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Case No: FD18P00814

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2019

Before :

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between :

Peter Stewart Uhd	**Applicant**
- and -	
Victoria McKay	**Respondent**

- -
- -

Mr Richard Harrison QC and Mr William Tyzack (instructed by **Dawson Cornwell**) for the **Applicant**
Mr Mark Jarman (instructed by **Brethertons**) for the **Respondent**

Hearing dates: 1 and 2 May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MACDONALD

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with an application under the Child Abduction and Custody Act 1985 for an order pursuant to Art 12 of the Hague Convention on the Civil Aspects of International Child Abduction (hereafter the 1980 Convention) directing the summary return of Ruby Margaret McKay-Uhd, born in December 2015 and now aged 3 years old, to the jurisdiction of Australia. The application is brought by the father of Ruby, Peter Stewart Uhd (hereafter 'the father'). The father also applies under the 1996 Hague Convention to enforce certain orders he secured following Ruby's abduction in ongoing children proceedings in the jurisdiction of Australia, requiring the return of Ruby to that jurisdiction (the father making clear he does not seek to enforce a concurrent order requiring Ruby to be placed in his care on return). The orders were registered, and permission given to enforce those orders by District Judge Gibson on 3 January 2019.

2. The mother, Victoria McKay (hereafter 'the mother') resists the application under the 1980 Hague Convention on the ground that the summary return of Ruby to Australia would result in a grave risk of exposure to physical or psychological harm or otherwise place Ruby in an intolerable situation for the purposes of Art 13(b) of the 1980 Convention. In addition, the mother appeals the decision of District Judge Gibson to register and give permission to enforce the orders made in Australia. She does so on the grounds that (a) pursuant to Art 23(c) of the 1996 Convention the Australian orders were made without her having been given the opportunity to be heard and (b) pursuant to Art 23(d) of the 1996 Convention the transfer of custody to the father is manifestly contrary to public policy. On giving directions for its determination, Williams J listed the mother's appeal to be heard with the application under the Child Abduction and Custody Act 1985.

3. During the case management phase of these proceedings Keehan J made an order permitting details of this case to be reported in the media in an effort to locate Ruby in this jurisdiction. Following the order of Keehan J, details of this case were the subject of significant levels of publicity in the press. Specifically, the name and photograph of Ruby, the name, photograph and occupation of the mother, the name of the father, the fact that the parents resided in Australia and the fact that the mother and Ruby may be in a camper van and could be in Scotland, were published extensively by the media. Following this publicity the mother was located. Within this context, an Internet search of the foregoing details reveals a wealth of coverage in respect of this case, that coverage identifying Ruby, the mother and the father, together with the circumstances of this case, in the manner that I have outlined.

4. Within the foregoing context and following representations from the Press Association through Mr Brian Farmer, an issue arises as to whether this judgment should be published in an anonymised form or whether, given the publicity this case has attracted by reason of the information the court has already permitted to be placed in the public domain, which publication assisted in locating Ruby, such anonymisation would be futile. On behalf of the father Mr Richard Harrison QC and Mr William Tyzack take no objection to the judgment being published in an unannonymised format in circumstances where the salient details of the case are already widely in the public domain. On behalf of the mother, Mr Mark Jarman

indicated that if the court ordered the return of Ruby to Australia the mother would seek for any published version of the judgment to be anonymised on the basis that Ruby would have a considerable change of circumstances to deal with without the additional burden of attendant publicity. On behalf of the Press Association, Mr Brian Farmer submitted that, the public having been informed that Ruby was missing in this jurisdiction, and it subsequently having been reported that she had been found following the court permitting details of the case to be published, it is in the public interest for the press to be able to report on the final outcome of the proceedings in respect of Ruby and, more broadly, on a case that demonstrates to the public the consequences of child abduction.

5. Having considered the respective submissions as to publicity, having balanced the competing rights engaged, namely the Art 8 right to respect for private life of Ruby and her parents, and of the mother's other child, and the Art 10 right to freedom of expression, having considered the question of proportionality and having regard to the extensive information that has already been placed in the public domain by earlier order of this court, I am satisfied that this judgment should be published in its current form subject only to the anonymisation of the name of the mother's older child, T. I am satisfied that in circumstances where this court has already permitted the salient identifying details in respect of this family and the circumstances of the case to be widely published with a view to locating Ruby, there is little to be gained by anonymising this judgment prior to its publication on Bailii. In the circumstances I have described, even were the judgment to be anonymised prior to publication, the identity of those with whom this judgment is concerned would be *readily* apparent from its facts in the context of material already widely available in the public domain. Further, it seems to me that there is merit in Mr Farmer's submission that it is in the public interest for the press to be able to report the final outcome of these proceedings in circumstances where there has been significant publicity during the initial stages of the same and, more widely, to report the consequences of this case of child abduction.

6. Within the context of the father's application under the 1980 Convention, the mother makes the following concessions before this court:

   i) At the time the mother removed Ruby from the jurisdiction of Australia on 22 September 2018, Ruby was habitually resident in that jurisdiction for the purposes of Art 3 of the 1980 Convention;

   ii) At the time the mother removed Ruby from the jurisdiction of Australia, the father was exercising rights of custody in respect of Ruby for the purposes of Art 5 of the 1980 Convention;

   iii) At the time the mother removed Ruby from the jurisdiction of Australia the father had not given his consent to that removal;

   iv) Less than one year has elapsed sine the mother removed Ruby from the jurisdiction of Australia;

   v) The removal of Ruby from the jurisdiction of Australia by the mother on 22 September 2018 was wrongful for the purposes of Art 3 of the 1980 Convention.

7. Within the context of these concessions, and where there has been a wrongful removal of Ruby from the jurisdiction of Australia for the purposes of Art 3 of the 1980 Convention, this court is now required to order the summary return of Ruby to the jurisdiction of Australia unless the mother can demonstrate that one of the exceptions provided by the 1980 Hague Convention is made out.

8. In this case, the mother relies solely on the exception provided by Art 13(b) of the 1980 Convention, namely that to order the summary return of Ruby to Australia would result in a grave risk of exposure to physical or psychological harm or otherwise place Ruby in an intolerable situation. In seeking to make good that exception, the mother makes extensive complaints regarding the conduct of the father during the course of their relationship, and thereafter within the context of extensive proceedings in Australia relating to Ruby's welfare, which proceedings, as I have noted, remain ongoing in that jurisdiction.

9. In summary, the mother's case is that the father has been physically and emotionally abusive to her, emotionally abusive to Ruby and emotionally, physically and sexually abusive to her son from a former relationship, T, such that to order the summary return of Ruby to Australia would result in a grave risk of her exposure to physical or psychological harm or otherwise place Ruby in an intolerable situation. Further, the mother contends that the impact on her own mental health of the alleged abuse of herself and the children, in the form of complex Post Traumatic Stress Disorder (hereafter PTSD), has likewise been such that, whatever the objective level of risk, the adverse impact on her mental health of an order for the summary return of Ruby to Australia would be such as to result in a grave risk of Ruby's exposure to physical or psychological harm or would otherwise place Ruby in an intolerable situation.

10. The father vehemently denies the allegations made by the mother and contends that, in light of findings made by the court in the proceedings in Australia concerning Ruby's welfare, and patent conflicts that are apparent between versions of events given to the Australian courts during those proceedings and versions of the same events given to this court in these proceedings, the mother has, in fact, engaged in a protracted campaign to alienate Ruby from him. Within this context, he asserts that the mother's premeditated and carefully planned abduction of Ruby from the jurisdiction of Australia, and her subsequent concerted efforts to avoid detection in the United Kingdom by going to ground in the Outer Hebrides, is simply a further and more extreme element of that campaign to exclude him from Ruby's life.

11. In determining the issues in this matter I have had the benefit of reading in full the trial bundles lodged in this case, which bundles include the statements from the applicant father and from the respondent mother, and which statements exhibit an extensive collection documents, including psychological reports on each of the parents filed and served in the proceedings in Australia and a series of domestic abuse risk assessments authored by domestic abuse organisations in that jurisdiction from which the mother sought assistance. In addition, I have heard oral evidence from Dr McClintock, a forensic consultant psychiatrist jointly instructed in these proceedings to prepare a report on the mother dated 24 April 2019. Finally, I have had the benefit of extensive and helpful written and oral submissions from Mr Harrison and Mr Tyzack on behalf of the applicant father, and from Mr Jarman on behalf of the respondent mother.

BACKGROUND AND EVIDENCE

12. As I have intimated above, the background to this matter is extensive, and includes protracted and ongoing proceedings in Australia concerning Ruby's welfare. The following aspects of the background and the evidence are pertinent to the issues this court is now required to determine.

13. The father was born in 1961 and is now aged 57. He is an Australian national. The mother was born in 1975 and is now aged 43. She is a British national but has lived in Australia since she was twenty-one and her right to reside in that country subsists. The parents commenced their relationship in August 2012. The mother makes a number of allegations regarding the beginning of their relationship, including that the father had "stalked" her in 2005 in an attempt to persuade her to enter a relationship with him at a time when she was in a relationship with her previous partner, Dominic McKay, the father of her other child, T, who was born in July 2009. The mother also alleges that the father used "lies" and "serious charm offensive techniques" to begin his relationship with her in 2012.

