Neutral Citation Number: [2022] EWHC 743 (Fam)

IN THE HIGH COURT OF JUSTICE **No. FD21P00475**
FAMILY DIVISION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985 INCORPORATING THE HAGUE CONVENTION 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

IN THE MATTER OF THE SENIOR COURTS ACT 1981

IN THE MATTER OF CC (a child)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 8 February 2022

Before:

MR DEXTER DIAS QC

(Sitting as a Deputy Judge of the High Court

pursuant to Section 9(4), Senior Courts Act 1981)

(**In Private**)

B E T W E E N :

QR (Father) Applicant

- and -

ST (Mother) Respondent

MS I. RAMSAHOYE (instructed by Dawson Cornwell) appeared on behalf of the Applicant.
MS K. SLATER (instructed by Duncan Lewis) appeared on behalf of the Respondent for judgment.
MR M. JARMAN previously conducted the case on behalf of the Respondent.

Hearing dates: 7 and 8 February 2022

A P P R O V E D J U D G M E N T

(v i a M i c r o s o f t T e a m s)

MR DEXTER DIAS QC:
(sitting as a Deputy High Court Judge)

1 This is the judgment of the court.

2 I subdivide it into nine sections to assist parties follow the court's line of reasoning. Extensive anonymisation has been used. Such anonymising of the names of real people, while necessary, has a dehumanising effect. I fully recognise that. It has been used solely to protect the privacy of parties and particularly the child at the heart of these proceedings.

§I. INTRODUCTION

3 CC is a very bright 4 year-old boy who was born in a northern county of England, but who just three months after his birth flew with his mother to a different country and a different continent – to the Republic of South Africa. There he lived most of his young life until his mother brought him back to the United Kingdom and then kept him here against the wishes of his father, causing his father great anguish and consternation. The vital issue arising in this case is whether this court should insist that CC make another intercontinental flight. This time to be returned to South Africa by virtue of the powers vested in the court under the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention": Cmnd 8281).

4 The deep philosophy and explicitly stated objects of the Convention are unmistakable: the summary return of children taken from their country of habitual residence to another country without the consent of the left-behind parent with rights of custody. The Preamble to the Convention makes plain the vice it is designed to combat:

> "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence."

5 Judicial authorities are obliged to "act expeditiously in proceedings for the return of the child": see Convention, Art 11. Ordinarily, the child should be returned 'forthwith': see Art 12(1).[i] But as Baroness Hale pointed out in *Re D (A Child: Abduction Rights and Custody)* [2006] UKHL 51, at [68], 'There are some cases, albeit few in number, where this is not the case'. The deceptively simple question before me is whether CC falls into that limited category.

6 For there are exemptions – "defences" to return, where, to use the language of Art 13(b), the requested State "is not bound to return the child". This includes where the child would be exposed to a grave risk of harm or where the child would be placed in an intolerable situation. The Convention is not blind to this. It should never be mechanistically enforced and become, as Lady Hale put it, "an instrument of harm": *op. cit.* at [52].

7 CC was born on [a date in] 2016 in the north of England. He enjoys dual British and South African nationality.

8 The parties to the application are, first, CC's father Mr QR. He is a South African national. He is represented by Ms Ramsahoye of counsel. Then second, the respondent Ms ST. She is CC's mother. Ms ST is a national of [another African country] with indefinite leave to remain in the United Kingdom. She has been represented by Mr Jarman of counsel. His position today, with permission of the court, is covered by Ms Slater of counsel to whom the court is most grateful.

9 What happened was this. CC's parents met in high school in South Africa. Their relationship started as a youthful romance, but it inevitably had to end when her mother left for England and Ms ST went along, too. Several years later, Ms ST returned to South Africa and took up the relationship with Mr QR. Frankly, it did not go well. They separated in 2016, after CC was conceived but before he was born. Approximately three months after his birth in [a northern city of England], he was taken by his mother to South Africa. This was on 26 September 2016. From then until 8 April 2021, he had been living in South Africa. Indeed, he had been attending the YY College preschool, certainly before Covid struck, as it ultimately did so devastatingly in South Africa.

10 Mr QR has rights of custody within the meaning of Art 3 of the Convention and also pursuant to the Children's Act 2005 in South Africa. The significance is that scheme of the Convention is the enforcement of rights of custody as opposed to court orders. The right to assert and enforce custody rights exists, therefore, independently of any pre-existing court order. Here the parents were signatories to a joint parenting plan endorsed and approved by the Family Court in South Africa. It is dated 7 August 2017. This agreement was mediated. Both parties were present in court and it was approved by the court. So that was 2017.

11 In 2018, Ms ST met and later married Mr G, a national of [another African country]. Unfortunately, that marriage failed in 2021. The breakdown was around the time that Ms ST travelled to England with her son. That was on 8 April 2021.

12 It must be pointed out that at first Mr QR agreed that his son could go to England. He says that he believed it was to be for a three-week holiday. Thus, CC should have returned to South Africa on 29 April 2021. Or thereabouts. However, once Ms ST sought to keep her son here, Mr QR did not consent to that. He had agreed to a holiday and then a prompt return to South Africa not, he says, to his son's wholesale relocation to the United Kingdom. Therefore, on 18 May 2021, his South African attorneys sent the mother a letter seeking for CC's return within twenty business days. CC was not returned before the expiry of that period. So his father took legal action.

§II. PROCEDURAL HISTORY

13 On 29 June 2021, Mr QR made an application to the Central Authority in South Africa. That was the appropriate procedural mechanism. Mr QR sought the summary return of his son to the jurisdiction of the Republic pursuant to the Child Abduction and Custody Act 1985 ("CACA 1985") in this country which incorporates the Hague Convention. His application for return was sent to this court for issuing on 12 July 2021. A first without notice hearing was listed on 4 August.

14 Ms ST's answer to Mr QR's claim is dated 23 August 2021. In it, she advances what essentially amounts to an Art 13 exemption - more accurately: a series of them. She conceded that at the material time CC was habitually resident in the Republic of South Africa within the meaning of the Convention. It was hard to envisage how she could not. CC had lived in South Africa all his life bar three months. However, in mounting her determined opposition to return, Ms ST relied upon five bases:

a. That the removal of the child from South Africa was not a wrongful removal but a lawful removal;

b. The applicant was not actually exercising custody rights at the time of the removal or retention;

c. He had consented or subsequently acquiesced in the removal or retention;

d. That there was a grave risk that CC's return would expose the child to physical or psychological harm or otherwise place him in an intolerable situation;

e. That CC objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views.

15 On 25 August, Ms ST and her counsel appeared before the court. That was in front of Newton J. Her application for her son to be seen by Cafcass was refused by the learned judge. This was to found the Art 13(2) exemption to return, based on the child's objection. This provision is consistent with the international obligation under the United Nations Convention on the Rights of the Child (UNCRC). Art 12 of that instrument provides:

> "12 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child,

> the views of the child being given due weight in accordance with the age and maturity of the child."

16 The UNCRC erects a presumption, therefore, that the child's views will be heard unless they are inappropriate. In the case management order of 25 August 2020, it was recorded that:

> "The mother's application for the child to be seen by Cafcass for the purpose of an assessment of his age and degree of maturity and whether he objects to returning to South Africa is refused."

17 I am bound to observe that such a conclusion by Newton J was inevitable. CC is too young for his views to have any credible legal meaning. Thus, such an exemption was bound to fail. Bluntly, Ms ST had better points. Thereafter His Lordship gave helpful case management directions, including granting permission to instruct an expert about Mr QR's custody rights in South Africa. The significance is that Art 3 of the Convention provides insofar as it is material that:

> "The removal or the retention of a child is to be considered wrongful where –
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention."

18 The parties jointly instructed Ms Amanda Cato to prepare the report and this was filed with the court on 21 September 2021. Her evidence is uncontroversial and agreed. Mr QR has enforceable rights of custody. Ms Cato makes it clear that the parenting plan entered into by the parents with the assistance of two mediators has been endorsed by the court and therefore, in South African law, is a court order. Furthermore, she advises that the parents have shared full parental responsibilities as contemplated by s.18 of the Children's Act 2005 in South Africa. In addition, Ms Cato states that the father as co-guardian has the right in terms of s.18(3)(c) and s.18(4) - (5) of the Act:

> "... to give or refuse any consent for the child's removal or departure from South Africa."

19 The matter was listed for final hearing on 15 November 2021 before this court. At that hearing, Ms ST abandoned all the bases for opposition (all exemptions) save for Art 13(b). On the evening before that hearing, Ms ST for the first time raised the issue of her mental health. She now stated that her profound mental anguish and abiding psychological condition was highly pertinent to the question of whether CC should be returned to South Africa.

