father. He lived in the United States of America. The mother had advanced the article 13(b) defence citing allegations of domestic violence and abuse. Also, that the older half-sibling was not going to return. The Mother stated that she was thereby forced to elect which of her children she was going to stay with. She chose the elder non subject child. She chose England. The subject children were ordered back in effect without her. That is not the factual matrix here. Here the Mother does not know what she is going to do. Hers is not an unequivocal refusal to return. This Court does not know (and has therefore had to assess what is most likely) if N was told by his mother to join her and his sisters and her family fell in with her plan.

44. The Court of Appeal overturned the return order. Moylan LJ provides us with a comprehensive review of the caselaw including the law as developed by the Supreme Court. As such, I set out his compendious judgment at some length but with my own emphasis added in bold:

> 84. It also hardly needs restating that, as set out in *Re E* at [52] and repeated *In re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257 at [6], the terms of Article 13(b) are **"by their very nature restricted in their scope". It has a high threshold demonstrated by the use of the words "grave" and "intolerable".**
>
> 85. **The focus of Article 13(b) is, of course, on the child. The issue is the *risk* to the *child* in the event of his or her return. In *Re S* Lord Wilson emphasised, at [34], that "it matters not whether the mother's anxieties will be reasonable or unreasonable"**. In the context of that case, which was addressing the consequences on the mother's mental health of returning, the "critical question is what will happen if, with the mother, the child is returned". He then said:
> "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,

[8] Ibid. at p. 31§§39 - 41

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."

86. The focus on the child's position was also emphasised by Baroness Hale in *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, at [52]:
"On this case, it is argued that the delay has been such that the return of this child to Romania would place him 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". It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus, the English courts have sought to avoid placing the child in an intolerable situation 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. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so. In Hague Convention cases within the European Union, article 11.4 of the Brussels II Revised Regulation (Council Regulation (EC) No 2201/2003) expressly provides that a court cannot refuse to return a child on the basis of article 13(b) "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return". Thus, it has to be shown that those arrangements will be effective to secure the protection of the child. With the best will in the world, this will not always be the case. **No one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm**."

87. It is well-established that both physical and emotional abuse can establish the existence of a grave risk within Article 13(b). This applies both when the abusive behaviour has been directed against the child and when it has been directed against the taking parent. As was said in *Re E*, at [34]:

"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."**

88**. It is also clear that the effect of the separation of a child from the taking parent can establish the required grave risk. This situation is one of those listed as potentially falling within the scope of this provision**, at [36], in the *Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part VI Article 13(1)(b)* published in 2020 by the

Permanent Bureau of the Hague Conference on Private International Law ("the *Guide to Good Practice*"). This was the basis on which a return order was set aside by the Court of Appeal in *Re W and another (Children)* [2019] Fam 125. In the course of my judgment, I said, at [57]:

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

89. **It is also relevant to note the long-standing appreciation of the risk that the effective operation of the 1980 Convention would be undermined if the taking parent was able to establish Article 13(b) by the simple expedient of deciding not to return with the child.** In England and Wales, this was referred to by Butler-Sloss LJ in *C v C*, at p.661 D/E, when she raised the concern that refusing to make a return order "**because of the refusal of the mother to return for her own reasons, not for the sake of the child … would drive a coach and four through the Convention**". This is also referred to in the *Guide to Good Practice*, under the heading "*Unequivocal Refusal to Return*":

"In some situations, the taking parent unequivocally asserts that they will not go back to the State of the habitual residence, and that the child's separation from the taking parent, if returned, is inevitable. In such cases, even though the taking parent's return with the child would in most cases protect the child from the grave risk, any efforts to introduce measures of protection or arrangements to facilitate the return of the parent may prove to be ineffectual since the court cannot, in general, force the parent to go back. It needs to be emphasised that, as a rule, the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child."

90. However, as was pointed out by Sir Mark Potter P in *S v B (Abduction: Human Rights)* [2005] 2 FLR 878, at [49]:
"**The principle that it would be wrong to allow the abducting parent to rely upon adverse conditions brought about by a situation which she has herself created by her own conduct is born of the proposition that it would drive a coach and horses through the 1985 Act if that were not accepted as the broad and instinctive approach to a defence raised under Art 13(b) of the Convention. However, it is not a principle articulated in the Convention or the Act and should not be applied to the effective exclusion of the very defence itself, which is in terms directed to the question of risk of harm to the child and not the wrongful conduct of the abducting parent**. By reason of the provisions of

Arts 3 and 12, such wrongful conduct is a 'given', in the context of which the defence is nonetheless made available if its constituents can be established."