14. The mother and father began cohabiting in November 2012 and married in April 2013. The mother contends in her statement before this court that on the day after their marriage the father's behaviour changed and that between 2013 and 2015, when the parties separated and the father agreed to vacate the matrimonial home, he regularly became abusive and violent towards her and T. Whilst not providing detailed particulars, the following allegations are set out in the mother's statement:

    i) Between 2013 and 2015 the father's behaviour included physical, verbal and emotional violence and coercive and economic control. The mother relies on a statement from Dominic McKay to corroborate allegations of domestic abuse, albeit the accounts provided by Dominic McKay derive exclusively from what the mother has told him;

    ii) With respect to physical violence, the mother alleges that the father would "drag me round the house, pin me down and scream in my face" and, in respect of emotional abuse, alleges that the father "would play mind games, punish me if he felt I did something wrong, give me silent treatment, spread malicious gossip about me amongst out friends, hurt our family dog and isolate me."

    iii) With respect to economic abuse, the mother asserts that the father was "mostly unemployed" and would force the mother to pay all of the bills from her state benefits.

    iv) With respect to physical and verbal abuse towards children, the mother alleges that the father beat T, left him by the roadside, locked him in a car on a hot day and shouted at him. The mother alleges that the father also put his fingers inside T's mouth causing him to choke and threatened him on a regular basis. The mother relies on a statement from Dominic McKay which asserts that T reported that the father had hit him in the stomach, placed his fingers down T's throat, displayed anger towards the mother, squeezed him until T could not breathe, broke T's wooden sword.

v) The mother also alleges that the father attempted to kill T, asserting that he attempted to "smother T to death on several occasions". At no point does Dominic McKay suggest that the father attempted to "smother T to death".

vi) The mother further alleges that the father subjected T to sexual abuse, the mother stating that she caught the father doing so.

vii) The mother alleges that when she was pregnant with Ruby the father "would not allow me to receive any medical care and would not allow me to eat and drink".

15. On the face of it, the allegations set out in the mother's statement of evidence to this court are extremely concerning within the context of the terms of Art 13(b) of the 1980 Convention, to which this court is asked to have regard. On behalf of the mother, at this hearing Mr Jarman has reiterated these allegations, making clear that the mother relies on the same together with the contended for effect on her own mental health of an order for return being made as satisfying the exception set out in Art 13(b). However, during the course of their submissions on behalf of the father, I am satisfied that Mr Harrison and Mr Tyzack demonstrated that a significant degree of caution is required in respect of the allegations raised by the mother having regard to the totality of the evidence that is before the court.

16. With respect to the allegations the mother makes of domestic abuse by the father, the first point made by Mr Harrison and Mr Tyzack is that those allegations are not apparent from the contemporaneous medical records provided by the mother in these proceedings, which records they submit are wholly consistent with the account of the parents' relationship given by the father and wholly inconsistent with the account given by the mother.

17. It is apparent from the medical records that the mother has produced for these proceedings that no complaints by the mother of domestic abuse were recorded when the mother was speaking to the GP about her home circumstances on 13 August 2013 or 29 October 2013. By 22 September 2014 the mother had begun tapering off her anti-depressant medication, although at the time the mother was reporting an increase in her depressive symptoms. By 25 November 2014 she and the father had engaged in counselling and the mother was describing her relationship as poor. Again, there appears to have been no mention of domestic abuse on that occasion.

18. In considering the mother's medical records, Mr Harrison and Mr Tyzack further submit that there are also examples where those records flatly contradict the allegations the mother now makes in support of her argument that Art 13(b) is satisfied in these proceedings. As I have noted above, in her statement before this court the mother asserts that between 2013 and 2015 the father's behaviour included serious physical, verbal and emotional violence and coercive and economic control. However, on 28 April 2015, after telling her GP that she was feeling volatile and angry towards the father, she told the GP that the parents' relationship prior to her pregnancy with Ruby had been "normal" with "infrequent conflict".

19. It is correct that there is a reference in the record for 28 April 2015 to "bouts of anger tantrums", although it is difficult from the context to work out whether this is a reference to the father's conduct or that of the mother. This is particularly so in

circumstances where the mother conceded to her GP during the mental health care plan assessment on 28 April 2015 that, within the context of her recent pregnancy, she had experienced volatility with anger towards the father, and further conceded during a psychiatric assessment in the family proceedings in Australia by Dr Maloney in January 2018, to which I will come, that under "severe provocation", she had thrown objects, taken a knife and threatened to kill the father.

20. Within this context, I note further aspects of the mother's medical records that appear to contradict the account given in her statement before this court. As set out above, in her statement to this court the mother contends that when pregnant with Ruby the father "would not allow me to receive any medical care and would not allow me to eat and drink". However, in her medical records it is recorded that the mother told her GP *during* her pregnancy that the father "is 'at her' to take responsibility for her health". A letter written by the GP after this appointment referring the mother to a counsellor states that the mother was asserting that it was her distress, low mood and heightened anxiety that was "playing havoc with her marriage relationship". Again, there is no mention of domestic abuse.

21. Following the parents' separation, the accounts from the mother recorded in her medical records continue to contradict the picture of persistent, serious physical abuse that the mother sets out in her statement to this court. On 18 September 2015 the mother is recorded as telling her doctor that the alleged domestic abuse had been "mainly emotional, no physical / sexual". She alleged some physical violence towards T, asserting that the father deliberately squeezed T tightly and placed him in a headlock and used unpleasant words towards him". On 25 September 2015 the mother is again recorded as having given an account to her GP in which she alleged verbal, psychological and emotional abuse but not physical abuse. The GP letter of that date also records the mother telling her GP that the father had "been placed on a court order at this stage". However, there is no evidence that this was in fact the case.

22. Mr Harrison and Mr Tyzack submit that the inconsistencies between the accounts the mother is recorded as having provided to her GP and her account before this court regarding the nature and extent of alleged domestic abuse are further reflected in proceedings between the parents that took place in Australia before the mother removed Ruby to this jurisdiction.

23. The parents separated prior to the birth of Ruby in July 2015. Within this context, the last time the parents were alone together was during a perinatal appointment on 5 August 2015. On 16 September 2015 the mother applied for an interim intervention Order (analogous to a non-molestation order in this jurisdiction) alleging that the father was "stalking" her, an allegation denied by the father. Mr Harrison and Mr Tyzack submit that in making this application the mother made no reference to physical violence towards her by the father, either proximate to the date of the application or historically, in stark contrast to the account now provided by the mother in these proceedings.

24. The proceedings in respect of the mother's application in Australia for an intervention order reveal further difficulties when comparing the mother's account to this court of those proceedings with the totality of the material before this court. In January 2016 the mother obtained a variation to the interim intervention order granted in September 2015 to prevent the father having any form of contact with her. The mother alleged

that the day after the order was served on him the father broke into her house. However, an examination of the documentation from the proceedings in Australia shows that the first breach alleged by the mother amounted to the father removing his bicycle and a set of speakers from a carport, the Australian court describing this event as a "very minor breach" of the intervention order.

25. Within these proceedings, the mother alleges that the father was guilty of breaching the intervention order on multiple occasions and made her life a misery, alleged to Dr McClintock multiple further breaches of the intervention order and asserts in her statement before this court that the father was later charged with a further breach of the intervention order. However, the evidence before this court, which includes the applications and orders from the Australian proceedings, make clear that this is not in fact the case. Comparison of the mother's application form for an intervention order and her account to this court also raises issues. The mother's application form does not allege physical violence against her by the father, the mother describing an incident where the father verbally abused her, threatened her and harassed her. There is no mention at all of the father being physically violent to the mother, let alone that he would "drag me round the house, pin me down and scream in my face" as alleged in her statement before this court.

26. On 6 June 2016 the interim intervention order was made final by consent without admissions on the part of the father, which final order also restricted the right of the father to contact the mother with respect to contact with Ruby, save through the family court or written agreement between the parties.

27. In her statement to this court the mother alleges that the father continued a course of conduct against her and the children and over the course of the ensuing year was obsessed with litigation and "danced around the edges of the intervention order", harassed witnesses, harassed her through the agency of his lawyer and threatened to abduct Ruby. On 30 May 2017 the mother applied for an extension to the intervention order made final on 6 June 2016. Between 13 and 15 March 2018 Magistrate Clifford dealt with the final hearing of the mother's application for an extension to the intervention order. The court heard the matter over three days and received oral evidence from nine witnesses, including the parents. The following findings were made by the court in a reserved judgment delivered on 17 May 2018 with respect to the allegations levelled by the mother:

    i) Whilst guilty of a "very minor" breach of the intervention order in 2016 by collecting his bicycle and speakers from the mother's property, the father did not go inside the house and did not damage the back door;

    ii) The court declined to accept the mother's case that the father had been in repeated breach of the intervention order, save for the minor breach identified in 2016;

    iii) The father did not breach the intervention order by intimidating a witness;

    iv) The father did not use the legal system as a means of harassing the mother;

    v) The father did not act in a manner at contact designed deliberately to traumatise the mother;

vi) The father did not harass the mother through her lawyers in the proceedings;

vii) The father did not attempt to intimidate the mother at the Family Court hearing;

viii) The alleged physical abuse of T was in fact the normal interaction of a man and a child living in one household and the alleged sexual abuse was no such thing.

28. Notwithstanding these findings, the mother repeated these allegations at later stages of the Australian proceedings and now repeats these same allegations before this court and to the jointly instructed expert in these proceedings, Dr McClintock. The mother also makes further assertions regarding the proceedings in Australia, including that the father and his lawyer were having an affair, that the lawyer for Ruby is failing properly to represent her interests and that the Family Consultant instructed by the court is biased.

29. The mother did not appeal the findings made by the court on 17 May 2018 in the intervention order proceedings (although she did make further applications for an intervention orders on 10 July 2018 and an application to extend the same on 17 May 2018, which further applications I deal with below).

30. In respect of the findings made by the courts in Australia, whilst accepting Mr Harrison and Mr Tyzack's submission that this court is bound by them by the principle of issue estoppel, Mr Jarman on behalf of the mother submits that these findings must, in circumstances where it is not entirely clear what material was before the Australian courts that made the relevant findings, be viewed in the context of certain admissions made by the father. In particular, Mr Jarman points to:

i) The fact that the father conceded to Dr Maloney that he had broken T's wooden sword in front of him, had mildly shaken T and had pulled T's hat on to his head too hard in frustration;

ii) The fact that the father conceded that he had put oil on T's genitalia, the father stating that he had been given the oil by the mother, who had instructed him on its use and made no objection at the time.

iii) The fact that the father conceded that he had *discussed* spanking as a possible punishment for T.

iv) Dr Maloney's conclusion that the father appeared not to have a clear understanding of the meaning of violence in a domestic situation.

v) The fact that the father concedes in his statement that he had placed his hand over T's mouth to prevent him from spitting.

