



Neutral Citation No: [2022] EWHC 739 (Fam)

Case No: FD21P00823

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30th March 2022

Before:

MR JUSTICE POOLE

Re V and W (Hague Return Order, Lithuania)

Between:

A Father

Applicant

- and -

A Mother (1)

**V and W by their Children's Guardian, Lynn
Magson (2 and 3)**

Respondents

Simon Miller (instructed by A L Law) for **the Applicant**
Ruth Cabeza (instructed by Dawson Cornwell Solicitors) for **the First Respondent**
Maria Stanley (instructed by Cafcass Legal) for **the Second and Third Respondents**

Hearing dates: 21 and 22 March 2022

APPROVED JUDGMENT

Mr Justice Poole:

1. The Applicant is the father, and the First Respondent the mother of two boys, V, aged 8 years 8 months, and W aged 7 years 6 months. The family is Lithuanian, both children having been born and brought up there until the mother moved with them to England in December 2020 where, except for a short visit back to Lithuania in January 2021, they have remained. The father applies for a return order under the 1980 Hague Convention. The mother accepts that she wrongfully removed the children from Lithuania where they were habitually resident. She does not argue that the father consented to the removal or has acquiesced in the children's retention, nor could she given that she left without informing the father or the Lithuanian courts which were dealing with family proceedings at the time, and she kept the whereabouts of herself and the children hidden for several months. The mother does contend that the court is not bound to order the return of the children because of the grave risk of harm and children's objections exceptions under Article 13 of the convention and that the court ought not to order their return.
2. A distinctive feature of this case is that there have been many applications, hearings and decisions involving the Lithuanian courts and authorities in the last two years, including on 25 May 2021, a decision of the District Court that the children, who had been living with the mother, should be removed from her care and residence transferred to the father. That decision is under appeal with judgment expected on 7 April 2022. Given that the hearing before me was conducted on 21 and 22 March 2022 I considered whether to proceed, and whether to give judgment, prior to the appeal judgment. The parties did not request an adjournment, nor did they ask me to await the appeal decision before giving judgment. For reasons that will be evident from what follows, I have decided to proceed and to give my judgment prior to the appeal decision.
3. Within the judgment of the District Court in May 2021 there are findings that the mother was causing the children to be hostile to the father and that she was obstructing their contact with the father. In fact the mother had absconded with the children during the course of the proceedings, abducting them to England, and she had not revealed her whereabouts to the Court. One issue for me to determine is the extent to which I am bound by findings made in the Lithuanian courts.
4. On 1 March 2022 the Regional Court, which is hearing the appeal in question, suspended the residence order of the District Court pending the outcome of the appeal.
5. The father has had no contact with the children, other than by sending them cards and letters, since August 2020. His application herein was made on 25 October 2021. The children's whereabouts was only discovered after a Location Order was made by the High Court on 26 October 2021. The mother and children's address is still not to be disclosed to the father. Judd J and then Newton J made directions giving permission for expert evidence from Dr Campbell, Consultant Clinical Psychologist, for translations of documents from the Lithuanian proceedings, for contact by way of letters and cards only, and for the appointment of a children's guardian who is Ms Magson.
6. The mother has been clear that she would return to Lithuania with the children if their return were ordered. The father has offered protective measures to apply if a return order were made but he has not agreed not to enforce any order that the children should live with him nor to apply for a stay of any such order. Hence, upon a return now to

Lithuania, in the absence of any contrary agreement by the parents, subject to the Lithuanian court orders, the children would remain with the mother until the appeal decision on 7 April 2022, and thereafter would either remain living with her if the appeal were successful or would be transferred to live with the father if the appeal were dismissed. In either event it is very likely that the Lithuanian courts would order contact with the other parent.

7. In these Hague Convention proceedings the mother has made a number of very serious allegations of sexual and physical abuse by the father against her when they were together and has alleged coercive and controlling behaviour by the father. Her allegations include sexual assault, rape, and strangulation. None of these allegations were made in the Lithuanian proceedings and they have not been considered by the courts in that jurisdiction.
8. The main issues for me to determine are:
 - i) In my evaluation of the evidence, am I bound by the findings made by the Lithuanian courts?
 - ii) In my evaluation of the evidence what is the correct approach to the mother's allegations of serious sexual and physical abuse, and coercive and controlling behaviour by the father, given that those were not raised in the Lithuanian proceedings?
 - iii) Is there a grave risk that return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation?
 - iv) Do the children, or either of them, object to return and have they attained an age and degree of maturity at which it is appropriate to take account of their views?
 - v) If (iii) and/or (iv) are made out should the court nevertheless order the return of the children to Lithuania?

The burden lies on the mother to establish the grave risk of harm exception under Art. 13b. The standard of proof is the civil standard on the balance of probabilities.