91. The summary nature of the process inevitably impacts on the manner in which the court assesses the evidence. As Baroness Hale and Lord Wilson explained in *Re E*, at [32]:
"… **in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination."**
This led the Supreme Court to endorse the following approach:

"[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.**"

92. This does not mean, as I said in *Re C*, at [39], that it was being "**suggested that no evaluative assessment of the allegations could or should be undertaken by the court". In support of this conclusion, I quoted what Black LJ (as she then was) had said in *Re K (1980 Hague Convention) (Lithuania)* [2015] EWCA Civ 720, at [53], about the *Re E* approach:**

"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."

I would emphasise that Black LJ was referring to discounting the *possibility* that the allegations would *give rise* to an Article 13(b) *risk*. She was not otherwise diverging from the approach set out in *Re E*. It is also plain that she was referring to the end of the spectrum, namely when the court was able *confidently* to discount the possibility that the allegations gave rise to an Article 13(b) risk. This is not to dance on pins but is a distinction of substance derived from the court not being in a position to determine the truth of the allegations relied on as establishing the Article 13(b) risk.

93. It was for this reason that, in *Re C* at [39], I commented that "a judge has to be careful when conducting a paper evaluation" of the evidence. The court has to be careful for the reason given by the Supreme Court, at [36], namely "the inability of the court to resolve factual disputes". This creates the "tension" there identified between this inability and "the risks that the child will face if the allegations are in fact true". This led the Supreme Court to adopt the "pragmatic and sensible

solution" set out above. In its concluding paragraphs in *Re E*, the Supreme Court repeated, at [52]:

"**Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk. The clearer the need for protection, the more effective the measures will have to be.**"

94. In the *Guide to Good Practice*, at [40], it is suggested that the court should first "consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk" before then determining, if they could, whether the grave risk exception is established by reference to all circumstances of the case. In analysing whether the allegations are of sufficient detail and substance, the judge will have to consider whether, to adopt what Black LJ said in *Re K*, "the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13(b) risk". In making this determination, and to explain what I meant in *Re C*, I would endorse what MacDonald J said in *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159, at [7], namely that "the assumptions made by the court with respect to the *maximum level of risk* must be reasoned and reasonable assumptions" (my emphasis). If they are not "reasoned and reasonable", I would suggest that the court can confidently discount the possibility that they give rise to an Article 13(b) risk.

95. But, I repeat, a judge must be careful when undertaking this exercise because of the limitations created by it being invariably based only on an assessment of the written material. **A judge should not, for example, discount allegations of physical or emotional abuse merely because he or she has doubts as to their validity or cogency. As explained below, in my view this would lead the court to depart from the *Re E* process of reasoning while, equally, not being in the position set out in *Re K***

96. If the judge concludes that the allegations would potentially establish the existence of a grave risk within the scope of Article 13(b), then, as set out in *Re E*, at [36], the court must "ask how the child can be protected against the risk". This is a broad analysis because, for example, the situation faced by the child on returning to their home state might be different because the parents will be living apart. But, the court must carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to a grave risk within the scope of Article 13(b). And, to repeat what was said in *Re E*, at [52]: "The clearer the need for protection, the more effective the measures will have to be".

97. In my view, putting it colloquially, if the court does not follow the approach referred to above, it would create the inevitable prospect of the court's evaluation falling between two stools. The court's "process of reasoning", to adopt the expression used by Lord Wilson in *In re S*, at [22], would not include either (a) considering the risks to the child or children if the allegations were true; nor (b) confidently discounting the possibility that the allegations gave risk to an Article 13(b) risk. The court would, rather, by adopting something of a middle course, be likely to be distracted from considering the second element of the *Re E* approach,

namely "how the child can be protected against the risk" which the allegations, if true, would potentially establish.

98. The likely consequence of adopting this middle course is, in my view, that the court will be treating the allegations less seriously than they deserve, if true. Equally, there is the danger that, for the purposes of determining whether Article 13(b) is established, the court will not properly consider the nature and extent of the protective measures required to address or sufficiently ameliorate the risk(s) which the allegations potentially create. In my view, as explained below, this is what happened in the present case.