31. Whilst I have paid careful regard to these matters, comparing the father's admissions and the findings of Magistrate Clifford in the intervention proceedings, there is nothing inconsistent between the admissions made by the father and the findings made by that court. For example, the father's admissions that he had broken T's wooden sword in front of him, had mildly shaken T, had pulled T's hat on to his head

too hard in frustration, had discussed spanking as a possible punishment for T and had placed his hand over T's mouth to prevent him from spitting are consistent with the Magistrates conclusion that the alleged physical abuse had not occurred. By way of further example, the father's admission that had put oil on T's genitalia in response to being given the oil by the mother, who had instructed him in its use and made no objection at the time, which account the Magistrate accepted, is consistent with the Magistrate's finding that "the alleged sexual abuse was not in fact sexual abuse".

32. In short, and as made clear by Magistrate Clifford, having heard evidence over the course of three days, the court considered that evidence more consistent with the account of these events put forward by the father than that of the mother. Within this context, in his statement to this court, the father states that:

> "I admit that, at times, step-parenting the highly spirited and often ill-disciplined T was very challenging. In or around mid-2014, when he had just learned how to spit and would not stop was spitting (*sic*) at me, I did put my hand over his mouth. It wasn't my finest moment as a parent but was very, very far from 'choking' or 'smothering' as [the mother] alleges".

33. In addition to the proceedings issued in Australia by the mother for an intervention order, the father commenced proceedings in that jurisdiction with respect to Ruby on 7 March 2017 for an order seeking shared parental responsibility and contact with Ruby. On 2 May 2017 the proceedings were transferred to the Family Court of Australia. Again, Mr Harrison and Mr Tyzack submit that it is notable that the mother's account of those proceedings is couched in terms that do not accord with other material now before this court.

34. Mr Harrison and Mr Tyzack submit that at times in her statement the mother entirely mischaracterises the course of the children proceedings by making assertions that are wholly untrue or gross distortions of the truth. For example, Mr Harrison and Mr Tyzack note that the mother asserts in her statement before this court that on 30 May 2017 Judge Curtain found the father "to be a perpetrator of extreme abuse and a danger to me and the children". However, it is apparent from the material before the court that no such finding was made (as would be consistent with the hearing being without notice to the father), with Judge Curtain's order simply setting out the case management directions for a future hearing.

35. The mother also asserts in her statement before this court that, within the context of the children proceedings in Australia, the case was placed in the 'Magellan List' (a case management step for cases involving allegations of recent domestic abuse), the mother implying that this signified the court had concluded that the children were at grave risk of harm. However, whilst it is the case that Judge Curtain directed on 2 May 2017 that the proceedings be placed on the Magellan list, that is not the whole story. What the mother fails to mention in her statement before this court is that on 1 June 2017, as demonstrated by the documents from the relevant Australian proceedings, the Magellan Registrar declined to place the case on the list, directing that the proceedings did *not* meet the criteria for inclusion in the Magellan list, the only allegation of child abuse being a historic allegation in relation to T (which allegation was later found to be untrue). Within the foregoing context, the mother thereby presents a wholly misleading picture in her statement to this court when she states:

> "In May 2017 at the Federal Court hearing, Judge Curtain found the [father] to be a perpetrator of extreme abuse and a danger to me and the children. Ruby and T were placed on the Magellan list which is the equivalent of the Child Protection Register (*sic*) in England."

36. Within the Australian children proceedings, on 3 August 2017 the Australian Family Court made an order for the father to spend time with Ruby once per week at a contact centre. A further order to this effect was made on 21 January 2018. The progress of contact proved problematic (for reasons that remain disputed between the parties) and the father issued two contravention applications (akin to enforcement applications in this jurisdiction). The first, on 15 December 2017, alleged breaches by the mother of the order of 30 August 2017, and the second, on 3 August 2018, alleged breaches by the mother of the order of 21 January 2018. Once again, the mother appears to seek to exaggerate the position in respect of these applications, asserting in her statement before this court that the father issued twelve contravention applications, rather than the two evidenced before this court.

37. Within the context of the proceedings in the Australian Family Court, this court also has the benefit of psychiatric assessments completed on the mother and the father by Dr Michael Maloney, the 'Reportable Counselling' reports of Family Consultant Joy Slattery, compiled following nine sessions with the mother, the father and Ruby between February and May 2018 and a report from the contact centre at which contact between the father and Ruby took place pursuant to the order of the Australian Family Court. I will deal with the contents of the psychiatric reports compiled by Dr Maloney on the parents when I come to examine the psychiatric evidence in this case. It is convenient to consider the reports of Ms Slattery and of the contact centre at this point.

38. Ms Slattery conducted nine sessions with the mother, the father and Ruby. This included observing contact between the father and Ruby on seven occasions. In her first report dated 9 May 2018, Ms Slattery concluded as follows in respect of the father:

> "I have been impressed with [the father's] approach to Ruby at all times, he has ensured Ruby felt comfortable, he was on Ruby's level, he was able to pick up on cues from Ruby, he was very attuned to Ruby's needs, he allowed Ruby to have space if she needed this. At all times [the father] has approached Ruby very gently and allowed Ruby to feel comfortable with him...It is my view that Ruby will benefit greatly from spending time with [the father] as evidenced from observing his capacity to parent, but it will require [the mother] facilitating, encouraging and supporting this."

In her final report dated 2 November 2018, following the mother's abduction of Ruby from the jurisdiction of Australia, Ms Slattery reached the following conclusions as a result of her work on the case:

> "the above order has not been followed by [the mother] at all...it appeared that at times progress was hampered by [the mother] including her second attempt to try and obtain an intervention order...It is my view that [the father] is an appropriate parent who would appropriately meet Ruby's intellectual needs, her emotional needs and her practical needs. It is my

> view that [the mother] is not meeting Ruby's overall emotional needs in keeping Ruby out of [the father's] life. [The mother's] motivation in keeping Ruby away from [the father] is now in question. If I had believed at any time that Ruby would be at risk with [the father] I would have taken the appropriate action. It is my view that Ruby should at least spend time with [the father] as soon as possible as Ruby becomes older she becomes more vulnerable to being negatively influenced against [the father]. It is now of concern that [the mother] has been provided with a great deal of opportunity to allow Ruby to spend time with and develop her relations with [the father] but [the mother] has failed in her responsibility as a parent to ensure Ruby has this right. It is my view that given [the father's] temperament Ruby would emotionally manage being with him whether it is supervised or not. It is my view that Ruby would feel comfortable and engage with [the father] quite quickly again provided this was not hampered by [the mother]."

39. Within this context, the reports from the contact centre that are before this court also paint a positive picture of contact between the father and Ruby when that contact took place. At the first session of contact on 30 May 2018, whilst Ruby alternated between playing and breast feeding of her own volition, contact is recorded as going well. On 6 June 2018 Ruby was noted to run up to her father and give him a hug with contact going well. Contact again went well on 4 July 2018.

40. With respect to the conduct of the mother in relation to contact at the contact centre, Mr Harrison and Mr Tyzack point to the fact that the mother is recorded as making a number of allegations to contact centre workers about the father which contradicted the findings made by Magistrate Clifford in the intervention order proceedings. On 30 May 2018, at the first scheduled session of contact between Ruby and her father, the mother is recorded as stating to a contact centre worker that the father may exhibit inappropriate sexualised behaviour towards Ruby during contact and a female worker would be better able to identify such behaviour. Mr Harrison and Mr Tyzack submit that this was a wholly mendacious allegation, particularly in circumstances where only thirteen days earlier Magistrate Clifford had found that the father had not sexually abused T and where there had been no other suggestion in any context that the father might sexually abuse a child. On 27 June 2018 the mother described the father as an abusive parent and on 3 July 2018 again raised concerns about allegations of sexual abuse, contending that the father should not be permitted to take photographs of Ruby at contact as "*there might be concerns regarding sexual abuse allegations*". Once again, Mr Harrison and Mr Tyzack submit that the mother was seeking to give a false impression of the father to staff at the contact centre given the findings previously made by the Australian court.

41. The court received detailed submissions concerning a contact that took place between Ruby and her father at the contact centre on 26 June 2018. On that occasion, when Ruby was told it was time to see her father she pulled down the mother's top and started breast feeding. When she had finished the worker repeated that it was time to see her father. In response Ruby began to cry and cling to her mother, resulting in the contact worker eventually carrying Ruby to father, who was able quickly to settle her and contact thereafter went well. As a result of this incident the mother made a formal complaint regarding the conduct of the contact worker, alleging that the same

meant that Ruby had "*tasted her first direct experience of male violence*". Mr Harrison and Mr Tyzack submit that this incident demonstrates the extent to which the mother seeks to exaggerate innocent situations to her own ends. Mr Jarman submits that the incident, and the manner in which it is described, is evidence of the impact on the mother's perception and outlook of the father's conduct.

42. Through Mr Harrison and Mr Tyzack, the father contends that, in addition to the complaint made by the mother following contact on 26 June 2018, within the proceedings the mother has also made complaints about the independent children's lawyer, the father's lawyer, Ms Slattery (which complaint the Australian court expressly rejected) and another family consultant originally appointed. Within this context, I note that the mother was described by Ms Slattery, who observed contact, as "*a subtle bully in intimidating staff [at the contact centre]*." It is also notable that after the events of 26 June 2018 the mother did not apply to vary the contact order, but rather made a further application for an intervention order against the father on 10 July 2018 and an application to extend the same on 17 August 2018.

