Neutral Citation Number: **[2023] EWHC 246 (Fam)**

Case No: FD22P00282

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08.02.2023

Before :

MRS JUSTICE MORGAN

- -

Between :

SKJ — **Applicant**

- and –

SLJ — **Respondent**

- -
- -

Indira Ramsahoye (instructed by **Brethertons LLP**) for the **Applicant**
Cliona Papazian (instructed by **Martin Tolhurst Solicitors**) for the **Respondent**

Hearing dates: 28th – 30th November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 08.02.23 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE MORGAN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must

ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Morgan:

The Application

1. The application before the court dated 5th April 2022 has been brought by the Father of the subject children pursuant to Articles 3 and 12 of the Hague Convention 1980 and concerns the parties' children, Emily who is 11 years and 8 months and Adam who is 9 year 11 months. The children are known within the family as Emily and Adam. The respondent, to the application is the children's Mother . The applicant Father is 45 years of age, the respondent Mother is 41.

2. Father seeks the summary return of the children to the State of Texas, USA. His case is that Mother either wrongfully removed - in the sense that her actions were premeditated and involved her obtaining his consent to a holiday which was a pretence for a removal - the children to England; or wrongfully retained the children here, the Father having consented to a holiday between 4-20 March 2022.

3. On 10 March 2022 Mother verbally informed Father that she did not intend to return to the USA and that she intended to issue divorce proceedings. So it is that if it is determined to be a wrongful retention, the Father says that the children were wrongfully retained as of 11th March 2022 on which date the Mother issued applications in this jurisdiction for Child arrangements orders; prohibited steps orders and specific issue orders. Her applications came before the Family court in Medway on 21 March 2022. Those proceedings have been stayed. The Mother, who was represented by her present solicitors but with different counsel, asserted in the application placed before the District Judge at Medway that whilst the Father is habitually resident in Texas she and the Children were habitually resident here. That was not so and should not have been said to be so.

4. The Mother contends that the date of wrongful retention is 14th March when the Father obtained interim orders directing that Mother return the children to Texas by 21 March 2022. Mother did not do so, and the Texan court granted Father an interim custody order and supervised contact to Mother on Tuesday and Saturdays. Mother has been in breach of the Texan orders since then.

5. Before me there is no issue as to Habitual Residence. Notwithstanding her earlier assertion to the Medway Court, Mother accepts that the children are habitually resident in Texas and were habitually resident there when Father made his application to this court. Mother also concedes that the children have been wrongfully retained by her in this jurisdiction. The Mother accepts that Father has rights of custody within the meaning of Article 3 of the Convention.

6. There have been a number of hearings in respect of the application. At the first hearing before Holman J a report was directed to be prepared by CAFCASS High Court Team together with a psychological report upon Mother, and a report from an expert in Texan law. Both parties were given permission to file evidence in support of their respective cases. Consequent upon that direction there are very lengthy statements of evidence from the parties and it is perhaps no surprise that by the time of the PTR before Moor J on 28th October this hearing was structured such that oral evidence would be given by the professional witnesses only.

7. The Mother defends these proceedings on the following grounds: -

   a. Article 13(2) child's objections.

b. Article 13(b) grave risk of harm / intolerability.

c. Article 20, it being asserted that Texas does not have a relocation jurisdiction.

8. At this hearing the Father has been represented by Ms Ramsahoye the Mother by Ms Papazian. Counsel had each in preparation for this hearing prepared detailed skeleton arguments which were provided to me in good time to assist with reading in readiness for the hearing of evidence and submissions. Those skeleton arguments have been amplified by skilled oral submissions from each following on from the evidence.

9. The Mother alleges she is someone who has suffered domestic abuse. It is accordingly incumbent upon me to consider participation directions so as to enable her to participate in the hearing. Arrangements had been made for the Mother to sit screened from sight of the Father (the special measure requested on her behalf). Before the hearing started discussions between the Mother and her counsel resulted in a position whereby the Mother sat behind her counsel at the far end of the court from the Father but nevertheless without a curtain or screen. This being a departure from what had been sought I raised the issue with Ms Papazian who was explicit that this was now the Mother's preference but that the Mother's legal team would keep the matter under review and ask for a different arrangement if needed. So far as I was able to tell during the hearing, from observing the Mother engaging with her solicitor, seeing her listening to the evidence, writing notes to her counsel and giving instructions, it was unnecessary for me to interfere with the approach taken about her participation.

