



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 58

P417/23

OPINION OF LORD STUART

In the Petition of

MP

Petitioner

for

Orders under the Child Abduction and Custody Act 1985

Petitioner: McAlpine; Family Law Matters
First Defender: Laing; Burnett Christie Knowles McCourts
Fourth Defender: Trainer; TC Young LLP

25 August 2023

Introduction

[1] The petitioner and first respondent are husband and wife, although now separated. They are both Polish nationals. They have two children, X, born 24 January 2010, and Y, born 7 December 2015. X is the fourth respondent, having entered process on his own instruction. The second and third respondents have not entered process, so I need not say anything further about them. The petitioner and first respondent resided together with the X in Poland until June 2013. In June 2013, the petitioner moved to Scotland. In September 2013 the first respondent and X moved to Scotland to reside in family with the petitioner. Y was born in Scotland. The family remained residing in Scotland until July 2021

when all four returned to reside in Poland. Thereafter, the petitioner and first respondent separated. Following separation, the petitioner exercised contact with X and Y.

[2] On 16 January 2023 the first respondent, along with X and Y, returned to Scotland on the understanding that they would be holidaying in Scotland for one week, returning to Poland on or around 23 January 2023. The first respondent, X and Y did not return to Poland and currently remain residing in Scotland. The petitioner seeks Orders of this court under the Child Abduction and Custody Act 1985 for the return of X and Y to Poland.

[3] The first and fourth respondents oppose those orders. They do so on two basis:

(1) that there is a grave risk that X and Y's return to Poland would expose them to physical or psychological harm or otherwise place X and Y in an intolerable situation and/or

(2) X and Y object to being returned to Poland and have attained an age and degree of maturity at which it is appropriate to take account of their views.

Applicable law

The Hague Convention on the Civil Aspects of International Child Abduction ("the Convention")

[4] The Child Abduction and Custody Act 1985 gives legal force in the UK to the Convention. Both the UK and Poland are signatories to the Convention. Thus the relevant terms of the Convention govern whether the orders sought by the petitioner should be granted. Insofar as relevant to the submissions made to me, the terms of the Convention are as follows:

"Article 3

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;
and

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

Article 12

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

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. ...

Article 13

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

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

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

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

[5] It is conceded on behalf of the first respondent and X that (i) on 23 January 2023 X and Y were habitually resident in Poland, (ii) the petitioner has custody rights in respect of X

and Y under the law of Poland and (iii) on 23 January 2023, the petitioner was exercising his rights in respect of X and Y. Standing these concessions, it follows that under reference to Article 3, X and Y are being wrongfully retained in Scotland and, subject to the provisions of Article 13, in accordance with the terms of Article 12, this court should order the return of X and Y forthwith.

[6] However, as discussed further below, the first respondent and X argue under reference to Article 13 of the Convention that the court should not order X and Y's return to Poland because (i) there is a grave risk that X and Y's return to Poland would expose X and Y to physical or psychological harm or otherwise place them in an intolerable situation ("the grave risk defence") and/or (ii) both X and Y object to being returned to Poland and both have attained an age and degree of maturity at which it is appropriate to take account of their respective views ("the objection defence").

The grave risk defence

[7] The proper approach for this court to take in relation to the grave risk defence was authoritatively set out by the Supreme Court in the case *In re E (Children)* [2012] 1 AC 144, as further explained by the English Court of Appeal in the case *In re S (A Child)* 2012 2 AC 257 and as applied in Scotland by the Inner House in the recent decision in the case *AD v SD* 2023 SLT 439.

[8] In *In re E*, Lady Hale and Lord Wilson, in delivering the opinion of the Supreme Court, sated at paragraphs 31 to 36:

"31. ... We share the view expressed in the *High Court of Australia in DP v Commonwealth Central Authority* [2001] HCA 39, (2001) 206 CLR 401, paras 9, 44, that there is no need for the article to be 'narrowly construed'. By its very terms, it is of restricted application. The words of Article 13 are quite plain and need no further elaboration or 'gloss'.

32. First, it is clear that the burden of proof lies with the 'person, institution or other body' which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination.

33. Second, the risk to the child must be 'grave'. It is not enough, as it is in other contexts such as asylum, that the risk be 'real'. It must have reached such a level of seriousness as to be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.

34. Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or *otherwise*' placed 'in an intolerable situation' (emphasis supplied). As was said in *Re D*, at para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

35. Fourth, Article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within Article 13b the court is not only concerned with the child's immediate future, because the need for effective protection may persist.

36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations

are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues.”

[9] In *AD v SD*, Lady Wise, giving the opinion of the court, stated at paragraphs 26 to 28:

“26. ... In contrast, since the decision of the UK Supreme Court in *In re E* [2012] 1 AC 144, the position where an Article 13(b) ‘grave risk’ defence founding on domestic abuse is pled, the court’s approach is more nuanced. A staged approach is required, with the court first asking itself of the disputed allegations 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 it concludes that there would be such a grave risk,

‘the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country...’. (*In re E*, paragraph 36).

27. Within the first stage of the assessment, unless there is no *prima facie* case made out at all, it is necessary to evaluate the available material and analyse the nature and severity of the risk to the children. The allegations are assumed to be truthful for the purpose of that exercise. It is that analysis that puts the court in a position then to make a proper assessment of whether the proposed protective measures will be sufficient to address or ameliorate that risk (*In re C (A Child)* [2021] 4 WLR 118, paragraphs 55-59). The importance of that analysis lies in the relationship between the level of risk and the need for protection; a particularly high risk of the most severe harm will require to be balanced by more effective protection than a lower risk of either that or of less severe harm (*In re E*, paragraph 52). So the exercise involves a delicate slide rule type balance to be struck between the assessed risk and the protective measures offered.

28. It is also important to note that, in principle, where a party’s subjective perception of events leads to a risk to her mental health, this can found an Article 13(b) defence. If there is a grave risk that the children would be placed in an intolerable situation as a result of the mother’s suffering that may be sufficient (*In re E*, paragraph 34). The crucial question is not whether the parent’s anxieties are reasonable, but what will happen if the children are returned with her. If she will suffer such anxieties that the effect on her mental health will create an intolerable situation for the children they should not be returned (*In re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257). Finally, and of some significance in the present case, Article 13(b) requires the court to look prospectively. The protective measures

may require to cover more than the immediate future because the need for effective protection may persist (*In re E*, paragraph 35). There is support elsewhere for the now established approach in this jurisdiction: *LLR v COL* [2020] NZCA 209 at paragraphs 106-110.”

The objection defence

[10] The leading authority in “child objection cases” remains *In re M* [2007] UKHL 55; [2008] 1 AC 1288. The principle speech, with which the other judges agreed, was delivered by Lady Hale. From paragraph 42 her Ladyship stated:

“42. In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the Contracting States and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the Contracting States.

43. My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word ‘overriding’ if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.

44. That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.
...

46. In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only

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

48. All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child. The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction. Further elaboration with additional tests and checklists is not required."

[11] In *W v A* 2021 SLT 62, giving the opinion of the Inner House, having considered *In re M*, Lord Malcolm stated at para [9]:

"[9] In art. 13 cases the age and sufficient maturity test, once passed, is a gateway to the court exercising a discretion, authoritatively said to be 'at large', as opposed to being directed by the Convention to return the abducted child. In the present case, given the terms of Article 11 of the Council Regulation, the long term decision on residence remains with the Polish Court. It must be informed of any non-return order and its reasons, and its judgment in resolution of the parental dispute will be directly enforceable in Scotland. This is a key factor. The question is whether in the meantime the child should be returned to Poland pending that decision. In this regard courts are increasingly giving weight to the views of the child. A child-centric approach is required, with her interests and general welfare at the forefront. The focus is not on the moral blameworthiness of the abducting parent, nor on notions of deterrence. While Convention considerations will always be relevant, the further one is from the main aim of a speedy return, the less weighty they will be. If a child is integrated in the new community it is relevant to consider the effect of a further, and unwanted, international relocation pending the long term decision. ..."

[12] Although the Council Regulation referred to (2201/2003) is no longer applicable post the UK's withdrawal from the European Union, the passage remains relevant insofar as it

recognises the distinction between jurisdiction over long term decisions and short terms return and insofar as it refers to the “child-centric approach”; a phrase mooted by Mr Gupta, counsel intervening on behalf of the children in *In re M*.

[13] It is, therefore, against the above legal background and context that I consider the two defences presented on behalf of the first respondent and X.

Evidence

[14] Various affidavits and productions were lodged on behalf of the parties.

X

[15] An affidavit signed by X and dated 11 July 2023 was lodged in process and relied upon. I have narrated a substantial part of X’s affidavit because I consider it important in the context of the decision I have reached.

[16] X stated that he did not want his address to be shared with the petitioner. He hated living in Poland from the moment he went back to live there in 2021. He had no real memories of Poland. He identifies as Scottish and feels Scotland was and is his home. Prior to returning to Poland he spoke Polish within his home and English outside. He was really upset about moving to Poland. He had no friends there. On returning to Poland he struggled to adjust to living there. The most difficult part was school. He had no idea how to write in Polish. He struggled to understand the language. He was unable to choose his subjects and there was no access to the subjects he loved. He had no friends at school. He had a lisp when speaking in Polish. He found it really hard to communicate with other pupils, was constantly bullied and called a “retard”. He dreaded going to school every day.

He felt under a lot of religious pressure; at school and from his dad. Religion was a compulsory subject at school.