43. It is apparent from the application made by the mother on 10 July 2018 for a further intervention order that the mother again provided an incomplete and misleading account to the court, failing in particular to make any mention of the judgment of Magistrate Clifford of 17 May 2018 in which judgment her case had been rejected. In particular, the following points are noteworthy with respect to the mother's application on 10 July 2018, some of which points she repeated to Registrar Fitzgibbon on that date:

    i) The mother alleged that the father used contact at the contact centre as an ongoing form of abuse of the mother. The contact records make no mention of attempts by the father to use contact as a form of abuse of the mother.

    ii) The mother alleged that the father used his lawyer to bombard the mother's lawyer with abusive emails, which the mother's solicitor refused to pass on. On 17 May 2018 Magistrate Clifford had found that the father had not used lawyers or the legal system to abuse or harass the mother.

    iii) The mother alleged that the father had sent her photographs of Ruby and that there had been sexual abuse. On 17 May 2018 Magistrate Clifford had rejected the allegation of sexual abuse made by the mother against the father.

    iv) The mother alleged that the father broke into her property a number of days after the interim intervention order was granted. On 17 May 2018 Magistrate Clifford had found that the father had not broken into the property but had collected belongings from the car port.

44. Within the context of the foregoing allegations, the mother obtained a further intervention order as a result of her application on 10 July 2018. That order did not have the effect of suspending contact between the father and Ruby. On 17 August 2018, the mother applied for an extension of the intervention order. Once again, it is noteworthy that in her statements to Registrar Fitzgibbon of that date the mother again repeated allegations that had previously been determined and rejected by Magistrate Clifford on 17 May 2018. In particular:

i) The mother alleged that the father would post photographs of Ruby on a "paedophile website" given his past history of sexual abuse of T. Again, on 17 May 2018 Magistrate Clifford had rejected the mother's allegation that the father had sexually abused T.

ii) The mother alleged that the father was subjecting her to psychological abuse via his lawyers. However, again, on 17 May 2018 Magistrate Clifford had found that the father had not used lawyers or the legal system to abuse or harass the mother.

45. The mother indicated on 17 August 2018 that she would not be attending contact because she had been granted a variation of the interim intervention order. In her statement before this court the mother further misstates the history of the matter when seeking to justify that course of action, for example dating a car accident (which accident was caused by a wheel coming off her car) to August 2018 that had in fact occurred on 27 June 2018. Within this context, contact between Ruby and her father ceased. Mr Harrison and Mr Tyzack submit that, within the context of the very promising start to contact detailed in the report of Joy Slattery and in the reports from the contact centre, the evidence demonstrates that the mother orchestrated a deliberate campaign to interfere with contact in order to frustrate it and, ultimately, to terminate it. The father made further applications designed to enforce contact. As a result, the case was ultimately listed for a 'First Day' hearing on 7 November 2018.

46. The judgment of the Australian court delivered on 22 November 2018 following the abduction by the mother of Ruby from the jurisdiction of Australia found that the mother commenced planning for the abduction of Ruby towards the end of August 2018, in cooperation with Dominic McKay.

47. Within this context, Mr Harrison and Mr Tyzack submit that it is significant that at about this time the mother moved to a domestic abuse refuge run by Safe Steps, before moving to a further refuge. The records before the court show that this was a self-referral by the mother. As noted above, the parents had not had contact with each other alone since August 2015. There is no incident evidenced in the material before the court that triggered the mother's self-referral at this point in time. However, the mother now contends that it was the car accident some two months earlier on 27 June 2018 that triggered her move to a refuge, the mother contending that she had by this time come to believe the father to have been involved in bringing about that accident.

48. As with other aspects of her case, the mother's account of the car accident has evolved in the telling. On the documentary evidence before the court, it is apparent that the mother was clear before Registrar Fitzgibbon on 10 July 2018 that the accident was *not* the father's fault. The police report of the incident that is before this court likewise does not record any allegation by the mother at the time of the accident that the father was to blame. However, by the period during which the Australian court has concluded that the mother was planning to abduct Ruby, the mother was contending that the father had tampered with her vehicle and caused the accident. A SHIP Family Violence Risk Assessment dated 29 August 2018 indicates that by this date the mother was asserting that the father "had" loosened her wheel (the mother also reported during the course of that assessment that she believed the father was having a relationship with his lawyer and that she had "grave fears" about how the father was treating his own 90 year old father). The mother does not point to any

evidence which brought about this change of view in respect of the car accident (it is clear from the documents before this court that the wheel that came off the mother's car was the same wheel recently fitted by a garage).

49. It is apparent from documentation filed with this court by the mother that, following her move to a domestic abuse refuge, the mother was assessed as being at "very high risk" by another domestic abuse organisation. The court has before it, and has considered carefully, a number of comprehensive risk assessments in this regard. In her affidavit dated 7 September 2018, the mother alleged that the father's violence against her and the children was "escalating". On 10 September 2018, and prior to any diagnosis being given to the mother, whether by Dr Maloney or otherwise, the mother is recorded by the refuge as suffering from PTSD.

50. Mr Harrison and Mr Tyzack submit that there is other evidence before the court that demonstrates that the mother carefully planned her abduction of Ruby from the jurisdiction of Australia. The mother obtained passports for both of the children. On 5 September 2019 the mother requested a copy of the children's medical records for the past 12 months. On 14 September 2018 she informed Safe Steps of her intention to proceed *legally* to relocate to the United Kingdom. It is clear from a bank statement produced by the mother at this hearing that she thereafter purchased tickets to the United Kingdom on 20 September 2018. At this time the mother was aware that proceedings were ongoing in Australia and that the matter was listed for a further hearing on 24 September 2018. On 21 September 2018, in the knowledge that she had the day before booked return tickets to the United Kingdom for travel on 22 September 2018, the mother secured a note from her doctor stating that she would be unfit to attend court between 21 September 2018 and 5 October 2018. It was at this appointment that the history provided by the mother caused the GP in Australia to consider a diagnosis of PTSD.

51. On 22 September 2018 the mother removed Ruby from the jurisdiction of Australia without the father's consent. Following her arrival in England, at which point the mother contends she was bedridden for two weeks with anxiety, the mother bought a camper van and proceeding to tour England with the children, eventually ending up in the Outer Hebrides, where she lived for two months during October and November 2018. It would appear that the children were home-schooled during this period.

52. In these circumstances, the mother failed to attend the hearings at the Australian court on 24 September 2018 regarding the intervention order. When the mother failed again to attend on 15 October 2018 her application for an intervention order was dismissed. Within the context of the children proceedings in Australia, at a hearing before the Registrar on 25 September, at which hearing the mother was represented by counsel and solicitors, and Ruby was separately represented, the court made an order for the father to have weekly supervised contact with Ruby at the contact centre and thereafter at the office of Joy Slattery. The court rejected the mother's application for the father to attend a Men's Behaviour Change Programme.

53. On 16 October 2018 the father asserts that Dominic McKay misled Police as to the mother's whereabouts, telling them that she was down the street on an errand. On 2 November 2018 the father, following notification from a process server that the mother's home was now unoccupied, made an application to the Family Court of Australia for an order to locate Ruby and prevent her removal from that jurisdiction.

The application was heard by Ms Justice Johns on 7 November 2018 at a hearing at which the father and Ruby were each represented. A recovery order was made and an order made for substituted service on the mother via Dominic McKay and by email. The mother was ordered to attend a hearing on 9 November 2018 with Ruby. On 9 November 2018 the mother failed to attend the hearing and, the court being satisfied that the mother had been served, a warrant was issued for her arrest backed for bail subject to the mother appearing on 16 November 2018. A further recovery order was made, the judge again recording her satisfaction that the orders of 7 November 2018 had been properly served on the mother.

54. On 10 November 2018 the father was notified by the Police that the mother had removed Ruby from Australia on 22 September 2018. On 12 November 2018 the father was given permission to issue a subpoena against Dominic McKay. At a hearing in Australia on 22 November 2018 Mr McKay appeared at court for questioning. He conceded that he had booked a flight to join the mother and the children, to depart on 23 November 2018, and that he had been involved in a complex series of transactions in relation to the mother's property, which he had acquired for no consideration, and had transmitted money to her in the United Kingdom. Having heard his evidence, the judge considered Dominic McKay to be "evasive and less than forthright" during his evidence. Within this context, the court concluded that Dominic McKay had prior knowledge of the mother's plan to abduct Ruby from the jurisdiction of Australia. The court injuncted Dominic McKay from leaving Australia.

55. As I have noted, the children proceedings in Australia remain ongoing. In those proceedings the father applies for contact and for a change of residence. He has also made an application for an order that Ruby be vaccinated, the mother opposing the same. The father instigated proceedings under the 1980 Hague Convention at the end of November 2018. Following a series of hearings before the Family Division, including an order by Keehan J publicising this case in an effort to locate Ruby, which order resulted in extensive media coverage of this case, the mother was located and this matter was set down for hearing. As I have noted, the father also applied under the 1996 Hague Convention to enforce the orders he secured from the Australian court dated 7 November, 9 November and 22 November 2018 following Ruby's abduction requiring the return of Ruby, and those orders were registered, and permission given to enforce those orders by District Judge Gibson on 3 January 2019. The mother appeals that outcome on the grounds set out in the introduction to this judgment. The father makes it clear that he seeks to enforce the Australian orders insofar as they require Ruby to be returned to Australia but *not* in so far as they seek to remove Ruby from the care of the mother. The father also offers the following undertakings to this court:

    i) Not to remove, or seek to remove, Ruby from the mother, save for the purposes of agreed or ordered contact, pending an *inter partes* hearing in a family court in Australia seised of welfare issues in relation to Ruby.

    ii) Without making any admissions, not to harass, molest, pester, use or threaten violence against the mother, and not to instruct or encourage any other person to do so, pending the first *inter partes* hearing in a family court in Australia.

    iii) Not to contact the mother save for in relation to arrangements for contact with Ruby, or in connection with urgent matters relating to the welfare of Ruby.

iv) Not to attend at the mother's address (or such other address at which she may be residing) unless agreed in writing by both parties pending the first *inter partes* hearing in a family court in Australia.

v) To pay child maintenance in the sum determined as appropriate by the Australian authorities or a family court in Australia.

vi) Not to attend the airport upon the mother's and Ruby's return to Australia.

vii) To restore the application pending in the Family Court of Australia for an *inter partes* hearing as soon as possible upon the mother's and Ruby's return to Australia, and to lodge all statements, reports and orders made in the English proceedings under the 1980 and 1996 Hague Conventions with the court in Australia.

viii) To take no steps to interfere with the mother's legal aid in Australia.

ix) Not to institute or voluntarily support any criminal prosecution of the mother arising from her wrongful removal of Ruby from Australia.

x) Prior to Ruby's return to Australia, to apply to, or attend before, Ms Justice Johns (if available, and if not available before another judge of the Family Court of Australia) and request the discharge of any warrant for the arrest of the mother and to provide undertakings to the Australian court in the terms set out in 1 to 9 above.

xi) To seek the discharge of the Recovery Orders directed to the police in Australia contained in the Australian orders dated 7 and 9 November 2018, and the arrest warrant relating to the Mother in the order dated 7 November 2018 on the basis that the Mother complies with her obligation under the order of 22 November 2018 to produce the child to the Child Minding Centre at the relevant Family Court in Australia and is without prejudice to his ability to seek further Recover Orders from the Australian Court in the event of the Mother's non-compliance.