20 Time is unquestionably of the essence in child abduction cases. This is to prevent the harm of retention away from the child's habitual residence. Indeed, judicial authorities have a duty to act with due expedition: see CACA 1985, Schedule 1, Art 11. Nevertheless, the court must balance expedition with fair hearing rights and due process. Therefore, on 15 November, the court granted the application to adjourn proceedings for an assessment of Ms ST's mental health. In the first instance, the hearing was adjourned to 19 November. On that date, Ms ST made a successful Part 25 application for a psychiatric expert. Permission was granted to instruct consultant psychiatrist Dr Chahl. His report was filed with the court on 18 January 2022.

21 On 28 January 2022, the mother's solicitors sent the doctor a list of eleven further questions. They also provided him with evidence. First, there was a standalone JPEG image entitled "One page of medical records received on 21 January 2021". Second, a letter to Dr Chahl setting out a list of the mother's current mediation and a screenshot from her doctor's portal. Third, there was a Word document with the list of the medication. There was not any confirmation of who prepared this list. Last, there was a patient summary record. None of this was done either with the permission of the court or notice to the other party, let alone with the other party's consent.

22 Dr Chahl is a single joint expert. On behalf of Mr QR, serious criticism is made of this unilateral approach to Dr Chahl. It was said to be an attempt to persuade him to change his conclusion rather than the seeking of clarification. In any event, Dr Chahl provided his answers in a letter dated 1 February 2022. Nothing that was sent to him caused him to change his diagnosis or prognosis.

23 The matter was relisted for a final hearing and two days were set aside. The case came on for hearing on Monday 7 February 2022. On that day the court received submissions from counsel. Without objection, the hearing was conducted using the MS Teams remote video platform. That of course enabled Mr QR to join from South Africa. Remote hearings do have several undoubted advantages. That said, there was no conceivable curtailment of the Art 6 ECHR rights of parties, since by agreement no oral evidence was to be called. The second day was 8 February, when the court indicated it would hand down its judgment. That is today.

§III. ISSUES

24 Parents often agree for one of them to take their child to another country.

25 CC's parents did so here. Once the travelling parent unilaterally retains the child beyond the agreed time, that amounts a repudiation of the left-behind parent's rights. In the Explanatory Report of the Hague Convention (April 1981), Professor Eliza Pérez-Vera points out points out at [11] that:

> "… we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed."

By virtue of Art 12, the Hague Convention 1980 operates to return the child promptly for the home court to resolve any relevant disputes. But there are exceptions. That is the question now. The Art 13(b) exemption is therefore the exclusive matter for the court to determine in this case. It is commonly referred to as a "defence" to return. I use the terms interchangeably. They mean the same thing.[ii] The person who relies on an exemption must prove it to the ordinary civil standard.

26 The remaining objections that Ms ST advances need to be properly parsed out into discrete issues. There are three. Thus the mother has to prove on a balance of probabilities that return would:

(1) Expose the child to the grave risk of physical harm; or

(2) Expose the child to the grave risk of psychological harm; or

(3) Place the child in an intolerable situation.

27 Each limb of the 13(b) exemption/defence can be – is here - pleaded in the alternative. One such finding is capable of founding a Convention exemption to return. As Baroness Hale stated in *In re D* at [55], it would be "inconceivable" where a court had made such a finding that a child would be summarily returned "to face that fate".

28 But what do 'intolerability' and 'grave risk' mean? In the Explanatory Report Professor Pérez-Vera explains that a distinctive feature of the Hague Convention is that the legal concepts within it are not defined.[iii] Thus, the meaning of Art 13(b) has developed through judicial interpretation in a series of seminal cases. This accords with the depiction of judicial law-making by eminent American jurist Justice Benjamin Cardozo's in *The Nature of the Judicial Process*.[iv] Shorn of antiquated pronoun use, Justice Cardozo states that the judge:

> "legislates between the gaps. [He or she] fills the open spaces in the law … The law which is the resulting product is not found, but made." (pp.113-15)

However, he sounds a note of caution:

> "The judge is not to innovate at pleasure … [but] is to draw inspiration from consecrated principles." (p.141)

29 These consecrated Convention principles will be decisive in this case. Indeed, the Convention as a living instrument has been wrought and made real in a number of cases – as we shall see. In particular, the relevance and intensity of review of any overarching welfare issues is strictly delimited by both the summary nature of proceedings and the defined objects of the Convention. The approach was enunciated by Mostyn J in *FE v YE* [2017] EWHC 2165 (Fam):

> "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 no 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."

30 The Republic of South Africa is not a signatory to the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Thus, the mother has sought a raft of protective measures to be put in place prior to any return to South Africa and for them to continue there. But her primary case – and she has not deviated a millimetre from it as is her right - is that her son should stay here in the United Kingdom. Mr QR has offered undertakings. They include an undertaking to obtain an enforceable mirror order in South Africa. The effectiveness or ineffectiveness of all these proposals is revealed by the evidence, to which I now turn.

§IV. EVIDENCE

31 There was no oral evidence. That is a direct consequence of the summary nature of proceedings. As Mostyn J stated in *FE v YE* at [15]

> "Oral evidence is very much the exception rather than the rule. The available defences must be judged strictly in the context of the objective of the limited relief that is sought."[v]

32 The sources of evidence include an electronic bundle which extends to 623 pages and medical records about Ms ST which run to 55 pages. There were position statements from both counsel which the court found invaluable. They were focused and tightly argued. Further documentation was circulated without objection shortly before the hearing began. These documents related to possible accommodation in South Africa and medical services for mental health support.

33 I turn first to the evidence of the parties. I will deal initially with the filed evidence of the respondent mother as she must prove the claimed defence/exemption to the requisite standard. Then Mr QR. After that, I will review the expert evidence about Ms ST's mental health from the jointly instructed psychiatrist Dr Chahl.

a. Ms ST

34 Ms ST says that she started a relationship in South Africa with Mr QR in 2004 when she was 18. She went to the United Kingdom with her mother and so the relationship ended a few years later. She returned to South Africa again in 2013 and the relationship started up again in 2014. In 2015, she states that he became abusive, coercive, and controlling towards her, but when he proposed, she accepted. She became pregnant. He still wanted sexual intercourse with her during the pregnancy and she refused. As a result, she alleges that he, as she puts it, beat her up and they ended the relationship as a result. Nevertheless, she decided to keep the baby which was CC and she resolved to bring him up on her own. She went to live with her brother U in [a major South African city].

35 Mr QR tried to effect a reconciliation while she continued to live with her brother. She came to the United Kingdom for the birth of her baby because she wanted her child, as she says, to have a better life. Mr QR told her that he would change and she "foolishly" believed him. Therefore, she returned to South Africa approximately three months after CC's birth. It was now September 2016 and, again, she went to live with her brother. Wedding plans had been discussed in August 2016 but by October, the relationship had broken down. She was still living with her brother. The parents broke up for good in May 2017.

36 In July 2017, there was the mediation I have already mentioned. At that point, she was working in a law firm. About the mediation, she says she felt deceived and coerced into a parenting plan she was not happy with.

37 In March 2019, she married another man, but that marriage soon ran into trouble. They finally split, she says, in May 2021. That was a month after she came to the United Kingdom in April. When that marriage failed, the tenancy on their property was surrendered. So the mother has no property from that relationship and she has nowhere, she says, to live in South Africa. If she has to return because her son is ordered to return, she will have nowhere to live, no job, no benefits, and no real support. Rental prices are

between 7,000 and 9,500 rand per month. She says that looking back, Mr QR did not really want a relationship with his son. He was inconsistent with contact and that used to make CC cry. She does not want to go back to court in South Africa because she feels he, that is Mr QR, 'would win' because he is very manipulative. She stopped working at the law firm in March 2019 and she found it hard to find employment in South Africa following the pandemic. In April 2021, she came to the United Kingdom and she did have some employment here.

38 In South Africa, she has her brother and an aunt, but she cannot live with either of them. There is no real support in South Africa and she contrasts that vividly with the situation in England where she has most of her family and they provide her with regular fulsome support.

39 At para.40 of her statement, she states that the protective measures offered by Mr QR are inadequate. I will turn to the protective measures in §V. of this judgment. She ends her statement by asking the court not to order the return of her son.

40 I am bound to say the parties have been exercised by the question of CC's birth certificate in South Africa. There has been shortly before the judgment started a flurry of emails about this vexed topic. The certificate itself is woefully inaccurate. It shows that CC was born in South Africa and not in [a northern county], and that is wrong. Ms ST alleges that this was because of a fraud by the father. He denies it. I make two points about all of this. First, without oral evidence, it is impossible to resolve this issue on the papers in summary proceedings. Second, as importantly, if not more so, I have indicated to parties that I regard this as of secondary or tertiary importance in the determination of the Art13(b) exemption. I therefore turn to the evidence of Mr QR.

b. Mr QR

41 Mr QR is a South African national and has always resided in South Africa. He was "devastated" by Ms ST's actions, that is the mother's unilaterally retaining their son in the UK. She did that following what he says was an agreed three-week holiday in England. Instead, she decided to uproot their son from his home in South Africa and she separated him from his father. Even before CC was born, the mother and her family had made it difficult for him to see his son. Under their cultural rituals, he had to pay them 15,000 rand just to get access to his son. It is partly because of these difficulties that he applied for a parenting plan in the South African courts in order to have regular contact with his son.