10. As a preliminary issue the Mother made an application to admit into evidence a letter from her treating counsellor. The application was made very late – so late in fact that had the evidential timetable been observed evidence would already have been part way through. The letter had been obtained by the Mother herself and not on the advice or on the instigation of her counsel or solicitor. Ms Ramsahoye unsurprisingly objected to its admission into evidence making the strong point that it should not have been obtained in circumstances where there was already properly directed part 25 compliant evidence in relation to Mothers mental health and that as recently as the PTR no mention of, still less application for it had been made.

11. I had considerable sympathy for Ms Ramsahoye's well-made points but given that central to the arguments I was to consider was the Mother's mental health and the impact on it of any return order (with of course the concomitant effect on the children) I permitted Ms Papazian to introduce it and Dr Farhy to read it in advance of cross examination. The weight to be given to that report is however diminished to very little indeed by the following

i. It comes late and at the Mother's behest

ii. The obtaining of it is outwith the part 25 constraints -which are there for a reason – and as a result there is neither letter of instruction nor any documentation of communications with the professional concerned leading to its production

iii. To the extent that there is information provided to the counsellor it is entirely the Mother's self-reporting

iv. The Mother does not waive – and nor did Ms Papazian when I asked her if it be her intention to do so – the confidentiality of the relationship from which the letter is generated and so one does not have for scrutiny the notes or recordings which lie behind it

v. The point later made in evidence to me by Dr Farhy is an important one - that the role of a counsellor in what is described as 'person centred' work is very much to support and promote the interests of their patient somewhat detracts from the objective usefulness of this sort of document coming in in this sort of way

It follows that whilst I have read and taken note of the contents of the letter I have preferred to rely (and found it safer to do so) on the evidence in respect of the mental health issues relevant to my decision that comes from Dr Farhy.

Background

12. The immediate background to this litigation appears above. The wider background need be set out in outline only. The parties who are both British nationals met in about 2005 or 2006 through their mutual involvement in a new Christian church . They married whilst on holiday in Sweden on 28th March 2008. The children of the family were both born in England. In 2014 the parties moved to Texas. The specific reason for the move is a matter of dispute between the parties but not one which it is necessary for me to consider far less to determine at this summary return hearing, given the parties' position on Habitual Residence, but there is something approaching common ground that the move was for work reasons for the Father (though both parties worked once in Texas) and for what the Father says were better family prospects.

13. The children both attended an Elementary School in Texas, Emily from August 2016 and Adam from August 2018. Emily has been diagnosed with autistic spectrum disorder, the diagnosis being in 2017 -18. She exhibits sometimes behaviour reflective of that diagnosis, but it is notable that when the Cafcass officer came to give evidence she told me that what she had expected might be a difficult exercise in engaging Emily in discussion and conversation had been nothing of the sort.

14. In September 2021 the Father discovered that the Mother was paying money to an English family lawyer. As a consequence of this, the Father issued divorce proceedings in Texas. There were discussions between the parties, and they agreed that the Father would stop the divorce proceedings on the basis that they would try counselling and mediation. Those proceeding remain, as I am told at this hearing, live in Texas in the light of the developments in the parties' lives and the obvious failure of counselling and mediation as a route through their difficulties.

15. The Mother has a longstanding and significant mental health history including post -natal depression, depression, PTSD, a possible diagnosis of bipolar disorder and significant anxiety. She has made what are characterised as serious suicide attempts in December 2015 and January 2016, first by an attempt at home, and then by jumping from a moving vehicle. Those suicidal or self-harming behaviours appear to have been within the context of being unhappy at living in America and wishing to return to England. She has at various

times been medicated and I have been told at this hearing was referred for CBT following the second suicide attempt. There is evidence including that within her medical records on the basis of which the jointly instructed expert in these proceedings offered a tentative diagnosis of personality disorder. He has, in the lifetime of these proceedings become rather firmer in that view.

The Relevant Legal Principles and Applicable Law

16. Counsel have helpfully agreed the relevant legal principles and applicable law and what follows I take in very large part from their analysis.

Article 13b Defence:

17. The leading authority is *Re E (Children) (Abduction: Custody Appeal) [2011] 2 FLR 758, SC*. Macdonald J summarised the relevant principles in *Uhd v McKay [2019] EWHC 1239* [§67] :

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

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

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

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

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

(vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent Mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b)."