THE EXPERT EVIDENCE

56. As I have noted, in addition to relying on her allegations of domestic abuse and abuse of the children, the mother contends that the impact on her own mental health of the alleged abuse of herself and the children, in the form of complex PTSD, has likewise been such that the adverse impact on her mental wellbeing of an order for the summary return of Ruby to Australia would, whatever the objective level of risk, result in a grave risk of Ruby being exposed to physical or psychological harm or otherwise being placed in an intolerable situation.

57. Within this context, on 5 April 2019 Gwyneth Knowles J allowed an application by the mother pursuant to Part 25 of the FPR 2010 for permission to instruct Dr McClintock, a consultant forensic psychiatrist. As I have noted, the court has had the benefit of reading Dr McClintock's report and of hearing oral evidence from him.

58. Dr McClintock's report is dated 24 April 2019. Dr McClintock took a comprehensive history from the mother. That history included an account by the mother that she displayed behavioural difficulties during her teenage years as the result of having been assaulted, which behaviour caused her to be placed in care for a period of time. When assessed by Dr Maloney in 2018, the mother had provided the same account (against this, I note that when providing a history during the course of a mental health assessment on 28 April 2015, the mother ascribed her teenage behaviour to a high degree of pressure to perform academically). Having set out those matters that the mother reported to him during the course of his taking a history from her, Dr McClintock reaches the following salient conclusions in his report (emphasis added):

    i) Based on the symptoms reported by the mother, *and if her account is correct*, the mother's presentation is consistent with a diagnosis of complex PTSD;

    ii) Whilst the mother stated that she had experienced assault as a young teenager, the symptoms reported by the mother are, *if her account is correct*, a reaction to the manner in which the father treated the mother during the marriage and following their separation;

    iii) The mother will continue to experience the symptoms she described until there has been a conclusion to the court proceedings. If permitted to lead a life without what she sees as the interference of the father her symptoms would improve. If the proceedings do not have a favourable outcome for her, her symptoms will continue to be problematic;

    iv) In circumstances where the mother made clear she would find a return to Australia intolerable, she would be prompted to relive many of her previous unpleasant experiences;

    v) The question of the impact of any psychiatric condition the mother is suffering from on her parenting is a difficult matter to comment on but if her symptoms did not show improvement there is a potential for her being less emotionally available for the children.

    vi) Based on her presentation, the mother requires talking therapy and medication.

59. Cross examined on his report by Mr Jarman, Dr McClintock again made clear, as he does at several points in his report, that his conclusion that the mother's presentation was consistent with complex PTSD is conditional upon the events as described by the mother having happened, Dr McClintock making clear that any diagnosis of complex PTSD is dependent on the traumatic events that triggered that condition having taken place. He was further clear that if the court had the benefit of findings indicating that those events had not taken place, or otherwise doubted the veracity of the mother's account in respect of the same, then his conclusion that the mother's presentation was consistent with complex PTSD diagnosis would, consequently, become less reliable.

60. Whilst Mr Jarman put it to Dr McClintock that there was nothing to suggest that the mother was feigning complex PTSD, Dr McClintock again came back to his view that the accuracy of his conclusion that the mother's presentation was consistent with complex PTSD was dependent on whether the history provided by the mother was an accurate one or one that was feigned. Within this context (and whilst I note that the

GP in England recorded that on 12 October 2018 the mother became distressed only when the father's name was mentioned and had been seen in the Emergency Department exhibiting distress) I further note that at two points in his report Dr McClintock recorded that at times during the course of his taking of a history from her, the mother purported to be crying but at no point did Dr McClintock see any tears shed. When he challenged the mother about this she asserted that she was "not putting it on". In answer to a question from the court as to whether he attached any significance to this, Dr McClintock answered that, in his experience, in the same way it was not possible to have complex PTSD in the absence of the events said to have caused trauma, it was not possible to cry without tears.

61. On the question of the impact upon the mother's mental health should the court order the return of Ruby to Australia, Dr McClintock opined that it is to be anticipated that the mother would be distressed by such an outcome. However, beyond this, Dr McClintock was not able to quantify the impact of a return order. Within this context, nowhere is his report, nor during his oral evidence, did Dr McClintock express the view that the impact on the mother of returning to Australia would be such as to disable her from caring for Ruby. In particular, there is no suggestion in the evidence of Dr McClintock that the mother's subjective fears are such that, whatever the level of objective risk may be, an order for return would in any event result in a deterioration in her mental health of such gravity as to place Ruby in an intolerable situation in her care or, to adopt the mother's assertion in her statement, that a "return to Australia would be physically and psychologically disabling and consequently impact on my ability to care for the children".

62. The furthest Dr McClinctock was prepared to go was the conclusion set out in his report that "if her symptoms did not show improvement there is a *potential* for her being *less emotionally available* for the children" (emphasis added). With respect to the impact of this on Ruby, Dr McClintock was clear that he was not, as an adult psychiatrist, able to comment on the effect of Ruby of this outcome. Within this context, the court has no other evidence on that point beyond the common sense proposition that a child whose primary carer suffers mental health difficulties may be placed in a difficult situation, which proposition falls to be evaluated by reference to any evidence of the manner in which Ruby coped in the care of her mother during the difficult phases of the parents' marriage (which period included on the mother's own evidence, difficulties with the mother's emotional equilibrium, mood and levels of anxiety) and the protracted legal proceedings thereafter.

63. Finally, in relation to the question of protective measures to address any impact on the mother's mental health of the court ordering the return of Ruby, Dr McClintock once again pointed out that the sufficiency of protective measures is, in part, dependent on the accuracy of the conclusion that the mother's presentation is consistent with complex PTSD which is, as I have said, dependent on the accuracy of the history given by the mother. In his report Dr McClintock also noted that it is to be anticipated that both the necessary medication and the required psychotherapeutic input is likely to be available in Australia. In any event, in this regard it is quite plain on the evidence before the court that, during the course of the parents' marital difficulties, and during the course of the protracted children proceedings thereafter, the mother was able to access medical care, appropriate medication and specialist counselling to assist with her issues of mood and levels of anxiety. There is no

suggestion in the evidence that such services would be denied to her if she returned to Australia with Ruby, particularly within the context of ongoing family proceedings in which the court itself ordered specialist psychiatric assessments and the services of a family specialist in the form of Ms Slattery.

64. In addition to Dr McClintock's psychiatric report on the mother, the court has the benefit of two reports from Dr Maloney, an Honorary Psychiatric Fellow at the University of Melbourne, completed in respect of the mother and the father over a year earlier in January 2018 in the family proceedings in Australia. With respect to the mother, in a report dated 29 January 2018 Dr Maloney describes the mother providing a history of domestic abuse in her relationship with the father. Having outlined the mother's history, Dr Maloney made no mention of PTSD. I also note from Dr Maloney's report that the mother was very keen in January 2018 to paint a *positive* picture of her mental health. Within this context, I further note the contents of a statement that is exhibited to the mother's own statement, dated to 2018, from a friend of hers, Carmen Bulmer, which states "*I do not have any concern for [M]'s mental health from my observation of her ability to care for young children*".

65. The manner in which the question of PTSD arose in Australia following the opinion provided by Dr Maloney is apparent in the documentary evidence before the court. On 5 September 2018, and prior to any diagnosis being given to the mother, whether by Dr Maloney or otherwise, the mother is recorded by the SHIP refuge as stating that she was suffering from PTSD but that this had not been diagnosed. As I have noted, on 21 September 2018, and in the knowledge that she had the day before booked tickets to the United Kingdom for travel on 22 September 2018, the mother secured a note from her doctor stating that she would be unfit to attend court between 21 September 2018 and 5 October 2018. It was at this appointment that the GP considered the mother was "suffering symptoms of PTSD".

THE LAW

Art 13(b)

66. As I have noted, the mother seeks to establish that the exception provided by Art 13(b) of the 1980 Convention is made out in this case. Art 13 of the 1980 Hague Convention provides as follows with respect to the exception relied on by the mother:

> "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."