9. I have received three bundles of documentary evidence running to a total of over 900 pages. On behalf of the mother, Ms Cabeza suggested that I hear oral evidence from the Guardian and, on the question of protective measures, from the father. I gave the father time to clarify his instructions in relation to protective measures and he produced a further short position statement to which I shall return. In the light of his clarification and the fact that the mother's challenge to the Guardian concerns the correct legal approach to the Lithuanian court findings, which could be dealt with by submissions, I decided that I did not need to take the exceptional course of hearing oral evidence. The documentary evidence includes expert reports from Dr Campbell, Consultant Clinical Psychologist, from the Guardian, Ms Magson, and voluminous documentary evidence from the courts and authorities in Lithuania including brief psychological assessments of the children and "Children's Rights" reports on each of them.

The Legal Framework

The Convention

10. Article 1 of the Hague Convention states that its objects are:
 - (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 access under the law of one Contracting State are effectively respected in other Contracting States.

11. Baroness Hale, in *Re D (A Child: Abduction Rights and Custody)* [2006] UKHL 51, at para.48, said:

“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.”

12. Article 3 of the Convention defines when the removal or retention of a child is considered to be wrongful – in the present case it is accepted that the children’s removal was wrongful.

13. Article 12 of the Hague Convention provides that:

“Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

14. There is no dispute that that this application has been brought in this jurisdiction, where the children are, within one year from the date of wrongful removal. The mother accepts that the children were habitually resident in Lithuania when she wrongfully removed them. The mother does not allege that the father has consented to or acquiesced in the removal or retention of the children. The mother does raise Article 13 defences to a return order that would otherwise be mandatory, namely the Article 13b defence of grave risk of harm, and the children’s objections.

15. Article 13 provides so far as is relevant to the present case that:

“13. 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:

...

(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.”

16. If one or more of the Article 13 exceptions is made out, the court does not have to order return of the child and may exercise its judgement not to do so. This is commonly referred to as the exercise of the court’s discretion.

Grave Risk of Harm or Intolerability

17. The principles to be applied in relation to grave risk are well established and were set out in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, in particular at [31] to [36]. MacDonald J helpfully summarised the applicable principles in *MB v TB* [2019] EWHC 1019 (Fam) at [31] and [32]:

“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.

vi. Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child’s situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).

[32] The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures.”

18. At [37] of the same judgment MacDonald J addresses the way in which the court should evaluate evidence:

“The methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon at its highest is not an exercise that is undertaken in the abstract. It must be based on an evaluation of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention. The court does not simply

assume, without more, the maximum level of risk contended for by the abducting parent. Rather, the court examines the information available to it and, having considered that information, arrives at a reasoned and reasonable assumption as to the maximum level of risk having regard to the available evidence.

19. *In Re D (Abduction: Rights of Custody)* [2006] UKHL 51, Baroness Hale held as follows at [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”. 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.”

Child’s Objections

20. In relation to children’s objections, I follow the guidance of Black LJ in *re M (Republic of Ireland) (Child’s Objections) (Joinder of Children as parties to appeal)* [2015] EWCA Civ 26 at [69] to [71]:

“69. In the light of all of this, the position should now be, in my view, that the gateway stage is 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. Sub-tests and technicality of all sorts should be avoided. In particular, the *Re T* approach to the gateway stage should be abandoned.

70. I see this as being in line with what Baroness Hale said in *Re M* at §46. She treated as relevant the sort of factors that featured in *Re T* but, as she described the process, they came into the equation at the discretion stage. It also fits in with Wilson LJ’s

view in *Re W* that the gateway stage represents a fairly low threshold.

71. I do not see it as altering the outcome of most cases although it may sometimes make the route to the determination rather less convoluted. In particular, it would not lead to considerations which are undoubtedly relevant being lost, as they will be given full consideration as part of the discretionary stage. It would be unwise of me to attempt to expand or improve upon the list in §46 of *Re M* of the sort of factors that are relevant at that stage, although I would emphasise that I would not view that list as exhaustive because it is difficult to predict what will weigh in the balance in a particular case. The factors do not revolve only around the child's objections, as is apparent. The court has to have regard to other welfare considerations, in so far as it is possible to take a view about them on the limited evidence that will be available as part of the summary proceedings. And importantly, it must give weight to the Hague Convention considerations. It must at all times be borne in mind that the Hague 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. To reiterate what Baroness Hale said at §42 of *Re M*, "[t]he message must go out to potential abductors that there are no safe havens among contracting states".

21. In *Re F (Child's Objections)* [2015] EWCA Civ 1022, the Court of Appeal confirmed that no gloss should be applied to the word 'objects' in the Convention:

"35. In her definition of an objection, (counsel) had, in my view, introduced an unwarranted gloss on the simple words of Article 13. It is not necessary to establish that the child has "a wholesale objection" to returning to the country of habitual residence and "cannot think of anything positive to say about that other country". The exception is established if the judge concludes, simply, that the child objects to returning to the country of habitual residence. Mr Williams QC reminded us, rightly, that the Convention is applicable in a large number of countries and that "objects" has an autonomous meaning, but he did not advance a proposed definition in amplification or explanation of the words of the Convention itself. That was prudent, in my view. Whether a child objects is a question of fact, and the word "objects" is sufficient on its own to convey to a judge hearing a Hague Convention case what has to be established; further definition may be more likely to mislead or to generate debate than to assist."