18. The Supreme Court gave further guidance upon the application of Article 13b in the matter of Re S (A Child) (Abduction: Rights of Custody)[2012] UKSC 10 and in particular considered the question whether, in the context of the effect on a parent's mental health for the purposes of Article 13(b), there needs to be an objectively reasonable or realistic risk or whether the parent's subjective perception of the risk could be sufficient:

"27 In *In re E* [2012] 1 AC 144 this court considered the situation in which the anxieties of a respondent Mother about a return with the child to the state of habitual residence were not based upon objective risk to her but nevertheless were of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to the point at which the child's situation would become intolerable. No doubt a court will look very critically at an assertion of intense anxieties not based upon objective risk; and will, among other things, ask itself whether they can be dispelled. But in *In re E* it was this court's clear view that such anxieties could in principle found the defence. Thus, at para 34, it recorded, with approval, a concession by Mr Turner QC, who was counsel for the Father in that case, that, if there was a grave risk that the child would be placed in an intolerable situation, "the source of it is irrelevant: eg, where a Mother's subjective perception of events lead to a mental illness which could have intolerable consequences for the child". Furthermore, when, at para 49, the court turned its attention to the facts of that case, it said that it found "no reason to doubt that the risk to the Mother's mental health, whether it be the result of objective reality or of the Mother's subjective perception of reality, or a combination of the two, is very real".

In response to Thorpe LJ's suggestion that the "crucial question" had been whether "these asserted risk, insecurities and anxieties [were] realistically and reasonably held" by the Mother and his dismissal of the Mother's case founded on her "clearly subjective perception of risk", Lord Wilson said:

"34 In the light of these passages we must make clear the effect of what this court said in *In re E* [2012] 1 AC 144. 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."

19. Macdonald J gave further guidance that the evidence cannot be viewed entirely in the abstract. The court is entitled to weigh all the evidence and make an assessment about the credibility and substance of the allegations. The court referred to dicta from Moylan LJ in Re C (Children) (Abduction: Article 13(b) [2018] EWCA Civ 2834 and said at paras 70-72:

"70.In the circumstances, the methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the

court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.

20. The Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part IV, Article 13(1)(b) provides the following guidance:

    a. Article 13(1)(b) contains the following three different types of risk - the return would expose the child to (i) physical harm; (ii) psychological harm; or (iii) otherwise place the child in an intolerable situation;

    b. each category of risk can be raised independently;

    c. harm to a parent, whether physical or psychological, could, in some exceptional circumstances, create a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The Article 13(1)(b) exception does not require, for example, that the child be the direct or primary victim of physical harm if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child;

    d. the wording of Article 13(1)(b) also indicates that the exception is "forward-looking" in that it focuses on the circumstances of the child *upon return* and on whether those circumstances would expose the child to a grave risk.

    e. the analysis should not be confined to an analysis of the circumstances that existed prior to or at the time of the wrongful removal or retention. It instead requires a look to the future, *i.e.*, at the circumstances as they would be if the child were to be returned forthwith. The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence;

    f. however, forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That said, past behaviours and incidents are not *per se* determinative of the fact that effective protective measures are not available to protect the child from the grave risk;

    g. as a first step, the court should consider whether the assertions are of such a nature, and of sufficient detail and substance, that they could constitute a grave risk. Broad or general assertions are very unlikely to be sufficient;

    h. if it proceeds to the second step, the court determines whether it is satisfied that the grave risk exception to the child's return has been established by examining and evaluating the evidence presented by the person opposing the child's return / information gathered, and by taking into account the evidence / information

> pertaining to protective measures available in the State of habitual residence. This means that even where the court determines that there is sufficient evidence or information demonstrating elements of potential harm or of an intolerable situation, it must nevertheless duly consider the circumstances as a whole, including whether adequate measures of protection are available or might need to be put in place to protect the child from the grave risk of such harm or intolerable situation, when evaluating whether the grave risk exception has been established.

21. I have had regard also to the following cases in which the Court of Appeal considered the approach to be taken in relation to an article 13 (b) defence in circumstances where the effect on a returning parent fell to be factored into that consideration: *B (A Child) (Abduction: Article 13 (b))* 2020 EWCA Civ 1057 and *A (Child Abduction : Article 13 (b))2021 EWCA Civ 328*

The Sufficiency of Protective Measures:

22. In the recent case of Z v D (ART 13: REFUSAL OF RETURN ORDER) [2020] EWHC 1857 (Fam), Macdonald J summarised the principles to be considered by the court in examining the sufficiency of protective measures that are available on return:

> *"[29] With respect to the second question, namely determining whether protective measures can meet the level of risk reasonably assumed to exist on the evidence, the following principles can be drawn from the recent Court of Appeal decisions concerning protective measures in Re GP (A Child) (Return Order: Habitual Residence) [2017] EWCA Civ 1677, [2018] 4 WLR 16, sub nom Re GP (A Child: Abduction) [2018] 1 FLR 892, Re C (Children) (Abduction: Article 13(b)) [2018] EWCA Civ 2834, [2019] 1 FLR 1045 and Re S (A Child) (Hague Convention 1980: Return to Third State) [2019] EWCA Civ 352, [2019] 2 FLR 194:*
>
> *(i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.*
>
> *(ii) In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.*
>
> *(iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking. (iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.*
>
> *(v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.*

(vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.