67. The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144. The applicable principles may be summarised as follows:

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

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

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

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

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

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

68. In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process (which include the fact that it will rarely be the case that the court will hear oral evidence and, accordingly, rare that the allegations or their rebuttal will be tested in cross examination). Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is *not* one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, *if* that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

69. However, as I have had cause to note in a number of cases recently, the methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon to establish the exception under Art 13(b) at its highest is not an exercise that is undertaken in the abstract. The requirement, made clear in *Re E*, for the court to evaluate the evidence against the civil standard of proof whilst taking account of the summary nature of the proceedings, must also mean that the analytical methodology endorsed by the Supreme Court in *Re E* by which the court assumes the risk relied upon at its highest is not an exercise that excludes consideration of relevant evidence before the court. Indeed, in *Re C (Children)(Abduction: Article 13(b)* [2018] EWCA Civ 2834, Moylan LJ held as follows by reference to the judgment of Black LJ (as she then was) in *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720:

> "[39] In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations. In *Re W (Abduction: Intolerable Situation)* [2018] 2 FLR 748, I referred to what Black LJ (as she then was) had said in *Re K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720 when rejecting an argument that the court was "bound" to follow the approach set out in *Re E.* On this occasion, I propose to set out what she said in full:
>
> > '[52] The judge's rejection of the Article 13b argument was also criticised by the appellant. She was said wrongly to have rejected it without adequate explanation and to have failed to follow the test set out in §36 of *Re E* in her treatment of the mother's allegations. In summary, the argument was that she should have adopted the "sensible and pragmatic solution" referred to in §36 of *Re E* and asked herself whether, if the allegations were true, there would be a grave risk within Article 13b and then, whether appropriate protective measures could be put in place to obviate this risk. That would have required evidence as to what protective steps would be possible in Lithuania, the submission went.

> [53] I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Article 13b exception (see *Re E* supra §32) and for the court to evaluate the evidence within the confines of the summary process. Hogg J found the mother's evidence about what had happened to be inconsistent with her actions in that she had continued her relationship with the father and allowed him to have the care of E, see for example what she said in §37 about the mother not having done anything to corroborate her evidence. She also put the allegations in context, bearing in mind what Mr Power had said about something good having happened in E's parenting, which she took as a demonstration that E would not be at risk if returned to Lithuania (§36). The Article 13b argument had therefore not got off the ground in the judge's view. The judgment about the level of risk was a judgment which fell to be made by Hogg J and we should not overturn her judgment on it unless it was not open to her (see the important observations of the Supreme Court on this subject at §35 of *Re S*, supra). Nothing has been said in argument to demonstrate that the view Hogg J took was not open to her; in the light of it, it was unnecessary for her to look further at the question of protective measures. She would have taken the same view even if the child had been going back to the father's care, but the Article 13b case was weakened further by the fact that the mother had ultimately agreed to return with E.'

[40] As was made clear in *Re S*, at [22], the approach "commended in *Re E* should form part of the court's general process of reasoning in its appraisal of a defence under the article". This appraisal is, itself, general in that it has to take into account all relevant matters which can include measures available in the home state which might ameliorate or obviate the matters relied on in support of the defence. As referred to in *Re D*, at [52], the English courts have sought to address the alleged risk by "extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient" (my emphasis).

[41] I would also note that the measures being considered are, potentially, anything which might impact on the matters relied upon in support of the Article 13(b) defence and, for example, can include general features of the home state such as access to courts and other state services. The expression "protective measures" is a broad concept and is not confined to specific measures such as the father proposed in this case. It can include, as I have said, any "measure" which might address the risk being advanced by the respondent, including "relying on the courts of the requesting state". Accordingly, the general right to seek the assistance of the court or other state authorities might in some cases be sufficient to persuade a court that there was not a grave risk within Article 13(b)."

70. In the circumstances, the methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.

71. That the analytical process described in *Re E* includes consideration of any relevant objective evidence with respect to risk is further made clear in the approach articulated by Lord Wilson in *Re S* to cases in which it is alleged, as it is in this case, that the subjective anxieties of a respondent regarding a return with the child are, whatever the objective level of risk, nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable. As noted above, in *Re E* the Supreme Court made clear that such subjective anxieties are, in principle, capable of founding the exception under Art 13 (b). However, it is also clear from the decisions of the Supreme Court in *Re E* and in *Re S* that there are three important caveats with respect to this principle.

72. First, the court will look very critically at an assertion of intense anxieties not based upon objective risk (see *Re S (A Child)(Abduction: Rights of Custody)* at [27]). Second, the court will need to consider any evidence demonstrating the extent to which there will, objectively, be good cause for the respondent to be anxious on return, which evidence will remain relevant to the court's assessment of the respondent's mental state if the child is returned (see *Re S (A Child)(Abduction: Rights of Custody)* at [34] and see also *Re G (Child Abduction: Psychological Harm* [1995] 1 FLR 64 and *Re F (Abduction: Art 13(b): Psychiatric Assessment)* [2014] 2 FLR 1115). Third, where the court considers that the anxieties of a respondent about a return with the child are not based upon objective risk to the respondent but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable, the court will still ask if those anxieties can be dispelled, i.e. whether protective measures sufficient to mitigate harm can be identified (see *Re E (Children)(Abduction: Custody Appeal* at [49]). Within this context, in *Re S* Lord Wilson observed at [34] as follows:

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

73. Accordingly, within the foregoing context I accept Mr Harrison's submission that in evaluating the extent to which the anxieties of a respondent about a return with the

child that are not based upon objective risk to the respondent but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable, the court should consider, amongst other factors, the objective evidence (if any) that the respondent will have good cause to be anxious if the child were returned to the jurisdiction of habitual residence, as well as the protective factors that may ameliorate such a situation.

74. In circumstances where the aforesaid objective evidence includes findings made by the Australian court, and where the mother continues to advance before this court an account that is at entirely at odds with those findings, I note the following passage from the judgment of Lord Brandon in *The Sennar (No. 2)* [1985] 1 WLR 490 at 499B-C concerning the circumstances in which findings made by a foreign court are binding on this court under the principle of issue estoppel:

> "The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."

The 1996 Convention

75. With respect to the application to enforce the orders made by the Australian Courts under the 1996 Convention and the mother's cross appeal in respect of the same, I will deal with the relevant principles shortly in circumstances where, at the urging of the parties and in agreement with the same, this matter is most conveniently disposed of within the framework of the 1980 Convention (albeit I am satisfied that the 1996 Convention provides an alternative source of relief for the father).

76. The key provision of the 1996 Hague Convention for present purposes is Art 23, which provides as follows:

> "(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.
>
> (2) Recognition may however be refused –
>
> a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;
>
> b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

> c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;
>
> d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;
>
> e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;
>
> f) if the procedure provided in Article 33 has not been complied with."

77. Art 23(1) provides that measures taken by one contracting State "shall" be recognised by another contracting State, subject to the exceptions set out in Art 23(2). With respect to the exception in Art 23(2)(c) concerning the opportunity to be heard, it is important to note that that exception is itself subject to a further caveat, namely that the exception applies "except in a case of urgency". Mr Harrison submits that orders made in the context of child abduction, which the relevant Australian orders were in this case, must fall within that latter exception as "a case of urgency". He relies on the decision of the Supreme Court in *Re J (A Child)(1996 Hague Convention: Cases of Urgency)* [016] 4 All ER 1048 in which Baroness Hale stated as follows at [38] with respect to the meaning of "cases of urgency" in Art 11 of the 1996 Convention:

> "[38]... Secondly, the Report and the Handbook clearly have abduction in mind, but only in the context of proceedings for return under the 1980 Convention. In that context, both interim contact orders and "safe harbour" orders are contemplated. Abduction in cases where the 1980 Convention does not apply is not considered, yet the 1996 Convention clearly provides for wrongful removal and retention in article 7. Far from derogating from the jurisdiction of the home state in these circumstances, the use of article 11 would be supporting it. It would be extraordinary if, in a case to which the 1980 Convention did not apply, the question of whether to order the summary return of an abducted child were not a case of "urgency" even if it was ultimately determined that it was not "necessary" to order the return of the child.
>
> [39] While I would not, therefore, go so far as to say that such a case is invariably one of "urgency", I find it difficult to envisage a case in which the court should not consider it to be so, and then go on to consider whether it is appropriate to exercise the article 11 jurisdiction. It would obviously not be appropriate where the home country was already seized of the case and in a position to make effective orders to protect the child. However, as Lord Wilson pointed out in the course of argument, the courts of the country where the child is are often better placed to make orders about the child's return."

78. With respect to the public policy exception under Art 23(2)(d) of the 1996 Convention, it is well established in other contexts that the test for establishing that an order is "manifestly" contrary to public policy is a rigorous one. Cases dealing with the exception in BIIa have emphasised the exceptional nature of a finding that an

order is manifestly contrary to public policy (see *Re L (A Child)(Recognition of Foreign Order)* [2013] Fam 94 at [47] to [52] and *Re D (Recognition and Enforcement of Romanian Order)* [2016] 1 WLR 2496 at [50]). Finally, even where an exception is established under Art 23(2) of the 1996 Convention, the court retains a discretion to recognise and enforce the order or orders in question.

DISCUSSION

The 1980 Convention

79. Having had the opportunity of reading in full the bundle in these proceedings, together with the careful and full Skeleton Arguments prepared by Mr Harrison and Mr Tyzack and by Mr Jarman, having heard evidence from Dr McClintock, and having listened carefully to the comprehensive oral submissions of counsel, I am satisfied that the mother has *not* made out the exception under Art 13(b) in this case. In the circumstances, I must order the summary return of Ruby to the jurisdiction of Australia. My reasons for so deciding are as follows.

80. The mother rests her case under Art 13(b) of the 1980 Convention squarely on (a) what she contends is an objective grave risk that Ruby will be exposed to physical or psychological harm or otherwise placed in an intolerable situation should an order for her return to the jurisdiction of Australia be made and (b) that, in any event, her subjective fears are such that this outcome will be the result of such an order for return whatever the court's conclusions regarding the objective level of risk of an order for return. Within the context of his comprehensive written and oral submissions, Mr Jarman emphasises the latter point by reference to the report of Dr McClintock.

81. With respect to the objective level of risk, as I have noted above, whilst the court is enjoined by *Re E* to assume the level of risk at its highest and then to consider whether protective measures are capable of addressing that risk, the court is not prevented from examining the evidence before it that informs the question of objective risk and evaluating that evidence in a manner consistent with the summary nature of these proceedings. Given the comprehensive level of information before the court, and within the context of the summary nature of these proceedings, I have undertaken that exercise in this case.