22. In *Re M (Abduction: Rights of Custody)* [2008] 1AC 1288, Baroness Hale gave guidance on the exercise of the discretion which applies however the discretion arises under the Convention at [43]:

“... in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child’s rights and welfare.”

She continued at [46] (as referred to by Black LJ in *M (Republic of Ireland)* (above))

In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.

Evidence

23. I must evaluate the evidence having regard to the summary nature of these proceedings. V is a healthy, intelligent boy who is developing as expected. W has developmental difficulties and is of small stature. In Lithuania he was noted to suffer from anxiety, difficulty sleeping, and speech problems.
24. The parties met in 2012, the children were born in 2013 and 2014. The parties separated in April 2015. They reached an agreement that the children should live with the mother and have contact with the father. This agreement was recorded by the District Court on 14.12.15. The settlement included agreement as to financial arrangements.

25. The mother became increasingly concerned about the father's approach to caring for the children when they were with him. On one occasion, when W was five, he went missing when in his father's care but having been left with his grandfather, and was found wandering by a lake. The mother sent an anxious message to the father about this but his short reply suggested that it was W's fault and that he needed to learn his lesson. The mother was anxious about the children returning from the father with injuries – photographs show W with a particularly nasty ear infection with broken skin and redness around the ear which she claims the father had not ensured was treated. The mother says, and the children have repeatedly said, that the father would punish W physically including by twisting his ear lobe causing pain and frightening both boys (for the avoidance of doubt this is unrelated to the ear infection episode).
26. In late 2018 and early 2019 the parties were engaged in court proceedings about child and financial arrangements and it is clear that trust and relations between them were deteriorating.
27. The mother alleges that on or about 25 July 2020 the father physically assaulted W by beating him with his hand to his back and bottom after he had soiled his underwear. She made a detailed, contemporaneous report of this to child protection authorities. The father responded by making an application to enforce contact orders and later for the children to reside with. The father was the subject of criminal investigation and was remanded with conditions not to contact the children. The mother made complaints to the police, and when they ultimately decided to take no action - on 12 January 2021, on the basis that “no act having characteristics of a criminal offence has been committed” - she complained about that decision (formal complaint dated 19 January 2021). Her complaint was dismissed on 8 March 2021. So far as I can determine she appealed against that dismissal and made an application about it to the European Court of Human Rights, but I cannot find any further determinations in relation to that matter.
28. The father's application for change of residence of the children was determined on 25.5.21 by the District Court and determined in his favour. The court also made changes to the financial arrangements under which it appears that the mother has been obliged to pay maintenance for the children to the father even though the children have been living with her in England. The judgment is long and detailed but within it are the following findings:
 - i) The evidence (about the father's alleged assault of W) is “uninformative, inconsistent and the testimony of the mother, children and witnesses is unreliable.” [paragraph 24]
 - ii) The mother's attempts to gather evidence about the father's conduct by recording discussions with the children was damaging to their “psychological development.” [26]
 - iii) The [mother] overreacts to the [father's] desire to see and have contact with the children; she is convinced that she is protecting the children from a threat, even though there is no objective evidence that the father of the children is a threat to them.” [31]
 - iv) The mother's behaviour “may have had a negative impact on the children's psychological state: inadequate communication with the children, prejudice

against the father, instilling a hostile attitude towards the father in the children, separating the children from the father and grandparents, changing their places of residence and education.” [32], repeated as firm assertion at [40].

