



Neutral Citation Number: [2023] EWCA Civ 208

Case No: CA-2022-001880

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS JUSTICE ARBUTHNOT
FD22P00036

Royal Courts of Justice
Strand, London, WC2A 2LL

28 February 2023

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE STUART-SMITH

Re: S (A Child)
(Abduction: Article 13(b): Mental Health)

Anita Guha and Emily Mitchell (instructed by **Dawson Cornwell LLP**) for the **Appellant**
Michael Gratton KC and Paul Hepher (instructed by **Sills and Betteridge Solicitors LLP**)
for the **Respondent**

Hearing date : 7 December 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The mother appeals from the order made on 7 September 2022 by Arbuthnot J under the 1980 Hague Child Abduction Convention (“the 1980 Convention”) by which she ordered the summary return of the parties’ child, S aged 6, to Australia. The judge decided that the mother had failed to establish the exception to a summary return order under article 13(b), which was the only exception under the 1980 Convention relied on by the mother.
2. The mother has another child, A, aged 9. Although he lived with the mother and the father after the mother moved to Australia in 2015, A was not included within the proceedings because the father has no rights of custody in respect of him and no separate application was made by the father. As explained further below, the mother decided that A should remain in England. The judge did not criticise this decision and clearly accepted that it was motivated by what the mother considered was in A’s best interests.
3. The mother has had longstanding, chronic mental health problems with acute, severe episodes as set out below. Expert psychiatric evidence was obtained for the purposes of the proceedings from a Consultant Psychiatrist, Dr Ratnam.
4. The mother relied on a number of matters in support of her case that article 13(b) was established. These included allegations of physical abuse in respect of her and of the children; that the father emotionally abused her by being coercive and controlling in their relationship; the impact of a return to Australia on her mental health; and the effect on S of his being separated from A.
5. The judge considered each of the matters separately and decided that none of them established a grave risk of harm within the scope of article 13(b), save for the potential impact on the mother’s mental health. In that respect, the judge decided, at [144]:

“I am satisfied that without the protective measures the grave risks to S of a return to Australia are that his mother’s mental health would decline and she will not be capable of caring for him physically as happened when she went into hospital in April 2020 or emotionally which may affect his own psychological health in the medium to long term and be an intolerable situation for him. Without the protective measures the Article 13(b) exception would be made out.”

The judge then decided, at [147], that the “protective factors which the father has offered satisfy the safeguards suggested by Dr Ratnam”. The “most important ones are the ones relating to the mother’s mental health”. After stating, at [148], that “there is a risk that the stress and anxiety will reduce the mother’s ability to respond to treatment and will worsen her mental health”, the judge concluded that:

“the safeguards, in particular the professional support for her mental health which will be set up in advance and her continuing ability to access the right medication at the correct dose, *will* reduce the risk to the mother and S and *ensure* that

the latter will not face a grave risk that he is exposed to psychological harm or placed in an intolerable situation on his return to Australia.” (emphasis added)

6. The mother’s case on appeal was, in summary, that the judge’s analysis in respect of the nature of the risk of harm and of the proposed “safeguards” was flawed and that, accordingly, her conclusion in respect of article 13(b) was wrong. It was submitted that the judge did not sufficiently explain her conclusions which, in any event, were based on a flawed analysis of the expert psychiatric evidence and of the nature and extent of the risk of harm to S. It was submitted that, but for these errors, the judge would have concluded that article 13(b) was established and that we should, accordingly, dismiss the father’s application.
7. The father’s case, in summary, was that the judge had reached a decision which was open to her and which she has sufficiently explained and justified.
8. On this appeal, the mother is represented by Ms Guha and by Ms Mitchell, who did not appear below. The father is represented by Mr Gratton KC and Mr Hopher, neither of whom appeared below.

Background

9. The judgment below is not reported.
10. The mother is a British national aged 31. As referred to above, she has a child by a former relationship, A, aged 9. The father is an Australian national aged 37. The parties met in 2011 in a third country and began a relationship in 2015. The mother and A moved to live with the father in Australia in July 2015.
11. The mother has always been A’s primary carer. His father has had no relationship with him. As set out in the judgment below, the father “is considered by A to be his birth father and ... to all intents and purposes is his father”.
12. The mother worked in Australia between 2016 and 2019. The father worked a shift pattern which meant he was at home for one week and away for one week. The judge described the mother as the children’s “primary carer”.
13. The mother has a history of chronic mental health issues which escalated following her discovery in October 2019 that, as described by the judge, “the father had been conducting a four-year extra-marital affair with her best friend”. This precipitated an acute deterioration in the mother’s mental health, as described below. The parties separated in or about February 2020 with the mother and the children remaining in the family home.
14. In April 2020, the mother “self-harmed and attempted to take her own life” and was admitted to hospital for psychiatric treatment. She remained in hospital for five weeks. As set out in the medical records, the diagnosis was “adjustment disorder with depression and anxiety plus ADHD”.
15. The parties reconciled between June and September 2021. “The relationship continued to be volatile and contributed to the mother’s declining mental health”.

16. The mother left Australia with the children on 11 November 2021 without telling the father. He was initially misled by the mother's sister as to where they were. They have been living in England since then.
17. The father's application under the 1980 Convention was issued on 17 January 2022. He also commenced proceedings in Australia in which he sought an order that S live with him and that the mother be deprived of parental responsibility.

1980 Convention Proceedings

18. The mother opposed the father's application under the 1980 Convention initially on the basis of the father's consent and article 13(b). Only the latter was pursued at the final hearing below.
19. Both parties filed extensive statements and, as referred to above, expert evidence was obtained from a Consultant Psychiatrist, Dr Sumi Ratnam, an adult psychiatrist for 28 years. She has given expert evidence in other cases under the 1980 Convention.
20. Cafcass was directed to provide a report on A's views on a return to Australia if an order was made that S should return. Cafcass declined to provide such a report on the basis that no application was made in respect of A and, as set out below, the judge refused the mother's further application that they be required to do so. This was not addressed during the course of this appeal but, it seems to me, that it is an issue which might merit further consideration in another case. I would, however, note in passing that the result has been that neither child's views or wishes and feelings have been independently provided to the court at a time when children are seen at a very young age in other jurisdictions for the purposes of applications under the 1980 Convention.
21. The final hearing had initially been listed to take place on 27 and 28 April 2022. This had to be adjourned because, it appears, of the application for expert evidence, which was clearly necessary, not being formally made until 3 March 2022, although the application itself is dated 2 February. It was relisted for 9 and 10 May 2022. At that hearing the judge heard oral evidence from Dr Ratnam.
22. The case was then adjourned to a further hearing on 25 July 2022 because "various aspects of the case were unresolved". This included the fact that, during the course of the proceedings, the father had removed the mother from his private health insurance. The judge considered that, if the mother was to return to Australia, she "would need additional support provided by the health professionals she had already had dealings with". Enquiries needed to be made as to whether the mother's cover could be reinstated and "ensuring the mother could use the insurance to pay privately for support for her mental health". Additionally:

"Another aspect that required further evidence was from the mother in relation to her mental health and from Dr Ratnam in relation to what medical records she had seen. The protective measures or undertakings had to be finalised and finally the mother had to establish A's position about a return to Australia."