82. Whilst the mother prays in aid her account of what she contends was a high level of physical, emotional and economic domestic abuse on the part of the father, as will be apparent from the account provided above, examination of the evidence the mother relies on to make good these contentions indicates significant forensic difficulties. It is not appropriate within the context of the summary nature of these proceedings, which ordinarily prevents cross-examination of the evidence, for this court to make detailed findings on the basis of the evidence before it. However, in examining the objective level of risk contended for by the mother, and her submission that that level of risk satisfies the terms of Art 13(b) of the 1980 Convention, I am satisfied that the court must have regard to the following matters:

    i) The mother's assertion to this court that during their marriage, and prior to their separation in September 2015, physical violence by the father was "a regular occurrence" is contradicted by the mother's recorded accounts to her

doctors as set out in the medical records before the court, rendering the mother's evidence before this court on that subject unreliable.

ii) The findings of Magistrate Clifford made on 17 May 2018 contradict the mother's statement to this court that the father broke into her property, that the father committed multiple breaches of the intervention order, that he physically and sexually assaulted T, that the father intimidated witnesses in the proceedings in Australia and that the father used the legal system in Australia to harass the mother, again rendering the mother's evidence before this court on those subjects unreliable.

iii) The mother's assertion that the father was found by Judge Curtain in the children proceedings in Australia to be a perpetrator of extreme abuse and a danger to children are not borne out by the evidence, neither is her assertion that the conduct of the father was such as to require the proceedings to be placed on the Magellan list, again rendering the mother's evidence before this court on those matters unreliable.

iv) Other relevant assertions by the mother relevant to this court's decision are likewise contradicted by the totality of the evidence before this court, for example the mother's contention that during her pregnancy the father denied her food and medical attention.

v) Within this context, the Mother's account to this court of the events she relies on to establish the exception under Art 13(b) of the Convention is *highly* discrepant when compared to previous accounts she has given to professionals in Australia and when compared with the findings of the Australian court.

83. Within this context, whilst the mother continues to advance an account before this court that contradicts the findings made by the Australian court, this court is, I am satisfied, bound to have regard to those findings. Further, and in any event, it is plain when comparing the mother's account before this court with primary source evidence provided to this court by the mother, that her accounts have repeatedly changed in the telling and must be treated with a considerable degree of circumspection in reaching a conclusion on the objective level of risk inherent in ordering the return of Ruby to the jurisdiction of Australia.

84. Within the foregoing context, overall a particularly striking feature in the mother's account to this court and in the evidence more widely, including the reports from the contact centre, is a marked tendency on the part of the mother towards hyperbole and exaggeration. For example, the father's apparent difficulties in parenting his step-son become an attempt to *kill* T on repeated occasions. The removal of a bicycle and a set of speakers from a car port following the breakdown of the parents' marriage becomes breaking into her house. The proceedings in Australia become child protection litigation that merits being placed on the Magellan list when, in fact, there has been an explicit decision that the case does *not* meet the criteria for such inclusion. A car accident that the mother stated in terms at the time was nothing to do with the father becomes an attempt by the father to cause deliberate harm to the mother and the children. During the course of contact, an attempt by a contact centre worker to get a fractious 2 year old child to her father (who thereafter succeeds in quickly calming her) becomes Ruby's "first direct experience of male violence". The

contact is described by the mother in extreme terms such as "trauma" and "torture" notwithstanding clear evidence that contact with her father was largely positive for Ruby.

85. Within this context, having regard to the evidence before this court, the mother appears to have a marked tendency to ramp up a given account in an effort to make good her case. She concludes her statement by saying that "I honestly feel the [father] will not stop until one of us is dead". Within this context, whilst I have given careful consideration to the risk assessments by domestic violence agencies in Australia upon which the mother relies, I must also have regard to the fact that those assessments were based exclusively on the mother's self-report, which self-reporting took place in the context I have just set out. As I have noted, examination of the evidence demonstrates that such exaggerated accounts are consistently and markedly at odds with prior statements by the mother and/or the findings of the Australian court. In the circumstances, I am satisfied that these matters constitute a further reason for the court to treat the mother's evidence with a considerable degree of circumspection in reaching a conclusion on the objective level of risk inherent in ordering the return of Ruby to the jurisdiction of Australia.

86. Finally, these matters must also be placed in the context of the assessments that informed the decisions of the Australian court and the orders made by that court. It is apparent from conclusions of Joy Slattery and the accounts provided by the contact centre that contact between Ruby and her father was not considered to present any physical or psychological risk to Ruby, notwithstanding the allegations levelled by the mother in that jurisdiction. Further, in the context of that evidence, and following Ruby's abduction, the Australian Family Court was sufficiently confident in the assessments of the father to order that upon her return, Ruby be placed in his custody, again notwithstanding the allegations made by the mother.

87. I have considered carefully Mr Jarman's submission regarding the effect on Ruby of her mother being arrested on her return to Australia for the offence of child abduction within the context of the terms of Art 13(b). Information before this court makes clear that section 65Y of the Family Law Act 1975 (Cth) of Australia stipulates that the penalty for removing a child who is the subject of a parenting order from the jurisdiction of Australia is imprisonment for up to three years. On 22 November 2018 the Australian court observed that "The mother's actions in removing Ruby from Australia without the father's consent or the Court order represent a serious breach of her parenting obligations which may attract significant penalty."

88. Generally, the risk of the abducting parent being arrested and prosecuted for child abduction is not sufficient by itself to satisfy Art 13(b). In *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433 the possibility of criminal proceedings being brought and even the possibility of the mother being arrested at the airport on her return was not enough to establish a grave risk of harm to the children. In *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 the possibility that the father would change his mind and bring criminal proceedings against the mother if she returned to the United States was likewise not sufficient to establish the exception under Art 13(b). Within this context, in *H v K and Others (Abduction: Undertakings)* [2018] 1 FLR 700 at [55] to [57] I observed as follows in respect of the risk of arrest and prosecution:

> "[55] With respect to the mother's submission that children will be placed in an intolerable situation if she is arrested and prosecuted for child abduction, in that this will deprive them of their primary carer, I accept that this risk cannot be entirely ruled out in this case given the understandable reticence of the FBI to reveal details of the existence or progress of any federal investigation. Indeed, in almost all cases it will not be possible to exclude entirely the risk that the abducting parent will face arrest and prosecution on return. The authorities make clear that this risk will generally not be sufficient to satisfy the terms of Art 13(b).
>
> [56] Two further points fall to be made in this regard. First, a parent who chooses to abduct a child from one jurisdiction to another must expect to be the subject of arrest and prosecution. That is simply one of the proper consequences of a parent unwisely taking the law into his or her own hands rather than seeking relief through the courts. It sits ill in the mouth of a parent who has abducted a child to complain about the consequent risk of arrest and prosecution. Within this context, there is a principled argument that the court seeking to enforce the return of the child, and thereby maintain fidelity to an international instrument designed to discourage and prevent child abduction, has no business trying to protect the abducting parent from arrest and prosecution upon their return under domestic laws designed to achieve precisely the same end.
>
> [57] Second, and within this context, I am unable to accept Mr Devereux's submission that the caveats that the father seeks to add to his undertaking not to support criminal proceedings against the mother with respect to her abduction of the children from the jurisdiction of the United States, namely that he will so undertake "to the extent that this does not violate or breach any public policy, statute, regulation, court order or other legal duty on the father" are inappropriate or devalue the undertaking. In my judgment, it is perfectly proper for the father to ensure that his undertaking does not bring him into conflict with the domestic laws of the United States. Once again, there is a principled argument that it would be entirely wrong to expect the innocent left behind parent to place themselves in conflict with the laws of their home country in order to prevent the lawful arrest and prosecution of the culpable abducting parent. In short, it is wrong in principle to expect the left behind parent to assume some of the legal risk created by the abducting parent by giving undertakings that have the potential to, or do come into conflict with the laws of the home state. In the circumstances, I am satisfied that the caveats the father places on his undertaking are both reasonable and necessary."

89. In the context of this case, the court must also have regard when considering the risk to Ruby of her mother being arrested and detained, to the fact that the Australian Family Court was sufficiently confident in the assessments of the father to order that upon her return, Ruby be placed in his custody, notwithstanding the allegations made by the mother. In this latter context, whilst an undoubtedly disturbing prospect for the mother, the fact that the mother may be liable to arrest and, following a trial, to imprisonment for child abduction is less likely to represent a grave risk of exposure to harm for Ruby.

90. Within the foregoing context, and making due allowance for what is known about domestic abuse, the manner in which such abuse can be perpetrated and its effects, having regard to the totality of the evidence before the court, I am not satisfied that the objective level of risk in this case is of a degree that meets the imperatives of Art 13(b), namely that there is a grave risk that if returned Ruby would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. Whilst it is clear that during the breakdown of the parents' marriage, and in the protracted litigation between them that followed there were significant periods of strain between the parents, and that the father did commit a minor breach of the intervention order for which the Australian court imposed a penalty, the highly changeable and contradictory accounts that have been provided by the mother do not provide a proper basis for concluding that the objective risk in this case meets the imperatives of Art 13(b). Further, and within this context, it would be unjust in this case to proceed on the basis of assumptions as to the objective level of risk based on those accounts.

91. With respect to the mother's case that, notwithstanding the court's assessment of the objective level of risk, the adverse impact on her mental health of an order for the summary return of Ruby to Australia would be such as to result in a grave risk of Ruby exposure to physical or psychological harm or otherwise place Ruby in an intolerable situation, I am likewise not satisfied that that case is made out.

92. The foundation of the mother's case in this regard is that she is suffering complex PTSD as the result of the father's conduct, which condition will be exacerbated by any order returning Ruby to the jurisdiction of Australia to a degree that will result in Ruby being placed in an intolerable situation. Within this context, once again, the highly changeable and contradictory accounts that have been provided by the mother as documented in this judgment are relevant.