[17] He had always had a bad relationship with his dad. He now felt nothing but fear and frustration. Since he had been little he had always been scared of him. He would try not to make him angry and would lie to him to make life easier. His dad has been abusive towards his mum for a really long time and also been abusive towards him and Y. His dad was very controlling towards his mum. She was not allowed to go to work. He felt like his dad expected his mum to be a slave in the house. His mum was not allowed to have a life of her own. She did not go out with friends. He always preferred it when his dad was not at home. He felt he could relax more.

[18] He was aware that his parents had not been happy for a long time but that things got worse when they moved back to Poland. There were lots of arguments. His dad started acting like a crazy person. His dad was always shouting at his mum. His dad started saying really horrible things about his mum to him and Y. That made him feel angry as he knew they were not true. On one occasion after moving back to Poland his dad told him that his mother was a prostitute and that she was out sleeping with men for money. His dad told him and Y to hide behind a tree and wait for mum to come home and that they were about to catch mum sleeping with other men. On another occasion when they were living together in Poland his dad took him and Y into the attic of the house. They found a bracelet or something that belonged to his mum. His dad said that it was a sex toy and his mum used it when she was being a prostitute. It made him angry as he knew it was not a sex toy and he knew the things his dad were saying were not true.

[19] At some point towards the end of 2021 or the start of 2022 he was upstairs when he heard his dad screaming at his mum. He went downstairs and saw his mum's phone had

been completely destroyed. His dad's jacket was ripped. His mum's nails were broken and her hands were bleeding. His dad stormed out of the house. Shortly after the police came to the house.

[20] His mum and dad separated on 16 December 2021. He remembers the date really well. He had been at the cinema with his dad and Y. When they got home his mum and dad explained that they were getting a divorce. His mum and dad started having a huge argument. He and Y were crying and his dad was being extremely aggressive. Eventually his mum called his grandmother and his step-grandfather came to pick them up. After his parents split up his dad started acting like even more of a crazy person. His dad threw him and his mum and Y out of the family home. His dad did not care where they lived or what they did. He was really scared because he did not know what his dad was capable of doing. His dad's behaviour was really unpredictable. He felt constantly on edge. The fights between his mum and dad did not end after they split up. In 2022 his dad came round and started shouting at his mum. He was upstairs but he could hear screaming. When he came downstairs the TV was broken. On another time when his dad was screaming at his mum when he and Y were there his dad grabbed his mum and sort of pulled her around. He tried to intervene. He was really scared. Eventually his dad left the house. The police came to the house again.

[21] Because of everything his dad was doing he did not really want to see him after his dad and mum split up. There was a time when he was with his dad for a week. It was absolutely awful. His dad spent the whole week totally focussed on saying horrible things about his mum and gran. They did not do anything fun. It was basically just his dad ranting to Y and him about his mum and her family the whole time. His dad went on about

how terrible his mum was. His dad said that his mum was just interested in sleeping with men and being a prostitute.

[22] His dad made things at school in Poland even more difficult. His dad would constantly turn up and try to speak to him in the playground at lunchtime. His dad would constantly try to record him in the playground. All his dad would do was to continue to say awful things about his mum and gran. Other kids could hear and he felt really embarrassed. Eventually he stopped going into the playground at lunchtimes. It made it even more difficult to make friends and the bullying got even worse. His dad was really strict about school. His dad expected him to get good grades but he could not get the grades his dad wanted because of how far behind everyone else he was. He constantly had the feeling of letting his dad down because his dad would be so angry with him about how he was doing at school.

[23] Because of everything his dad was doing and how awful school was he felt totally depressed during 2022. He thought about killing himself often and he tried to go through with it once. It was just after an incident when his dad had turned up at school. He suddenly saw his dad in the hallway. His dad called him over and had a huge rant about his mum and everything that was going on. His dad went on for ages until a teacher intervened and told his dad he had to leave. After that day he remembered being in his house in Poland which had a second floor balcony. He decided he was going to jump off the balcony. He just could not take it anymore. He talked himself out of it but he was pretty much constantly in a very dark place. Other than when he went to school he didn't go outside. He spent all of his time in his bedroom speaking to his friends in Scotland. He felt such a huge sense of despair. It was like there was no point to anything. His mum eventually noticed that he was not happy. His mum helped him get support from a

psychologist, Magdalena Smolen, roughly every week. He would go to Magdalena's office and speak about things at school and things that his dad was doing.

[24] Since moving back to Scotland in January 2023, when his mother told him they were staying in Scotland it was one of the happiest days of his life. He started to feel that there was a future for him for the first time in a long time. He felt safe and truly happy. His life has improved significantly. He is attending high school where all of his friends from before moving back to Poland go to school. He has a good group of friends and enjoys spending time with them. He felt he could go back to having a normal life. He is looking into joining the Air Force Cadets. He has chosen his subjects for next year, including drama, modern studies, business management and design and technology. None of these subjects were available to him in Poland. He is getting good grades. He does not feel like the odd one out any more. He is able to have a normal life. He just feels like he has come home.

[25] His mental health has improved a lot since moving back to Scotland. From January until the start of these proceedings he felt like his depression was under control and he did not have suicidal thoughts. He was still able to get support from his psychologist if he felt he needed it but it was nowhere near as often as before. Since moving he has spoken to his psychologist once every couple of months. These discussions have generally been after he has had communication with his dad. The most recent call with his dad was at Easter. He felt that the entire call was like an interview. His dad just wanted to know what his mum was doing. He said things that implied his mum was doing bad things, like putting pills in their food. He made comments about her having a secret boyfriend and that she was a prostitute. He needed support after that call because he felt he had to work through his dad's mind games.

[26] His dad has tried to add him to various social media platforms. He has blocked his dad from these. He does not want to speak to his dad. He does not think his dad is actually interested in him or his brother and that he and his brother are just a way for his dad to get to his mum. His dad recently set up a Facebook account. His dad is constantly posting things obviously aimed at his mum, his brother and him. His dad posts very religious things and makes comments about these proceedings. He is worried about what his dad has been posting. He is worried what people might think or do if they were to recognise him as a result of the postings. He is worried that they might even try to hurt his mum because of the things posted about her.

[27] Since he became aware of these court proceedings he has started to have suicidal thoughts again. He feels sad and angry. He began to feel suicidal about a week after he became aware of these proceedings. All the memories of how awful life was in Poland came back to him and he has started to feel the same sense of hopelessness. A big part of that hopelessness is the prospect of having to move back to Poland and having to see his dad again. He is aware that the court is only making a decision about whether he should carry on living here or go back to Poland. That is enough to make him feel incredibly anxious. He is really worried the Polish court might make him see his dad again. He is really worried about his dad's reaction to him being part of these court proceedings. He thinks his dad will be very angry about the things he has said to the Child Welfare Reporter and in his affidavit. He is scared of his dad even without saying the things he has said. He has no idea how his dad will react or what his dad might be capable of.

[28] He is aware that the court could decide for him or Y to go back to Poland without the other. If Y went back to Poland without him or his mum he would feel sad, distraught and angry. He would never forgive his dad for that. It would completely destroy his family. He

would never speak to his dad again. At the moment, the idea of having to see his dad makes him feel like jumping off a bridge. The chance of rebuilding a relationship with his dad would be gone if Y was separated from him.

[29] He very strongly wants to stay living in Scotland. He worries about how his future would turn out if he went back to Poland. One day he wants to go to university and he sees his future in Scotland. He does not see a future at all for himself in Poland. He considers himself to be Scottish and he wants to stay in the country where he feels he belongs. To him, his entire life is in Scotland. He is 13 years old and he feels he is old enough to know his own mind.

The first respondent

[30] The first respondent is the petitioner's wife. As narrated above, the petitioner and first responded are separated. In January 2023 the first respondent and X and Y travelled to Scotland, where they have remained. The first respondent has signed an affidavit dated 11 July 2023. Insofar as relevant to my decision, the first respondent states as follows.

[31] When X went to kindergarten in Scotland the first respondent wanted to find employment. At this point in time the petitioner's behaviour towards the first respondent changed. The petitioner told the first respondent she was not to find employment and was to remain at home. The petitioner told the first respondent that she was to do as she was told. That kind of controlling behaviour continued until Y was born in December 2015. After Y was born the petitioner's behaviour towards the first respondent became a lot worse. That was when the proper abuse started.

[32] The first respondent stated that after Y was born the petitioner started to regularly physically abuse her. He would push her, shove her and banned her from leaving the house

completely. He would stop her from speaking to anyone. In 2020, following surgery for cervical cancer the petitioner would tell her that she was not a real woman.

[33] The first respondent stated that she was raped on lots of occasions by the petitioner after Y was born. The petitioner would force her into the bathroom and force her to have sex with him. The worst incident was in February 2020. This was after the first respondent's final operation. She had been told to avoid sexual activity to avoid pain. After returning to the house from taking X and Y to school the petitioner pushed her into the bathroom and had sex with her. She told him that she did not want to do this but the petitioner did not listen. Afterwards she was bleeding. She telephoned her friend Waldamar as the petitioner would not take her to the hospital or to the doctor. The petitioner just went to work.

Waldamar took her to the hospital but she did not see a doctor as she was so scared of what might happen if the police got involved. She had Waldamar swear he would not tell anyone what had happened. She thought the petitioner would kill her if he found out she had told anyone. The petitioner had told her that he had friends who for three or four hundred pounds would break her neck.