23. In respect of A's position, as referred to above, the judge refused the mother's application that Cafcass be ordered to provide the requested report. The judge's order of 10 May 2022 recorded that the judge endorsed the mother's proposal that the mother would speak to A regarding his wishes and feelings about staying in England without his mother and S and "living temporarily with" his maternal grandmother and maternal aunt.
24. Further statements were provided by the parties and Dr Ratnam provided two further, addendum, reports.
25. In her statement, the mother explained why she had decided that it was in A's best interests for him to stay in England. I do not propose to include any of the details she set out, but they provide a clear analysis of, and explanation for, her decision. As referred to above, the judge accepted that the mother's decision was genuine in the sense that it reflected her assessment of what was in A's best interests. The father expressed his concern about this, noting in a statement that: "I struggle to imagine the colossal impact separating the boys would have on each of them. In particular A who will have no immediate family around him should the mother and S return to Australia".
26. At the hearing on 25 July, Dr Ratnam gave updating oral evidence and the parties made their respective submissions. The judge later received further written submissions as to the father's proposed undertakings. Judgment was handed down on 12 September 2022.
27. The judge made a summary return order subject to a number of undertakings from the father. These included undertakings to give the mother exclusive occupation of the former matrimonial home; to pay a sum by way of maintenance for six months with a lump sum of three months in advance; to pay for medical insurance; and a non-molestation undertaking. The judge required these to be "registered" on the basis that they were all measures within the scope of the 1996 Hague Child Protection Convention. It is not necessary for the purposes of this appeal to determine whether that was right as it appears that the undertakings have been registered.

The Medical Evidence

28. Dr Ratnam's evidence is of particular importance in this case. I therefore propose to deal with it at some length.
29. Dr Ratnam was provided with the mother's medical records from when she moved to Australia in 2015. She assessed the mother in person on 22 April 2022. She provided three written reports (5 May, 4 July and 21 July 2022), answered a number of written questions and gave oral evidence on two occasions.
30. Dr Ratnam summarised the mother's medical history. I do not propose to set out her summary in full. Prior to October 2019, it was principally derived from 13 letters from a Consultant Psychiatrist dated between May 2016 and October 2019. It is important to note that these provide snapshots of the mother's circumstances and do not provide a comprehensive picture of the mother's mental health during this period. For example, one letter, apart from recommending that she starts CBT "for anxiety", also noted that the mother was "busy with work and home".

31. The letters start with the mother being diagnosed in May 2016 with a “major depression episode with anxiety features in remission”. The mother was “having supportive psychotherapy for this”. In July 2016 there was “an increase in anxiety” followed by a “panic attack”. The diagnosis in July repeated that this was a “major depression with anxiety features and a relapse of anxiety”. By November 2016 the mother’s “anxiety levels were reduced and her mood was stable”. However, by January 2017 she was having panic attacks “and her mood was low”. She was prescribed an antidepressant. At times she was also prescribed diazepam. There are further references to “panic attacks” and “high levels of anxiety”.
32. The mother’s mental health deteriorated significantly in October 2019 when she discovered the existence of the father’s relationship (as described in paragraph 13 above). In November 2019 she was diagnosed with an adjustment disorder. As referred to above, the mother self-harmed and attempted to take her own life. She was admitted to hospital for psychiatric treatment in April 2020, where she remained for five weeks.
33. Following her discharge from hospital, the mother was seen monthly “and struggled with distress which was mainly related to marital difficulties, isolation and loneliness”. In October 2020, as set out in the judgment, the mother “was saying that she was lonely and isolated and was struggling as a single mother”.
34. In November 2020 the mother cut her wrists with a razor. Her prescription for antidepressants was increased.
35. As referred to above, the parties reconciled between June and September 2021. Quoting from the judgment, the mother “left a suicide note in August 2021”. In September 2021, the mother said she felt “overwhelmed” and “was finding it difficult to function and was preoccupied with the fidelity of her partner”. She was prescribed medication for her ADHD, her depression and her anxiety.
36. In her first report, Dr Ratnam said that the mother fulfilled the “criteria for a diagnosis of recurrent depression” and for “generalised anxiety with panic attacks”. The mother was, however, “not depressed at the time of the assessment” (22 April 2022).
37. In answer to the question of the likely impact, if any, upon the mother’s emotional and psychological health if she and S were to return to Australia, Dr Ratnam replied that “a return to Australia *will* impact adversely on [the mother’s] mental health” (my emphasis). She then said:

“Stress can trigger relapses and can also impact on recovery from mental illness.

Whilst adequate treatment is available in Australia, other factors are also important in recovery and maintaining stability of mental health. Relationship discord and inadequate social support impact adversely on recovery from anxiety and depression and are aetiological factors [in] relapses.”

There are other passages in Dr Ratnam’s written reports, and also in her oral evidence, in which she identified a number of significant aetiological factors “for deterioration”

in the mother's mental health. These factors were important because they "not only increase the risk of a deterioration in her mental health but will adversely impact on the prospect of recovery".

38. The factors referred to by Dr Ratnam included: "distress" which can "not only serve as the trigger [for a relapse in the mother's mental health] but it is going to impact upon her recovery from traumas"; separation from A which would be "incredibly difficult" for the mother because she "has been his sole carer and his most significant attachment figure throughout his life"; social isolation; the loss of the support provided by her family in England, in respect of which Dr Ratnam identified the importance, "in terms of recovery from mental illness", of "a supportive network – not only psychiatric and psychological intervention – but a supportive network" as well as "social stability"; if the mother's account of "the parents' relationship" was accurate "a return to such circumstances [namely, an "acrimonious relationship"] will impact adversely on her mental health particularly as [the father] has denied acting in such a way"; the mother needed "to be reassured that her safety is ensured" because "feeling fear regarding her own safety ... will also be a significant aetiological factor for deterioration in her mental health"; and, as referred to further below, "acrimonious proceedings" in Australia about S would be a significant stress factor.
39. By the date of Dr Ratnam's second report on 4 July 2022, the mother was "not coping with her situation" and had been diagnosed with depression. Her anxiety had increased and "is now impacting on her daily activities as it did in the past". Dr Ratnam repeated that a return to Australia "will impact adversely on [the mother's] mental health". However, significantly, she added that:

"In the first instance, it is important that her mental state is stabilised but this is unlikely to occur with on-going proceedings."