[30] In addition to these factors, Mr Bennett submits that the discrete question of whether the court can trust a parent to comply with an undertaking can and, in this case should, form part of the evaluative evidential exercise with respect to protective measures, relying on the decision of the Court of Appeal in Re F (A Minor) (Child Abduction: Rights of Custody Abroad) [1995] Fam 224, [1995] 2 FLR 31. However, it seems to me that this question is one that is already encompassed in an examination of the extent to which the undertaking is likely to be effective, both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.

[31] Within the foregoing context, it is well established that courts should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting State are equally as adept in protecting children as they are in the requested State (see for example Re H (Abduction: Grave Risk) [2003] EWCA Civ 355, [2003] 2 FLR 141, Re M (Abduction: Intolerable Situation) [2000] 1 FLR 930 and Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433). However, having regard to the principles set out above, where the social service authorities of the requesting State are relied on as a protective measure, the court will still need specific details of the measures it is proposed that those authorities will be taking in order that the evaluative exercise set out in the foregoing paragraph with respect to the efficacy of the protective measures can be undertaken."

Evidence

23. I have had and read a trial bundle running to some 646 pages. In addition, I have heard oral evidence at this hearing from Dr Farhy (consultant psychologist) Mr Vaught (an expert on Texan Law) both of them instructed jointly by the parties. It is not my intention to set out all of that which I have heard and read. I will make reference to those parts of the evidence which I have found of particular relevance and assistance but I have held in my mind in reaching my conclusions the evidence placed before me and the submissions made on behalf of each of the parties.

24. Mr Vaught, is a Board-Certified Family Law expert practising from a specialist Family law firm in Texas. Although selected for his expertise in the area by Mother's legal team and agreed by Father's, he may with the benefit of hindsight have not had the breadth of experience of advising in Hague cases as had been anticipated. He had provided answers in three tranches to questions raised of him. those answers appear in documents dated June 19th September 25th and October 17th. My impression from listening to his evidence is that his focus on the questions asked – and perhaps more focussed questions- developed over the course of his instruction. In submissions Ms Ramsahoye suggested that Mr Vaught had led himself into error by turning his mind to the domestic law of Texas rather than looking at the construction of article 3 in Hague terms. Mr Vaught did not address the question of 'home state jurisdiction' although he may have been unaware from his instructions that Mother had conceded a wrongful retention from the home state and that the children remain habitually resident in the state of Texas.

25. Whilst there was ultimately, as appears in the discussion later in this judgment, some clarity as to what Mr Vaught was advising in relation to whether there was or was not a relocation

jurisdiction available to the Mother in Texas, I did not find his evidence otherwise either illuminating or helpful. It is regrettable that his wide experience of Family Law in the courts of Texas had not included international (with the exception of some arising from the proximity of the Mexican border) or Hague cases at all. Regrettable also that whilst he had experience of perhaps 8 -10 relocation cases those had been all either within the state of Texas or interstate. Thanks to Ms Papazian's dogged persistence in exploring with him the Mother's article 20 case I was able ultimately to understand what it was he said about it, though I did not ultimately accept all of that which he expressed orally on the point.

26. Ms Julian the Cafcass officer had met and interviewed both children. She had been directed pursuant to the direction of Holman J having read the papers and interviewed the children to prepare a report as to:

(1) the children's degrees of maturity having regard to their ages;

(2) the children's objections, if any, to a summary return to the State of Texas, USA; and
(3) the children's wishes and feelings.

27. Ms Julian reported the children as being delightful children to interview. What I have read chimes with that and they are obviously intelligent and well-mannered children. They also clearly love and have a sense of loyalty to each of their parents. They are she observes mature for their age – a description provided by those who know them at school and with which she did not disagree. She had not, within the report filed, advised specifically on whether the children had objections and if so what they were to a return to the State of Texas. In her oral evidence she told me that she had been preparing reports for some years now pursuant to similarly couched directions but that it was her habit to regard the question of a child's objection as a matter for the court notwithstanding and so she did not ever refer to it directly. There was, as Ms Julian put it *nothing negative about Texas* said by either of them to her. She reported that Adam was overheard at school to have said "if someone told me I was going back to America, I'd punch them in the face" but she was not able to assist with the context or timing of the overheard remark.