29. By the time of the hearing in the District Court and of this decision the mother had left Lithuania with the children. She first left on 12 December 2020 but returned with the children briefly in January 2021 to allow them to attend appointments with a psychologist and to collect further personal items to take back to England. She then removed them on or about 12 January 2021 and has remained in England with them since then. Both mother and father have new partners with whom they live.
30. The father’s last contact with the children was in August 2020. The mother did not tell him or the authorities in Lithuania that she was leaving for England with the children, nor did she reveal her whereabouts after she had left. Even at the time of the judgment of 25 May 2021 she had not revealed their whereabouts to the court or the father. The court therefore had no information that they were safe, well and in education. The lengthy court decision, which I have read in full, was that the children should be removed from the mother to live with the father. It was based on findings that the mother had moved the children’s home repeatedly, causing instability, and that she was manipulating them against the father.
31. The father sought enforcement of the order on 22 June 2021. The mother made a complaint against the judge and applied for her to be removed, which was refused. The mother appears to have followed up that complaint with some vigour. She also entered an appeal against the decision of 25 May 2021 which is due to be determined on 7 April 2022, the appeal hearing having taken place in March 2022. Following hearings in January and March this year the financial and residence decisions are suspended pending the outcome of the appeal.
32. The records in Lithuania do show the mother complaining about the father having evicted her and the children from the family home in 2015 (“he chased us out of house ... into the street.”) but there were no allegations of serious sexual assault or rape or strangulation made by her at that time, or subsequently in the Lithuanian proceedings, and no detailed evidence about the father being coercive and controlling.
33. The Lithuanian psychological assessments of the children are brief but follow involvement with the family over a number of weeks. The children were reported to be opposed to seeing the father, although V’s attitude was more equivocal after discussions with the psychologist. They both had good bonds with the mother. They were anxious about seeing the father. They both reported to the psychologist that the father had beaten W. In the Children’s Rights reports, which appear to be similar to a Cafcass report in this jurisdiction, the children were consistent in their reporting of the physical beating of W by the father, witnessed by V. The children were said to have a good bond with the mother but did not want to see the father. The father had attended a 20 hour course on “conscious parenting”, the children were seeing a psychologist, and the mother was undergoing therapy. The reporter noted the mother’s hostility to the father and the father’s complaint that she had made up the allegation of assault against W as an excuse to prohibit contact with the children. There was no recommendation to change the residence of the children, but rather to work with the family to promote contact with the father. The mother eventually ceased co-operation and, as is now known, took the children with her to England.

34. Dr Campbell, Psychologist, has given evidence in these proceedings. On interviewing the mother he reported that “I did not detect signs or symptoms of a formal mental health problem [but]... her stress levels in general remain high.” He continued, “I would describe her as having relocated her emotional investment in life from the unsafe place that is Lithuania (... as it exists in her mind) to the UK ... initially her refuge and over time as the place that has rescued her...” As for the impact of return to Lithuania with the children, “there is a distinct possibility that she would descend into quite poor mental health if she needed to return to Lithuania when she (and her sons) did not want to ... by quite poor mental health I mean depression and anxiety with an emphasis on the latter.”
35. Dr Campbell recommended that upon return the mother should be supported by a psychological therapist. On seeing the father’s response Dr Campbell’s opinion did not change. He considered that protective measures as proposed could help the mother’s anxieties. As to the impact of any deterioration in her mental health on the children, he said that return would be perceived by the mother as, “pretty much ... a catastrophic outcome for her. This does positively suggest that her parenting could falter if she were to become depressed.”
36. The Children’s Guardian, Ms Magson has provided two reports to the court, the first dated 10 January 2022. She tells the court that, having started school in England on 8 March 2021 with no spoken English, V has thrived academically and socially. He is described as happy and hard-working with a 100% attendance record. W has been on a reduced attendance at school due to his developmental difficulties and he has required 1:1 support at school. He was emotionally unsettled at first but has calmed down. He has undergone an Educational, Health and Care assessment. Ms Magson spent an hour with V at her initial meeting with him. He told her that he had known that they were leaving Lithuania to stay in England and had had a chance to say goodbye to others (but not his father). He described how the father had hurt W, twisting his ear. The father had not hurt V but he would become very angry with both brothers if they were naughty. He described his paternal grandparents in Lithuania as being on “Daddy’s team”. His mother had told him that she had paid for everything and the father for nothing. He preferred school in England to Lithuania and preferred the shops and activities here. He wanted to remain in England and preferred living here. He did not want to see his father. He appeared anxious and looked tearful when discussing the prospect of returning to Lithuania.
37. Ms Magson spent 20 minutes with W at their initial meeting. He revealed that the father had beaten him up, hitting him on the bottom and back with his hand making him cry. His father would hurt his ear, twisting the lobe – he demonstrated the same action as V had done. He liked school in England but not in Lithuania. He much preferred living in England.
38. Both boys said that they missed their maternal grandmother in Lithuania. The view of the Special Educational Needs Coordinator at the boys’ school was that V’s maturity was consistent with peers of the same age but W was less mature than his chronological age. V struck Ms Magson as a thoughtful boy and she thought that the boys’ accounts were consistent.
39. Ms Magson’s second report is dated 16 March 2022 by which time she had seen the Lithuanian court documents (in translation). Police checks had revealed that the father

had been convicted of a public order offence, a breach of the peace, in Lithuania in 2014 for which he had been fined. It was reported to Ms Magson that following her initial discussions with the children they had become unsettled, W especially. The allocated social worker reported that the mother was engaging well with services to support the children. In the light of the court documents Ms Magson expressed caution about the extent to which the children's views as expressed to her could be considered to be authentically their own. She noted that the Lithuanian court had been satisfied that the children could be kept safe in the father's care. She noted that it was "not evident" that the mother had raised in Lithuania the "full extent" of domestic abuse she now alleges which involves an allegation of rape against the father. She concluded that she did not put forward an active case to oppose the children's summary return to Lithuania but would support a short delay if their return is ordered to ensure the services can be identified to support their return and for a copy of the judgment of this court and her reports to be obtained, translated, and provided to the authorities in Lithuania.