[34] The first respondent stated that the petitioner would regularly scream and shout at her. He would call her names like slut or whore. He would do this in front of the children [I note that the Reporter records in her report that X told her that the petitioner would call the first respondent a prostitute, a slut and a whore]. The petitioner controlled all of the money. She was not given access to any of the money. She was given money only when the petitioner felt like giving her some. The petitioner held all of the bank cards. When her father transferred her money from New Zealand the petitioner would transfer this into his own account. Towards the end of their marriage she got a job with Menzies at Newbridge. The petitioner was angry about this and unsupportive. He made life difficult for her. He

would deliberately come home late to make her late for work and get her into trouble with her employer. Eventually, in around June 2021, the petitioner told her to fuck off back to Poland and evicted her and X and Y from the house. She moved in with Waldamar along with X and Y until July 2021 when, without anywhere else to go, she moved back to Poland with X and Y. The petitioner went to Poland with them and stayed whilst she and X and Y moved into a house owned by the petitioner, before returning to Scotland. In October 2021 she and X and Y went on holiday to Scotland where they met the petitioner. The petitioner made it clear that she was to go back to Poland and not return to Scotland.

[35] The first respondent stated that between July 2021 and December 2021 the petitioner did not ask for X and Y and did not have contact with them. In December 2021 the petitioner came to the house. He said he wanted a divorce and if she did not agree he would kill her. He broke the television and damaged the doors and walls. He hit her and pulled her hair. He screamed and swore at her. She called the police and they asked the petitioner to leave. The petitioner served an eviction notice on her and X and Y in January 2022. 7/1 of process is a copy of the eviction notice [a translation of the notice bears to seek eviction of the first respondent and her children and items belonging exclusively to her by 31 January 2022]. On the day of her eviction she had returned with X and Y from collecting them from school. The locks on the doors had been changed and there were padlocks with chains on the gate. She and X and Y were left standing in the cold on the street. She felt completely hopeless. X and Y were confused and frightened. She found rented accommodation in the short term and then lived with her mother for a period of time. She did not receive her belongings until May 2022.

[36] The first respondent stated that in December 2021 the petitioner was arrested and charged for abusing and threatening her mother and encouraging X to do the same. She

witnessed the event and gave evidence at trial, following which the petitioner was convicted. X also gave evidence at the trial [I return to this below when I consider 7/4 of process, a copy of the Summary Judgment of the court following the trial].

[37] The first respondent stated that between January 2022 and January 2023 the petitioner did not have much contact with X and Y. He would attend at the school occasionally, stand at the gates and record them. In February 2022 he saw X and Y for a 30 minute contact session. In August 2022 she agreed for Y to see the petitioner for a weekend. X refused to go. The petitioner picked Y up on 13 February and agreed with the petitioner that he would bring Y home the following afternoon. The petitioner did not return Y as agreed. The petitioner would not answer her call. The petitioner responded to texts only to say not to bother him. She and her family searched for the petitioner and Y without success. She was mentally exhausted and terrified about what the petitioner might do to Y. On 23 August 2022 she reported the abduction of Y to the police. She understands from the police that they persuaded the petitioner to return Y to her on 31 August 2022. The police informed her that Y was upset and wanted to see her. That was incredibly upsetting for her. When Y came home he was nervous, crying and trembling. He was hostile and used swear words towards her. Y said that the petitioner had given him a knife and taught him how to use it to destroy "the enemies". She asked Y what Y meant by the enemies and Y said her and her mother. The petitioner made it difficult for X and Y to attend school. He did not agree to their education. She had to apply to court and on 9 September 2022 the court issued a decision and the consent to the enrolment of X and Y at school against the petitioner's will.

[38] The first respondent stated that in November 2022 the petitioner raised court proceedings in Poland. In December 2022 the court made an order allowing the petitioner

contact with X and Y every second Sunday for two hours. X and Y next had contact with the petitioner in January 2023. X and Y told her that the petitioner constantly asked questions about her, where they were staying and about their lives. He did not focus on them. Her solicitor negotiated an agreement to allow her to go to Scotland with X and Y. They arrived on 16 January 2023. When in Scotland she decided that she didn't think it would be best for her or X and Y to return to Poland. She told the petitioner she would not return to Poland. Between July 2021 and January 2023 X would constantly tell her that he wanted to return to Scotland to live. X and Y consider Scotland to be their home. Her decision to remain in Scotland was not one she had planned out however she came to the conclusion that it was better for everyone if she and X and Y stayed in Scotland. She felt it was the best thing for X and Y to be in Scotland, which is somewhere they love and call home.

[39] The first respondent stated that she wants to stay in Scotland for a number of reasons but the main reason is that X and Y wish to stay in Scotland. X loved living in Scotland. He had friends and went to school. He learned good English and developed good friends where they live. When X returned to Poland he hated it. He was bullied at school as he was not as good as the other students in terms of being able to read and write in Polish. He had no friends to speak of. He was very unhappy. He told her on many occasions he wanted to return to Scotland. He told her Scotland is his home. He did not cope with Polish schools. His mental health got worse and worse when they were in Poland. That was due to him hating school in Poland and having to deal with everything his dad was doing. He was there when the petitioner attacked her and destroyed their house. X told her that he felt very depressed in Poland. He told her he had thought about killing himself because he was so upset with his life in Poland. She paid for X to get therapy and support from a Polish psychologist, Magdalena Smolen. X still speaks to the psychologist whilst in Scotland.

7/2 and 7/5 of process are reports prepared by Ms Smolen [referred to below under heading "Productions"]. She is terrified that if X and Y are forced to return to Poland that X will harm himself. When people came from the court to take their passports X said to her that he would not go back to Poland and he would kill himself if he was told to. X said the thought of going back to Poland made him want to kill himself. X was crying and telling her he did not want to go anywhere. Y is also afraid that he won't see her again after the petitioner did not return him to her in August 2022. X and Y are brothers and are very close. Y will follow what X does. Y wants to stay in Scotland too. Y loves it here and loves his school. X loves school too.

[40] The first respondent stated that she is terrified that if she and X and Y return to Poland the petitioner will try to find her and hurt her. The petitioner has told her on lots of occasions that he will kill her. She has reported the petitioner to the police in Scotland.

7/10 and 7/11 of process are emails from June and July 2023 from the police that confirm their investigations following the report are ongoing. She does not want to return to Poland. She fears for her own safety but more than that she fears for the safety and happiness of X and Y. X and Y have a good life here and want to stay.

[41] The first respondent stated that if she and X and Y were returned to Poland they would have no place to stay. An application for a flat in Poland is processed for up to several years. Until then she would have a status as a homeless person and have to stay in a homeless shelter with shared bedroom and hard living conditions. Living with children in those conditions is practically impossible and she is aware that some children are removed from their mothers and placed in children's homes for periods of time. She cannot live with her parents. Her father lives in New Zealand. Her mother lives in a two bedroom house with her husband and her grandmother. Her grandmother receives dialysis every two days.

They cannot return to the rented property she had in Poland as this been rented to someone else. X and Y would return to their previous schools. X and Y were also stalked by the petitioner there. Y struggled in the Polish school. He was sad about leaving his friends in Scotland. 7/9 of process is a letter from one of Y's teachers in his school in Poland [referred to below under heading "Productions"].

[42] Finally, the first respondent stated that her own mental health has suffered greatly due to the petitioner and what he has done to her and the children. She regularly feels extremely depressed and anxious. She has nightmares about what the petitioner has done to her. She received medical assistance in Poland for her mental health. 7/3 of process is a medical certificate that confirms she has depressive syndrome [referred to below under heading "Productions"]. She has also been examined by Professor MacPherson, who has prepared a report, which is 7/6 of process [referred to below under heading "Productions"]. 7/8 of process is a letter from her lawyer in Poland, which sets out all the different cases involving the petitioner [referred to below under heading "Productions"].

Agnieszka Tynicz

[43] I paraphrase Ms Tynicz's affidavit. Ms Tynicz is Polish. She has worked "here" (by which I understand to mean Scotland) since 2015. She works on a self-employed basis assisting Polish people who have moved to Scotland with administrative tasks, such as completing tax returns. She speaks fluent English. Ms Tynicz first met the first respondent and petitioner in the summer of 2018. Initially, she provided some assistance with the petitioner's tax returns. Later she and the first respondent became friends. Ms Tynicz states that she saw the petitioner be aggressive and demanding towards the first respondent. The first respondent was afraid of the petitioner and was quiet in his company. She was

completely different when not in the petitioner's company. She witnessed only verbal abuse by the petitioner of the first respondent. She has witnessed the petitioner call the first respondent horrible names. She has seen the petitioner be aggressive towards the children. The children were scared of the petitioner and obeyed him. Since the first respondent and X and Y have returned to Scotland Ms Tynicz sees them every two or three days. X speaks good English and speaks to her in English. When she is at the first respondent's house she hears X speaking English to his friends whilst playing online video games. All of X's friends from his primary school went to the same high school so he knows them well. X is very sociable and has lots of friends. X was very upset when he found out that his dad wanted the court to make a decision about him returning to Poland. When she was discussing the court papers with the first respondent X came into the room and said in a raised voice that he did not want to go back to Poland. X said he was going to hurt himself. He was angry. X has made it very clear to Ms Tynicz that he does not want to go back to Poland. Ms Tynicz stated that Y is quite confused by the whole situation. Y has told her that he is loves living in Scotland. Y has lots of friends here and found new ones since returning to Scotland. When she visits the first respondent it is common to see Y playing football in the garden with five or six friends.