28. What they had plainly not been happy about was being caught in the midst of the breakdown of their parents' relationship. Both children spoke to Ms Julian and described their experience of living in Texas with their parents. Adam was interviewed first and said *'Mum, Dad or Melody* [the family dog] *got us up. Back then they were still like big enemy, shouting at each other…. Mostly Mum shouting at Dad, fighting too…. I don't really like those days. I was mostly in the middle of the fight or in the media room with Emily to try to get away from it… Dad would try to calm Mum down. But that usually just made the fight longer and bigger."* It could not have been clearer that he was affected by his parents' relationship and their failure to protect him from the consequences of its breakdown. He went on to say '*It happened quite a lot until one day during Covid when it all stopped for about a year. Then it went right back up again. It was about the time we came back here."* Some of what Adam reported to the Cafcass officer resonated with the covert recordings admitted into evidence, describing as he did that his Mother *"mostly been in a bad mood there*" i.e. in Texas and that she also shouted at Emily. He told Ms Julian that his Mother *hates liars and Emily can be a bit of a liar as she's autistic… and Emily was beginning to get afraid of mum because of the shouting."*

29. When Emily had been asked by Ms Julian about her own experiences of her parents she said that "*liked Dad a bit more as he had the same experience as me, being shouted at by*

Mum" In her detailed report Ms Julian went on to set out Emily's elaboration that life at home had what she called good bits and bad bits but of her Mother she observed :*She always picked on me (eg.by pointing out any problems) as I was autistic, and on Dad as he was autistic. I saved dad whenever I could, and he saved me*". What Ms Julian went on to say was that Emily explained that they (she and her Father) would try to defend each other for example if her room was dirty or she forgot to take her medication. *"Also I didn't really like her because when it was mum in the house, she gave us our least favourite food but when dad was there, he would ask us and take that into consideration.* I found Emily's reported views made for a sad state of affairs whether or not they amounted to an objection.

30. Adam was explicit in relating the way in which his Mother presented differently here and in America. My impression from Ms Julian's evidence is that he was comparing the two situations in his mind when he said that his Mother's *"mental health is boosted"* here; that his *"Mother shouts a lot less"* and he thinks *that is one of the reasons why "Emily's mental health has gone up."* . He noted that his grandparents, whose home the children and the Mother have been sharing help his Mother and do everything for her. Tellingly in the context of whether he objected to a return he said this *"If it wasn't for mum's mental health, I would choose to go back but since her mental health was quite bad in Texas I've chosen to come here."* . Adam in particular is very aware of his Mother's mental health and, on the reports of his own comments, is as I see it, in danger of taking responsibility for it.

31. Unsurprisingly perhaps there were signs of both discussion and influence on the children by the adults with whom they have been living in England. I did not have evidence which suggest that this is deliberate still less by coaching but they were plainly aware that they were being asked their views for a purpose and plainly aware of what their Mother would want to happen. Ms Papazian also made the strong point to Ms Julian in cross examination that there is no indication from the way in which the children speak of their Father that they have been as it were 'turned against him'. She is right about that they speak with love and fondness of him and say in terms they miss him. Adam made reference to England being his real home and of familiar sights. That cannot be his own experience and perception since for most of his life he has lived in America. What he said to Ms Julian was consistent with understanding the trip as a holiday *Emily and I just thought we were staying for a week or two. Mum didn't want us knowing.* There is no suggestion that the children were aware that the family dog would be travelling to join them although plans for that must self-evidently have been made in advance by the Mother.

32. Ms Julian asked Adam directly how much his Mother wants him to stay here. His reply betrays that he has been more involved in adult discussion than should be the case *"over the top (of the 1-10 scale). She's been fighting about it for years. And dad said if you don't like it in Texas, we can move back…. Mum told us. And that promise was broken."* . Despite his involvement in adult discussion if they moved back, he thought he and Emily would live with their Father and their Mother would get an apartment of this he observed *"That would be quite good. He's got a lot better at cooking. He was a very good Dad, fun and kind."* . Decisions as to where these children should live whether those decisions are made here or in Texas are for another day, but the character of Adam's observations is to contemplate with a degree of equanimity a return to Texas.

33. The overall impression from the totality of Ms Julian's report and her oral evidence was in essence a preference which the children expressed as to where they would live.