40. The mother makes numerous serious allegations against the father including rape within their relationship, forcing her to perform sex acts on him, strangulation, and coercive and controlling behaviour including financial control. She alleges that he has committed fraud, dealt in drugs, and has been involved in criminal behaviour in Lithuania and abroad. The father alleges that the mother has been controlling, fraudulent, has lied about her occupation which he asserts in the past was an escort accompanying men in different countries, that she has been a cocaine user, that she has abused alcohol, that she has mental health issues, that she would be constantly changing partners, and that the men would sleep in the same bed with the children.

Submissions

41. The mother's position is that her evidence about the father should be taken at its highest and that, as such, it demonstrates a grave risk that return would harm the children. The father has not been willing to agree to protective measures that would militate against that risk. The mother has acted at all times to protect the children from the father. It is not unusual for a victim of sexual and physical abuse not to make full allegations at an early stage. In fact the mother had learned to obey the father and up until August 2020 was still insisting on the children seeing the father for contact. The beating of W was the last straw and it was the authorities who imposed restrictions on the father seeing the children. The father breached those orders and has himself used the court as a means of trying to control the mother – he applied for a change of residence very soon after the mother reported to child protection authorities that he had beaten W; he unsuccessfully applied to enforce financial orders against the mother. He did manage to have her assets frozen for a time. The fact that the police did not bring charges against the father does not mean that he did not beat W as the children have alleged. The father knows that the children have not had contact with him for over 18 months and are fearful of him, even if he believes that is due to manipulation by the mother, but he will not agree to a gradual reintroduction of the children to him, or to stay the effect of the order for a change of residence.
42. The father's position is that this court must adopt the findings of the Lithuanian court – the mother's conduct and treatment of the children in cutting them off from the father is positively harmful to them and removal from her care would not harm them, it would be beneficial. The findings of the Lithuanian court in May 2021 are damning of the mother and the children require protection from her. In his written evidence the father

says that he would take advice from his Lithuanian lawyer on whether he should agree not to enforce, or to seek to stay, orders that the children should live with him. I gave him time to take that advice and to clarify his position on the first morning of the hearing. He responded with a short written position statement which included, “He asks the court to return the children to his primary care... [he will] contact Children’s Rights and notify them of the decision of the court to return the children to [his] care and invite them to assist with the return of the children and to discuss matters relating to contact of the children with their mother.”

43. In response to the father’s clarified position, Ms Stanley for the Guardian informed the court that the Guardian no longer held to the conclusion of her second report. She did now oppose a return order on the basis that the protective measures were insufficient. The father’s assertion of residence with him was one reason to conclude that there was insufficient protection of the children against harm upon return.
44. In his closing submissions for the father Mr Miller sought to give further “clarification” of the father’s position saying that he would defer to the opinions of Children’s Rights, giving them time to consider the matters before this court and this court’s judgment. In response Ms Stanley said that her instructions remained to oppose a summary return order. She said that the Guardian expressed concerns as to the “oscillation” in the father’s position.
45. Article 23(1) of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation, in Respect of Parental Responsibility and Measures for the Protection of Children, provides that,

The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

Art 23(2) sets out grounds on which recognition may be refused. They include,

(d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child.

By Art 1(1) the objects of the Convention are stated to include determination of “the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child”. By Art 3 the measures referred to in Article 1 may deal in particular with (b) rights of custody including rights relating to the care of the person of the child.

By Art 25,

The authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction.

46. In this case the courts in Lithuania have made findings of fact which were the basis of the measures taken dealing with custody rights, in particular in the judgment of 25 May 2021. That judgment is under appeal and the appeal court has suspended the measures pending the outcome of the appeal. The Guardian contends that this court is bound by the findings of fact. The Father has supported that position. I have been referred to the Court of Appeal Judgment in *E (Bila: recognition and Enforcement)* [2020] EWCA Civ 1030 which concerned the extent of the obligation on the court in this jurisdiction to enforce foreign order in relation to children. The Brussels II Revised Regulation 2201/2003 was the focus of the Court of Appeal's attention but is not applicable in the present case. There is no application for enforcement of the Lithuanian judgments or orders before me.
47. Ms Cabeza, for the mother, submits that Art 25 is limited in its scope – it is only findings of fact which were the basis of jurisdiction that are binding.