42 He rejects the allegations of abuse levelled against him in her statement. He says that what happened was they started dating in high school and then she left South Africa for the United Kingdom when her father died. She studied in England, eventually obtaining a diploma in law from the GXX College in [a northern county]. When she returned to South Africa in 2013, they decided to live together. Despite them becoming engaged in 2015, the relationship between them was not "healthy" and they did not get married. She moved out in November 2015 and went to live with her brother UT. She wanted their child to be born in a private hospital in England and that is why CC was born in the UK.

43 Their relationship continued to be problematic and they finally ended it in May 2017, and then Mr QR made the application to the children's court. You can see that from the children's court affidavit which he exhibits to his statement. It can be seen in that affidavit, he says, that he was being financially exploited by Ms ST and he was denied contact with his son. So he applied for contact.

44 Mediation began and that resulted in a parenting plan dated August 2017. That was ratified by the South African court and it mentions that if any parent relocates, the relocating parent will inform the other parent as soon as possible of any plan to relocate and give at least two months' notice. His son started attending crèche at the YY (preschool) College in 2019. CC enjoyed his time there despite the mother saying she had concerns about the school. Mr QR says they paid the fees and living expenses fifty-fifty, as he put it, and he provides evidence of this at pp.13 - 14 of his exhibit.

45 She led him to believe that the trip to England was a three-week holiday and she tried to reassure him by the fact that her husband to whom she was married at that point would be staying in South Africa. He has only realised during these proceedings that the relationship between her and Mr G had ended in disharmony and irretrievable breakdown. Once back in England, her argument for staying here was that she was better able to provide for their son and she would be able to get benefits for him in England. Therefore, CC was not brought back on 29 April. Mr QR never consented to her retaining him in the UK beyond this date and he has been consistent, he says, in his wish that his son be returned to South Africa.

46 He then deals in turn with the defences in Ms ST's answer to the return application. Noticeably, he does *not* deal with the question of her mental health. It will be observed in the court's recitation of her evidence that her mental health was not mentioned. That is because by the time that he filed his statement on 27 October 2021 she was not raising the question of her mental health as a defence. He does deal, however, with her claim of intolerability. He states that she has misrepresented the true financial position and also his previous financial contributions. There is the possibility of governmental support for her in South Africa and she has deliberately minimised the family support that she will enjoy in South Africa. He says:

> "She said she cannot live with her brother but on her own evidence she has other family in South Africa. I have no doubt she could stay with them whilst she finds suitable accommodation and employment. In the meantime, CC would be able to stay with me in an environment he knows and is comfortable in with his sister [Mr QR's child from another relationship]. I have the financial capacity to look after him."

47 I will deal with his proposals for protective measures in the next section, but Mr QR concludes by stating that he loves his son and seeks his expeditious return to South Africa, his country of habitual residence. He asks that any outstanding issues or disputes be addressed as they should properly be by the court in South Africa.

48 I turn finally to the expert evidence.

c. Dr Chahl

49 There is a joint single expert which is Dr Pavan Chahl. He is a consultant psychiatrist in locked rehabilitation and he practices psychiatry in the independent sector. Since 2004, he has been a member of the Royal College of Psychiatrists and says that he has given evidence at over one hundred Crown Court and civil trials, mental health review tribunals, and independent hospital managers' hearings. Since 2010, he has prepared an average of seventy-five medicolegal reports a year for the civil, family, and criminal courts. He has therefore a very extensive relevant experience. He is completely independent.

50 He interviewed Ms ST remotely on 13 December last year. His report is dated the same date and can be found in the electronic bundle at p.574. Further questions, as I have indicated, were put to him and they can be found at p.590 and he provided an addendum letter dated February this year. He was not required to give evidence to this court by either party. I have sought in correspondence with counsel to clarify what the court can make of his evidence. It is accepted by both parties that his evidence is not contested or challenged. Therefore, the court can rely upon it. Of course, what the implications of it are and what inferences can be drawn from it is still a matter of dispute. I will turn to that when I examine the submissions of counsel.

51 I cite Dr Chahl's evidence in a little detail as Ms ST's mental health situation is absolutely central to her case. Dr Chahl grounds his report by stating what an adjustment disorder is:

> "A state of subjective and emotional disturbance usually interfering with social functioning and performance arising in the period of adaption to a significant life change or a stressful event."

52 His diagnosis about Ms ST is as follows:

> "The information given by the mother in relation to her mental health, specifically previous suicidal ideation and episodes of self-harm, is not backed up by any objective evidence in the medical records. Her medical records show two episodes of depression in 2013 and 2021 respectively. Both episodes of depression seem to have occurred in the background of personal stressors. The episode in 2013 seems to have been multifactorial but significantly driven by financial stressors. The second episode in 2021 seems to be secondary to the stress of ongoing proceedings and loss of employment. I would classify both these episodes as two independent adjustment disorders."

53 He then says:

> "It is assumed that the condition would have not arisen without a stressor. The manifestations vary and include depression, anxiety, and inability to cope, as well as a level of disability in the performance of daily routine. The onset of symptoms must be within a month of the psychosocial stressor not of an unusual or catastrophic type."

54 The impact upon Ms ST of a return to South Africa, in particular her ability to care for the child in the event of a return order, is as follows. He says:

> "I found the mother to be anxious and low in mood. This would, in my opinion, be a proportionate response to her current stressors and in-keeping with her diagnosis of an adjustment disorder. On balance, the mother, in my opinion, does not suffer from a severe or enduring mental disorder. A return to South Africa is likely to be an adverse outcome from her perspective and lead to a worsening of her mental health. One would expect this reaction in most individuals in her circumstances. The mother's presentation is not extraordinary from a mental health perspective and in the absence of a severe and/or enduring mental disorder, I do not see it as being significantly different from individuals without her psychiatric history."

55 On any treatment or medication required, including timescales for treatment and costs, he says this:

> "Ms ST has been prescribed medications to help with her low mood. She is taking it as and when required. Antidepressants do not work when taken in this manner and require regular daily compliance with the prescription for weeks, if not months, for there to be a positive effect. The mother's adjustment disorder and low mood are, in my opinion, consequent to the legal proceedings and no amount of psychiatric treatment is going to help whilst the proceedings are ongoing. Any treatment that might be necessary should, in my opinion, be reviewed after the end of the current proceedings."

56 He says about his prognosis:

> "In the absence of a severe and/or enduring mental disorder, the prognosis is likely to be good. I would expect a worsening of her mood if the outcome of the case is not in her favour and this is to be expected in any individual in her situation."

57 Whether any risks identified can be ameliorated by any protective measures in South Africa is something that he considers next and he states:

> "If she returns to South Africa, she is likely to have to go through a further period of adjustment. She would benefit from taking on paid employment to help ameliorate expected financial difficulties. Any further episodes of depression or anxiety will have to be assessed and treated accordingly."

58 So that is the evidence of Dr Chahl, and indeed the relevant evidence before the court.

§V. PROTECTIVE MEASURES

59 The Supreme Court has made it plain that protective measures and undertakings play a crucial role in the operation of the Convention: *Re E (Children) (Abduction: Custody Appeal) [2011]* UKSC 27. Such measures potentially form part of the pattern of risk reduction and accordingly must be scrutinised carefully. While undertakings are unenforceable outside England and Wales, they are frequently accepted by our courts to provide a measure of protection until the court of the requesting state is properly seized: *Re C (Children) (Abduction: Art 13(b))* [2018] EWCA 2834.

60 I will deal first with Mr QR's protective measures undertakings and then examine Ms ST's counterproposals.

61 Mr QR has provided a composite schedule of what he proposes. They can be found at p.453 of the electronic bundle. They state as follows:

> "(1) Not to support or initiate any proceedings in advance of the mother's return if so ordered or obtain *ex parte* orders, the only exception being in regard to a mirror order which I have agreed to fund if necessary. It has been agreed that this should be in place before any return if so ordered. I have been advised by my South African

attorney that an order could be outside in the South African courts on an urgent basis within seven days of a return order being made. A letter to this effect has already been put before the court;

(2) Further, I specifically agree not to support or institute proceedings in South Africa whether civil or criminal for mother's committal to prison relating to CC's wrongful retention in England;

(3) Not to remove CC from the mother's permanent care without her consent or order from the court;

(4) Not to permit or encourage my family, friends, or others to attend any address that I have reasonable grounds for believing that the mother is present at unless agreed or by order of the court. I am even willing to undertake not to attend myself save for the purposes of the handovers until the matter is reviewed by the South African courts;

(5) Not myself or encourage any other person to use or threaten violence to CC or their mother;

(6) Not to contact the mother outside of contact arrangements stipulated in the current parental plan;

(7) Not to attend at the airport to meet CC on his arrival or to instruct anyone else to do so;

(8) To ensure that CC continues to have access to his medical aid care;

(9) To pay a sum of maintenance for his upkeep as per the parental plan. This will be an interim contribution of 3,250 rand per month to be reviewed at the maintenance court in South Africa upon return. To also jointly obtain/approve a day-care facility to allow [Ms ST] the opportunity to find employment in South Africa.