34. Before Ms Julian left the witness box I asked her about the recordings which have been admitted into these proceedings pursuant to the direction of Arbuthnot J on 27th July 2022. Those were recordings made covertly by the Father of the Mother behaving appallingly towards Emily in the presence of both children and on occasion of the Father recording himself having what I would characterise as self-serving conversations with the children about their Mother. In the body of her report Ms Julian had described the recordings as *difficult to hear* by which she explained from the witness box she meant hard to listen to. They were, she told me very concerning. I agree and share her concern. They are concerning first for the clear demonstration of what the children were experiencing from their Mother (as no doubt the Father intended in seeking leave to adduce them) and for the fact that the Father stood by covertly recording and evidence gathering rather than taking steps to protect the children from it (the significance of which appears to have escaped him when seeking leave to adduce them). The Mother and the Father in their arguments before me have sought to say that the recordings are evidence of poor and non-child focussed behaviour by the other. In a sense they are both right. It so happens that the recordings are produced to me within the context of a return application. Had they been produced in the context of a private law dispute between these parents the evidence they give me of the parenting decisions made by ***each*** parent would have led me to refer the matter to the relevant social services.

Dr Farhy

35. Dr Farhy is a consultant psychologist. Both his written and his oral evidence brought into sharp focus the issue of the defence raised by the Mother under Article 13 (b) harm and intolerability. There is no suggestion in this case that the intolerability is by reason of any direct effect on either of the children. It relates solely to the question of the effect on the Mother because of her mental health and the knock-on effect on the children. As emerges from the consideration of relevant and applicable legal principles earlier that is sufficient and has been accepted as so in principle by counsel before me – the debate is not about the principle but as to the fact specific situation here. It is the Mother's case that she is and has always been their primary carer. I do not see in the evidence that the Father in so many words concedes that but what is notable in the way that the arguments have been advanced before me is that no one has advanced a case that were it intolerable for the Mother to return to Texas with the children should I direct a summary return, then they should go with their Father and live with him pending resolution of their longer term living arrangements.

36. Within the body of his first report Dr Farhy provided an appraisal of the Mother's medical records and taking this along with testing summarised the position in the following salient aspects, The Mother is someone who has had mental health difficulties dating back to about 2004 so for a period of some eighteen years and pre-dating her relationship with the Father. On the tests he administered her scores pointed to tentative evidence for quite severe personality difficulties which may be expected to lead to episodes of break down and serious dysfunction.

37. There was from the Doctor a suggestion made tentatively that she may be suffering from a borderline personality disorder since he identified behaviours associated with this. Within his addendum report having taken the opportunity to consider the subject matter of the covert recordings, he became firmer in his consideration of the prospect of borderline personality disorder though stopping short of a diagnosis.

Within his report Dr Farhy had observed that "….*the findings cannot discount the possibility of severe breakdown (including but not limited to, self – harm in the past and in the future)*

38. There is of course a live issue between the parents as to whether, as the Mother alleges, the Father has been domestically abusive and coercively controlling of the Mother. If it is necessary for that to be the subject of a fact finding hearing so as to make decisions for the children it will be for a court determining the facts which I am not. Of relevance for me at this hearing however is Dr Farhy's expressed view of the Mother that *The vulnerabilities are there but it is unclear whether these are impacted by the behaviours on his part that she described or whether these do not occur and her distress and malfunction is wholly or mainly self-induced*. I understand that to mean that within the context of this summary return application, the Mother's psychological profile is one which falls to be considered regardless of any disputed facts. In his oral evidence Dr Fahy when being asked about the adequacy or otherwise of the protective measures expanded on this saying that because of the Mother's mental health difficulties it might be that however adequate the protections might be from an objective perspective there may be no meaningful effect for the Mother because of her own subjective view and fear. *It may be* he said to me *that the stressors are not unusual but she perceives them as so. She is someone who does not just see in black and white but its black or brilliant white so if something isn't brilliant white but something less than that then its black. So it is because of who she is and not what the stressors are that there's the chance that she will react badly on return. So even where there is a proposed measure that is objectively sound the Mother's subjective response is important and the impact on her mental health. Sometimes the demands are impossible to meet … the experience is genuine but cannot be assuaged by any attempt of the other party and so that makes it impossible to meet it.* What he had described as the chance of her reacting badly was not something he was able to quantify but his evidence was that it was real and heightened by her mental health profile.

39. So it is, said Dr Farhy that debate about sufficiency of protective measures may ultimately be pointless. This aspect of Dr Farhy's oral evidence linked back to the view expressed in his report that even aside from the risks that Father may or may not pose on any factual determination, the Mother is '*…at risk of self-harm, dissociation and impulsive behaviour when encountering stress situations* with the result that "*adequate and stress-free parenting under such circumstances cannot be guaranteed.*"

Discussion

40. I accept Ms Ramsahoye's submission that there is material before me which might permit a conclusion that this was not only, as is conceded, a wrongful retention but a wrongful removal planned in advance and executed. There are a number of aspects which make me suspect that it was so. Prominently amongst them are the arrangements to transport the family dog; the sale before leaving on holiday of the Mother's car; the near immediate application to the Medway family court and the attempt to mislead the District Judge at that court as to the habitual residence situation – which can only have been on instructions since the Mother was represented and clear assertion made on the application. On a narrow balance however and reminding myself that suspicion must be kept in its proper place, I have stepped away from determining that this was wrongful removal. Furthermore for the purposes of this hearing it does not matter. It is a deliberate and admitted wrongful retention.