Analysis

48. Scrutiny of the Lithuanian documents concerning the court proceedings and the involvement of the authorities, shows that the focus was on the allegation that the father beat W in early August 2020. It was that allegation that led to the cessation of contact, the imposition by the police of restrictions on the father seeing the children, the mother's leaving Lithuania with the children to escape the father, the father's application for residence, and the Court's decision that the mother had manipulated the children against the father and that the children should be removed from her in May 2021. The mother's allegations concerning violence against her by the father in their own relationship, which had ended in 2015, were not raised by her in 2020 and 2021 and did not form the focus of her concerns at that time. In the circumstances I do not regard the fact that she has not previously raised allegations of sexual, physical and emotional abuse of her during the relationship as a reason to dismiss those allegations that are made now, in these proceedings. They have not been investigated in Lithuania or taken into account by the courts there. The allegations are strongly denied by the father and they have not been tested in these summary proceedings. I therefore adopt the approach articulated by MacDonal J in *MB v TB* (above), namely, to examine the information available and to arrive at a reasoned and reasonable assumption as to the maximum level of risk having regard to the available evidence.
49. In accordance with Article 23 of the 1996 Convention, and the purpose and spirit of the 1980 and 1996 Hague Conventions, I must recognise and give full respect to the Lithuanian authorities' decisions, including the judgment of 25 May 2021. Nevertheless, the order made on that date is currently suspended pending the outcome of an appeal and I must recognise that measure also. I am not required to make a welfare decision. The decision of this court to return or not to return the children to Lithuania will not be inconsistent with the decisions of the Lithuanian courts regarding residence. As Mostyn J said in *FE v YE* [2017] EWHC 2165 (Fam) at [14],

It is therefore important to recognise that the nature of the relief which is granted under the 1980 Convention is essentially of an interim, procedural nature. It does not more than to return the child to the home country for the courts of that country to

determine his or her long-term future. The relief granted under the Convention does not make any long-term substantive welfare decisions in relation to the subject child.

50. On return the children would either live with the mother until the regional court in Lithuania orders otherwise or, if an order has already been made by the time of their return, live with their father. In either event they would be likely to spend time with the other parent, at least that is what the courts in Lithuania would be likely to order. An order for return would not conflict with the orders of the Lithuanian courts. A refusal to order the return of the children would not prohibit the Lithuanian courts from determining the appeal and making residence orders as they consider appropriate. The father could apply for enforcement of the judgment of 25 May 2021 or on appeal. The father could apply for child arrangements orders in this jurisdiction, including for the children to live with him in Lithuania. The court would have to consider issues of jurisdiction and welfare, having full regard to the recognition of the Lithuanian authorities' decisions.
51. Much has happened in these children's lives since the decision of the District Court on 25 May 2021. They are established in family life, school and social life in England. They have not seen their father. They are both older and more mature. I have further evidence relevant to the Art 13 exceptions. Whilst recognising the Lithuanian court's decision of May 2021 I must have regard to all the evidence now before this court. Therefore, even if I am bound by findings of fact made by the Lithuanian court in May 2021 those were findings made on the evidence before that court, whilst the evidence before me is more extensive if only because of the events that have occurred since May 2021. On my reading of the judgment of the Court of Appeal in *E (BIIa: Recognition and Enforcement)* (above) a court in this jurisdiction is not necessarily bound by welfare decisions taken in another jurisdiction (assuming it is a contracting state) if there has been a sufficient change in circumstances to necessitate a fresh welfare assessment. It would be wrong to review the substance of the previous court orders – to rule on the rulings – but once the court has embarked on a welfare assessment the previous rulings are to be regarded as part of the “whole picture” – see [76] of the judgment of Peter Jackson LJ . I am not engaged in a welfare assessment but the principle I apply is that the Lithuanian court decisions are recognised and are part of the whole picture. I also recognise the findings of fact made by the Lithuanian court in May 2021 and I do not re-open those findings. However, in considering the issues I have to determine I evaluate all the evidence including the findings made in Lithuania. I do not stop my enquiry at 25 May 2021.
52. As for the allegations that the father beat W in early August 2020 and had been violent to the children previously with unreasonable chastisement, I have regard to the findings of the Lithuanian court which were that there were no visible injuries on W when examined on 10 August 2020 ([23] of the decision); that the criminal investigation had been closed as the evidence to that investigation had been unreliable and inconsistent and no crime was disclosed [24]; that the mother's attempts to gather evidence by recording discussions with the children about the beating were not probative and were harmful to the children [26]; and that expert reports did not confirm the alleged beating [27]. Nevertheless, the Lithuanian court did not find that the allegation was concocted nor can I identify a clear finding that some form of beating did not occur in early August

2020 or that the father had not physically punished the children. I am not therefore bound to accept findings to that effect. I do take into account the findings that the mother had influenced the children to be hostile towards the father and that she had constantly told them of the violence they had suffered at his hands [40]. As such, considerable caution has to be exercised in relation to the allegations made by the children and their voiced objections to returning to Lithuania. I note V's references to financial arrangements between his parents and his reference to his paternal grandparents being on his father's "team". These are indicators that the mother has influenced his thinking to become hostile to the father. However, the children have repeated the allegations of the father beating W independently and consistently to the Guardian. They did so in a way that appears to have been genuine and unrehearsed. I do not doubt the sincerity of their feelings of fear about the father and of their emotional associations with his chastisement of W, even though the mother has strongly contributed to those feelings.