(10) I maintain that I consider that the mother would be able to stay with a family member upon arrival in South Africa. However, if it is not possible for the mother to stay with a family member, e.g. the aunt referred to at para.37 of her statement, I am prepared to offer the mother an apartment to live in for two months."

62 I pause there to interject that shortly before judgment Ms Ramsahoye confirmed that Mr QR agreed to extend that coverage period from two months to three months. Further, he gave an undertaking about CC's air fare.

"(11) I agree to pay for CC's single economy return [flight] to South Africa."

63 Ms ST made counterproposals about the protective measures and they are at the end of her statement dated 24 September 2021 at para.40. She puts forward a comprehensive package of countermeasures. I have considered them carefully and they can be found in the bundle between pp.137 - 140. I do not read them out in detail here. It is submitted on her behalf

that they are realistic and appropriate. In addition to fleshing out in some detail the travel arrangements and insurance, she seeks undertakings for:

> "...sufficient money to enable me to purchase a bed, blankets, some furniture, and kitchen essentials. I have nothing whatsoever in South Africa as my husband sold everything and has not paid me any money from the sale of my belongings. That sum cannot be confirmed at this stage until costs are calculated in depth."

64 Furthermore, she seeks 8,000 rand per month for maintenance, not the 3,250 that has been offered. She seeks confirmation of medical insurance both for her son but also for her and she also wants an air ticket back to South Africa. However, I emphasise that her prime case is that there should not be a return.

§VI. LAW

65 I divide the law into three subsections: (a) the Hague Convention; (b) Art 13(b); (c) the proper approach to evidential evaluation.

(a) The Hague Convention

66 Perhaps children have always been abducted or retained against the wishes of one of their parents. With progressive globalisation, the problem has assumed an increasingly urgent international dimension. The Hague Convention 1980 on the Civil Aspects of International Child Abduction is an international treaty that was concluded at the fourteenth session of the Hague Conference on private international law, also known as the HCCH – the acronym reflecting its dual English and French language origins. Since 1893 this conference has sought unification of private international law through the device of multilateral conventions. What became the 1980 Convention evolved over time from the 1902 Convention on the Guardianship of Minors to the 1961 Convention on the Protection of Minors. Article 1 of the 1961 Convention changed the primary basis of jurisdiction from the nationality of the child to the child's habitual residence and this continues in the 1980 Convention.

67 Article 1 of the Convention unequivocally states its objects:

a. To secure the prompt return of children wrongfully removed or retained in any Contracting State; and

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

68 Thus the Convention engages the principle of international comity. In *K (A child) (Northern Ireland)* [2014] UKSC 29, Baroness Hale succinctly explained the policy and purpose of the Convention. Her Ladyship stated:

> "It was designed to protect children from the harmful effects of being taken or kept away from their home country and to ensure that decisions about their future are taken in that country rather than in the courts of the country to which they have been taken. The remedy is to send them straight back to

> their home country. If that child has been taken or kept away wrongfully, that is in breach of rights of custody."

69 Once returned, the object is as Baroness Hale explained in *In re D* at [48]:

> "… 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."

(b) Article 13(b)

70 The scheme of the Convention allows for limitations on the duty to return. Art 13 provides, insofar as it is material, that:

> "...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.
>
> ...
>
> 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."

71 The incremental judge-made approach to 'filling in the gaps' of the Convention (in Justice Cardozo's terms) has provided answers about how we should understand its terms. A paradigm example is found in the Supreme Court's clarification of the exception of harm or intolerability under Art 13(b) in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27. The cases about intolerability are not mere disputes about words but about ideals and conceptions. About what level of harm the child should be likely to be exposed to before the Convention's imperative of return may be forestalled. The most pertinent principles were invaluably summarised by Mr Justice MacDonald in *H v K and others* [2017] EWHC 1141 (Fam) as follows at [42]:

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

(2) 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;

(3) 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 language, a link between the two;

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

(5) Article 13(b) looks to the future, the situation as it would be if the child was returned forthwith to his or her home country. The situation with 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;

(6) Where the defence under Art 13(b) is said to be based on the anxieties of the respondent about a return which is not based on objective risk but to the intensity of their reaction as it is likely to be in the event of a return and whether that will destabilise the parenting of the child to a point where the child's situation would become intolerable, in principle, is something that can provide a defence under Art13(b);

(7) In *Re E*, the Supreme Court made it clear that in examining whether the exception in Art13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the process. There is the tension between the need to evaluate the evidence against that civil standard and the summary nature of proceedings, and the Supreme Court made it clear that the approach to be adopted in respect of the harm defence is not one that requires the court to engage in a fact-finding exercise to determine the veracity of the matters alleged as being the basis of the defence. Rather, the court should assume the risk of harm at its highest and then if that risk meets the test in Art13(b), go on to consider whether protective measures are sufficient to mitigate the harm that can be identified; and

(8) However, a number of recent authorities examined the methodology that the Supreme Court in *Re E* has put forward.

72 The requirement as is made clear in *Re E* is for the court to evaluate the evidence against the ordinary civil standard whilst taking account of the summary nature of proceedings. While there is academic and professional debate about the precise effect of *Re E*, the Supreme Court was clear in *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 FLR 442 at that the case was not just a 'restatement' of existing Convention law, but "an exercise in the removal from it of disfiguring excrescence": see *Re S* at [31]. Thus the methodology assumes the risk relied upon at its highest is not an exercise that excludes consideration of relevant evidence before the court. Therefore, one must look at the totality of the evidence and the court must do its best to make a judgment.

73 Indeed, in *Re C (Children) (Abduction Article 13 (B))* [2018] EWCA Civ 2834, Moylan LJ held, making reference to the judgment of Black LJ (as she then was) in *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720 as follows:

> "39. In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course, a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations. In *Re W (Abduction: Intolerable Situation)* [2018] 2 FLR 748, I referred to what Black LJ (as she then was) had said ... when rejecting an argument that the court was 'bound' to follow the approach set out in *Re E*. On this occasion, I propose to set out what she said in full:
>
> > '52. The judge's rejection of the Art13(b) argument was also criticised by the appellant. She was said wrongly to have rejected it without adequate explanation and to have failed to follow the test set out in [36] of *Re E* in her treatment of the mother's allegations. In summary, the argument was that she should have adopted the 'sensible and pragmatic solution' referred to in [36] of *Re E* and asked herself whether, if the allegations were true, there would be a grave risk within Art13(b) and then, whether appropriate, protective measures could be put in place to obviate this risk. That would have required evidence as to what protective steps would be possible in Lithuania, the submission went.
> >
> > 53. I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Art13(b) risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Art13(b) exception (see *Re E* supra [32]) and for the court to evaluate the evidence within the confines of the summary process...'
>
> 40. As was made clear in *Re S*, at [22], is the approach 'commended in *Re E* should form part of the court's general process of reasoning in its appraisal of a defence under the article'. This appraisal ... has to take into account all relevant matters which can include measures available in the home state which might ameliorate or obviate the matters relied on in support of the defence. As referred to in *Re D*, at [52], the English courts have sought to address the alleged risk by 'extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient'..."

74 In terms of protective measures, these can include general features of the home state such as access to courts and other state services. The expression itself "protective measures" is a broad concept and is not confined to specific measures. It can include any measure which might address the risk being advanced by the respondent, including relying upon the courts

of the requesting state. Accordingly, the general right to seek assistance of the court or other state authorities is something that is capable of persuading a court that there was not a grave risk within Art13(b). But each case, I emphasise, is fact-specific and the court must look at the specific circumstances and the evidence in front of it and do its best.

75 Lord Wilson gave guidance in *Re S* about cases where there are, as here, alleged subjective anxieties about the return - whatever the objective level of risk. If the intensity is likely to destabilise the respondent's parenting of a child, this is something that has the capacity to render the position of the child intolerable. As noted above, in *Re E*, the Supreme Court made it clear that such subjective anxieties are capable of founding an exception under Art 13(b). However, it is also clear that in order to do so, there are three important caveats. First, the court will look very critically at an assertion of intense anxieties not based upon objective risk: see *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10 at [27].

76 Second, the court would need to consider any evidence demonstrating the extent to which there will objectively be good cause for the respondent to be anxious on return which evidence will remain relevant to the course assessment of the respondent's mental state if the child was returned (again see *Re S* at [34]; also *Re G (Child Abductions: Psychological Harm)* [1995] 1 FLR 64; and *Re F (Abduction) (Article 13(b): Psychiatric Assessment)* [2014] 2 FLR 1115).

77 Third, where the court considers that the anxieties of the respondent are not based upon objective risk but, nevertheless, of such intensity to destabilise the parenting such that the situation will become intolerable, the court must still ask if those anxieties can be dispelled, i.e. whether protective measures sufficient to mitigate any harm can be identified (see *Re E* at [49]).