Dr Ratnam also considered that "it will take time to achieve the most effective treatment dosages and ... it is likely that any response will be partial whilst there is on-going stress". If the mother did return to Australia, it was

"important that there is adequate provision of private healthcare in the long-term as she has suffered with chronic mental health problems and the return to Australia will be associated with stress including potential separation from A. As stated in my first report it is important that provision of services is identified before her return".

40. In her third report dated 21 July 2022, Dr Ratnam said that the father's further statement "clarifies that adequate healthcare provision is available in Australia" but she reiterated that "it is important that [the mother's] mental health is stabilised in the first instance".
41. Dr Ratnam gave extensive oral evidence on 9 May and 25 July 2022 of which we have a transcript. I have read the whole of the transcript but propose to quote only some parts of it, in particular when she dealt with what, in her opinion, would happen if the mother were to return to Australia.

42. At the hearing on 9 May, when asked whether the mother remained “vulnerable to suffering another acute relapse in her mental health”, Dr Ratnam replied:

“So the mother already has a history of recurrent depression so a risk of further depressive episodes is increased. Unfortunately the mother has stopped taking her antidepressants which is not advisable, particularly given her history, and the potential of a risk of deterioration should she have to go back. There is also a risk of exacerbation of symptoms of anxiety should she face a return to Australia. I cannot, I cannot (sic) predict the extent to which her mental health will relapse and I cannot predict whether she will relapse to the extent where she requires hospital admission. But a return to Australia will, *in all likelihood, lead to deterioration of her mental health.*” (emphasis added)

43. Later, Dr Ratnam was again asked about whether the mother’s mental health might deteriorate and whether it might deteriorate to the same extent as before (“attempting to take her own life and being admitted as an in-patient to a psychiatric unit”). She replied:

“Yes, as that - I think what, what - if, if it was decided that the mother were to return to Australia it is very important that measures are put in before she goes from a mental health perspective *to try and prevent deterioration to such an extent.* And that will involve - mother has stopped her antidepressants. I would recommend she starts those again. What mental health services are - they can be set up before she returns. But she - and preferably with people that she has been in contact with before, so services she has been in contact with before. So that there is already a management plan, because even with patients where someone has had a significant episode of severe mental illness in the past if management plans are put in place *you can try and prevent a deterioration to the previous extent.* But it would be very important to set up adequate input before she returned, if that was the case.” (my emphasis)

I have quoted this passage in full, and highlighted certain words, because it is relevant to note that Dr Ratnam was saying that these measures were “*to try and prevent*” a deterioration and, secondly, that it was not *a* deterioration, which she had explained she considered likely, but deterioration “*to such an extent*”, namely to the extent set about above.

44. This was also the context in which she gave her next answer when she was asked:

“But, Dr Ratnam, that is your recommendation of support that could try - could theoretically be put in place to reduce the risk of a significant deterioration. But it will not eliminate the risk, will it?”

To which she responded:

“It will not eliminate the risk, but it is, it is a lifeline. To say it is *not inevitable* that the mother will end up in hospital and suicidal because - if, if this is put in we can - there is a *possibility* that the deterioration (inaudible) will be prevented.”
(emphasis added)

Again, it is relevant to note *what* Dr Ratnam was saying was not inevitable as well as her following observation that preventing this was a possibility. It seems clear that the missing words are to the effect of “to that extent”.

45. As referred to above, Dr Ratnam identified a number of factors which would impact on the mother’s mental health both in respect of a deterioration and in respect of recovery. These included distress, about which Dr Ratnam said in her oral evidence in May:

“Distress - and as I say in my report - distress itself not only can serve as the trigger but it is going to impact upon recovery from her traumas. It is difficult to predict whether it will be one strand, or two strands, or an accumulation of strands. But, you know, generally speaking distress itself, given the mother's vulnerability and her history of mental illness, is likely to lead to - increase the risk of deterioration in her mental health.”

When asked whether “acrimonious proceedings [in Australia] in respect of where S should live” would be “a significant stress factor for the mother”, Dr Ratnam replied:

“I think that particularly in Australia with a lack of support around her for that, so ... the father would have to definitely give an undertaking that he would not seek to remove S from the mother's care, and that would have to be enforceable in some way.”

46. When being asked about the impact of the mother’s mental health issues on her ability to care for S, Dr Ratnam accepted that any deterioration in the mother’s mental health on a return to Australia was “likely to involve the re-emergence of panic attacks” and was “most likely that ... she will have a relapse in depression”:

“Again I cannot tell you the extent of this but certainly in the past she has talked about not being emotionally available for her children when unwell, and that she found it difficult to attend to their physical needs, and this is (inaudible) also, where in fact the impact of her mental health on parenting when she has been unwell.”

47. Dr Ratnam added that, “what we really worry about is a parent's emotional availability for a child”. The extent to which the mother’s “emotional availability” would be affected would “be dependent on the severity of the depression”. Dr Ratnam repeated that she could not predict how severe any deterioration would be if the mother returned to Australia.

48. Dr Ratnam was clear that, if a return was ordered, immediate adequate mental health care must be available for the mother at the same level as that previously available to her. She also agreed, when asked by the father's counsel, that having the same insurance package and having access to the same treating team, would "help address the concerns about deterioration and how to meet that". She likewise agreed that the provision of housing and adequate financial support and ensuring S remained in the mother's care, would be "additional significant protective factors".
49. When pressed by the father's counsel about whether she was "able to qualify if a deterioration is going to be significant or something else?", Dr Ratnam, having said that "you cannot predict the nature really of any relapse or the time period", reiterated that it was "hard to predict ... what the deterioration will look like". It was "about how [the mother] views the situation in Australia and how she deals or relates to the situation with [the father]". She added, because it had been suggested to her that a return was "not a permanent return", that "even a temporary return for [the mother] is viewed negatively, and it is viewed as if she is going back to an untenable position". She also said that, in her experience, acrimonious relationships "take a very long time to resolve".
50. As referred to above, by the date of the July hearing the mother's mental health had deteriorated and had "affected her functioning". This was reflected in Dr Ratnam's further oral evidence. When asked how this affected her opinion "as to the impact on the mother's mental health if she were to return to Australia", Dr Ratnam replied that "the decline in functioning is particularly concerning in terms of a return to Australia" because "many people develop mental health problems but they are still able to" function. Dr Ratnam explained that:

"A return to Australia is likely to cause a further decline to her mental health and, if not a decline, then it will impact on her recovery in response to medication. Also, a decline in functioning will impact on her ability to adapt to life in Australia and that will impact adversely on her mental health."