99. This does not, of course, mean there is no evaluation of the nature and degree of the risk(s) which the allegations potentially establish. This is the essence of the approach endorsed in *Re E* because the court is required to determine *whether* the allegations, if true, would establish the required grave risk.

45. Moylan LJ returned to the care that the court must undertake in *Re B (Abduction: Consent: Oral Evidence) (Article 13(b)) [2022] EWCA Civ 1171,* where the trial judge had fallen into error in making a return order in a case of allegations of domestic violence and abuse, and further issues facing the mother on return with young children. He had to consider the elements of risk together, and then in concrete terms the situation the returning parent (here, the mother) would face:

78. First, I agree with Mr Hames that, at least at some point, the effect of the allegations relied on by the taking parent should be considered together when determining whether there is a grave risk. There may, of course, be cases when this is not realistic because the allegations are not connected. However, I would suggest that, when a judge takes this course, he/she should make this clear. This is because, if they are considered only individually, there is a clear prospect of the court failing to consider their overall effect and the totality of the overall risk.

46. This is why I treat the position of N together with the other Art 13 (b) considerations; I am concerned with the *totality* of the risk. Moylan LJ continues:

79. In the present case, I do not agree with Mr Turner's submission that the judge had "an overview of the matter". In my view, it is clear that the judge only looked at the allegations by category and individually and did not consider their overall effect. However, I would not have allowed the appeal on the basis of this alone. This is because I do not consider that, if the judge's analysis had been otherwise sound, I would have concluded that his decision that Article 13(b) had not been established was wrong.

80. In my view, however, by conflating the process as set out in *Re E*, the judge failed properly to evaluate the nature and level of the risk if the mother's allegations were true and also failed properly to evaluate the sufficiency and efficacy of the

> protective measures. This can be seen most clearly from the manner in which the judge expressed his conclusions……..
>
> 82. In my view, the judge could not confidently discount the possibility that the allegations gave rise to an Article 13(b) risk and needed to apply the *Re E* approach. He needed, therefore, both to analyse the nature of the potential risk(s) *and* then carefully consider whether and how such risk(s) could be addressed or sufficiently ameliorated so that the children would not be exposed to the risk(s). The judge did not do this, or at least did not do so sufficiently, because he conflated the process.
>
> 83. In addition, as submitted by Mr Hames, the judge's analysis was also flawed because he wrongly relied on certain matters, as summarised below, with the result that he failed sufficiently to consider "in concrete terms" the situation which the children would face on a return to Spain…..
>
> 90. The same applies in respect of the financial situation that the children would face. On the mother's case, she would have insufficient financial resources to meet, even, her and the children's basic needs. Putting to one side the judge's reliance on the father as a source of financial support, the judge had no substantive evidence that the mother would be entitled to state benefits which would enable her to meet the needs of herself and the children for any significant period of time. Again, the evidence from the Spanish authorities suggested that there was, at least, considerable fragility in the mother's position which might lead to the children being taken into care. The judge's dismissal of the mother's concern about this because they would be returned with the mother, and not returned to foster care, does not, with all due respect, address the mother's concern.

47. Additionally, there is a risk of harm to the girls in being separated from their half-sibling and/or their mother even though they have been separated in the past and the twins are still very young. That the separation of siblings can give rise to a grave risk of harm or intolerability is recognised in authorities such as ***B v K (Child Abduction)*** **[1993] 1 FCR 382**. This view was also endorsed in the Guide to Good Practice.

48. This court can only speculate on how long the separation between N and his sisters might last. But if there are sufficient protections in place, then it is likely that the Mother will want him with her and the twins. If she is right about her allegations of mistreatment then there has to be a good chance that the Latvian court may give her leave to remain in this jurisdiction sooner rather than later.

49. In **Re GP (A Child) (Abduction): Consideration of Evidence) [2017] EWCA Civ 1677, [2018] 1 FLR 892**, where a return order to Italy was overturned, the mother's appeal allowed, Henderson LJ stated:

> "it was … necessary …. **to examine in concrete terms the situation that would actually face GP on her return to Italy. What would happen when she and**

> **her mother stepped off the plane? Would her mother be arrested? Where would they go, and what would they live on?** [para 6]"
>
> "If the judge felt that he had insufficient information to answer these questions, he should …. have adjourned the hearing so that more detailed evidence could be obtained, for example about the financial position of the mother and the practicalities of an application to commute the mother's sentence of imprisonment to community service ….[para 63]."