78 In *Re S* therefore, Lord Wilson observed at [34]:

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

(c) Proper approach to evidential evaluation

79 As Dame Elizabeth Butler-Sloss P (as she then was) observed in *Re U (L) (A Child) (2) B (L) (A Child) (Serious Injury: Standard of Proof)* [2004] EWCA Civ 567, the court "invariably surveys a wide canvas". I take this precept to be no less applicable in Hague Convention cases. It is a fundamental tool and technique of proper evidential analysis.

80 In *Re T (Children)* [2004] EWCA Civ 558, her Ladyship added:

> "...evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence..."

81 That concludes the court's summary of the relevant law.

§VII. SUBMISSIONS

82 After much contention, all that remains is Ms ST's Art13(b) exemption claim. Accordingly, I will summarise her submissions first.

a. Respondent submissions

83 Mr Jarman submitted that an objective risk is clear from Dr Chahl's report and that there would be a deterioration in her mental health. She is taking a "whole range", as he put it, of medication and the antidepressants have been increased. They are going to take some months to be effective, according to Dr Chahl. In the United Kingdom, she has family and support and she has been able to obtain work although she has given it up recently. She was working in August. She worked in a shop but gave that up because of mental health issues as her medical notes make clear. In South Africa, she will have to look after her son and she will not be able to get a job. Her mental health will deteriorate. Her mental health is, as Mr Jarman put it, "subjectively acute". That is what she feels and it is ongoing and she is taking medication to alleviate the symptoms.

84 There is not much more of a personal stressor than her having to return to South Africa against her wishes and particularly when she has no accommodation and no employment. It is very clear, he submits, that intolerability is made out. The protective measures advanced by the father on the face of them are "comprehensive" and are going to be subject to mirror orders in South Africa. However, that does not take into account the reality of Ms ST's circumstances in South Africa. There is no offer to pay for her air fare which counsel both agreed is approximately £450-£500, something like that. The maintenance is limited to 3,250 rand. When Mr Jarman made his submissions, Mr QR had undertaken to pay two months' accommodation. It is now three months' accommodation. Not a derisory amount. But Mr Jarman submitted that it is unlikely within two months that she will have a job. I take the same submission to apply to three months. What is Ms ST supposed to do then? Mr Jarman asks.

85 In the past, Mr QR has not paid for CC's needs, school fees, in particular. In April 2020, there was 20,000 rand outstanding which is about £950. He has drip-fed her maintenance in the past, small amounts over time. She has investigated schools in South Africa such as the VWA Institute and the school fees are about 96,000 rand per annum. The fees at JLZ are 62,000. There are government schools, but they are in or near townships and these parents would not want their son to go there. There is no offer about paying for school and that is another element of intolerability. There are no benefits available to Ms ST in South Africa because she has not worked since 2019. Her written evidence states that she has no entitlement to benefits and, therefore, she would be wholly dependent on Mr QR. Her only state claim would be for their child because they have not been married.

86 The other marriage to Mr G has ended with a without any assets for her. She has paid medical bills in the past for their son. The applicant father will not pay for medical insurance and that is important because she is undoubtedly going to have ongoing medical issues. So we have a mother who is unable to work, who has a depressive illness that will be aggravated on return to South Africa, and who has no support.

87 The maintenance he offers is inadequate. Even if the case went to the court in South Africa, it is likely that the maintenance would be less than Mr QR has offered. The accommodation

costs are expensive and she would not be able to afford them. He has changed his position and said, at first, that she could stay in one of his properties, but he has rented that out and so he offers her a one-bedroom commercial property. She says that it is unfurnished. That is disputed and the court was directed to a photograph or a picture in the additional bundle which appears to show, it is submitted, furnishing in the property. Irrespective of that, the reason Mr Jarman says it is cheap is because it is next to a township and that is not a safe area. To walk to her aunt's would take well over two hours. The mental health services in South Africa would not be sufficient. The free telephone advice is not appropriate for what she needs. It is not individual counselling. There is not individual therapy as a free resource. The diagnosed mental health problems of Ms ST that Dr Chahl set out would not be helped by a telephone helpline.

88 Mr Jarman submits that she did not previously raise the issue of mental health because if there was a return to South Africa, Mr QR could use the mental health situation against her and seek to have her admitted to a psychiatric unit. There is thus a grave risk of psychological harm. There is a high degree of risk to this child to his education, to his accommodation, and his well-being. All of that will be subject to various stressors and that amounts to an intolerable situation in South Africa.

89 If she sought to apply to the South African court as an unmarried mother, she would have limited maintenance and she would be a litigant in person because she cannot afford legal representation. Therefore, this court could not be confident that the protective measures would mitigate the risk of psychological harm or intolerability and stop the risk remaining grave.

b. Applicant submissions

90 Ms Ramsahoye submitted that the court should not be misdirected into a welfare analysis. That is not how to construe the Convention. Article 13(b) is an exception to the policy of the Convention which is that there should be return forthwith to the habitual residence. Welfare, she submits, should not be uppermost in the court's mind. Protective measures are only to be put in place until the home court gets, as she put it, "in the saddle". The focus should be on the child not on the intolerability of the situation of the mother which is a category error that Mr Jarman makes in his submissions.

91 The defence here is impossible to advance. There is no evidence of the mother's mental health in her 283 pages of written evidence. She only raised this at the last minute in November and the first time the mother visited a doctor in England is in October and that is after these proceedings had begun. Her mental health history identifies two episodes of depression. One in 2003 where she took an "overdose" about which there is no detail, but this was nineteen years ago. The second episode was in 2013. That was nine years ago and both of these were because of external stressors.

92 It is submitted that her low mood derives from two things. First, the proceedings and her circumstances; and, second, fundamentally because she does not want to return to South Africa. She has not been taking her medication in accordance with medical recommendation. In the doctor's response to the further questions, he stated that her reaction is not materially different from someone without a diagnosed condition of adjustment disorder and, in any event, CC must be currently exposed to her adverse mental health position and presentation. Counsel invited the court to consider the learning in the

"Red Book" (The *Family Court Practice* 2022) at p.387, chapter 2175, para.15. I have read and re-read it.

93 What that paragraph states is that, "The burden is a very heavy one" to establish one of the exceptional defences (see *Re E*) and the court would require clear and compelling evidence. This is not a financial proceedings court but even if the Art13(b) defence is not proved, the father is nevertheless, as a sign of good faith, giving undertakings with a view to safeguarding and protecting his son so he has some security before the South African court makes any further orders on maintenance. If the mother wishes him to pay school fees, she can go to court in South Africa. That is the forum to resolve this dispute. In the parenting plan of 2017, the maintenance was set at 3,250 rand per month and it was to be reviewed at the maintenance court. She can invite the court to extend the period of accommodation for more than three months and she can do that from here and now. She could stay with her brother. She has lived with him previously for an extended period.

94 What Ms Ramsahoye submits is that the South African court can be seized with this very quickly. There can be applications made from here. A mirror order would be listed urgently from the South African court within seven days, the expert says. In any event, if CC needed a home, he can have one with his father and thus he would not be homeless. Ms ST can get support from the Social Security Agency in South Africa and that would be, even on her case, 420 rands per month approximately. She should pay for her plane ticket. Why is it that Mr QR has to shoulder the bulk of the financial burden? She was never his wife and she has unlawfully retained their son in the United Kingdom.

(c) **Response**

95 In response to this, Mr Jarman submitted that he is not suggesting Ms ST is completely helpless, but the inescapable fact is that her mental health is poor. It is likely to deteriorate if she has to go back to South Africa. This is going to create conditions and a situation for their son that will be intolerable. The distinction between South Africa and the United Kingdom is that she is presently being supported by her family here. So she has respite and support whereas in South Africa she is on her own.

§VIII. DISCUSSION

96 I have carefully read the entire bundle in these proceedings, including the witness statements of parties and the expert evidence of Dr Chahl. I have considered the skilful and invaluable position statements filed by Mr Jarman and Ms Ramsahoye. I noted the persuasive way both counsel developed their arguments, forensic blow for blow, submission and counter-submission. I commend them for it. All of this has been indispensable to the court in its analysis of the three cardinal questions.

97 To ground my analysis, I restate the Art13(b) test: has the mother proved on a balance of probabilities that return would:

(1) Expose the child to the grave risk of physical harm; or

(2) Expose the child to the grave risk of psychological harm; or

(3) Place the child in an intolerable situation?

98 I will consider each of these three issues in turn. Before I do, I must address some submissions of broader principle and approach raised by counsel.