53. I adopt the approach already set out, namely, to form a reasoned and reasonable assumption as to the maximum level of risk having regard to the available evidence.
54. From August 2020 to their departure for England in January 2021 (after an earlier departure in December 2020) the children were caught up in very hostile relations between their parents involving court battles and police investigations. They were receiving psychological support and Children's Rights services were involved. By comparison, although there has been involvement of the Guardian, a psychologist and an allocated social worker, they have enjoyed a more stable life in England and appear to be doing well at school – V is thriving and W has become more settled and is making progress. Neither wants to return to Lithuania. They are clear in expressing their wishes not to return. V in particular has given reasons for objecting to a return: he prefers his school here, the available activities here, and the shops here. He misses his maternal grandmother in Lithuania suggesting that he does not have a wholly binary view of that country. In my judgement his assertions do amount to objections to return. Furthermore, he has attained an age and maturity at which, I am satisfied on the evidence about him, it is appropriate that take his objections into account.
55. W is younger and less mature – he is not as mature as most of his peers of the same age. He has not articulated reasons not to return to Lithuania in the same manner as his older brother. Whereas V is of sufficient maturity and has expressed himself in a reasoned way so that I am sure that he does object to return, I am more cautious about accepting that W objects to return. I am sure that he wishes to remain in England with his mother and brother, but I am not satisfied that he has raised objections which, given his age and maturity it is appropriate that I take into account.
56. Dr Campbell's evidence is important in relation to the mother's mental state and the consequences of a return order. This is not a case in which it can be said that the mother's mental health would inevitably disable her from caring for the children were they to return to Lithuania, but Dr Campbell's evidence certainly gives rise to concerns about the risk of harm to the children on return.
57. In considering the Art 13b objection or defence to return and having made assumptions above about the maximum level of risk on the available evidence, I conclude that on return, even if the children were to remain residing with the mother until further or other order of the Regional Court,

- i) The children would be justifiably afraid of spending time with the father and of being treated harshly by him including by physical chastisement;
- ii) The children would be at risk of excessive physical chastisement from the father;
- iii) The mother would be justifiably afraid of the father seeking to control and coerce her were she to have to have dealings with him about child arrangements or financial arrangements in Lithuania;
- iv) The mother would be justifiably afraid of the father using physical violence against her should they have face to face dealings in Lithuania and would be at risk of suffering physical violence at his hands.
- v) There would be a substantial risk that the mother's mental health would deteriorate were the children to be returned to Lithuania. Dr Campbell's evidence is reasonably clear on that question. I also take into account the risks to her from the father and the fear that she would justifiably feel, that I have identified above. Were the children to live with her in Lithuania, the mother's ability to care for them would be liable to be adversely affected by a deterioration in her mental health. Again, Dr Campbell's evidence supports that conclusion. I also take into account all the evidence about the children's close bond with the mother and their reliance on her. The children are psychologically very dependent on their mother at this stage of their lives. They would be deeply affected were her mental health to deteriorate. If her mental health were to deteriorate then in all the circumstances of this case, the children would be exposed to psychological harm as a result.
- vi) The children, V in particular, have voiced clear wishes not to return to Lithuania and not to see the father. They are fearful of him. Even discussing the prospect of return and of seeing him has unsettled them. They have reported that he has been physically violent to them, W in particular, in the past. There would be a real risk that the children would suffer psychological harm were they compelled to return to Lithuania. They now think of that country as a place to fear because of their associations with their father. However that has come about, and whatever work might be done in the future to counter that association, that is how they feel now.
- vii) The children would be uprooted from their school and friends in England where they have now resided for over a year. The instability caused by return to Lithuania would compound the risk of harm identified above.
- viii) W is vulnerable – he has suffered anxiety in the past. He has developmental problems. He associates his father's violence to him with problems he has had due to developmental problems or anxiety, namely soiling his underwear. He now associates life in England with security and safety from that sort of response to his vulnerabilities. His vulnerabilities and the way he believes his father responded to them exacerbates the risks to him of harm upon return.
- ix) V and W are very close. They are close in age and they have a strong sibling bond. V is protective of W and would be likely to be deeply affected by concern for his younger brother if return were ordered.