Waldamar Slowinski

[44] I paraphrase Mr Slowinski's affidavit. Mr Slowinski is 70 years old. He is Polish. He has lived in the UK since 2008. He knows the first respondent as he first knew and is friends with the first respondent's mother. They knew each other in Poland. In February 2020 he stated that he received a telephone call from the first respondent. She was very upset. She asked him to take her to the hospital or GP. When he picked her up the first respondent told

him that the petitioner had forced her to have sex with him, which had caused bleeding to her private parts. When he saw her in person the first respondent looked upset and scared. She was absolutely terrified and was crying. She decided not to disclose anything to the doctor. He saw the petitioner verbally abuse the first respondent and X and Y in their home. He has seen the petitioner call the first respondent a whore and a slut. He has seen the petitioner use these kind of words in front of the children. He knows X and Y well. He has known X since he was three and Y since he was born. He has a close relationship with them. He sees X and Y once a week minimum. Sometimes two or three times a week. He and his partner pick X and Y up from school on a Friday when the first respondent is working. X loves school. X has told him he has no friends in Poland. X has told him on a few occasions that he does not want to go back to Poland and that he does not like it there. X told him that he found school difficult there. Y is the same. Y is super happy to go to school. Y is keen to tell him about his classes. He gave Y a saxophone recently as Y is keen on playing music. He saw X and Y in Poland when he visited the first respondent's mother. X and Y are much more open and happy now they are living in Scotland.

The petitioner

[45] By statement dated 12 May 2023 the petitioner stated that he resides in Poland. He is currently unemployed and is seeking employment. An order of the Polish court requiring him to pay "excessive maintenance" led to him declaring himself personally insolvent. In relation to contact with X and Y the first respondent made it difficult for him to see them. He made a safeguard application to the Polish court, which was heard on 23 December 2023 [6/20 of process is a record of the court's decision and reasons and is discussed below under the heading "Productions"]. He has seen his sons only once after the hearing, on 8 January

2023). He has only spoken to them three times. During his most recent conversation with X and Y, on 9 April 2023, X told him that he and Y were being controlled whilst talking to him. At the hearing on 23 December 2023 the first respondent asked for consent to take the children to Scotland. Despite serious concerns he consented because the court had previously granted substitute consent and he suspected the court would grant her one at the hearing again. On 28 January 2023 the first respondent sent the petitioner a text that she and X and Y were unwell and would not return to Poland until they had recovered. On 27 February 2023 the first respondent informed X and Y's school that X and Y were in Scotland and that they would continue in that country. The first respondent did not inform the petitioner of the decision. In the academic years 2021/2022 and 2022/2023 X missed 387 and 280 classes, respectively. Y missed 387 classes in the academic year 2022/2023. He did not consent to the first respondent moving X and Y to Scotland and their permanent residence there.

[46] By affidavit dated 13 July 2023, having seen the answers for the first and fourth respondent (X) and the report of the Child Welfare Reporter, the petitioner stated that he entirely rejects the first respondent's allegations of abuse. He clarified that in relation to the first respondent's motion, no abuse happened. The first respondent's argument that she is afraid of him does not deserve to be taken into account. They do not live together. They do not have contact except for occasional meetings in connection with contact and text communication. He supported the first respondent's return to work a few months prior to their return to Poland. Given the first respondent's very limited earning capacity they agreed that he would work and the first respondent would look after their young children. He did not make his children homeless in Scotland or Poland. Their intention was to return to Poland.

[47] Following their return to Poland in July 2021 he returned to Scotland to fulfil his work commitments. When he returned to Poland in December the first respondent stated that she wanted a divorce by mutual consent. To avoid an escalation before Christmas 2021 he moved out of the house. In January 2022 the first respondent and her mother obstructed his visits to see X and Y. In January 2022 he asked the first respondent to move out of the house and forbade her mother from entering the house. Despite owning as many as four properties at that time the first respondent was not going to leave the house. He addressed her about this in an official letter. He was forced to add the children just as a formality on the advice of his attorney. In February 2022 he returned to Poland. The locks and alarm for his house had been changed. Accompanied by the police he entered the property by drilling the locks. The first respondent and her mother turned up without X and Y. He explicitly stated during the intervention that he wanted his children brought and wanted them to stay with him. The first respondent took the children to another property. The first respondent's mother lived in the property. The first respondent owned the property. The children did not know that.

[48] He does not believe the views expressed by X and Y are their own. They have never displayed such behaviour in his presence. He believes that they have been heavily influenced by the first respondent and her mother. At the time of the divorce the first respondent enrolled the children with a psychologist who he believes has been tasked with manipulating the children. Since engaging with the psychologist X's behaviour toward him has deteriorated. He believes that the first respondent is trying to alienate his children from him. He also believes that since the first respondent has engaged a psychologist his children have been given a pharmacological drug of an unknown name, the nature of which is unknown to him. X did not like school in Poland because he fell behind. While it was still

possible he did homework over the phone with X and they read the assigned reading together over in Polish. Not only did the first respondent not help X and Y with their studies she did not ensure that they attended classes regularly. In regard to paragraph 13 of the child welfare report he does not understand what could have embarrassed X. School was the only place where he could see his children. He finds X's claim that he felt like he was being interrogated incomprehensible. X was upset by the constant psychological pressure put on both X and Y by the first respondent, her mother and the psychologist. He notes that at paragraph 20 and at other places in the child welfare report X highlights that he is stressed and that the suicidal thoughts X talks about might again be the result of enormous psychological pressure put on a child who is unaware of the manipulation by third parties. The decision to return to Poland never evoked negative emotion in the children. On the contrary, they were looking forward to it. He has tried to maintain contact with X and Y but has not spoken to them since April 2023. He tries to call every two days to the Polish and English numbers but gets no reply. If X and Y were returned to Poland they could live with him. The children could go to one of five schools within 4-5 miles. Due to help offered by his family he would be able to see that they go to school and help them with their homework. They would be safe and happy there. The first respondent has access to sufficient funds in Poland so that the children would want for nothing. The first respondent could also secure employment.

[49] The children should be returned to Poland to allow them to have a relationship with their father. A contact order has been granted in Poland and the first respondent has not complied with it from the very beginning. He believes that X and Y should grow up in Poland. They have family there. They are Poles and when they reach the age of majority they will be able to decide on their own where they want to live.

[50] In relation to the criminal proceedings in Poland his attorney lodged an Objection to this under Article 506. After an Objection is lodged the penal order expires. It is not relevant to this case [7/4 of process is a translated copy of the summary judgment and I will discuss this below under the heading "Productions"]. In August 2022 he did have contact with Y. He did not abduct Y. The police were involved. Y wanted to stay with him. Y did not want to go back to his mum.

Child welfare report

[51] Given the allegations made in, and the nature of, these proceedings, I was conscious at the outset that it was important to appoint an experienced child welfare reporter. The reporter appointed is very experienced. Her report is thorough, objective and measured in answering the questions posed by the court. It is independent. I consider that I am entitled to place considerable weight on it. No submission was made to the contrary.

[52] In relation to X, the reporter met X at his school having arranged this meeting without contacting either party. X's discussions with the reporter elicited many of the same experiences, concerns and fears expressed by X in his affidavit. No material inconsistencies are evident. X confirmed to the reporter that he understood that this court is being asked to make an order for his return to Poland and not being asked to determine whether it was better for him to live with one parent or the other. The reporter reported that X objected to being returned to Poland. In summary X objected because Scotland is "home". When he was in Poland he was unhappy to the extent of having suicidal thoughts and attempting to hurt himself. He was unhappy at school where he was bullied and struggled with the work, having difficulties with reading and writing Polish. Whilst there, he wished to return to

Scotland. He kept in touch with his friends in Scotland. Now that he is back in Scotland, he is happy and is enjoying school – essentially, he has returned “home”.

[53] The reporter reported that X is 13 and is able to express his views clearly. He is able to give a “comprehensive rationale” for them. Given his age, he obviously has memories of his life in Scotland and then in Poland.

[54] Finally in relation to X, the reporter acknowledged that assessing the extent to which children’s views are independent of parental influence is not straightforward as there will always be some degree of influence – positive or negative, express or implied. However, in relation to X, the reporter expressed the opinion that X is clearly of an age and degree of maturity to be able to express his own views. The justification which he gave for not wishing to return to Poland was “objectively rational”. The reporter also noted that although he is angry and upset with his father, he did not rule out the possibility of an ongoing relationship with him which can occur if a child is subject to nefarious influence.

[55] In relation to Y, I was not provided with an affidavit from Y, so am more reliant on the Reporter for her investigation of any factual narrative. Again the reporter met Y at his school, when she spoke to him alone. Y is 7 and in primary 3. The reporter explained to Y that she was there to find out about what he thought about whether he should go back to Poland. Y said that school in Poland was “good” and that he had friends there. Y also confirmed that school in Scotland was also “good” and that he has made friends. Y said that if he had to go back to Poland he would be “a little sad” and when this was repeated back to him he corrected “sad”. Y said “I love Scotland – I love it so much.” His tone was quite emphatic. Y said that his friends in Scotland were “so good”, which he said with emphasis. Y said that he thought he would like to see his dad for “two days”. Y wanted his dad to come to visit him in Scotland, maybe for a weekend. When asked about X, Y said that he

loved his family, by which he meant both of his parents and X. Y said that his mum did not want to go back to Poland as “she wants to be safe here”. Y said that X wanted to stay in Scotland because “he doesn’t want any trouble. He wants to be safe like mum.” Y repeated he wanted to stay in Scotland.

[56] The reporter reported that Y objects to returning to Poland. This is because he loves Scotland and he has good friends here. The Reporter reported that Y was of an age where he can express a view. The Reporter was less confident that Y could understand the particular nuance of a Hague Convention application – in the sense of a return to the jurisdiction and not a determination about who he wished to live with but nonetheless, Y did express more than once that he did not wish to go back to Poland and that he loved Scotland.

[57] Finally in relation to Y, the Reporter reported that, whilst objecting to a return to Poland, Y made positive comments about both parents and his schools in both places. It did not seem to the Reporter that Y was expressing a view which was not his own.

Productions

[58] 7/1 of process appears to be a formal written request that the first respondent “and your children” vacate the residential building by 31 January 2023. It appears to provide independent support for the first respondent’s affidavit.