Dr Ratnam agreed that, as a result, her prognosis for the mother's mental health was "more pessimistic and negative". She repeated, as referred to in her report of 21 July 2022, that "the focus should be on stabilising [the mother's] mental health", adding that "Any further stress is likely to impact on the mother's recovery. And so, any return will impact adversely on that recovery".

51. Dr Ratnam doubted that the mother would be able to cope, for example, with contested child proceedings in Australia without adequate psychiatric support and considered that, even with such support, the stress of "high conflict" child court proceedings in Australia and the stress of returning there "are really going to affect her ability to respond to treatment". Her "difficulties" would be "exacerbated" by the loss of the support she has in England from her family and friends.
52. In answer to questions from the father's counsel, Dr Ratnam made clear that stabilisation "would have to occur before a return to Australia". By this, Dr Ratnam was not referring to "full recovery", which she considered "unlikely", but a return to "functioning" as the mother had been prior to her deterioration. When asked what a "reasonable period" would be to enable this to occur, Dr Ratnam replied that it was

“impossible to give you an answer”. This was because “because mental health is not linear and improvement is not linear”.

Judgment

53. At the start of her judgment, the judge summarised the parties’ respective cases. The mother relied on *Re S (A Child) (Abduction: Rights of Custody)* [2012] [2012] 2 AC 257 (“*Re S*”) and submitted that “if returned, the mother’s anxieties and depression would be of such a degree that they would be likely to destabilise her parenting to the point that S’s situation would be intolerable, or he would be exposed to physical or psychological harm”. The mother had “struggled with her mental health for a number of years and suffered a crisis in October 2019” (as referred to above). She also said that “the father was abusive to her and the children and she is at risk from him if she returns”. He did “not understand her mental health problems and she fears he will use her mental health against her and make a successful application to remove S from her care”.
54. The mother also relied “on the intolerability for S of being separated from A”, with whom he had always lived. The judge recorded that the father was “very concerned about the plan to separate the two little boys”.
55. The father’s case was summarised by the judge as follows:
- “The father opposes the 13(b) argument. Ms Papazian for the father accepts that the mother has longstanding mental health issues which at times have been acute and that the mother has required hospitalisation. The mother has had robust treatment in Australia and the father has put forward a number of undertakings which Ms Papazian contends should reduce the mother’s subjective fears and she argues that such a return would not place S in an intolerable situation even if it is a return without his half-brother A.”
56. The judge then summarised the law in respect of article 13(b). She referred to, and quoted from, *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 (“*Re E*”); *Re S*; and the *1980 Child Abduction Convention: Guide to Good Practice, Part VI - Article 13(1)(b)* published by the Hague Conference. She said:
- “34. I must consider whether the mother has proved that there is a grave risk that a return to Australia would expose S to physical or psychological harm or otherwise place him in an intolerable situation.
35. The harm referred to is the harm likely to be caused to the child, not the adult. It is, however, clear from *Re S* (above) that the subjective anxieties of the mother can found an article 13(b) defence.”
57. The judge summarised Dr Ratnam’s written and oral evidence. She separately dealt with “Past psychiatric history”; “Psychiatric state as of 9th May 2022”; “Present psychiatric state – 25th July 2022”; and “Future prognosis if return ordered”. When

dealing with the mother's mental health as at the date of the hearing in July, the judge noted the following aspects of Dr Ratnam's evidence. From the GP's records, the mother "was now depressed". The judge also referred to Dr Ratnam's oral evidence that:

"contrary to the father's final statement, the mother was not exaggerating the deterioration of her mental health or 'case building'. She had been assessed by her doctor and other mental health professionals who agreed her mental health had deteriorated."

The judge did not, at this stage, refer to Dr Ratnam's opinion, as expressed in her July 2022 reports and in her July oral evidence, that "it is important that [the mother's] mental health is stabilised in the first instance".

58. As to the future prognosis, the judge said:

"80. The most important evidence given by Dr Ratnam was on the future prognosis for the mother's mental health on a return to Australia. Whilst in all likelihood this would impact adversely on and cause a further decline to the mother's mental health, the extent of the deterioration was unpredictable.

81. A return would impact on the mother's recovery in response to medication and also on her ability to adopt to life in Australia and that would impact on her mental health. In July 2022 therefore, her prognosis for the mother's mental health was more pessimistic than it had been in May 2022.

82. A significant factor for the deterioration in the mother's mental health on a return to Australia would be if the father had been physically and emotionally abusive and was now denying it and she had genuine feelings of fear about her own safety. If the court accepted the father's account, then although a return would be likely to impact adversely on the mother's depression and anxiety, adequate treatment would be available in Australia.

83. Any high conflict litigation in Australia would be a significant stressor which would impede her recovery. Dr Ratnam was doubtful whether the mother would cope with such proceedings without adequate psychiatric support in place. Even with that, the stresses from the threat of having S removed and from the relocation would affect her ability to respond to treatment.

84. Dr Ratnam said that although there was no professional concern about the mother's parenting in Australia her depression and anxiety could impact on her emotional availability to the children. Such an emotionally remote parent

would not respond consistently to a child's needs. That could affect attachment and have later impact on children.

85. An added stressor would be if the children were separated, then that was likely to impact adversely on her mental health too. Dr Ratnam said the separation from A would be very difficult for the mother. She is his primary carer, and the separation could have an impact on A in later life."

59. The judge then summarised Dr Ratnam's evidence in respect of a return to Australia:

"89. Dr Ratnam said that if management plans were put into place, even where someone had had significant episodes of mental ill-health in the past, the plan could prevent a deterioration, but it might not eliminate it completely. She said it was not inevitable that the mother would end up suicidal as the mother could reach a situation where she was stable in Australia by putting in place the measures set out above combined with various protective undertakings."

It is relevant to note the judge's use of the word "could" ("could prevent a deterioration"). In fact, Dr Ratnam, as set out above (paragraph 42), had said that the mother's mental health would, "in all likelihood", deteriorate. Further, Dr Ratnam was not referring to *a* deterioration. She was saying that you could "try and prevent" a significant deterioration (as described in paragraph 43 above). It was also a deterioration of *this* nature that Dr Ratnam was saying would not be eliminated (see paragraph 44) and also in respect of which she made the observation that preventing such a deterioration was a possibility.

60. The judge set out a number of undertakings which the father would be required to give and which were to be registered in the Australian court. In the judge's view this meant that, not only the English court, but also the mother "would be reassured that they are enforceable and would protect the mother in many different ways until and after she has the protection of the Courts in Australia".
61. Under the heading "Discussion", the judge said:

"the first question is whether the mother has proved her fears are reasonable and that there is a grave risk that S will be exposed to harm or placed in an intolerable situation."

Understandably, Ms Guha submitted that this demonstrated that the judge had not applied the correct legal approach as set out in *Re S*. I return to this below.