50. Protective measures. Whether such measures exist capable of ameliorating these risks, and whether the father is likely to put them into effect, will need to be addressed with care by the court. They are fundamental to this case. (See **Re S (A Child) [2019] EWCA Civ 352**).

51. In **Re C [2018] EWCA Civ 2834 Moylan LJ** said at para 43:

> "*.... In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective. This applies both in terms of compliance and in terms of consequences, including remedies, in the absence of compliance. The issue is their effectiveness, which is not confined to their enforceability…..".*

The Three Stages

(a) International issue estoppel

52. As indicated above there are three stages that I now have to consider – the first is, are there already findings of fact which constitute an international issue estoppel? I will then turn to the Art 13 (b) defence and then whether there can be protective measures.

53. As stated above, the Latvian court was seised of the issues of domestic violence both in the context of the custody dispute and specifically as regards injunctions. Both parties submitted to the jurisdiction of Latvia and both took part in its proceedings. Had I been able to say with clarity that the Latvian court either decided (a) there was no merit in the mother's individual allegations or (b) dismissed her complaint of domestic violence (or she failed to purse her complaints when she could have (*Henderson* estoppel)) then it was likely that I would have to have regarded myself as bound by their determinations. The law is well established. The law is well stated in the *Carl Zeiss Stiftung v Rayner & Keeler* (*No 2)* [1967] 1 AC 853 case. But here what the Latvian court decided is unclear.

I think Mr Hepher is right when he says that the burden of establishing an issue estoppel is on the father's team and they have not been able to deal with this clearly.

54. I raised this specifically with Mr Basi and he directed me to certain passages which he said amounted to findings which should be binding on me. I will come to those but special caution is required where the character of the proceedings is different (see Lord Reid in *Good Challenger Naveganta SA v Minerealexportimport SA* [2003] EWCA 1668). Domestic violence raised in the context of a custody dispute is unlikely to be so relevant. Similarly Family proceedings have been less amenable to the hard doctrines of issue estoppel rather than those seen in the civil courts.

55. The Latvian courts approach is set out below in italics. I have put my comments out of italics immediately afterwards. (All emphasis supplied).

> 7 June 2022, "4.3.4 *There is no evidence in the case that the children were harmed as a result of the Defendant's actions."*
>
> No evidence is not evidence that the children do not face a risk of harm.
>
> "*In the opinion of the [Latvian] Court, the situation regarding joint custody of the children could improve if the parties understood that they have joint children and a joint duty to take care of them.* ***Both the Plaintiff and the Defendant want to provide their children with a safe environment, adequate care and supervision.*** *Therefore, there is no reason to doubt that the parties will be guided by the best interests of the children when deciding issues that can significantly affect the development of children.*
>
> A desire by the Father to provide a safe environment is not a finding that he is or will be creating such an environment.
>
> 4.4. *"The application for the dismissal of temporary protection against violence has been*
> *submitted by the Defendant.*
> *The Plaintiff* ***has not filed*** *a request to determine that the temporary protection against violence is to be valid after the judgment enters into legal force (Sections eight and nine of Article 250[58] of the Civil Procedure Law),* ***nor has she raised any objections to the Defendant's application.*** *Therefore, the means of temporary protection against violence can be dismissed* ***without evaluating the circumstances stated in the Defendant's application.*** *The adoption of a ruling on the dismissal of the means of temporary protection against violence does not limit the right to submit an application for temporary protection against violence, if there is a basis for temporary*

protection against violence specified in Article 250[45] of the Civil Procedure Law.

This is indicative of the Mother having not engaged in the process. (Mr Basi (for the father) did not take a *Henderson*[9] estoppel point and so I have not developed that here). Second, it expressly says that they did not evaluate the circumstances.

In the appeal – see 30.1 and 30.2 at p. 215:

> *[30.1] After evaluating the circumstances found in the case, namely the circumstances of the children's parents and the circumstances of the children's custody, such as unjustified insistence of one parent, categoricalness, lack of justification for the claims raised, obstacles to joint decision-making, reluctance to make joint decisions,* ***the Court panel concludes that in the case under consideration none of the parents has implemented such conduct that would in any way endanger the development of the children or put the effective custody of the children at risk,*** *that maintaining joint custody does not jeopardize the full development and well-being of the children. In tum, mutual differences of opinion, the personal resentment of the parties for a failed cohabitation are not grounds for awarding sole custody to one parent over minor children.*
>
> *[30.2] Thus, after evaluating all previously established circumstances and evidence,* ***the Court panel concludes that the parties have not always been able to establish respectful communication, however mutual disagreements have not hindered or interfered with making important decisions in the interests of children.*** *In this case, there is no evidence of specific situations when the children's interests actually suffered due to the fact that the children's parents were unable to make joint decisions on matters of custody…"*