93. The court does not have before it expert evidence confirming a diagnosis of complex PTSD in the mother. The most that Dr McClintock can say is that the symptoms *as described by the mother* are consistent with a diagnosis of complex PTSD. Dr McClintock was however, at great pains to stress that this conclusion was conditional upon the mother's account of the trauma she alleges being accurate. For the reasons I have set out above, there must be grave doubts that this condition is met in circumstances where the mother's accounts of that trauma are either not found in earlier contemporaneous documentation, are contradictory as between different versions or have been found by the Australian court to be untrue. Dr McClintock was clear that such a situation would make his conclusion that the mother's presentation is consistent with complex PTSD less reliable. I am also satisfied that Dr McClintock retained doubts about the credibility of the mother's presentation in the context of her apparently feigning crying during the course of his examination.

94. In oral evidence, in answer to questions put by Mr Jarman, Dr McClintock could not agree with Dr Maloney's assessment of the mother as exhibiting an signs of a different condition, considering that there was not sufficient information to arrive at such a conclusion. However, this is not the same as saying that Dr McClintock's own conclusion that the mother's account was consistent with complex PTSD is thereby reinforced.

95. In my judgment the real significance of the difference between the views of Dr Maloney and Dr McClintock lies in the fact that, in the context of the markedly

different accounts given by the mother to each doctor, the former did not raise any concerns regarding PTSD whilst the latter considered the mother's presentation to be consistent with that condition. In speaking to Dr Maloney, the mother made broad assertions regarding historic domestic abuse but did not raise any allegations relating to the period following the parents' separation and no allegations of abuse of T or Ruby. Dr Maloney was clear that the mother was keen to "paint a very positive picture of her mental health". Within this context, Dr Maloney did not arrive at complex PTSD. By contrast, when the mother came to speak to Dr McClintock a little over a year later, the mother raised detailed allegations against the father both within the period of their relationship and the period following separation and specific and detailed allegations of abuse against T. With respect to her mental health the mother provided detailed descriptions of serious and protracted symptomology. Within this context, Dr McClintock did arrive at complex PTSD. The distinction between the histories given to the respective psychiatrists and between their respective conclusions further illuminates Dr McClintock's cardinal point that his view that the mother's presentation is consistent with PTSD is dependent on the accuracy of the history given by the mother to Dr McClintock, which detailed history she did not give to Dr Maloney and which is in any event unreliable for the reasons I have already given.

96. In addition to the doubts about the fundamental foundation of the mother's case that she is suffering complex PTSD as the result of the father's conduct, which condition will, irrespective of the objective level of risk, be exacerbated by any order returning Ruby to the jurisdiction of Australia to a degree that will result in Ruby being placed in an intolerable situation, there is little evidence before the court to support the assertion that an order for return would result in the mother's mental health deteriorating to such an extent that Ruby would be placed in such a situation. First, and once again, the question of the extent to which the mother's mental health would decline if an order for return was made is bound up in the question of the credibility of the mother's account. Second, on the evidence available to the court, at its highest the mother's case as to the impact on her mental health, and hence on Ruby should a return order be made is encompassed in Dr McClintock's exert opinion that:

> "I think this is a very difficult issue to comment on but if Ms. McKay's symptoms do not show a significant improvement then I would be concerned about the potential for her being less emotionally available to the children and over time there might even be the possibility of emotional harm being caused to them. As an adult psychiatrist, I am unable to comment further".

Further, this court has before it evidence that notwithstanding the difficulties the mother asserts she had with her mental health during the course of the parents' marriage and the disputes following their separation, the mother, who accessed medicinal and therapeutic assessment during that period, was not prevented by those circumstances from caring appropriately for Ruby. Nor is there any evidence that the issues alleged by the mother with respect to her mental health had an adverse impact on Ruby.

97. In *Re S* Lord Wilson made clear that in evaluating an asserted grave risk of exposure to harm arising from subjective anxieties independent of objective levels of risk, the court will look very critically at such an assertion and that any objective evidence of

the actual position on the ground will remain relevant. Having undertaken a critical examination of the mother's assertions, and the evidence relevant to the same, I am satisfied that the mother has not made out her case that, irrespective of the objective level of risk, the impact on her mental health of returning Ruby to the jurisdiction of Australia will be such as to result in Ruby being placed in an intolerable situation. To speak plainly, the court is further left with the distinct impression that the mother has sought cynically to tailor her account to this court, and to the jointly instructed expert, in order to try to meet the imperatives of Art 13(b) on that basis.

98. Finally, and in any event, I am satisfied that such risks as are contended for by the mother are amply met by the protective measures that are available in this case. Whilst, having regard to the conclusions set out above it is not strictly necessary for the father to offer them, he nonetheless continues to offer undertakings and has expanded those undertakings since the conclusion of submissions, as set out above.

99. Within this context, Mr Jarman points to the decision of the Court of Appeal in *Re C (Children)(Abduction: Art 13(b)* [2018] EWCA Civ 2834, in which Moylan LJ observed as follows regarding the efficacy of undertakings given to an English Court:

> "...in deciding what weight can be placed on them, the court has to take into account the extent to which they are likely to be effective. This applies both in terms of compliance and in terms of consequences, including remedies, in the absence of compliance. The issue is their effectiveness which is not confined to their enforceability: see for example *H v K and Others (Abduction: Undertakings)* [2018] 1 FLR 700 at [61]. In saying this, because I acknowledge the concerns that have been expressed about the court's perhaps giving insufficient weight to the point made by Ms Cooper and the need for caution when relying on undertakings, I make clear that I am not saying that enforceability is not an issue, only that it forms one element of the court's assessment."

100. Certain communications exhibited to the father's statement suggest that undertakings provided by the father to this court would not be directly enforceable in the Australian court. The information does however, make clear that the father could apply to attend the Australian court to give the same undertakings to that court within the ongoing proceedings in that jurisdiction concerning Ruby. The father has undertaken to this court to do this (there is a suggestion in some of the information before the court that the father can register the undertakings as protective measures for the purposes of the 1996 Hague Convention). Within this context, I am satisfied that the undertakings offered by the father to this court can be effective as protective measures.

101. In addition to the protection afforded by the undertakings that the father is willing to give to this court, and to repeat to the Court in Australia in identical terms, I am satisfied that with respect to protective measures, this court must also have regard to the fact that the Australian proceedings are ongoing and in which Ruby is separately represented and an independent Family Consultant has been appointed. Within this context the mother also has ready access to the court and is able to apply for protective orders, which the mother has demonstrated an ability to do historically. It is likewise clear from the mother's evidence that she has developed contacts with domestic violence organisations.

The 1996 Convention

102. In light of my decision to make a return order under the 1980 Hague Convention, I do not consider it necessary to analyse in detail the position under the 1996 Convention. I do however make clear that, having regard to the evidence before the District Judge, I am satisfied that the grounds of appeal relied on by the mother cannot be made out.

103. With respect to the exception provided by Art 23(2)(c) of the 1996 Convention, I am satisfied that the relevant orders made by the Australian courts were made in a case of urgency, those orders being made in response to the abduction of Ruby by the mother from the jurisdiction of Australia. In the circumstances, I am satisfied that the relevant orders fall outside the scope of the Art 23(2)(c) exception. Had this not been the case, and whilst it might be said that it sits ill in the mouth of a parent who has abducted a child and gone to ground in a foreign jurisdiction to then plead a failure by the court in the requesting jurisdiction to provide that parent with an opportunity to be heard in subsequent proceedings to recover the child, I am in any event satisfied that the mother was given such an opportunity. The mother was legally represented in the Australian proceedings, with lawyers who attended on 7 November 2018. At the hearing on 7 November 2018 orders were made for substituted service via email and Dominic McKay and on 9 November 2018 the Australian court expressed itself satisfied that the mother had been served by email. At the hearing on 28 November 2018, Dominic McKay told the court that he had "*been communicating with [M]... on an almost daily basis*" .

104. Second, having regard to the evidence before this court, and in particular to the assessment of Ms Slattery and the reports from the contact centre, I am satisfied that it cannot be said that the relevant orders of the Australian court are contrary to public policy for the purposes of Art 23(2)(d). In the context of the abduction by the mother of Ruby from the jurisdiction of Australia, the orders represent the outcome of a considered welfare decision by a competent court in the context of a child abduction and where there is evidence that the left behind parent is capable of meeting the welfare needs of the child. Before making the relevant orders the court in Australia heard submissions from the father and on behalf of the separately represented child. The court had the benefit of, and considered, the recommendations of Joy Slattery which considered that there was no risk presented by the father having unsupervised time with Ruby. Within this context it cannot be said that the orders seeking to effect the return of the child to the jurisdiction and to place the child in the father's care on an interim basis were orders that were contrary to public policy. Indeed, those orders come nowhere near to engaging the public policy exception in Art 23(2)(d) of the 1996 Convention.

CONCLUSION

105. On the information available to this court, I am satisfied that the mother's actions in removing Ruby from the jurisdiction of Australia represented a blatant and premeditated act of child abduction. That conclusion is reinforced by the fact that having abducted Ruby from the jurisdiction of Australia, the mother sought to go to ground in the Outer Hebrides in an effort, I am satisfied, to avoid detection. For the reasons I have set out, this court is also left with the strong impression that thereafter the mother sought before this court to distort and misrepresent the facts in this case

with the aim of bringing herself within the exception provided by Art 13(b) of the 1980 Convention.

106. For the reasons I have given, I am satisfied in this case that the mother has not succeeded in that aim. Within this context, I am satisfied that I must order the summary return of Ruby to the jurisdiction of Australia for the disputes between the parents as to her welfare to be determined in the jurisdiction of Ruby's habitual residence. I am further satisfied that, in light of the history of this case, that Ruby's return should be by way of a direct flight from the jurisdiction of England and Wales to the jurisdiction of Australia without transit through a third country. I accept the undertakings offered by the father as set out above, within the context of which undertakings the order for return will be executed. For the reasons I have given, I dismiss the mother's appeal with respect to the registration and enforcement under the 1996 Hague Convention. I will invite counsel to agree an order accordingly.

107. That is my judgment.