62. The judge then separately analysed the matters relied on by the mother for the purposes of determining whether a grave risk within article 13(b) had been established.
63. The first was the mother's allegation that the father had been physically abusive towards the children. The judge described this as "the father using a form of punishment which is not acceptable in this jurisdiction where it is thought to be

particularly emotionally damaging to children, and ineffective in any event". She noted that the father had had extensive agreed contact after the parties had separated and considered that, if the mother had had real concerns, she would not have allowed such extensive contact. She decided that, taking "the evidence at its highest, this did not establish that there was "a grave risk that a return to Australia would expose S to physical harm, with or without undertakings".

64. The second was the mother's allegation that the father had been physically abusive of her. As set in the judgment, the mother's case was that:

"The mother said in her statement of 22nd March 2022 that "since [the father's] affair I have been suffering with mental health. [The father's] controlling behaviour, emotional and psychological abuse has hindered my recovery. It has been a cycle impossible to break. He has upon occasions been physically violent". She explained that the father's on-going behaviour was a source of huge distress to her."

In respect of physical abuse, the mother relied on one incident when the father had "slapped her face" when she had been crying uncontrollably. The judge decided that, again taking the evidence at its highest and "bearing in mind that the mother would be protected by undertakings", the mother would not be at risk of physical abuse on return to Australia.

65. The mother relied on a range of matters in support of her allegation that "the father emotionally abused [her] and was coercive and controlling in their relationship", which included the father using security cameras at the home to watch or monitor the mother on occasions. The judge noted that there was "some supporting evidence for this" and also that there was "no doubt that in Australia in the wake of the discovery of his affair the mother had suffered extreme anxiety and depression leading to self-harm and suicide attempts and inevitably this will have coloured her perception of the things the father did".
66. The father did not accept that he had behaved as alleged although he accepted that he had used the security cameras "on occasions to communicate" with the mother. The father's case was that:

"in the face of the mother's mental health when she had on three occasions tried to self-harm or commit suicide combined with her occasional heavy drinking, he was concerned for his sons' welfare and felt he needed to keep an eye on the family. He may have overstepped the line but whether at its highest the relationship is abusive is a different matter."

67. The judge concluded, in respect of this part of the mother's case:

"122. Individually her complaints are perhaps not the most serious but to a mother with severe anxiety, they add up and I accept they have become genuine concerns for her.

123. Taking the evidence from the mother at its highest and evaluating the maximum level of risk, I consider there was some but not much objective evidence of controlling behaviour, but it is the subjective evidence, the intensity of the mother's fears which is significant in this case and the effect her mental health might have on S."

The judge concluded that the father's undertakings would ensure that S would not be at a grave risk within article 13(b) "were the mother to have no mental health problems".

68. This led the judge to consider the mother's case in respect of the impact on her mental health of a return to Australia. She said:

"I must consider whether her anxieties about a return with S are of such an intensity, when taking into account the undertakings, as to be likely in the event of a return to destabilise her parenting of him to a point where there is a grave risk that he would be exposed to psychological harm or that he would be placed in an intolerable situation. I bear in mind that Article 13(b) looks to the future, the situation that S would face were he returned forthwith to Australia."

The judge referred to a number of matters which would impact on the mother's mental health on a return to Australia. These included:

"126. I accept Dr Ratnam's evidence that the mother's mental health decline in 2019 was caused by the father's infidelity with the mother's best friend and her traumatic response to the discovery of the affair. This response continued as the mother was reminded of the deception whenever she saw the father."

The judge also accepted that "the mother felt relatively isolated and that she had few friends"; that "one of the mother's concerns is that she will lose the support of her family"; and that an "additional source of anxiety ... would be the risk of high conflict litigation in Australia".

69. Another source of anxiety would be that A was remaining in England. The judge accepted that the mother's decision was based on her conclusion that this was in his best interests. The judge also accepted that the mother "will miss A very much"; she will "worry about him even though he will be in the care of the maternal grandmother and aunt and she will be able to speak to him often".
70. Another source of anxiety for the mother would be S's "reaction to the loss of his playmate" A. However, the judge considered that the mother would "support S in understanding what has happened". Further, she considered that "a decision made now to separate the boys is not a long-term decision but a short term one until the mother is returned to Australia and can decide with the court's assistance what is best for S".

71. As for the effect on S, the judge concluded that, “so far as the separation from A being intolerable to S ... it will be entirely a question of how the mother handles the separation”. Although the judge referred to this at this stage of her judgment, the separation of the siblings was not again part of her consideration of whether article 13(b) was established.
72. The judge summarised, at [141], that the mother “is suffering from extreme anxiety and depression in the face of a possibility of a return to Australia”. Adding that she had “accepted, however, the evidence of Dr Ratnam that although the mother’s mental health may well decline, and this will not be assisted by the absence of A, she says there are steps that can be taken to manage if not eliminate the risk”.
73. This latter passage in the judgment clearly connects with what the judge had said earlier about Dr Ratnam’s evidence (see paragraph 59 above). I have already made some observations about that earlier analysis which could also be applied to this later passage. The judge is right that Dr Ratnam referred to the need to be “thinking about protective measures [which] would also help manage the situation” on a return to Australia but it is the efficacy of those measures which was important. However, as quoted above, Dr Ratnam was clear that she could not predict the extent to which the mother’s mental health would deteriorate and that the measures she identified were, I repeat, “to try and prevent deterioration” as had occurred in April 2020.
74. The judge’s conclusions in respect of article 13(b) are set out at [144]-[149]. She first concluded that, subject to the issue of protective measures, article 13(b) was established. She said:

“144. I am satisfied that without the protective measures the grave risks to S of a return to Australia are that his mother’s mental health would decline and she will not be capable of caring for him physically as happened when she went into hospital in April 2020 or emotionally which may affect his own psychological health in the medium to long term and be an intolerable situation for him. Without the protective measures the Article 13(b) exception would be made out.”

The judge’s analysis was then as follows:

“145. In my judgment what is important so far as the mother’s mental health is concerned, is that the affair is slowly receding into the past. The root cause of her current anxiety and depression is these proceedings and the adjournment between 10th May and 25th July 2022 and the thought of a return to Australia. The uncertainty must be extraordinarily difficult for the mother. I accept her future anxiety will be focussed on the possible decisions of the Australian Court and her fears about S being removed from her care will be a major part of that.

146. At one point in her evidence Dr Ratnam suggested the Court might wait for the mother’s anxiety and depression to subside. This was the one piece of evidence given by Dr Ratnam I did not agree with. I could not see that a wait for a

month or three or slightly longer would improve the situation when the mother's anxiety and depression would return as the date for her travel to Australia approached. Furthermore, it would be more difficult for S to remove him the longer he remained in this jurisdiction.