56. At first blush paragraphs 30.1 and 30.2 read as a rejection of the Mother's case. But it is not. First, it is confined to historical matters and second, in the context of whether in the past, such conduct has impact on the children's development. For the future, the children's development might not be endangered but that is not go so far as to either reject or specifically rule out (a) the particularized allegations of misbehaviour and/or (b) ruling out that the children (either directly or more likely, indirectly through their mother) is at risk of harm.

57. On balance and by a slender margin, I reject the contention that the findings of the Latvian court act as an issue estoppel. It was open to the father to bring better evidence

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[9] *Henderson v Henderson* (1843) 3 Hare 100; for discussion on this, see, generally *Johnson v Gore-Wood* [2000] UKHL 65 (albeit that discussion was obiter; see *Tinkler v Commissioners for HMRC* [2021] UKSC 39.)

of the Court dismissing the mother's allegations but he did not do so.

58. There were criminal allegations by the father. First, there was an allegation of perjury which was dismissed by the Court. Second, there was a matter which is described as an "administrative offence". I do not know what this is and neither did any of the counsel. However it looks on its face as if it has been resolved – the note I have seen in the papers adopts the wording; it has been "decid*ed*" – there is no further sanction referred to there and the matter looks closed. I did consider adjourning this matter for further clarification but on balance the matter looks as if it has concluded. But in any event I shall order the father not to pursue any criminal allegations and seek to withdraw any which have been made. There must not be a danger to the Mother's liberty at the moment of her arrival in Latvia. I do not accept he cannot be trusted to do this; there is no example of him defying court orders.

(b) The Art 13 (b) Defence

59. I consider that the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk. I have had to do this on the limited evidence available which is before me. As is usual, I have not heard oral evidence. But when it comes to risk to children the Courts must err on the side of caution. This decision will come as a great disappointment to the father who continues to protest strongly there is no merit in the allegations – indeed it is *he* who has been the victim of domestic violence. But as a concerned father, I am sure he will also understand that where there is risk to the welfare of children, the Court must proceed with great caution.

60. The allegations the mother makes against the father, albeit denied by him, constitute in 13(b) terms a grave risk were the mother and/or children to return to Latvia. The father has on the mother's case perpetrated against her extreme violence and abuse, to which the children have been exposed. He has threatened to kill the mother. He is intent on exacting punishment against her. He has, regardless of the Latvian court's involvement, proceeded to behave in a controlling way, threatening and harassing the mother.

61. I know I must not simply slavishly follow what the mother says. This is doubly so because her case in respect of the Latvian courts and police (i.e. that they are in the thrall

of the father) is at best hyperbole and at worst pure fiction. But there are other troubling matters; for example, she complains of long-term mistreatment. But in a statement to the police in Latvia on 18 July 2020 (p. 202) she said,

"the Plaintiff stated that: "she has been living with [the Father] *for a year now because she got pregnant and gave birth to twins* – [the Father] *has a very good attitude towards the children, there are no problems, it's just that the parents of the children find it difficult to understand each other"; "the police were called because the Plaintiff was said to have had her heart full about this situation"; "[at the time of the conflict] both babies were sleeping on the sofa, the children were not affected in any way by this conflict and were not involved"..*

62. The mother has always been the children's primary carer. Whilst the father was exercising his rights to spend time with the children (day visits), they have never stayed overnight with him (without their mother). They are undoubtedly young and vulnerable children who are attached to their mother.

63. The mother is emotionally fragile. She is anxious and fearful of the father and of the prospect of returning to Latvia. But the trigger for her symptoms of PTSD and high anxiety would be triggered by the presence or the misbehaviour of the father. I am confident that the trigger is not being in the land mass that is Latvia but her being in malign contact with the father. If the father were to come to England (which he probably would have to do if the matter remained here) then she would be "triggered" just the same if he came into (malign) contact with her, as if he did in Latvia.