- x) The children have not seen their father either in person or via a screen for over 18 months. The prospect of return to Lithuania coinciding with being compelled by the court to spend time with him would exacerbate the risk of psychological harm to them.
58. In the event that the children returned to Lithuania but resided with the mother with time spent with the father, for the reasons set out above I am satisfied that there would be a grave risk that return would expose them to physical and psychological harm or would otherwise be placed in an intolerable situation.
59. Were return to Lithuania to be into the care of the father, residing with him, or if that were to follow within a month or so of return, then the risk of harm would be even more grave, and the situation more intolerable for the children. I would go so far as to say that psychological harm to the children would be inevitable were they made to leave their home in England, to return to Lithuania to reside with the father. Whilst the mother has said that she would return with the children and the residence order is currently suspended, it may be in force from 7 April meaning that residence with the father on return is a strong possibility.
60. For the avoidance of doubt I do not take into account risks associated with the father's alleged drugs dealing or criminal behaviour. In my judgement the mother's assertions are not supported by any evidence and it would be inappropriate for me to take them into account even allowing for the summary nature of these proceedings. I do not believe that the mother's credibility is so undermined by her making those allegations that I should not take into account her allegations of sexual and physical violence. The mother has given first hand evidence about those matters.
61. I have to consider the measures to protect the children from these risks. The father agrees to lodge with the Lithuanian courts a return order and undertakings he will give not to use or threaten violence, not to harass or pester the mother and children, and not to directly communicate with the mother. However, I have no reassurance that the Lithuanian courts would recognise and enforce undertakings given to this court. I have no legal opinion or other evidence to that effect. In the voluminous court papers from Lithuania from the proceedings between the parties there, I cannot find any reference to recorded undertakings. The father agrees to pay for travel and any quarantine requirements (due to the Covid-19 pandemic) and the court could order that such payment was made in advance. As to other financial arrangements, the father's position is that the mother and children could live in the mother's home in Lithuania (she agrees it would be available to her) but that child maintenance "has already been determined by the court in Lithuania", that any medical or therapeutic treatment would be available free of charge, and that the mother could rely on state benefits. He has not offered any financial support.
62. The mother has sought agreement that the father would not seek to enforce court orders for the children to live with him. On the one hand such court orders, if upheld on appeal, are intended to be for the benefit of the children and so the father might well not agree to ignore them if to do so would be harmful to the children. On the other hand, the order for residence was made in May 2021 and the circumstances for the children are now very different and would be very different on return. The father took time to clarify his views on protective measures about child arrangements and chose a firm line as set out in a brief, further position statement provided during the lunch adjournment on the first

day of the hearing. In that document he did not acknowledge any possibility, even in the interim, of the children being returned with his agreement in their mother's care and a gradual reintroduction of him into their lives after a gap of over 18 months. He did not recognise the impact on the children of a forced return to Lithuania. His proposals do not provide for a "soft landing" for then children but a very "hard landing", potentially leaving their mother's care upon or shortly after return. In consequence of this further position statement about protective measures the Guardian changed her position to oppose a return order because the protective measures were insufficient.

63. Whilst Mr Miller, on the father's behalf, later submitted that the father's intention is to leave decisions about arrangements to the authorities, it is very clear what the father would be fighting for. He believes that the children are being harmed in the mother's care and require removal. He has not reflected on the children's viewpoint and the need to protect them from the risk of harm and to avoid placing them in an intolerable situation. It is insufficient simply to rely on the authorities in Lithuania to protect the children because, with respect to them, they will not have time to scrutinise all the evidence that has emerged since May 2021 including the mother's allegations against the father, and the children's changed circumstances and experiences, in time before the appeal decision. The court is asked to order summary return. Even if some delay is built in to an order for return to allow information to be given to the authorities in Lithuania, such delay can only be for a relatively short period. The 1980 Convention is not intended to secure return, where appropriate, several months in the future when the court does not know what circumstances will prevail. In those circumstances there appear to me to be no sufficient protective measures available to ensure that the children's return to Lithuania can be managed so as to avoid a grave risk of harm or intolerability.
64. In relation to the children's objections, I have found that V, but not W, has objections which are appropriate to take into account. However, given the findings of the Lithuanian court as to the mother's influence of the children, and the fact that in the intervening period between those findings and now the mother has ensured that the children have had no contact with the father, I am concerned that the mother's influence is such that I cannot be satisfied that V's objections are authentically his own. I take into account welfare considerations and the purposes of the Convention, but the influence of the mother is potentially so strong in this case that I would not exercise my discretion to refuse return on the basis of V's objections.
65. As such, the remaining question is whether the court should exercise its discretion to order return notwithstanding that it is not bound to do so given the finding of grave risk of harm or intolerability. Again, I must take into account welfare considerations and the purpose of the Convention. It must be a rare case where the court will order return notwithstanding a finding that the Art 13b exception is established and I cannot find any reasons in the present case why it would be appropriate to exercise my discretion to order return. The grave risk of harm provides ample reason to exercise my judgement not to order a return.
66. I re-emphasise that this is not a long-term welfare decision. I do not at all condone the mother's actions in removing the children from their home country without consent or permission during the course of family proceedings there. I fully recognise and respect the decisions of the Lithuanian courts but in the current circumstances and having regard to the situation in which the children would now be placed on return and the

insufficiently protective measures available, I am not prepared to order the children's return. The father's application is therefore dismissed.