[59] 7/2 of process appears to be a psychological opinion dated 07 December 2022 prepared by Magdalena Smolen. The opinion was therefore prepared before the first respondent’s return to Scotland. It records that since 17 January 2022 X had been receiving ongoing psychological support for “adaption difficulties which emerged after moving to Poland, lack of acceptance of the breakup of the Family and suicidal thoughts due to the divorce of his parents.” The opinion records a change of school and residency as a result of

a need for a sense of security and a need to isolate X from his father. That X still thinks of Scotland, of his friends there with whom he stays in constant contact. That X identifies himself with Scotland and that he considers that country his own. That X worries that he already has educational deficiencies compared to the Scottish school. That X does not accept Poland, that he does not remember Poland from the past and that it was in Scotland he grew up. That the situation with X's father does not help him, currently X expresses no desire to stay in contact with his father. The opinion records that X is unable to think in a positive way about his father. This is not imposed by his mother but by his father's behaviour. The opinion records that Y is also receiving psychological support. Y is afraid of meeting his father because he is not sure if he will return to his mom thereafter. His mother is an important person to him. He is emotionally bound to her. Taking into consideration Y's age, he still strongly needs his mother.

[60] 7/5 of process is a further psychological opinion prepared by Magdalena Smolen, dated 10 July 2023. The opinion confirms ongoing psychological support for both X and Y. The opinion records that on returning to Scotland X's suicidal thoughts had disappeared, that he was emotionally stable and that he was active in peer relationships and at school. The opinion however also records that "currently" X is again having suicidal thoughts and lowered mood due to his father's current attitude. X does not want to keep in touch with his father. X worries that he will be returned to Poland. X identifies himself as Scottish, it is where he has friends and a school that meets his needs. The opinion records that the petitioner has never engaged with Ms Smolen and that he does not understand X's needs and does not listen to X. Ms Smolen expresses the opinion that:

"[X] has no chance to adapt in Poland. I have a comparison of how he functioned here and how he began to function in Scotland. It is only the possibility of staying in

Scotland that would give him the opportunity of attaining the condition of mental health.”

The opinion confirms that Y remains under psychological support. He is calm, strongly communicative, orientated in life and satisfied with the current quality of his life. Since he has been in Scotland he has calmed down strongly. He would not like to go back to Poland. He is very close to X, who has always been a role model for him. He cannot imagine life without X. He has a strong emotional relationship with mom. “Lately” he has picked up on X’s drop in mood and Y has become emotionally withdrawn himself.

[61] 7/3 of process appears to be a medical certificate in relation to the first respondent dated 23 March 2022. It records a diagnosis of “depressive syndrome: F32”. It records that the first respondent first reported to the office on 04 January 2022 with symptoms of depression related to “a very difficult, highly stressful family situation, the cause of which is the patient’s husband.” The certificate records that “the patient and her children were thrown out of the house by her husband.”

[62] 7/4 of process is summary judgment in relation to the criminal proceedings concerning the petitioner. It is dated 13 January 2023. I was not taken through this but the petitioner makes reference to the notice of Objection lodged by him, the consequences of that Objection and the subsequent relevance to the proceedings before me. Accordingly, it is appropriate that I consider this production. The judgment records that the petitioner was found guilty of an offence (paraphrasing) whereby he made several hand gestures towards the first respondent’s mother and instructed X to make similar hand gestures. As recorded above, both the first respondent and X gave evidence at trial. On “page 3 of 4” the Judgment makes reference to “An objection may be lodged against the summary judgment”. I presume this is what the petitioner is referring to in his statement. On “page 4 of 4” the

judgment states that “If an objection is lodged, the summary judgment shall become null and void and the case shall be heard under the general rules.” Thus it would appear that following the petitioner’s Objection the summary judgment might have become null and void but the case shall still be heard. In addition, whilst the Objection may reduce the summary judgment, it remains the case that, as per the relevant affidavits, both the first respondent and X gave evidence at trial about an incident involving the petitioner and X.

[63] 7/6 of process is a clinical psychological report prepared by Professor Gary MacPherson dated 10 July 2023 concerning the first respondent. Professor MacPherson records the history taken from the first respondent and makes reference to statements and a “Report from Dr Renata Pokusa-Rzeczyzcka” at footnote 14, which I have interpreted as 7/3 of process. Professor MacPherson offers the opinion that the first respondent suffers from a Major Depressive Episode and an Adjustment Disorder and that her symptoms are related to the behaviour of her husband towards her and the children. Professor MacPherson acknowledges that a causal link between the alleged behaviours and the diagnosed conditions would require the court to accept as established the alleged behaviours.

[64] 7/8 of process appears to be a document dated 22 May 2022 prepared by Lukasz Barszcz, an attorney acting for the first respondent, listing proceedings involving the petitioner. These include criminal proceedings concerning “family abuse”, “failure to meet maintenance obligations and preventing the execution of a court decision and civil proceedings concerning payment of a sum of money. Also listed are proceedings against the petitioner concerning members of the first respondent’s family, including criminal proceedings for “theft”, “making false accusations”, “persistent harassment” and “preventing execution of a court order” and three civil proceedings in relation to “payment of the amount of money”.

[65] 7/9 of process as an opinion of Lucyna Szerszen, a tutor of Y's from his school in Poland. The opinion is expressed in the current tense but is dated 05 June 2023 when Y was back in Scotland. The opinion records that X and Y did not start school until 08 September 2022 due the fact the petitioner did not consent to X and Y starting school education and that it was not until the first respondent applied to the court for an appropriate order that X and Y could proceed with their education. The opinion records that when Y first attended the first impression was of a boy lost. He was sad and did not smile much. Y explained that he was Scottish and he missed his colleagues from Scotland. The opinion records that the first respondent did all she could not to make Y feel bad. She made sure he had done his homework and was well prepared each day. She paid for Y to have a hot meal every day. She paid for Y to participate in school trips. Y constantly compared the school with the one in Scotland. Y said that his home was in Scotland. Y expressed no desire to contact his father, he still remembered the incident from August 2022. The opinion records that the first respondent is an important person for Y, he feels safe and stable in her presence, he has a strong emotional bond with her. The opinion records that Y was a good student, he tried to keep up with his peers, and he was kind, cultured, polite and friendly.

[66] 7/10 and 7/11 are emails between agents acting for the first respondent and Detective Lucy Mason. These record that there were, as at 15 June 2023, ongoing enquiries relating to allegations of domestic violence/abuse by the first respondent against the petitioner.

[67] 8/1 and 8/2 of process are, respectively, a short email from a member of staff at the school currently attended by X and a copy of a "tracking update" from the school for X. The tracking update gives an accurate indication of a pupil's current progress, including attendance, behaviour and engagement. The email records that the tracking update is "very

positive and demonstrates that [X] has settled well". The email also states that "[X] mentioned when discussing the court case that [he] wished to live in Scotland." The tracking update appears to indicate that with one minor exception for maths homework, in 30 out of 31 rankings, X ranks the highest of three possible ranks indicating there are "no concerns ... that are impacting on ability to achieve full potential".

[68] Finally, 6/20 of process is a record of a Decision of the Polish court concerning an application by the petitioner for contact between him and X and Y. Some emphasis was placed on the terms of this document on behalf of the petitioner. Accordingly, it is appropriate to consider it in a little more detail. The petitioner's application for "safeguard contact" was made in the action brought by the first respondent. The application sought contact (1) every first, third and fifth weekend of the month, from the end of school on Friday to 7pm on the Sunday (2) every Wednesday from the end of school to 8pm (3) during Christmas and (4) by telephone every day for at least 30 minutes. In a passage heavily relied upon on behalf of the petitioner the Decision states:

"In her reply to the Application, the Pursuer initially moved to dismiss it (p. 495), but during a hearing on 23/12/2022 she consented to the arrangements for the contact between the Defender and the children as proposed by the Court (p. 516)".

[69] Immediately afterwards the Decision states:

"The Pursuer applied to the Court for a safeguard by the Court issuing a substitute declaration of intent consenting to the trip abroad by the children during school break (p. 487). By the letter dated 20/12/2022, the Defender consented for the children to be able to go abroad during their school break (p. 513)."

[70] In making an order for contact for two hours every second Sunday, the court stated:

"In the present matter, the factual situation of the children of the Parties is very difficult which is due to deeply divided parents and involving the children in the divorce-related conflict. The father kept his son [Y] at his address for the period of about 3 weeks in August this year, not having agreed that with the mother which resulted in reporting the matter to the police and had an adverse effect on the children's emotional wellbeing. The father keeps stalking the children at school in

[place] which is also a very taxing experience for them. The minor children of the Parties remain under care of a psychologist. Minor [X] displays suicidal thoughts and somatic symptoms – he recently vomited before going to school, he did not want to go to school because he was of afraid of the father who would stalk him at school. (Pursuer’s statement page 517, psychology report pp. 499-500).

In the present factual situation, having taken parental conduct and deep divide between the spouses into consideration, it would be contrary to the welfare of the children to regulate the contact of the Defender with his minor sons to the broad extent applied for by the Defender in his application for a safeguard.

Equally, having taken into consideration the principle that the father’s contact with his sons is both his right and responsibility and the presence of the father is essential to build a relationship between them, the Court found that it is reasonable to set the contact of the father with his sons to take place every second Sunday of the month for 2 hours in a place in [place] that is attractive to the children without the mother being present.”