64. I do note in passing that the Mother had evidence of her psychological health but failed to adduce it at first instance in Latvia. The Court of Appeal there then refused to admit it (on what sounds like a similar rendition to England's rule in *Ladd v Marshall*). Both Keehan J and HHJ Hess rejected the mother's application for an expert report. I have read the evidence the mother has obtained. In *Uhd v McKay* [2019] EWHC 1239 (Fam), MacDonald J commented at para 73:

> "within the foregoing context I accept Mr Harrison's submission that in evaluating the extent to which the anxieties of a respondent about a return with the child that are not based upon objective risk to the respondent but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child

to a point where the child's situation would become intolerable, **the court should consider, amongst other factors, the objective evidence (if any) that the respondent will have good cause to be anxious if the child were returned to the jurisdiction of habitual residence, as well as the protective factors that may ameliorate such a situation**".

65. I also take into account that the reports which the mother relies on are all self-reporting. These are not independent experts in the sense of being neutrally instructed by both parties and being alive of their primary duty to the Court.

66. I do note that on the mother's own case, when she was in Latvia and after the breakdown of the relationship, she was able to access mental health support herself from Dr Lapina, a health visitor and crisis support. This bodes well for the availability of such support.

67. The mother states that her mental health is impacted upon when she sees the father [**159, para 61**] and it appears there is a direct link in respect of the mother's concerns in respect of the father [**219, 453**]. Protective measures could be put in place preventing or severely limiting any physical contact.

68. But if the Mother were the victim of the father's future misbehaviour (wherever that might occur; England or Latvia) I am satisfied that represents something which would impact on her ability to function and parent. The twins would suffer accordingly. There would be a real risk of harm. It would be intolerable for the twins to have their mother the subject of physical or mental violence. The question then becomes whether this can be safeguarded against.

69. The mother does not trust the father. But she has trusted the Latvian courts. She has submitted to their jurisdiction[10]. It was only after their Court of Appeal produced a result which was not to her liking that she fled. There is no reason to suppose that the Latvian police or other responsible authorities would refuse to comply with Latvian court orders or would become the agents for the father. I am very confident that I can reject the mother's allegation that the courts and / or police of Latvia are corrupt and will do the father's bidding. Leaving to one side the improbability of a Sergeant in the armed forces having sway over the courts and / or the police such that they would criminally fail in

[10] On the mothers own case, she had litigated for two years in Latvia [**157, para 52**] and obtained a restraining order [**158, para 56**] and has applied 4 times for one.

their duties, I note that this is not a complaint made at any stage in the Latvian proceedings. The rhetorical question of why did she engage with the Latvian process at all? (including to appeal level) if she had no faith in the Latvian administration justice, remains unanswered. (It is also noteworthy that no single incident was cited of the court's supposed bias (indeed, the Court's rejected some of the father's contentions) or an occasion where the Latvian police corruptly failed to act.) I am very confident that this was a makeweight argument thrown in to bolster her case when it has no substance in fact.

70. I would add that I have also included N's potential separation as adding to the possibility of harm. Had that been the only objection (rather than it adding to the mother's case) then I would have held it was insufficient to make out an Art 13 (b) defence. I am fortified in that view by adopting the same powerful logic as Mr Justice Cobb *in Re S (Child Abduction - Joinder of sibling - Child's Objections)* [2016] EWHC 1227 (Fam). In another case of the separation of half-siblings, he held:

"For the purposes of my decision, I accept that a return of S will indeed impose a separation of the siblings. I accept the evidence that R and S are close; however the girls are 3½ years apart in age. They are at a very different stage of their emotional and educational development. In the event that S is returned to France, the sisters will be able to see each other in holidays, for significant periods; although in different countries, they would be living reasonably easy travelling distance apart which would make even weekend meetings feasible. The separation may – subject to the views of the French Court on the relocation question and/or R's change of mind (as to which see [23] below – be only temporary.

[23]. It is of course as much R's decision as it is mine which forces any immediate separation. R has declared a choice to be in England. In this respect, she is exercising some newly developed autonomy. That is a matter over which I have no influence let alone jurisdiction. R could just as easily decide to return to France to return to school there at least for the next year; she is after all nearly at the end of her education and may ultimately decide to complete it within a curriculum which she has thus far followed for all her school life."

71. I end this part of the judgment with an emphatic word of warning about these "findings." I have proceeded on the basis of a real and present danger; a risk of harm that if real (as I have found it is) would be intolerable. But I have assumed a great deal to reach this conclusion; I have heard no live evidence and it is no part of my function to either supplant the "home" court of Latvia or, as Lord Wilson once memorably said, "to mark their homework." The basis I have proceeded on is in no way intended to bind the Latvian court should that court having heard better evidence decide that I was mistaken as to the factual matrix.