147. The protective factors which the father has offered satisfy the safeguards suggested by Dr Ratnam. The most important ones are the ones relating to the mother's mental health.

148. In my judgment, although there is a risk that the stress and anxiety will reduce the mother's ability to respond to treatment and will worsen her mental health, the safeguards, in particular the professional support for her mental health which will be set up in advance and her continuing ability to access the right medication at the correct dose, will reduce the risk to the mother and S and ensure that the latter will not face a grave risk that he is exposed to psychological harm or placed in an intolerable situation on his return to Australia.

149. I note too that the mother will have the protection of the equivalent of a non-molestation order to deal with the concerns set out at paragraph 63 above. This will prevent a repeat of the father's behaviours that the mother was so concerned about."

75. As can be seen, in [147], the judge determined that the "protective factors which the father has offered satisfy the safeguards suggested by Dr Ratnam". Further, in [148], the judge concluded that, "although there is a risk that the stress and anxiety will reduce the mother's ability to respond to treatment and will worsen her mental health", the "safeguards ... *will* reduce the risk ... and *ensure* that [S] will not face a grave risk" within article 13(b) (emphasis added).
76. The judge then returned to the issue of S's separation from A. She accepted that S would miss A but noted that he would be cared for by his mother, his father would have contact and he would "resume the life he had, bar the absence of A". The judge appears not to have considered this relevant to whether article 13(b) was established as she made no reference to this part of the case in that context.
77. Finally, at [152], the judge said that article 13(b) was not established because: "Taking the risk of harm at its highest the protective measures put forward by the father will be sufficient to mitigate if not eliminate the risk of harm from the mother's mental health".

Submissions

78. I set out below a summary of the parties' respective written and oral submissions. I have, of course, taken all of those submissions into account.
79. Ms Guha submitted that the judge made a number of substantive errors when determining that article 13(b) was not established. In her submission, the only proper conclusion open to the judge on the evidence was that article 13(b) was established.

She invited this court to set the judge's order aside and to determine the application by dismissing it.

80. The points relied on by Ms Guha can be summarised as follows. First, she submitted that the judge failed properly to analyse the totality of the mother's case, compartmentalising the matters relied on by the mother rather than considering them together. Second, the judge failed to take Dr Ratnam's evidence fully into account and/or misstated or misconstrued aspects of her evidence. Third, having found that there was a grave risk of harm, the judge conducted a flawed analysis as to the adequacy and efficacy of the proposed protective measures. This was significantly because the judge had failed properly to consider either the sources of the risk that the mother's mental health would deteriorate on a return to Australia, as identified by Dr Ratnam, or the nature and the degree of that risk. Fourth, the judge did not sufficiently or accurately consider S's position on a return to Australia given the impact on his mother's mental health as well as his separation from his brother.
81. As referred to above, Ms Guha pointed to the judge describing the "first question" as being whether "the mother has proved her fears are reasonable and that there is a grave risk that S will be exposed to harm or placed in an intolerable situation". I propose to deal with this submission immediately.
82. I would agree that, if this was the only substantive question the judge had asked, her analysis would have been flawed. A taking parent does not have to prove that their fears are reasonable: see Lord Wilson in *Re S*, at [34]. However, it is clear from reading the judgment as a whole that this was not the substantive question the judge asked and, indeed, not one the judge answered. The judge clearly appreciated that the issue was not whether the mother's fears were reasonable but what the mental health risks consequent on a return were regardless of their source and whether or not they were objectively justified. This can be seen, for example, from her later reference to "the mother's subjective fears and her perception of events". Further, in any event, the judge found that article 13(b) was established subject to the issue of protective measures.
83. In her oral submissions, Ms Guha emphasised her case that the judge had mischaracterised and/or not properly applied Dr Ratnam's evidence and that the judge had not addressed, or had undertaken a flawed analysis of, the degree and nature of the risk that the mother would suffer a significant deterioration in her mental health on a return to Australia and whether that established a grave risk within article 13(b) because of the effect on S if that were to happen.
84. A significant part of Ms Guha's oral submissions focused on those factors, referred to by Dr Ratnam as being relevant to the risk that the mother's mental health would deteriorate and/or to the effectiveness of treatment, which, she submitted, were "absent from the judgment" and, in particular, absent from any analysis of the nature of the risk and of whether the proposed protective measures would ameliorate the article 13(b) risk as found by the judge. These factors included distress and anxiety; relationship discord; the mother's *own* perception of her safety (she "needs to be reassured that her safety is ensured"); inadequate social support; and high conflict litigation. For example, while Dr Ratnam had said in her first report that "adequate treatment is available in Australia" she had gone on to say that "other factors are also important in recovery and maintaining stability of mental health" such as relationship

discord and inadequate social support which “impact adversely on recovery from anxiety and depression and are aetiological factors [in] relapses”. These were, Ms Guha submitted, critical aspects of Dr Ratnam’s evidence which were not addressed in the judgment and which showed that the availability of treatment would not guard against the risks to the mother’s mental health because other factors were relevant.

85. Mr Gration summarised the father’s case as follows. He submitted that the judge had correctly identified and directed herself in accordance with the law applicable to article 13(b) as set out in *Re E* and *Re S*. The judge had had to analyse a very considerable volume of evidence including three reports and oral evidence in May and July from Dr Ratnam. There were also the mother’s medical records. It would, he submitted, be unhelpful and potentially unfair to go through individual aspects of the oral evidence. He reminded us of the observations made in *Re F (Children)* [2016] EWCA Civ 546 and in *Re F and G (Children) (Sexual Abuse Allegations)* [2022] EWCA Civ 1002 about the need to read judgments as a whole and that judgments do not have to deal with every point of evidence or with every argument.
86. He submitted that the judge can be seen to have undertaken a careful and detailed appraisal of the evidence and, he submitted, had reached conclusions which were open to her and which were based on the evidence. The judge had also received and considered comprehensive submissions in May and July 2022 including in respect of the issue of protective measures and, again, had reached conclusions that were open to her.
87. In his written submissions, Mr Gration relied on the fact that “large parts of the evidence and of the judgment had focused upon what treatment and other support can be provided for the mother so as to *ensure* that, upon return, she does not suffer a collapse in her state of mental health to the extent that she would be rendered unable to provide care for S” (my emphasis). This submission clearly reflected the judge’s approach to, and her conclusions as to, the effect of the protective measures. So too does his further submission that the judge’s “ultimate conclusion ... was that the mother *would* be sufficiently supported upon return that she *would not* suffer a deterioration in her mental health to the extent that it would impact on S and result in an intolerable situation for him” (my emphasis). In summary, Mr Gration submitted that the judge was entitled to reach this conclusion, by reference to and based on Dr Ratnam’s evidence, and that, accordingly, she was entitled to conclude that article 13(b) was not established.
88. Finally, in respect of A, Mr Gration noted in his Skeleton Argument that, while the 1980 Convention did not apply to him because the father has no rights of custody, it would be open to the court to make a return order if it considered this to be in A’s best interests. In fact, and this is an observation not a criticism, no such application was made although it was acknowledged on behalf of the father that it would be contrary to the children’s interests to be separated.