Submissions

[71] As noted above, standing the concessions on behalf of the first and fourth respondents that (i) on 23 January 2023 the X and Y were habitually resident in Poland, (ii) the petitioner has custody rights in respect of X and Y under the law of Poland and (iii) as at 23 January 2023, the petitioner was exercising his rights in respect of X and Y, I invited submissions first from the first and fourth respondents, giving the petitioner the opportunity to respond to the submissions made. It is convenient to begin with the submission made on behalf of the fourth respondent, X.

Ms Trainer on behalf of X

[72] Ms Trainer, on behalf of X, relied on both a grave risk and an objection defence. In relation to the objection defence, Ms Trainer submitted that X strongly objects to being returned to Poland. He is 13 years old and following her discussions with him, the child welfare reporter considered him to be clearly of an age and maturity that he can express his

own views. X spoke in stark terms about the differences between his life in Poland and his life in Scotland and is clear as to the reasons why he considers Scotland to be his home.

Ms Trainer relied on the child welfare report where it records that X was “able to express his views clearly” and was “able to give a comprehensive rationale for them”. The child welfare reporter was of the view that X’s views were his own. The instructing of his own solicitor and counsel to enter appearance in these proceedings was an indication of the strength and independence of X’s views.

[73] X identifies as being Scottish. The case is unusual insofar as the subject children have spent the majority of their childhoods in Scotland. X, having previously resided in Scotland for a period of 8 years from the age of 3, then in Poland for a period of 18 months and now back in Scotland for a period of 6 months, has settled back into the life and routine he previously enjoyed. He found school challenging in Poland where he struggled to read and write in Polish. He didn’t have friends at school in Poland and was bullied. He felt his religious views were not aligned with Polish culture. As per the Petitioner’s own statement, X was performing badly and had poor attendance at school in Poland. The position in Scotland is in direct contrast. X is thriving at school. His school report describes him as “an asset to his peers”, “takes his studies seriously and wants to do well”, “an excellent attitude to his work” and “a hardworking and polite pupil”.

[74] X’s mental health was adversely affected by the difficulties he faced with the negative educational and social consequences of school and the conduct of the Petitioner whilst in Poland. X has received psychological support since 17 January 2022 due to difficulties adapting to his move to Poland and the breakup of his parents’ marriage. Following his return to Scotland, X no longer had suicidal thoughts and his mental health stabilised. Following the raising of these proceedings, however, X’s mental health has

deteriorated. He perceives this to be as a result of the actions of the Petitioner in seeking his return to Poland. He considers a return to Poland would mean his mental health would again deteriorate. On the basis she is able to compare X's presentation in both Poland and Scotland, X's psychologist is of the view that X's mental health will only be protected if he remains in Scotland.

[75] Ms Trainer submitted that to return X to Poland would significantly disrupt his education and risk further deterioration of his mental health. Such a return is not in X's interests nor does it promote his general welfare. A child-centric approach in this case requires the court to refuse to order X's return.

[76] In relation to a grave risk defence, Ms Trainer submitted it is clear from the terms of the psychological opinions lodged on behalf of X (7/2 and 7/5 of process) that X's life in Poland and the anxiety about having to return to Poland have caused X psychological harm. Whilst X was engaging with psychological sessions in Poland, his psychologist reported that "he does not accept Poland, and declares that if he will be in Poland when he grows up, he will go to Scotland anyway" (7/2). Since returning to Scotland, his psychologist comments that "he worries that he will have to return to Poland because of his father."

[77] Whilst the Petitioner denies the abusive conduct alleged by X, independent evidence exists to support the proposition that X's subjective perception of events has led to a decline in his mental health. In X's affidavit he narrates that he has had thoughts of suicide as a result of both the conduct of the Petitioner and negative experiences with school in Poland. His mental health improved when he returned to Scotland and this is supported by his psychologist who noted that, having been able to compare X's state of mental health in both countries, she is of the opinion that "[X] has no chance to adapt in Poland [...] it is only the

possibility of staying in Scotland that would give him an opportunity of attaining the condition of mental health.”

[78] It is of note that within the petitioner’s supplementary affidavit he indicates “if they were to be returned to Poland, the boys could live with me or they could live with their mother in one of her four properties”. This, Ms Trainer submitted, indicates a fundamental lack of understanding by the petitioner in relation to (i) the strength of views held by X and (ii) the serious mental health difficulties experienced X, partly caused by X’s perception of the conduct of the petitioner. Ms Trainer submitted that such a statement indicates a risk that the petitioner may attempt to seek residence of the children, thereby failing to respect the views and evidence presented by X in these proceedings and exposing him to a risk of further psychological harm.

[79] X also holds a clear and unequivocal position in relation to the return of his younger brother, Y. At paragraph 25 of his affidavit, X makes clear his view is (i) a return order should not be granted in relation to him (X) and (ii) to grant a return order only in relation to Y would directly and significantly cause X psychological harm. Thus, Ms Trainer submits, the defence is made out in relation to both siblings.

Mr Laing on behalf of the first respondent

[80] On behalf of the first respondent, Mr Laing made submissions in relation to both grave risk and objection defences. In accordance with the approach set out in *In re E* and *AD v SD*, Mr Laing identified a number of allegations, which he submitted would, if true, either directly or indirectly, as a consequence of the effect on the first respondent, give rise to a grave risk of physical or psychological harm to X and Y, or which would place X and Y in an intolerable situation. These allegations included (i) sexual abuse of the first respondent,

(ii) physical abuse of the first respondent, both pre and post separation of the petitioner and first respondent, (iii) verbal abuse of the first respondent pre-separation, (iv) controlling behaviour of the first respondent by the petitioner, (v) the eviction of the first respondent and X and Y in December 2001, (vi) physical abuse of X and Y, (vii) verbal abuse of X, (viii) the petitioner stalking X and Y at their schools, (ix) the petitioner involving X in criminal conduct and (x) abuse of the first respondent's mother.

[81] Mr Laing made reference to X's mental health, including (i) the adverse effects from X's schooling in Poland, (ii) the development of suicidal thoughts in Poland, their remission when back in Scotland and their return arising from a possible return to Poland and (iii) the behaviour of the petitioner towards X. Mr Laing also made reference to the first respondent's mental health, including (i) her development of a depressive syndrome from around January 2022, (ii) her diagnosis of a major depressive episode and adjustment disorder by Professor MacPherson and (iii) Professor MacPherson's opinion that her symptoms were related to the petitioner's behaviour towards her and X and Y. In light of these factors, Mr Laing submitted that a return to Poland would have adverse effects on the first respondent and, given that the first respondent is X and Y's primary carer, this would in turn have adverse consequences for X and Y. Mr Laing also made reference to the petitioner's apparent absence of insight into the emotional and psychological impact on X and Y of his behaviour, including in relation to his attendance at schools in Poland and the suggestion by the petitioner that X and Y could live with him on a return to Poland notwithstanding the clear views expressed by X and Y about their seeing the petitioner.

[82] In light of the alleged behaviour and its reported consequences, Mr Laing submitted that the nature and severity of the risk to X and Y suffering physical or psychological harm or being placed in an intolerable situation was high. The allegations were wide ranging.

There were multiple sources of evidence that form the basis of and support the allegations.

The conduct alleged took place over a number of years. The alleged conduct took place both before and after the petitioner and first respondent's separation and the petitioner's behaviour demonstrated a wilful disregard for the emotional wellbeing of X and the first respondent.

[83] Turning to the second stage of the assessment and whether there were effective measures available in Poland sufficient to protect X and Y, Mr Laing submitted that whilst there was no reason to suspect Poland might not be a country where orders akin to non-harassment or non-molestation orders could be made, given (i) the causes for and nature of X's and the first respondent's mental health, there were no legal orders that could improve their respective mental health conditions and (ii) in any event, the petitioner's behaviour indicated that he would be incapable or unwilling to adhere to the terms of any such order. In relation to this later point, Mr Laing relied upon (i) the petitioner's failure to adhere to the direction of the Polish court by subsequently involving X and Y in discussions involving divorce-related conflict and asking about the first respondent, (ii) engaging in behaviour that would constitute a criminal offence, (iii) retaining Y contrary to agreement reached with the first respondent and (iv) the sexual abuse of the first respondent, which demonstrated a lack of respect for boundaries.

[84] Finally, under grave risk, Mr Laing submitted that if it was suggested an order might be made to return Y alone, that would create an intolerable situation for both X and Y in two ways. First, one of the children would inevitably lose the first respondent as their primary carer when the first respondent had been their primary carer throughout their lives. Second, X and Y, as siblings, would be forced to live apart where they had, in the main, lived their entire lives together.

[85] In relation to the objection defence, although Mr Laing addressed the court before Ms Trainer, Mr Laing's submission on the objection defence covered essentially the same ground as Ms Trainer's and I will not repeat what is set out above. In relation to X, Mr Laing emphasised (i) X's cogency of reasoning for and the strength of his objection to return, (ii) the strength of X's desire to remain in Scotland, (iii) the period for which X had held his views, (iv) X's friendships and the marked contrast between the positions in Scotland and Poland and (v) the contrast between X's respective educations in Scotland and Poland. In relation to Y, Mr Laing emphasised (i) Y's reasoning for objecting to being returned to Poland, (ii) the strength of Y's objection, (iii) the period Y had held his views, and (iv) Y's friendships in Scotland. Finally, in relation to both X and Y, Mr Laing submitted that (i) the court could conclude that the views expressed by X and Y were their own, (ii) X and Y, perhaps more so X, understood that any return was to Poland as opposed to the care of the petitioner and (iii) the extent of X and Y's integration into Scottish education, culture and society.

Mr McAlpine on behalf of the petitioner

[86] Given the concessions by Mr Laing and Ms Trainer and the consequence that under Article 3 it was established that X and Y had been wrongfully retained, I invited Mr McAlpine to respond to the submissions of Mr Laing and Ms Trainer. Mr McAlpine had lodged an outline written submission, which he adopted.