Generalities

99 Ms Ramsahoye expresses serious concerns about the thrust of Mr Jarman's submissions. She submits that they risk of diverting the court into an impermissible welfare analysis of its own at a remove of 5,000 miles from the home court. I recognise that Ms Ramsahoye is correct: best interests welfare analyses are not the meat and drink of these applications. But I am bound to say that I did not understand Mr Jarman's submissions to be directed at that. It is vital, it seems to me, for this court to gauge the welfare and well-being of the child on the ground, the reality of his life on return to the country of habitual residence with a view to judging risk and intolerability. The child's welfare is implicit in that analysis. How can it not be? That must be immediately and materially distinguished from deciding the general welfare question of the 'best option' for the child in a domestic "*B-S* analysis" under Part IV care proceedings of the Children Act 1989: see *Re B-S* [2013] EWCA Civ 1146. As Baroness Hale pointed out in *In re D* at [51]:

> "The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child."

100 In a real sense, I am not concerned with what is best, but whether return is unsafe. Lady Hale makes this plain. Equally, it would wrong in principle for me to determine any disputed custody issue: see Art 19 (and accompanying HCCH 'Outline'). As Sir Stephen Brown P stated: 'the purpose of proceedings in the Hague Convention context is not to decide in any sense the long-term merits of the custody of the child but to secure the prompt return of the child to the appropriate jurisdiction': *Re S (Child Abduction: Acquiescence)* [1998] 2 FLR 893 at 896.

101 Instead, these proceedings are about whether the prevailing conditions on return would expose the child to the grave risk of harm or intolerability. As Lady Hale continued also at *op. cit.* [51]:

> "… there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it."

102 Inevitably so. It would be contrary to the deep philosophy of this protective treaty, designed to inure children from harm, if it became in itself that 'instrument of harm': *op. cit.* at [52].

103 The second criticism is this. Ms Ramsahoye complained that Mr Jarman has strayed into focusing on the question of intolerability for the mother and not the child. Again, I understood Mr Jarman's submissions to be of a subtler complexion than that. It is, of course, settled law that the focus must be on the child but that cannot be holistically and meaningfully assessed without an intelligent and sensitive understanding of the impact of return on the child's primary carer. This is because any significant distress or intolerability suffered by the carer may impact the child. May. That much is obvious. I make it plain, therefore, that I do assess the question of intolerability to the mother. It is not freestanding. It is to examine any linked and consequent impact on CC. So I turn to the court's analysis.

104 The starting point is that South Africa is CC's habitual residence.

105 Next, in deciding whether to return him to his habitual residence, the procedure under Art13(b) and, indeed, the Hague Convention more widely, is a summary process. The court must do its best on the available evidence. No more, no less.

106 There are allegations made by Ms ST, but there has been no oral evidence. How should the court approach this forensic problem? In the matter of *IG (Child Abduction Habitual Residence Article 13(b)) KG v JH* [2021] EWCA Civ 1123, Baker LJ enunciated a number of principles that constituted the proper approach to Art13(b). He did this at [47] - [48]. At principle (4) in particular, His Lordship stated:

> "When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish 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 establish how the child can be protected from the risk."

107 The difficulty for Ms ST in respect of this approach is there is an authoritative and uncontested report from an independent expert. The claim of grave risk of psychological harm to CC caused by his mother's mental health cannot be assessed in an evidential void, ignoring what cannot be ignored: Dr Chahl's report. This is part of the broader anxious scrutiny. The expert report furnished the court with significant evidence to gauge what is likely to be Ms ST's mental health situation on return to South Africa and thus the consequent risk to CC – always that link to the child being the pressing question. This approach is endorsed by Baker LJ at principle (6) *op. cit.*:

> "That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do."

108 Therefore, I approach the evaluation in the real context. I approach it in the context of the independent expert evidence which is uncontested. That said, I emphasise that I do not decide the case on expert evidence alone, but in the context of all other evidence: *Re B (Care: Expert Witnesses)* [1996] 1 FLR 667. This, it strikes me, is an application of the precept in the case of *Re T*. Yet the evidence of Dr Chahl provides an invaluable anchor point with which to assess the true impact on Ms ST of her return to South Africa.

109 Finally, in respect of preliminaries, Ms ST severely criticises Mr QR for his lack of commitment to CC and to the quality of his relationship with his son. However, subject to intolerability, it is forensically irrelevant to this application. As Lady Hale pointed out in *In re D* at [36]:

> "As far as the Convention is concerned, a person either has rights of custody or he does not - the quality of his relationship with the child is not in point."

I would go as far as to say that to open up such criticisms, to investigate them, is to drive a coach and horses through the heart of the Convention. It is to indulge in irrelevancy. The court must not be tempted. This forensically disciplined approach is of a piece with the

injunction of the President of the Family Division in his 'Road Ahead' guidance (first published 2020):

> "§46 Parties will not be allowed to litigate every issue and present extensive oral evidence or oral submissions; an oral hearing will encompass only that which is necessary to determine the application before the court."

110 Having cleared these forensic decks, I now consider the three cardinal issues in turn.

Issue (1) - Physical harm

111 I can deal with this swiftly. There is no evidential foundation for the proposition that CC would be exposed to a grave risk of physical harm. I dismiss this as a basis for an Art13(b) exemption. I deal with it because it was pleaded in Ms ST's answer to the application.

Issue (2) - Psychological harm

112 The grave risk of psychological harm relied upon by Ms ST is the harm to her son from being exposed to the decline in her mental health condition. I fully acknowledge that the deterioration in the mental health of a parent on return is certainly capable of founding an Art 13(b) defence either because of grave risk or intolerability: *Re D (Article 13(b): Non-return)* [2006] 2 FLR 305. But the evidence to support such a finding must be 'substantial': *TB v JB (Abduction: Grave Risk of Harm)* [2001] 2 FLR 515; *Re D* (*op. cit.*).

113 I shall subdivide this into the objective and subjective position. I am bound to observe that the frontier between these two concepts – easily stated, difficult to discern in practice – is not sharp but opaque. It does not matter. What is important is to cover it all. I do now.

(a) Objective position

114 Ms ST has suffered two episodes of depression in 2013 and 2021. Both those episodes occurred with a background of personal stressors and are classified as two independent adjustment disorders. Ms ST relies on her deterioration upon returning to South Africa. Against this, Dr Chahl is clear: she does not suffer from a severe or enduring mental disorder. In the absence of these detriments, Dr Chahl deems that the prognosis for her is likely to be "good". Dr Chahl did not think a list of medications together with her narrative or her assertions that she had migraines every day constituted a severe mental disorder. He went on to say that an adjustment disorder was a very common condition.

115 He concluded that a return to South Africa would be expected to cause: "...***a slight worsening*** of her mood and anxiety and this is likely to be in a mild to moderate range" [emphasis provided]. He stated: "On assessment, I found the mother to be anxious and low in mood." Ms ST relies upon that. However, Dr Chahl that this would be a proportionate response to her stressors. He concluded:

> "A return to South Africa is likely to be an adverse outcome from her perspective and lead to a worsening of her mental health. One would expect this reaction in most individuals in her circumstances."

116 Her presentation, he decided, was "not extraordinary" from a mental health perspective and in the absence of that severe or enduring mental disorder, he did not see it as being significantly different from people *without* her psychiatric history.

117 Looking at the impact on CC, I find no evidence that Ms ST's ongoing mental health condition has materially impaired either her capacity to care for him or his experience of her care. It has not been suggested that she has failed to give him good enough care in the United Kingdom while she has been experiencing her present mental health conditions. Mr Jarman makes the point that here she has family support. I will return to the question of that support shortly.

118 In terms of self-harm, Dr Chahl noted that the information she gave about suicidal ideation and episodes of self-harm was not substantiated by the medical records. I am not sure that is entirely correct. There is a note in the medical records of an overdose almost twenty years ago in 2003. While not irrelevant, I cannot see that this incident, very remote in time now, is of great significance. Ms ST was 17 then, a teenager. She is now in her late 30s. In the interim, she has had a child with one man and she has been married to another. She has matured, doubled in age, had a child.

119 **Domestic abuse**. Mr QR acknowledges that the relationship with Ms ST was "at times volatile" and he accepted that in the past there would be times when they would fight a lot followed by periods of reconciliation. The text messages exhibited by Ms ST about the conflict and volatility were of the situations before CC was born. In submissions filed on her behalf, it is argued that he has admitted "situational abuse". But what is the scope of this concession? It strikes me that I must examine precisely what he stated in his filed evidence to understand the context. It can be found at p.405 of the bundle at para.53:

> "Despite [Ms ST's] allegations, I have a clear police record as can be seen at [and he gives the exhibit number]. I acknowledge there was an incident in 2015. However, there were no proceedings in relation to this incident as there was insufficient evidence to warrant a protection order. In my understanding in South African law, this can be labelled as 'situational abuse' based on the fact that [Ms ST] was blocking my exit from the complex. I did use force to flee the situation so we could both calm down. My intention was to exit the building, not to harm her. I do not believe she would have come back to South Africa after CC's birth in 2016 and even continued to look for wedding venues until 2017 if she honestly perceived me to be the abusive, controlling, and apathetic man she would like the court to see me as. As recently as December 2020, she even messaged me to say she never stopped loving me [and he gives the exhibit reference]. She made no police complaints about me or prevented me from having care of CC. If [she] truly believed I was a risk to CC, she would have not let me have contact with him for the past four to five years."