Legal Framework

Article 13(b)

89. Article 13(b) provides:

“... 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 ... 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 effect of article 13(b) is well-established. As set out in *Re E*:

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

[34] Third, the words “physical or psychological harm” are not qualified. However, they do gain colour from the alternative “or otherwise” placed “in an intolerable situation” (emphasis supplied). As was said in *In re D* [2007] 1 AC 619, para 52, “Intolerable’ is a strong word, but when applied to a child must mean ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’”. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e g, where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.”

90. It can be seen that an important element is the nature of the risk. There is a connection between the nature of the risk and the assessment of whether it is a grave risk within the scope of article 13(b). The more serious or significant the character of the risk, the lower the level of the risk which “might properly be qualified as ‘grave’”, and vice-versa. This can also be seen in Baroness Hale’s analysis of the facts of that case, which were very different from those in the present appeal. The evidence from a psychiatrist was that:

“[44] In the doctor’s opinion, the disorder currently had a minimal impact upon the mother’s ability to look after the two younger children. If an order were made for their return and

appropriate support were not put in place, there was a “high risk of the severity of the adjustment disorder worsening, resulting in psychological decompensation associated with deliberate self-harm or suicidality”. It would also significantly increase the risk of the disorder evolving into a depressive disorder. With appropriate support and a quick resolution of the issues concerning the care of the children, however, the disorder was likely to follow an uncomplicated course and resolve within six months.”

91. In her later analysis, at [49], Baroness Hale accepted that the risk to the mother’s mental health was “very real” and that if it “did deteriorate in the way described by [the psychiatrist] there would be a grave risk of psychological harm to the children”. However, unlike in the present case, the evidence established that, with appropriate support, “the disorder was *likely to follow an uncomplicated course*” (my emphasis). The issue in that case was, at [48], “how the protective measures recommended by [the psychiatrist] might be put in place”, not their efficacy if they were in place. The Supreme Court rejected the mother’s appeal because, in simple terms, at [46], the judge had been entitled to conclude that the protective measures would be in place and, accordingly, also to conclude that this “would be sufficient to avoid the risk”.
92. Finally, I would just repeat what was said in *Re E*, at [52]: “The clearer the need for protection, the more effective the measures will have to be.”

Determination

93. It is axiomatic that this court can only interfere with the judge’s decision if it is wrong. For the reasons set out below, I have concluded that it is.
94. I first address the mother’s challenge to the manner in which the judge considered the matters relied on by her sequentially and not collectively.
95. There is no doubt that the judge separately considered whether each of the matters relied on by the mother established a grave risk within article 13(b). I have noted before that this may lead a judge to overlook the need to consider the cumulative effect of those matters. In *In re B (Children)* [2022] 3 WLR 1315, I said:

“[70] The authorities make clear that the court is evaluating whether there is a grave risk based on the allegations relied on by the taking parent as a whole, not individually. There may, of course, be distinct strands which have to be analysed separately but the court must not overlook the need to consider the cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk(s) that might potentially be established as well as the protective measures available to address such risk(s).”

96. The judge in the present case did not consider the cumulative effect of the matters relied on by the mother. If the mother’s case had been confined to her allegations of physical abuse, it may well be that this would not have been sufficient to undermine the judge’s ultimate decision. It may also be that the weight properly to be attributed

to them would equally not have affected the outcome of an overall assessment for the purposes of article 13(b). However, the mother's case was not so confined. Further, I consider that the judge's ultimate conclusion in respect of article 13(b) was, at least potentially, undermined by her failure to include the effect of S's separation from A when determining whether article 13(b) was established. The judge needed to consider the combined effect of the mother's mental health and S's separation from A. The latter was an established consequence of a return order. The potential risk was that this would be combined with the mother suffering a significant deterioration in her mental health. The judge did not consider these matters together. In fact, when analysing the effect of separation, among other matters, the judge said that S "will be cared for by his mother".

97. I next turn to consider the judge's analysis of the evidence given by Dr Ratnam that the mother's mental health needed to stabilise before she returned to Australia. The judge clearly sought to address this aspect of Dr Ratnam's evidence at [147] (paragraph 74 above). However, in my view, her analysis does not properly reflect the effect of that evidence.
98. The judge might well be right when she said that she "could not see that a wait for a month or three or slightly longer would improve the situation". But, with respect, that does not address the effect of the evidence nor was it a reason for rejecting it. The evidence was dealing with the potential consequences of a return when the mother's mental health had declined such that it had affected her functioning. It was this which Dr Ratnam considered "particularly concerning in terms of a return to Australia". That was why she said that "the focus should be on stabilising [the mother's] mental health" *before* a return. Dr Ratnam could not predict how long that might take, but her evidence remained that this "would *have* to occur before a return to Australia" (my emphasis). This was clearly because, otherwise, Dr Ratnam was pessimistic about the prospects for the mother's mental health on a return both in terms of a further deterioration and in terms of her ability to respond to treatment. With all due respect to the judge, she did not sufficiently engage with this evidence for the purposes of determining whether article 13(b) was established.
99. I turn next to the judge's determination in respect of article 13(b), starting at [144].
100. The judge was clearly right to decide that, absent protective measures, the risk of the mother's mental health declining on a return to Australia established a grave risk of psychological harm to S and/or that he would otherwise be placed in an intolerable situation. As was said in *Re E*, this determination requires the court to consider both the likelihood of the risk occurring and the nature of the harm if it does occur. In the present case, the risk, as found by the judge, was that the mother's mental health "would" deteriorate to the extent that, by admission to hospital or otherwise, she would "not be capable of caring for [S] physically ... or emotionally". The evidence plainly established that, to repeat what was said in *Re E*, the risk had "reached such a level of seriousness as to be characterised as 'grave'". The father has rightly not sought to challenge this conclusion.
101. At [145], the judge addressed aspects of the evidence as to the causes of the mother's mental health difficulties. I would first note that, as submitted by Ms Guha, there was no evidence which supported the judge's assessment that the fact that "the affair was

slowly receding” was relevant. Indeed, Dr Ratnam’s evidence was that acrimonious relationships “take a very long time to resolve”.