41. As to the date of that retention I accept and prefer the submissions of Ms Ramsahoye and find that the date is the 11th March 2022 on the Mother's application to Medway, heralded the previous day by her verbal communication of her intention to the Father. It follows that I reject the submissions by which Ms Papzian contends for the date of 14th March 2022. I turn now to consider each of the Mother's defences.

Article 20

42. Ms Papzian raises as a defence that were I to direct a summary return to Texas there would there be no jurisdiction by which she could make an application for permission to relocate with the children to England. That aspect of her defence was heralded before Holman J and led to his directions for the instruction of the agreed expert Mr Vaught. Whilst Mr Vaught's written evidence came in a way that involved answering supplemental and addendum questions so as to clarify opinion already given, the end point of that process in his 17th October 2022 response in answer to the question *'what application does a parent need to make to secure an Order allowing them permission to permanently relocate outside of the United States with their children?'* was as follows :

'A parent needs to file a Suit Affecting the Parent-Child Relationship seeking to have the right to designate the primary residence of the child. Further, the parent needs to seek no geographic restriction for the primary residence of the child or a geographic restriction for the child which would allow parent to locate outside of the United States with the child. See Texas Family Code §§153.001, 153.132.'

43. I accept Ms Ramsahoye's submission that this opinion from the jointly instructed expert is one that I should take as providing the answer to whether there is a relocation jurisdiction, and her tactful observation that since it relates to the domestic jurisdiction of the home court, it is not an aspect of Mr Vaught's evidence which attracts the same disquiet as to want of familiarity with the Hague jurisdiction. The submission takes strength from the fact that in the next passage of his response, Mr Vaught goes on to detail the factors statutory and otherwise which would be taken into account in determining whether the application to relocate should be granted or refused. Those factors have a ring of familiarity to those bringing or considering like applications in this jurisdiction.

44. Ms Papazian cross examined Mr Vaught as to whether given the Mother's acceptance of a wrongful retention, and for that matter the Father's assertion that the reality is a wrongful removal, a past abduction would have an adverse effect on the likely outcome of her application to relocate. He said he thought it probably would. It was not clear on what he based that view. Ms Papazian developed her submissions orally on the basis of this answer to submit that I should regard the prospect of the Mother being able to succeed on a relocation application as being so damaged by there having been an abduction that I should treat the avenue as in effect not open to her. That was a bold submission. Bold and unattractive. The logical end point of it, as I debated with Ms Papzian, is that a court may be faced with an abducting parent who says in effect on the article 20 point *I have by my own bad behaviour in abducting the child damaged my prospects of being permitted to remove him by the lawful course so I should be allowed to have the benefit of being able to say that course is not open to me.* I should not have been attracted to a submission which has its roots in that logic, but in the circumstances of this case I prefer and accept in any event the submission of Ms Ramsahoye that such evidence as there is before me is that

there is a relocation jurisdiction available and the Mother has not made out her Article 20 defence.

Child Objections

45. The Mother defends the proceedings on the basis also that the children and each of them object to a return within the meaning of Article 13 (2). To succeed on this defence the Mother must satisfy the court that the children object to returning to Texas; and that Emily and Adam have reached an age and degree of maturity at which it is appropriate to take account of their views. I have considered already in detail the evidence from Ms Julian as to the children's articulated views. I accept her own assessment that they are mature children whose views it is appropriate for me to take into account. Both counsel have approached the case on the basis that the children should be treated as a sibling group of two and that it was not appropriate to advance any argument which suggested differing outcomes for them. I agree that they are right to do so.

46. Whilst Ms Julian's approach to the direction to report on what if any objection the children had to a return is a slightly curious approach to take in one sense, it so happens that in this case that, even where she has not commented on it, I can be quite clear that there was not within the views reported by Ms Julian anything in the character of an objection expressed by the children or either of them to a return to Texas. The closest in words was the reported overheard occasion on which Adam said he would *punch in the face* someone who said he was to return to Texas. Whilst Ms Papazian submits rhetorically what could that be but an objection, it is striking to me that it is without context or detail and also does not fit with that which comes out of the interview of Cafcass with him. It is true also that there were raised by them societal issues which might not be ordinarily found at the forefront of the mind of children of 9 and 11 – the reversing of *Roe v Wade* in the case of Adam and the lack of firearms control in the case of Emily . I had wondered about the extent to which those issues were indicative of the influence of their Mother on the views they expressed. The picture was mixed in that Adam said in terms that what he knew about diminution of the rights of women in relation to abortion came from his Mother, whereas gun control is an issue of direct experience for children in American classrooms as they experience safety drills.