[87] Mr McAlpine emphasised what he described as Convention considerations, citing deterrence of parents taking the law into their own hands or pre-empting disputes and the prompt return of children to their home country so that disputes, particularly factual disputes, would be resolved there. Mr McAlpine submitted that this court should, given the

nature of the proceedings, be slow to make any findings in fact where allegations were disputed and there had been no opportunity for cross-examination. Mr McAlpine submitted that whilst there might be a number of allegations made, the relevant question was whether any allegations, if true, supported a conclusion that there was a prospective, grave risk of X and Y being exposed to physical or psychological harm or otherwise being placed in an intolerable situation, which they did not. In any event, even if the court was to conclude that the allegations did lead to a conclusion that there was a prospective, grave risk of X and Y being exposed to physical or psychological harm or otherwise being placed in an intolerable situation, there were a number of factors in support of the proposition that any risk could be ameliorated, including (i) as per the order of 23 December 2023 the first respondent agreed to the petitioner having contact with X and Y, (ii) that the parties do not reside together, (iii) there was no evidence that the Polish courts and authorities could not protect X and Y and, as the authorities made clear, absent any evidence to the contrary, the court should proceed on the basis that any risks could be adequately addressed by the Polish court and authorities, (iv) the first respondent had ample accommodation available to her in Poland, (v) the first respondent had the financial means to support herself in Poland and (vi) the Polish court granted the current contact order on 23 December 2022 with the consent of the first respondent and the first respondent could return to the Polish courts to seek any variation of that order.

[88] In relation to the objection defence, Mr McAlpine accepted that (i) X and Y objected to return and (ii) were of an age and maturity such that it was appropriate for their respective views to be taken into consideration. However Mr McAlpine submitted that the court should not exercise its discretion in favour of a refusal to order return of X and Y to Poland. In relation to X, whilst X's stated views were strong, the petitioner asserted that

those views were not authentically his own and that this court could not properly resolve the dispute in these summary proceedings. The first respondent's agreement as recorded in the decision of the Polish court on 23 December 2023 coupled with what the petitioner described as multiple false allegations gave reason for the court to be cautious about whether X's views were entirely his own. In relation to Y, the strength of any view expressed was not sufficient to justify a refusal to order return of Y to Poland. Mr McAlpine submitted that, in any event, the views of X and Y were not determinative. In this case the court should give substantial weight to Convention considerations. There were ongoing proceedings in Poland. The first respondent's agreement to the petitioner's contact with X and Y as recorded in the Polish court's decision of 23 December 2023 demonstrated that both parents wanted (i) the children to reside in Poland and (ii) for the children to have regular contact with the petitioner and any views expressed by X and Y should not now cause the court to refuse to order their return to Poland. A return to Poland would allow the first respondent to seek any variation to the order of 23 December 2023 and the Polish court could consider any such application in light of tested evidence and any views expressed by the children at that stage to the Polish court.

Decision and reasons

[89] I was provided by way of affidavit and productions a considerable amount of material. In reaching my decision I have had regard to all of this material. I have taken out of these affidavits and productions that which I consider relevant to my decision and I have set this out above. Accordingly, in giving my reasons for my decision I have not considered it necessary to repeat the evidence *verbatim*. Having considered the material before me, remaining mindful of the directions of more senior courts about how I must approach that

material, and the submissions of counsel, I decline to make an order to return either X or Y to Poland.

The objection defence

[90] Whilst it seemed to me that Mr McAlpine ultimately recognised this, on the basis of the evidence before me I accept that both X and Y object to being returned to Poland and that they are of an age and maturity at which it is appropriate to take account of their respective views. The child welfare reporter explored the question of objection thoroughly and separately with X and Y and, subject to her clarification regarding the context in which she used the word, records that both children object to being returned to Poland. The child welfare reporter also concluded, and I accept, that both X and Y were of an age and maturity to express such a view. The child welfare reporter concluded that X was able to give a “comprehensive rationale” for his objection. That X has instructed his own agents and counsel – or at least that agents and counsel have satisfied themselves that they can properly accept instructions from X – is also a factor illustrative of X’s maturity. Although the child welfare reporter was less confident that Y understood the particular nuance of a Hague Convention application in the sense of return to the jurisdiction rather than a determination about who he wished to live with, Y nevertheless did express more than once that he did not wish to go back to Poland and that he loved Scotland.

[91] I do not accept the submission made on behalf of the petitioner that the views expressed by X and Y are not their own, or, that under reference to the decision of the Polish court dated 23 December 2023 (to which I shall return) and what the petitioner described as multiple false allegations by the first respondent and her mother, I should be cautious that X’s views are not entirely his own. The petitioner also states that X told him that X could not

say much to him during a telephone call as he was being monitored by his mother. X rejects that claim. As the child welfare reporter observes, assessing the extent to which children's views are independent of parental influence is not straightforward as there will always be some degree of influence – positive or negative, express or implied, but the persistence and consistency with which and to whom X has expressed his objection strongly suggests that X's views are his own.

[92] Having accepted that X and Y do object to being returned to Poland and are both of an age and maturity at which it is appropriate for me to take account of their views, the question arises as to whether I should exercise my discretion to refuse to order X's and/or Y's return. That discretion is "at large" and in exercising my discretion I should take a "child-centric approach" "with the child's interest and general welfare at the forefront". In weighing the relevant factors in that way, in the exercise of my discretion, I am clear that I should refuse to order either X or Y's return to Poland.

[93] I acknowledge that the Convention requires the swift return of children to the jurisdiction recognised as the proper place to make long terms decisions about their welfare, including residence, that the Convention is born out of a comity between the contracting states and a mutual respect for one another's judicial processes and that the Convention acts as a deterrence against abduction in the first place. Mr McAlpine submitted that I should attach substantial weight to these Convention considerations in this case. The wrongful retention, he submitted, was as blatant as one might get. I accept the relevance of these considerations and I do weigh them in the balance. I recognise that the petitioner appears to have acted swiftly in reliance of the Convention in seeking return. I note from 6/12 of process the petitioner signed the Article 28 authorisation on 18 April 2023 having previously

reported to the police and sought court orders. It is however important to recognise, as

Lady Hale made clear at paragraph 44 of *In re M*:

“As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously.”

[94] At paragraph 43 Lady Hale rejected the proposition that Convention objectives “should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.” And at paragraph 48 her Ladyship noted that “The Convention itself contains a simple, sensible and carefully thought out balance between various considerations.” In addition, in *W v A*, at para [9] (cited above), Lord Malcolm stated that:

“A child-centric approach is required, with her interests and general welfare at the forefront. The focus is not on the moral blameworthiness of the abducting parent, nor on notions of deterrence.”

In light of these dicta, it seems to me axiomatic that if a child-centric approach with the child’s interest and general welfare at the forefront suggests that the child should not be returned, the “Convention considerations” must yield.

[95] In relation to X, the evidence suggests that X has held a consistent, reasoned and strong view that he does not want to live in Poland and does want to live in Scotland. He has spent the majority of his childhood in Scotland and especially insofar as that part of his childhood where one interacts with others outside of one’s direct family, for example at school. As a consequence, and by his own expression, X feels, and I accept is likely to be, more integrated into the Scottish community. X identifies as being Scottish. X cites the consequences for his own mental health, his education, his friendships, his religious beliefs

and the state of his relationship with the petitioner as factors relevant to his objection to a return to Poland. X struggled academically at school in Poland due to a poorer understanding of the language. He was isolated and bullied at school. By contrast, correspondence from X's current school makes clear that X has settled well and is making good progress across a wide range of subjects. He has taken up again with the friendship group he developed in primary school and with whom he kept in touch whilst in Poland. Most concerning is the contrast and progress of X's mental health. On returning to Poland X's mental health significantly deteriorated to the point where he appears to have formed the settled intention to take his own life before he "talked myself out of it". On return to Scotland X's mental health improved. That remained the case until the institution of these proceedings, following which X's mental health has deteriorated and X again suffers from suicidal thoughts. That concern with regard to X's mental health is substantially supported by the opinions of the psychologist Magdalena Smolen who, for the reasons set out in her opinions, concluded:

"I have a comparison of how he functioned here and how he began to function in Scotland. It is only the possibility of staying in Scotland that would give him the opportunity of attaining the condition of mental health."

It is clear from the terms of X's affidavit that, for the reasons given by him, his relationship with the petitioner has broken down, that he is fearful of the petitioner and that, at least currently, he does not want to see the petitioner. Further support for X's rationale for objecting to a return to Poland can be found in the affidavits of Agnieszka Tynicz, Waldamar Slowinski and to some extent the petitioner himself. X's instruction of his own agents and counsel not only supports an inference about X's maturity, it is also eloquent of the strength of X's objection and his desire for that objection to be heard. In these

circumstances, I am very clear that a child-centric approach with the child's interest and general welfare at the forefront means that I should refuse the order X's return to Poland.

[96] Turning to Y, the contrast between Y's life in Scotland and Poland is more subtle.