102. It can also be seen that the judge’s analysis of the causes of the mother’s “current anxiety and depression” and “future anxiety” omitted, as again submitted by Ms Guha, significant other factors referred to by Dr Ratnam. There is no reference to distress; to social isolation and the loss of support provided by her family in England; to separation from A which Dr Ratnam said would be “incredibly difficult” for the mother; relationship discord; and the mother’s own perception of her safety. There is, in fact, no real analysis of the position the mother would be in on a return to Australia beyond a reference to the “possible decisions of the Australian court”. In my view, the evidence did not establish that the mother’s “future anxiety will be focused on” those decisions and “her fears about S being removed from her care”. As summarised above, Dr Ratnam’s evidence identified a number of other potential strands or factors.
103. The judge’s conclusions as to the efficacy of the protective measures are set out at [147]-[148]. Again, with all due respect to the judge, I question her conclusion that “the protective factors which the father has offered satisfy the safeguards suggested by Dr Ratnam”. Nor does the evidence support her conclusion that those “safeguards ... *will* reduce the risk to the mother and S and *ensure* that the latter will not face a grave risk” (my emphasis). There is no reasoning which supports or explains this analysis.
104. The conclusion, that the protective factors satisfy the safeguards suggested by Dr Ratnam is, with respect to the judge, only part of the picture. They might have been suggested by Dr Ratnam but she did not say, and her evidence did not support the conclusion, either that they “will” reduce the risk to the mother or that they would “ensure” that S would not face a risk of harm within article 13(b). I refer to this because the judge’s brief conclusion, in [148], can only be supported if she considered that that was the effect of Dr Ratnam’s evidence. This is the plain implication of her analysis. However, Dr Ratnam did not say, as the psychiatrist in *Re E* had said, how the risk would be avoided. As referred to above, she identified what measures needed to be in place “to try and prevent deterioration to such an extent” but she did not, because in her opinion she could not, predict whether they would or would not be effective.
105. I have already addressed the judge’s analysis of Dr Ratnam’s evidence, at [89] and at [141], and what I consider to be the flaws in that analysis (paragraphs 59 and 73 above). In my view, these flaws are carried through into the judge’s conclusion, at [148], that the proposed measures “will reduce the risk” and “ensure” that there is no grave risk to S. As referred to above, this part of the judgment was reflected in Mr Gratton’s submission that the judge had been entitled to conclude that “the mother would be sufficiently supported on return that she would not suffer a deterioration in her mental health to the extent that it would impact on S”. This might be a fair implication of what the judge meant but, in any event, I do not accept that the judge would have been entitled to reach this conclusion nor, in fact, does the judge’s analysis address why or how those measures reduce or ameliorate the risk of grave harm as found by the judge, at [144], such that there is no longer any such risk.
106. For the reasons set out above, I have concluded that the judge’s decision cannot stand.

107. The next issue is whether this court can properly determine the application or whether there needs to be a rehearing. In my view, we have sufficient information, including a transcript of Dr Ratnam's evidence and, indeed, of the whole hearing, to determine the application. It is not necessary further to prolong these proceedings to achieve a fair disposal of the father's application under the 1980 Convention and, in particular, to determine whether the mother has established the ground under article 13(b).
108. First, I see no answer to Dr Ratnam's clear evidence that the mother's mental health would have to stabilise "before a return to Australia." This evidence clearly demonstrated that the proposed protective measures would not reduce or ameliorate the grave risk as found by the judge because those measures were not addressed to this at all. They did not deal with the stabilisation of the mother's mental health prior to a return to Australia.
109. There was a suggestion that, if this was the only issue, it would be appropriate to wait for this to occur. I do not accept that for two reasons. First, the jurisdiction under the 1980 Convention is not a continuing jurisdiction but one which requires a summary decision to be made on the evidence at the date of the hearing. It is not a "wait and see" jurisdiction. Secondly, the evidence was that it was "impossible" to predict when this might occur "because mental health is not linear and improvement is not linear". In those circumstances, there would be no justification in adjourning the proceedings and even less in making some sort of deferred order.
110. In any event, this evidence has to be considered along with the question of whether the protective measures referred to by the judge *would* address or sufficiently ameliorate the risk as found by the judge such that S would not be exposed to a grave risk within the scope of article 13(b). In taking this approach, I am adopting the same structure that the judge applied. I have emphasised "would" because, clearly, if such measures only "might" (in the sense of might or might not) ameliorate what would otherwise be a grave risk, the grave risk would remain.
111. As referred to above, the judge rightly decided that article 13(b) was established subject to the issue of protective measures. The issue this court has to determine is whether those measures, as referred to in the evidence of Dr Ratnam, would be sufficient to reduce or ameliorate the risk that the mother's mental health would deteriorate to the extent of creating a grave risk of harm for S or of otherwise placing him in an intolerable situation.
112. For the reasons I have given above, I am clear that they would not. It is clear to me that the risk of grave harm which was identified by the judge was not met nor ameliorated by the measures referred to by Dr Ratnam. As referred to above, there was no evidence which supported the judge's conclusion that these measures would "sufficiently mitigate if not eliminate the risk of harm from the mother's mental health". Equally, there was no evidence which supports Mr Gratton's submission that "the mother would be sufficiently supported on return that she would not suffer a deterioration in her mental health to the extent that it would impact on S".
113. I repeat that the evidence was to the opposite effect, namely that the nature and extent of that deterioration could not be predicted, even with the safeguards referred to by the judge. Those safeguards were, I repeat, to "try and prevent a deterioration to the previous extent". They also have to be viewed in the context of Dr Ratnam's

prognosis being “more pessimistic and negative”. The inevitable consequence is that the risk as found by the judge, at [144], remained and remained grave. The evidence did not establish that the proposed measures would meet or sufficiently ameliorate that risk. At its height, the evidence established that the risk *might* be ameliorated. That was not sufficient in this case because, as was said in *Re E*: “The clearer the need for protection, the more effective the measures will have to be.”

114. Finally, I have not yet included as part of my analysis, the effect on S of being separated from his sibling. That alone would clearly not have established an article 13(b) risk. However, it does provide an additional element which supports the conclusion that there is a grave risk that a return to Australia would expose S to psychological harm or otherwise place him in an intolerable situation.
115. The fact that a risk within the scope of article 13(b) exists is not legally determinative because, under the 1980 Convention, it gives the court a discretion not to make a summary return order. However, it is well established that the discretion will almost inevitably be exercised by refusing to make a return order. As Baroness Hale said in *Re D (A Child) (Abduction: Custody Rights)* [2007] 1 AC 619, at [55]:

“it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate.”

There is no justification in this case for exercising the discretion other than by refusing to make a summary return order.

Conclusion

116. In conclusion, therefore, for the reasons set out above, in my view the appeal must be allowed and the father’s application under the 1980 Convention must be dismissed.

Lord Justice Peter Jackson:

117. I agree.

Lord Justice Stuart-Smith:

118. I also agree.