120 Domestic abuse is capable of establishing an Art 13(b) exemption, certainly where the effect on the victim parent by the abuser is likely to be severe: *DT v LBT (Abduction: Domestic Abuse)* [2010] EWHC 3177 (Fam), per Peter Jackson J (as he then was). This is beyond argument. However, here there have been no allegations of domestic abuse and violence since CC was born in 2016. The couple have not been living together from the time he came into the world. Ms ST subsequently married somebody else and there have been no concerns about abusive conduct during the contact arrangements which have been in place since 2017. Thus, in my judgment, it is difficult to conceive how domestic violence and

abuse remains part of her anxieties presently. There has been no suggestion of it for years. The far-reaching and debilitating effect of domestic abuse should never be underestimated; this court takes it *very* seriously. But in this particular case, on these very specific facts, the risk of domestic abuse and violence is remote. I judge that it can be discounted for the purposing of this application. I remind myself that these are summary proceedings; nothing has been proved about these historic allegations. To my mind, the risk is all but eliminated due to the prudent undertakings that contact between the parents will be strictly limited and restricted to contact at handovers. I now turn to the subjective question before giving my conclusion on psychological harm.

(b) <u>Subjective position</u>

121 Ms ST's case is that notwithstanding the court's assessment of objective risk, a return to South Africa will inevitably adversely impact her mental health due to her subjective assessment of the situation. It would exacerbate her depression and anxieties. This would cause grave risk of psychological harm to her son. It was framed with economy by Mr Jarman thus:

> "Any return to South Africa will exacerbate her symptoms and subjectively have a significant impact on the mother."

122 The notable word in that submission is "significant". To assess its validity, I review what the uncontested evidence of Dr Chahl actually is. In answer to the further questions posed on behalf of the respondent mother herself, Dr Chahl stated that the deterioration she was likely to suffer would be "a slight worsening" and also that any decline can be managed by her local GP in South Africa and she might not require any psychiatric treatment. What is striking, as Mr Jarman very realistically concedes, is that the issue of her mental health was not addressed at all in her written evidence of 24 September 2021. If this was such a pressing and vital issue, it is puzzling that there is no mention of it anywhere in her filed evidence to prevent her son's return to South Africa. To counter this concern, it is submitted on behalf of Ms ST that she was "reluctant to mention it previously because her mental health may be used against her by the father in South Africa". However, there is no evidence filed by her about this. I cannot accept that submission in the absence of any evidence – it has no foundation. What is left is her medical records and also the report of Dr Chahl. They do not much assist Ms ST.

123 Having considered them carefully, the court rejects the submission that return would have a "significant" impact on Ms ST. In fact, there is likely to be at most a slight worsening of her mood and anxiety. The deterioration will be in the mild to moderate range. Importantly, it can be managed by her GP in South Africa. That factor is significant. It is incumbent on the parent relying on the defence to establish that medical assistance would not reduce the risk, and therefore overall it would be 'grave': *Re S (Abduction: Custody Rights)* [2002] 2 FLR 815. The true nature of the impact on Ms ST can be cross-checked against Dr Chahl's conclusion that the impact would not be materially different from someone who did not suffer from her mental health condition - the adjustment disorder. I remind myself that Dr Chahl is the joint single expert. He is completely independent. His evidence remains unchallenged.

(c) Conclusion: psychological harm

124 Therefore, my conclusion on psychological harm is as follows. Ms ST has not proved to the requisite standard that objectively there is a grave risk of psychological harm to either her or

CC on return to South Africa. The expert evidence from the independent consultant psychiatrist is that the risk is low and manageable. Put another way, I am satisfied that the evidence permits me to discount the possibility of grave risk of psychological harm to CC.

125 Ms ST's anxieties can be reduced and allayed by the undertakings of Mr QR. They are, in my judgment, detailed, measured, and wide-ranging. Indeed, Mr Jarman characterised them as "comprehensive". I remind myself of what Lord Wilson said *Re S*. His Lordship was plain that in assessing the asserted grave risk of exposure to harm arising from subjective anxieties, the court must examine very critically such an assertion and the objective evidence of the actual position in the round must remain relevant. I have conducted a critical examination of the mother's assertions and relevant evidence, and also the likely position on the ground in South Africa. I find that she has not made out a case that whatever the objective level of risk, the impact on her mental health and subjectively of returning to South Africa would place her son in an intolerable situation. Dr Chahl put it directly:

> "Time to adjust would be the best treatment for Ms ST."

126 I note that Dr Chahl did not say the only treatment but the best treatment. It comes to this. What is necessary to deal with her adjustment disorder is time to adjust. Adjustment disorder is an emotional disturbance arising in a period of adaption to significant life change or stressful events. As Ms ST moves through that period, there is every reason to believe, based upon Dr Chahl's expert clinical evidence, that she will adapt to life once again in South Africa and the emotional disturbance will only result in a slight worsening. There are good grounds to believe it will improve and the expert prognosis is good. I remind myself that the risk must be grave. A risk that is real is insufficient. However, I find here that the risk to this child is nowhere near the necessary Convention threshold. The risk must be grave. That adjective was a very deliberate choice by the framers of the Convention as a more 'intensive qualifier' than 'substantial' risk.[vii] I judge that the situation upon return will be nowhere near risk of psychological harm to CC that is grave. I dismiss this claim for exemption. Therefore I turn to Issue (3) - intolerability.

Issue (3) - Intolerability

127 I have considered whether there is any other way that CC could be in an intolerable situation. The court is entitled, in fact obliged, to consider the undertakings the applicant proffers to improve the situation on return. In *Re C (Children) (Abduction Article 13 (B))* [2018] EWCA Civ 2834, Moylan LJ stated at [40] that the court:

> "...has to take into account all relevant matters which can include measures available in the home state which might ameliorate or obviate the matters relied on in support of the defence..."

128 Mr QR has undertaken to fund accommodation for three months. He says that this should give Ms ST an opportunity to explore employment opportunities and, indeed, other accommodation in South Africa. He will pay her 3,215 rand per month. If there are disputes about the level of proper maintenance, they can be litigated in the South African courts. It is perhaps paradoxically submitted on behalf of Ms ST that this is little comfort because should she make a maintenance application to the South African court the award may be lower than the amount that Mr QR is proposing to pay. Indeed, he has been paying what was mandated by the previous court order and parenting agreement. I take from this

the maintenance offered by Mr QR is not unreasonably and wretchedly low. It is not unrealistic. In fact, it is more than she might otherwise receive from the court.

129 It is submitted that she would not have funds to instruct a lawyer and would be compelled to act in person in a maintenance court. This submission is hard to sustain: Ms ST is an intelligent woman. She has a diploma in law from the United Kingdom and has worked in a law firm in South Africa. It strikes me that the place to resolve all these disputes is in the jurisdiction of habitual residence – the home court. As Baroness Hale made absolutely plain, this is the scheme of the Hague Convention 1980.

130 It is submitted that she would have no effective family support in the FX region of South Africa. However, she will be returning to [a major South African city] where she previously lived with CC. When the court asked for clarification, it transpired that both her aunt and her brother do actually live in that same city. She lived there with her brother in 2015. She also lived with him after CC was born and lived there when she travelled to South Africa in September 2016, and then later after the relationship with Mr QR terminated. It appears therefore that she has lived with her brother U for a not insignificant amount of time in [that major South African city]. It becomes difficult to maintain that she would have no effective support. She does have family in the same city. It is hard to believe that she would be completely abandoned by them and destitute if she was in need.

131 Her brother U sent an email on 15 September 2021. He says that they are renovating his home and one of the two bedrooms of the property is being redecorated. He says, therefore, there is no room for her. I am bound to say that this is hardly impartial evidence coming from her brother in support of her defence to the application. I can place only limited weight upon it. That is because there are photographs of the renovations including the painting of walls in mid-September. Next week is mid-February. It is hard to believe that almost five months later, the bedroom renovation would not be finished. It is said that the renovations are with a view to selling the property in due course, but there is no information at all provided about that.

132 I remind myself of where the burden of proof lies. It is on Ms ST. Therefore, it seems reasonable to conclude that, if necessary, Ms ST would be able to live with her brother as she has done before extensively. In any event, Mr QR states that, if necessary, CC can stay with him and he is, after all, CC's father. I emphasise that I am not conducting a conventional welfare analysis at this point, nor suggesting it is better for their son to live with father rather than mother. Nothing like that at all.

133 Further, issues about accommodation and the amount of maintenance that Mr QR is obliged to pay can be brought before the South African court. There is no evidence about how quickly that could be done, but the advice of Ms Cato is that the mirror orders hearing could be expeditiously convened within seven days of any return order granted by this court.