Y was born in Scotland and has also spent the majority of his childhood in Scotland, moving to Poland aged 5 and returning to Scotland age 7. I have no affidavit prepared on behalf of Y and am, consequently, more reliant on the child welfare report, which I have discussed above. The opinion of Y's teacher from Poland (7/9 of process) suggests that from at least September 2022 Y has expressed the view that he considers himself to be Scottish, that he missed his friends from Scotland and that he had concerns about his school in Poland compared to Scotland. The affidavits of Agnieszka Tynicz and Waldamar Slowinski give further support to the conclusion that Y is happy and thriving in Scotland. Given my clear opinion not to order X's return to Poland, a further factor arises in relation to Y. An order to return Y would have one of two possible consequences. It would either force the return of X if both X and Y were to remain in the care of their mother, or it would deprive either X or Y of the care of their mother should one child stay in Scotland and one return to Poland. The latter would also separate the siblings. There is no evidence before me about whether X could remain in Scotland in the absence of the first respondent. In any event, I do not consider it to be in the interest or general welfare of either X or Y to be separated from their mother or their sibling. I note the petitioner's suggestion that X and Y could reside with him in Poland. In light of the evidence discussed above, that suggestion itself suggests a significant lack of insight into the needs of both X and Y and would not be in either X or Y's interest or general welfare. The first respondent has been both X and Y's primary carer for their whole lives, a significant proportion of which has been without the presence of the

petitioner. Accordingly, taking a child-centric approach with the Y's interest and general welfare at the forefront I refuse the order Y's return to Poland.

The grave risk defence

[97] Standing my decision not to order return of X or Y on the basis of the objection defence, it is not strictly necessary for me to consider the grave risk defence advanced on behalf of X or the first respondent. However, out of deference to the submissions made and, lest I am wrong to refuse to return X and Y on the basis of their respective objections, I also consider whether I should refuse to return either X or Y on the basis that to do so would expose them to physical or psychological harm or otherwise place them in an intolerable situation. Inevitably there is an overlap in the consideration of and reliance on the evidence relevant to my consideration of the objection defence.

[98] I am conscious here of Mr McAlpine's submission concerning allegations made by the first respondent and X, an absence of ability to test them in cross-examination and the making of findings of fact. I acknowledge the proper approach set out in *D v D* 2002 SC 33 that where there are competing allegations of facts set out in the parties' affidavits, with no independent evidence to support a conclusion one way or the other, no firm conclusion should be made. In this case, that concern is, to a significant extent, ameliorated by the approach set out in *In re E* and reiterated in *AD v SD* discussed above, namely that where allegations of domestic abuse are made, the proper approach is to first ask whether, if the dispute allegations were true, would there be a grave risk that, if returned, the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. Accordingly, the proper approach does not require me to reach firm conclusions or make findings of fact, and I do not so.

[99] In relation to X, I have discussed above many of the factors that are also relevant to a decision regarding grave risk. On the basis of those factors alone I consider that to return X to Poland would result in him being placed at grave risk of being exposed to physical or psychological harm or otherwise being placed in an intolerable situation, as defined in *In re E*. The evidence regarding X's mental health clearly supports significant concerns regarding X's mental health. The possible deterioration of X's mental health and the spectre of suicide are self-evidently significant factors insofar as psychological harm or being placed in an intolerable situation are concerned. X's relative difficulties with schooling, the contrast of X's friendships and X's identity with Scottish social and cultural life are all relevant to psychological harm and being placed in an intolerable situation. These factors alone are sufficient to establish a grave risk of X being exposed to physical or psychological harm or otherwise placed in an intolerable situation.

[100] Likewise, the factors discussed above in relation to Y's objection to return are also relevant to grave risk. Again, on the basis of those factors alone, I consider that to return Y to Poland would result in Y being placed at grave risk of being exposed to physical or psychological harm or otherwise placed in an intolerable situation. Here, the possible separation of Y from either his mother and/or X, would clearly place him at grave risk of being placed in an intolerable situation.

[101] In addition to the above, in relation to both X and Y, there are also the possible consequences for the first respondent if she were to return to Poland insofar as those consequences might affect X and Y. I have addressed above the possibility of X and Y returning to Poland into care of the petitioner, notionally allowing the first respondent to remain in Scotland. For the reasons given above, I rejected that possibility. If the allegations of the first respondent are true, two concerns arise. Firstly, as was recognised by Lady Hale

in *In re E* at paragraph 34, among those things that it is not reasonable to expect a child to tolerate can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Secondly, the conclusions of Professor MacPherson regarding the causal link between the alleged behaviour of the petitioner and the first respondent's diagnosed major depressive disorder and adjustment disorder are brought into play. To have X and Y living with and cared for by the first respondent in circumstances where her mental health is significantly, adversely effected gives rise to a grave risk of placing X and Y in an intolerable situation.

[102] Finally, as I indicated above, I return to Mr McAlpine's reliance on inferences about the welfare of X and Y on return that can be drawn from the decision of Polish court as set out in 6/20 of process. Mr McAlpine submitted that the first respondent's recorded "consent" to the arrangements for contact between the petitioner and X and Y could only be reasonably interpreted as indicating that both the petitioner and the first respondent wanted (i) the children to reside in Poland and (ii) for the children to both have direct contact regularly with the petitioner. I do not accept that the suggested interpretation follows as submitted. Looking at the court's decision as a whole, as is appropriate in order to have a proper understanding of its import, the petitioner's original application was for contact with X and Y to include (i) every first, third and fifth weekend of the month, from the time the children finish their classes at school on a Friday until 7.00pm on Sunday, (ii) every Wednesday from the time the children finish their classes at school until 8.00pm and (iii) in the form of telephone calls with the children every day for at least 30 minutes. The first respondent initially sought to have the petitioner's application dismissed. However, during the hearing, the first respondent "consented to the arrangements ... proposed by the court." Those arrangements were very significantly watered down from the arrangements sought.

The court, in explaining the rationale for that “proposal”, narrated a number of circumstances it considered relevant, including the petitioner’s retention of Y in the absence of agreement resulting in the reporting to the police and adverse effect on Y, the petitioner “stalking the children at school” and that X and Y remain under the care of a psychologist. Against that background the court concluded “it would be contrary to the welfare of the children to regulate the contact of the Defender with his minor sons to the broad extent applied for by the Defender in his application”. However, the court also went on to conclude:

“having taken into consideration the principle that the father’s contact with his sons is both his right and responsibility and the presence of the father is essential to build a relationship between them, the Court found that it is reasonable to set the contact of the father with his sons to take place every second Sunday of the month for 2 hours”.

To me, as a judge who is required to make such decisions, the clear inference from the decision of the court is that the first respondent, faced with a court that was uninclined to reduce the petitioner’s contact to nil, consented to the court’s minimal proposals. That, it seems to me, might well have been a wise decision by the first respondent in the circumstances. That a party might agree to a proposal, which they do not necessarily want, is borne out by the petitioner’s own statement where he stated in respect of what I assume to be the first respondent’s desire to visit Scotland in January 2023 when she did:

“On 23 December 2022, [the first respondent] also asked for consent to take the children for a trip to Scotland during winter school break 2023. Despite serious concerns, I consented because the Court had previously granted her substitute consent and I suspected they would grant her one at the hearing again.”

[103] Having reached the conclusion that there is a grave risk that X and Y’s return would expose them to physical or psychological harm or otherwise place them in an intolerable situation, in accordance with the proper approach set out in *In re E* and *AD v SD*, I next

consider whether, on return, X and Y could be adequately protected against that risk. In this regard I acknowledge Lady Wise's observation in *ML v JH* 2021 Fam LR 60 at para [15] that:

“It has long been established that in the absence of compelling evidence to establish that the courts in the requesting country do not have the power to protect the child, the courts of the requested country should assume that they will be able to do so.”

[104] On the basis of the evidence before me I do not consider that any protective measures will be sufficient to address or ameliorate the identified risks to X and Y. It was not suggested by counsel for either the first respondent or X that there would not be available through the Polish courts measures akin to non-harassment or non-molestation orders and I proceed on that basis. No evidence was led by any party of what protective measures might actually be available in Poland. However, in relation to X, the issues identified concerning the nature and substantial cause of X's mental health concerns, X's self-identity as Scottish and with Scottish society and culture, X's education, his friendships and his feelings towards the petitioner could not be addressed by such orders. In relation to the first respondent, a consideration of Professor MacPherson's report might suggest that on conclusion of all legal proceedings in Poland, by which I mean divorce and child related proceedings, and the implementation of any necessary protective orders, with which the petitioner complied, it might be that the first respondent's mental health could or would improve. Three concerns arise with that conclusion. Firstly, it is unclear when such proceedings might be resolved and in the interim the significant concerns regarding the first respondent's mental health would remain. Secondly, irrespective of the existence of proceedings, it is likely that the first respondent and the petitioner will have some level of contact and interaction going forward around arrangements for X and Y. In light of any ongoing contact it might be that the first respondent's fears and anxieties will not completely abate. Thirdly, and perhaps most concerning, is the evidence from which I conclude that

there are significant doubts whether the petitioner would adhere to any protective orders. The petitioner retained Y for a significant period of time, contrary to an agreement reached with the first respondent, refusing to engage meaningfully with the first respondent about the matter, causing both the first respondent and Y significant stress and anxiety. Despite a clear direction from the Polish court about avoiding discussions with X and Y about certain subjects, including asking X and Y about the first respondent, X's affidavit contains passages that suggest the petitioner did engage in such discussion. Finally, and perhaps most relevantly, are the inferences that can be drawn from 7/8 of process, a, no doubt quite appropriately, unchallenged document dated 22 May 2022 prepared by Lukasz Barszcz, an attorney acting for the first respondent in proceedings involving the petitioner. That document highlights proceedings, both criminal and civil, for persistent harassment, failure to meet maintenance obligations and preventing the execution of court orders. Accordingly, I do not accept that any protective measures that might be available in Poland would be sufficient to address or ameliorate the identified risks to X and Y.

[105] For the foregoing reasons I am satisfied that in relation to each X and Y there is a grave risk that their return to Poland would expose them to physical or psychological harm or otherwise place them in an intolerable situation and, accordingly, on this basis, separately from my decision based on the objection defence, I refuse to order either X or Y's return to Poland.