Concrete proposals

72. From the moment that the mother returns to Latvia, she should have the protection of the orders which I propose to make. The father must not be at the airport. Accommodation can be provided from the €1,050 which he must provide as a condition of return. *The mother sought €400 per month but I am satisfied that €350 is within the reasonable bounds and the Mother did not seek to argue otherwise).

73. The father also offers sufficient means to provide for them. The Mother sought utilities at €150 and €450 for food and essentials. He will pay €400 and in addition the Mother will be entitled to state benefits and may be able to undertake some work.

74. The court looks at the accumulation of risks and considers the situation in concrete terms which the children would face on return. The risks are clearly present, the question then becomes whether there can be sufficient safeguards put in place.

(c) Safeguards

Protective measures

75. As Baroness Hale observed, in ***In re D (A Child) (abduction: Rights of Custody)*** [2006] UKHL 51, [2007] 1 AC 619, at [55] :

> *"it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate."*

76. The caveat is that the Court would require the child or children to return if protective measures are in place. There are three foci to the protective measures I plan to put in place – (a) financial security (b) domestic violence protection which will include limiting the amount of time that the parties will come into contact with each other and (c) a short hiatus before the children should return. (c) requires some explanation; the mother's anxiety is in part triggered by her fear that she will not be able to engage the Latvian courts in time; her counsel helpfully told me that she needs 10 days to issue her application and it will take 4 weeks to be heard. By giving a little longer to facilitate the return of the children, I am giving her the opportunity of engaging the Latvian courts before the return. This should allay her fears; if the Court in Latvia says her fears are misplaced or even invented then they will have been in the best position to do so. If they recognise her fears and their impact on the children then it is likely they will give her a further period of time. In any event it goes along way to reassuring her in respect of the fears which are the bedrock upon which her anxiety and claimed mental health issues is based.

77. To recognise that the dispute in Latvia and its timings might form part of the protective measures is an easy evolution from *Re D (A Child) (Abduction: Rights of Custody)* in which the Baroness Hale of Richmond said in her speech at [48]:

> *"The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed."*

78. Mr Justice Mostyn summarised the relevant principles in **B v B [2014] EWHC 1804**:

> "2 The Hague Convention of 1980 is arguably the most successful ever international treaty and it has over 90 subscribers to it, over half the countries in the world. The underlying and central foundation of the Convention is that, where

> a child has been unilaterally removed from the land of her habitual residence in breach of someone's rights of custody, then she should be swiftly returned to that country for the courts of that country to decide on her long-term future.
>
> 3 There are very few exceptions to this and the exceptions that do exist have to be interpreted very narrowly in order that the central premise of the Convention is not fatally undermined. It is important to understand what the Convention does not do. The Convention does not order a child who has been removed in the circumstances I have described to live with anybody. The Convention does not provide that the parent who is left behind should, on the return of the child, have contact or access in any particular way. The Convention does not provide that, when an order for return to the child's homeland is made, the child should stay there indefinitely. All the Convention provides is that the child should be returned for the specific purpose and limited period to enable the court of her homeland to decide on her long-term future. That is all it decides.
>
> 4 ... Equally, if the exception that is relied on is that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place her in an intolerable situation, that again has to be seen through the lens of the objective of the Convention. **We are not talking here about long-term risks. We are not talking here about long-term harm. We are talking about risks and harm that would eventuate only in the period that it takes for the court of the child's homeland to determine her long-term future and to impose the necessary safeguards, if necessary, in the interim.**"

79. If I needed any fortifying that the above judgment by Mostyn J was plainly right (and I did not need any such fortification) it is found in the ringing endorsement of his dicta in *B v B* by the Supreme Court (and also Dr Hans van Loon in his study for the European Parliament referred to by the Supreme Court) in *Re J (a Child)* [2015] UKSC 70 at paragraph [31].

80. The following two passages drawn from *Re E* provides a useful stepping off point in relation to the consideration of this issue:

"36.The exceptions to the obligation to return are by their very nature restricted in their scope. They do not need any extra interpretation or gloss. It is now recognised that violence and abuse between parents may constitute a grave risk to the children. **Where there are disputed allegations which can neither be tried nor objectively verified, the focus of the inquiry is bound to be on the sufficiency of any protective measures which can be put in place to reduce the risk.** The clearer the need for protection, the more effective the measures will have to be."