134 CC will get his health insurance paid for by his father. The complaint is that Ms ST would not have her health insurance paid by Mr QR. But what has been the position since the birth of CC while she was married? There is no evidence one way or another whether she did or did not have health insurance and, if she did, how it was funded. Mr QR is not married to her and never has been. He has not lived with her since their son was born in 2016. I cannot see why he should pay her health insurance. He will certainly pay his son's. I do not understand how his not paying her health insurance would be part of a picture of intolerability and why it is his obligation. However, I emphasise again the solution to this

lies with the South African court and Ms ST can immediately make her application there from these shores and the procedural ball rolling.

135 Mr QR says that a school can be found for CC. Ms ST queries how it would be funded. Again, if necessary, this is a matter for the home court to resolve. It is submitted on behalf of Ms ST that it would be intolerable for CC to go to a state school in South Africa, that such schools are not safe and they are either in or near townships. In summary proceedings, I find it impossible to assess the merits of such a suggestion. While it is true that CC has previously gone to a private nursery, I cannot accept that if it actually came to it, having to attend a state school would amount to intolerability. No doubt very large numbers of children in South Africa attend state schools. None of these matters individually or cumulatively amount to an intolerable situation for CC. The judgment of the court is that this is very far from the case. As Baroness Hale emphasised in *Re E* at [34]:

> "'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'... 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..."

136 I give 'intolerable' its natural meaning. It does not need nor merit the slightest gloss. It is what it says. The Convention, and the key terms within it, are to be construed broadly. They must be understood purposefully. That means in accordance with the animating spirit and intention of this international treaty: *Re H (Minors) (Abduction: Acquiescence)* [1997] 2 All ER 225. Viewing matters in that way, as I must, Ms ST has not proved that CC's situation on return comes anything near to the necessary intolerability threshold.

137 Last, and in any event, I am satisfied that such risks as are contended for by the mother are amply met and mitigated by the protective measures put forward by the applicant father. There is no evidence to doubt the efficacy of the South African courts in granting mirror orders and, indeed, enforcing them. It is fundamental to the philosophy of the Convention that there is respect for other Contracting States as part of international comity. As Baroness Hale stated in *In re D* at [52], the English courts typically rely 'on the courts of requesting State to protect [the child] once he is there'.

138 I have stepped back and reviewed the totality of the evidence holistically. Having done so, I find that Ms ST has not proved to the requisite standard that either her situation or CC's situation would be intolerable on her return to South Africa. There would, at most, be a slight worsening of her present presentation. It would be manageable by her GP. It is not materially different to someone without her condition. The best treatment is time to adjust. She will have accommodation for three months. She could live with her brother if necessary beyond that, just as she has done before. She can resort to the South African court for further support or arrangements.

§IX. DISPOSAL

139 In *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties To Appeal)* [2015] EWCA Civ 26, Black LJ (as she then was) stated:

> "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'."

140 I now draw together what has happened in this case. In short compass. Not in substitution for the above analysis set out at length at §VIII, but for the assistance of parties. They have a right to understand why I reached the decision I did.

141 In April 2021, Ms ST brought CC to England with the consent of Mr QR, but then contrary to his wishes wrongfully retained their son in the United Kingdom. In doing so, she unilaterally repudiated Mr QR's accrued rights of custody in respect of his son. I am bound to say that having read Ms ST's extensive written evidence in detail, the court must have sympathy for the difficulties that this young woman has faced during her life. It does. As Lady Hale stated in *In re D* at [56], 'moral condemnation is both unnecessary and superfluous'.

142 Ms ST's plan in all probability was to stay in England in an attempt to start a new life here, particularly since her marriage to another man had failed. She is entitled, of course, to want a new life in a different country, particularly one in which she has indefinite leave to remain. She might have done it to protect her well-being and what, in her view, was in her son's best interests. Perhaps most people can understand the motivation. But what she did was against the law. She is not entitled to break the law. She is not entitled to unilaterally deny CC's father his existing rights of custody, which also has the effect of preventing him seeing his son. Equally she cannot of her own motion prevent her son seeing his father.

143 It is an elementary proposition of childcare law that in general the involvement of both parents in bringing up their child will further their child's welfare. Indeed, in the United Kingdom it is a statutory presumption: see s.2A of the Children Act 1989. This accords with Art 9(3) of the UNCRC:

> "3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

There is no question but that Mr QR should be able to have contact with his son. That has been the position authorised and regularised in the home court. Thus, a fundamental interference with Mr QR's rights should have been the matter of proper application by Ms ST and proper judgment of the court, not a refusal to get on a return flight home. What she then proceeded to do was to attempt to construct a case to justify keeping her son in Britain. She sought to argue at first that the removal or retention was lawful. She has now accepted that it was not. She argued that Mr QR had acquiesced or consented. She now concedes he had not. She then argued that he was not exercising his custody rights in South Africa. He was. There is a report from an expert on South African law to confirm this. Ms ST had little alternative but to abandon this point.

144 In August 2021, she invited the court to authorise Cafcass to assess CC's wishes and feelings with a view to mounting a Convention defence of the child's objection under Art13(2). The court rejected this proposal. CC plainly has not attained the age nor has the

degree of maturity to make a meaningful contribution to this legal dispute. Therefore, none of these bases for retaining him in the United Kingdom worked. Ms ST was left with one resort, her last one, and it was Art13(b). I take such a claim seriously. As Lady Hale pointed out in *In re D* at [51], 'A restrictive application of article 13 does not mean that it should never be applied at all.'

145 Having carefully considered the evidence and submissions, my unhesitating conclusion is that Ms ST's claimed Art13(b) exemption has not been proved on a balance of probabilities. That defence has failed. Consequently, there is no reason why the crucial objects that underpin the Hague Convention should not immediately prevail. This is not one of that limited number of cases where summary return should be refused.[viii] I recognise that I reach this conclusion without the benefit of oral evidence. No party argued that there should be any. I did not consider it necessary. If I had, I would have insisted upon it.

146 Therefore, I conclude that I must order the summary return of CC to the jurisdiction of the Republic of South Africa. Lady Hale in *In re D* at [68] stated that 'The United Kingdom may be justifiably proud of its record in speedily returning abducted children to their home countries.' This return is anything but speedy. But return it must be. It must happen expeditiously from this point. There must be sharp focus on ending the harm of wrongful retention. As Mostyn J stated in *FE v YE* at [16]:

> "Obviously, justice delayed is a bad thing whatever the subject matter of the dispute, but it is especially bad if the dispute is about a child."

147 I make two consequential orders. First, an order for CC's return to South Africa forthwith in accordance with the policy and ambition of the Hague Convention 1980. Second, I direct that counsel agree an order to reflect the term of the court's judgment.

148 If I may say this to Ms ST to end. I fully understand the return of CC to South Africa is not what you wished for. But the law is clear. People cannot take the law into their own hands. While you preferred not to have to care for your son in South Africa, this is what again must happen. It is up to you to put your preferences to one side and do everything that you can to make CC's transition back to South Africa as easy as possible. Your love for CC has been one of the most redeeming features of this case. However, you must now put CC's interests in settling back into life in South Africa first. The court hopes that you can do that and find it in yourself to see past your obvious and understandable disappointment at the judgment of the court. The court asks you to do that for your son.

149 That is my judgment.

Endnotes

[i] Forthwith means forthwith. This is not an empty word or artificial and unrealistic ambition. Indeed, Art 11 stipulates: "If the judicial or administrative authority concerned *has not reached a decision within six weeks from the date of commencement of the proceedings*, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay." [emphasis provided]

[ii] The text of the Convention does not refer to either exception or defence with respect to Art 13. However, see *Hershman and McFarlane*: *Children Law and Practice* (2021) where the term "defence" is introduced in inverted commas: Division G, Section 4 (2.) [165B]. See also *In re D* at [55] where Lady Hale refers to 'so-called "defences"'.

[iii] The avowed purpose of the Explanatory Report is to 'throw into relief, as accurately as possible, the principles that form the basis of the Convention' and 'to supply those who have to apply the Convention with a detailed commentary on its provisions': see [5]-[6].

[iv] Yale University Press (1921).

[v] In *ES v LS* [2021] EWHC 2758 (Fam) Mostyn J deplored the tendency to adduce oral evidence in almost every 1980 Hague Convention case. Whilst the observation has aroused some controversy, Peel J in *VK v LK* [2022] EWHC 396 (Fam) at [8], agreed with the learned judge.

[vi] Cf. Lady Hale in *In re D* at [51]: 'It is obvious, as Professor Pérez-Vera points out, that these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated (*op cit*, para 34).'

[vii] See discussion in Procès-verbal No. 15 at p.362.

[viii] The learned authors of *Hershman and McFarlane* (*op. cit.*) observe: 'Decisions in which an Art 13(b) defence has prevailed remain very much the exception': *op. cit.* at [166F]. It is worthy of note that the 'Outline' that accompanies the Convention states that 'The Convention is based on the principle that, *save in exceptional circumstances*, the wrongful removal or retention of a child across international borders is not in the interests of the child.' [emphasis provided]