47. I am quite satisfied on the evidence that defence which the Mother raises under 13 b that the children or either of them have an objection to returning is not one which she has established before me. Ms Papazian submits that there is taken in totality a sense in which that which is gleaned from the children is to be taken as each of them is in fact objecting to a return because she says their views and their own lived experiences of their Mother's mental health issues in the past and their experiences of what is reported by them as her calmer presentation here is inextricably linked with the question of an objection and that they should be taken as having an objection to going back to the situation which would obtain in Texas. I do not accept that submission. Despite Counsel's valiant efforts on this point I am not persuaded that there is objection or close to it.

48. I have of course at this hearing been thinking about whether that which is reported by the children amounts to an objection within the meaning of Article 13(2) and not about what they say tells me of the experience they have had of living in the care of their parents and their longer-term welfare. I have confined myself to deciding whether there should be a return directed in a summary way and not strayed into other longer-term issues. I observe

however that some of what the children say is troubling and that even a cursory consideration of their wishes and feelings is sufficient to conclude that each would want to live without being shouted at and belittled and/or to be protected from that experience.

Intolerability

49. As with other aspects of the applicable case law, there is no dispute as between counsel about the fact that where the facts of the case warrant it, the intolerability may flow from the effect on the returning parents' availability – including in the emotional and psychological sense – to the child. It is here the potential for mental collapse of the Mother which would lead to the intolerable situation for Emily and Adam. I have a real sense of unease within this, a summary jurisdiction at the prospect of an intolerability which stems entirely from the as yet unknown prospects of the effect on the parent who has retained the children. I bear in mind that many in her position faced with having to return would suffer, and be expected to suffer, a degree of stress and distress at being sent back. Not least because it is a situation brought upon themselves. Furthermore in this summary jurisdiction it should not be thought that simply by claiming that however adequate the protective measures in place the anxiety of the returning parent and the effect on their mental health is such that their ability to care for the child is at risk.

50. In this case however and on the specific facts of this case I am driven to the conclusion that that is so. Ms Papazian is right that it is not in this case all unknown and speculative. There is a well-documented history of serious mental health deficits in the Mother. Whilst Ms Ramsahoye makes the succinct and well-pitched submission that there have not been recent crises, there is however within that well-documented history, evidence that previous crises were within the context of and associated with a strong wish to be (or not to be) in a particular country. There is no suggestion that the suicide attempts were trivial or did not require psychiatric inpatient treatment. There is no suggestion that the need to be available to care for her children was sufficient to prevent the Mother making those attempts. The evidence that I have from the jointly instructed expert in relation to the Mother, her mental health and the likely impact of stressors as they are experienced by her on her functioning- and thus her functioning as their parent - is troubling. He did not accept that there would be an immediate collapse in her mental health on return but he did accept that there would be a deterioration which whilst he would not quantify numerically was one which would affect her in a way that would not attach to her unaffected peers.

51. The addendum report on the evidence from the covert recordings produced by the Father gives an additional insight into one of the ways in which deficits in the Mother's parenting of her children may manifest itself in response to her experiencing what she perceived as stress. It is ultimately the consequences for her ability to parent the children with which I am concerned in evaluating the risk. In totality the evidence on this aspect and in the particular factual circumstances of this case is such that I am persuaded that the Mother has established the Defence under this head that a return would be intolerable for these children . In those circumstances and I exercise my discretion not to order their return. Whilst I agree with much of that which Ms Ramsahoye submits as to the excessive demands as to protective measures, the evidence of Dr Farhy as to protective measures which I accept means that it is unnecessary for me to consider the detail of Ms Papazian's schedule of deficiencies and the extent to which they are objectively speaking reasonable or excessive

52. The effect of my decision will be that the proceedings stayed in the Medway court will be revived. My preliminary view is that the reports of Ms Julian and of Dr Farhy as well as the evidence filed by each of the parties themselves in these proceedings should be made available within any proceedings in Medway and I will invite Counsel to consider that and either to include an agreed provision to that effect in any draft order or, if not agreed set out in short written form their respective positions which I will determine.

53. I wish finally to express my thanks to Ms Ramsahoye and Ms Papazian for the way in which they have each conducted this case and for the very obvious diligence and care which has gone into their detailed and painstaking documents on which they based their respective arguments.