And

"**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.**"

81. I have come to the view that the following safeguards will protect the mother, the twins and if they are joined by N, then N. These are safeguards which address the Article 13 (b) concerns. They will enable the Mother to be reassured that her case could be reviewed even before the children need to return; that will be a great comfort to her. Whilst from the father's point of view, there is every prospect – if he is right – that the children will be in Latvia in good time for Christmas. I am firmly of the view that these safeguards provide adequate arrangements that secure the protection of the children after their return. The safeguards are (and they are to be reduced to an order):

1. On arrival, the father will not be at the airport.
2. He will not travel to her home
3. The mother's finances will be met by the father paying €1050 towards her first three months' rent and thereafter €350 per month. He will continue to pay €400 per month child support. I note that in addition the mother accepts that she would be entitled to child benefit in addition to the child support the father provides. He must pay any arrears within 7 days.
4. The father is not to be told and shall make no attempts to discover the Mother's address upon her return.

5. Any contact between the children and the father will have to be considered by the Latvian courts but this Judgment may be made available to them in support of this Court's view that there should be the most minimal contact between mother and father. This could include neutral handovers at any contact.
6. He shall pay the reasonable costs of a one-way economy class flight to Latvia for the Mother and the children.
7. The father will not support or instigate any criminal or civil proceedings in respect of the unlawful removal to England and use his best endeavours to end any existing complaint;.
8. He shall not threaten, intimidate, or subject the Mother to any violence, nor instruct any person to do so.
9. He shall not attend the Mother's place of residence without prior agreement, save for contact as agreed between us or directed by the court.
10. He shall not remove the twins from the Mother's care, save for contact as agreed between the mother and father or as directed by the Latvian court.
11. He shall arrange for the lodging of this return order with the court in Latvia as soon as reasonably possible.
12. He will continue to pay €400 per month by way of child maintenance including for October 2022;
13. The €350 Euros for rent and bills shall be paid until the first of the following (a) further order by the Latvian court (b) further order of this court (c) the mother's removal to England or (d) 1 November 2023.

82. On this basis, there will be an order for return of the twins to Latvia; that return to take place no later than 18.00 on the 12th December 2022 (eight weeks). This order is subject to the following:
    i. if the Mother obtains an order in Latvia within that eight week period permitting the child to remain in England pending a full welfare hearing in Latvia then this order shall be stayed until a further hearing.
    ii. That further hearing shall be fixed as soon as reasonably possible following the making of such an order in Latvia. At that hearing this order shall be reconsidered.
    iii. If an order is made in Latvia permitting the twins to remain in England, then the father's obligation to pay the €350 pcm rent and bills shall also be immediately suspended.

83. I invite counsel for the father to draw up a file order embracing these terms.

Stay/suspension of any order for return

84. In ***BK v NK (Suspension of Return Order)*** **[2016] EWHC 2496 (Fam)**, Mr Justice MacDonald analysed the authorities concerning the suspension of return orders: see paras [52] to [59]. I too rely on the authorities cited there. But in particular paragraph [59]:

> "[59] Finally, in cases where a parent who has removed children from their jurisdiction of habitual residence and is facing the summary return of children to that jurisdiction forthwith, I consider that it is always important to recall the observations of Mostyn J in *B v B* [2014] EWHC 1804 that the objective of the Convention is to ensure that a child who has been removed unilaterally from the country of his or her habitual residence, in breach of rights of custody, is returned forthwith in order that the courts in that country can decide his or her long term future and that a decision by the English court to return a child under the terms of a Convention is no more and no less a decision to return the child for a specific purpose for a limited period of time pending the court of his or her habitual residence deciding the long term position."

85. If I am wrong about the extent of the risk of harm to the children (and the father has not been given an opportunity to cross-examine the Mother or give his own evidence in respect of allegations which he contests strongly) then I would have suspended the order for a period of eight weeks. The return would be suspended to enable the mother to seek permission to remain in this jurisdiction while the proceedings in Latvia are resolved if only on an interim basis. I would do this because:
    i. There are exceptional circumstances in this case as an order could result in the separation of a sibling group;
    ii. The mother and the children are now in this jurisdiction and intent on making their home here with the wider family;
    iii. Such a delay is consistent with the time required to bring the matter back before the Latvian courts for an interim determination.

86. All it remains for me to say is to thank counsel for all the parties, for their excellent advocacy; both written and oral.