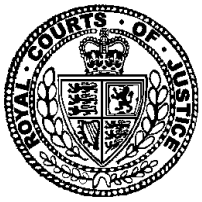

Neutral Citation Number: [2019] EWHC 256 (Fam)

Case No: FD18P00220

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/2/2019

Before:

THE HONOURABLE MRS JUSTICE KNOWLES

Re E (Abduction: Article 13B Deferred Return Order)

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Mr James Turner QC (instructed by Dawson Cornwall) for the father, RM
Mr Christopher Hames QC and Mr Mark Jarman (instructed by Venters) for the mother, EP
Mr Michael Edwards (instructed by CAFCASS Legal) for the child, EM
Miss Victoria Green (instructed by the local authority) for the local authority.

Hearing dates: 21-25 January 2019

- -

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 MRS JUSTICE GWYNNETH KNOWLES

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment)

in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Knowles:

1. The substantive application before me is made by the father seeking an order requiring the return to Spain of his daughter, E, pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ["the 1980 Convention"] which is given domestic effect in England and Wales by the Child Abduction and Custody Act 1985 and also as supplemented by certain provisions of Council Regulation (EC) No.2201/2003 ["BIIa"].

2. The First Respondent is the mother of the subject child. The Second Respondent is the child represented through a CAFCASS Guardian. The local authority currently accommodating the subject child, by reason of events which I explain in due course, is also represented in the proceedings but has not been joined as a party ["LA1"]. Additionally, E and her family also had involvement with another local authority before moving to Spain in July 2016 ["LA2"].

3. The issues which I am required to determine are as follows:

    a) Whether the subject child was habitually resident in Spain immediately before her abduction, so as to engage the powers and obligations conferred by the 1980 Convention; and

    b) If the 1980 Convention is engaged, whether any party who opposes the return of the child to Spain can establish that such a return would give rise to a situation described in Article 13(b) of the 1980 Convention. It is contended by the mother and by E's Guardian that the summary return of E to Spain, in either the care of her father or into Spanish state care, will create a risk of physical or psychological harm and/or place E in an intolerable position. It is also asserted that there are no adequate protective measures available to mitigate that situation.

4. This case has fallen well outside the six weeks' time limit for determination provided for in Article 11 of the 1980 Convention. It has also been beset with difficulties such as (a) the mother's loss of litigation capacity (happily temporarily) at a late stage of the proceedings when she was due to file important evidence about habitual residence and (b) E's worrying presentation in foster care which had implications for her contact with both parents.

5. In reaching my conclusions, I have read the following:

    a) Two substantive trial bundles concerned with the 1980 Convention proceedings;

    b) A separate bundle of materials in respect of various proceedings in Spain;

    c) Two bundles of material disclosed by LA2;

    d) One bundle of material disclosed by the police;

    e) And a bundle of material produced by LA1.

I have also read a bundle of relevant authorities together with position statements/skeleton arguments produced on behalf of all those represented at this hearing.

6. On 21 January 2019 I refused an application made by the father that I should hear oral evidence on the issue of habitual residence. I also refused an application that I should permit the father to give oral evidence about (a) the protective measures he offered to the court should E return to Spain and (b) his aggrieved feelings about the way in which he had been treated by the local authority. Instead, I directed that he should file a statement by the morning of 23 January 2019 limited to what those protective measures would be. A statement to that effect was duly produced.

7. I did hear oral evidence from Dr Teper, a consultant child psychologist, instructed to assist the court about E's unusual presentation in her foster home and about contact issues. Following her evidence, Mr Turner QC made an application for these proceedings to be further adjourned in order that a consultant child and family psychiatrist be instructed to report on E and her contact with her parents. Criticism was made of Dr Teper's report and assessment because she had failed to progress contact between E and her father and had failed to meet with either parent in defiance of an order made by me on 14 December 2018. I refused that application, giving a short ex tempore judgment on 24 January 2019.

8. I am extremely grateful to all the advocates who appeared before me. The quality of their submissions, both oral and written, helped me greatly in untangling some of the factual and legal complexities in this unusual case.

The 1980 Convention: Principles

9. In proceedings as complex as these, I have been guided by the principles found in the 1980 Convention, set out by Baroness Hale and Lord Wilson in Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144. In paragraph 8, they state that the first objective of the 1980 Convention is to deter either parent from taking the law into their own hands and pre-empting the result of any dispute between them about future upbringing of their children. If an abduction had taken place, the second objective was to restore the children as soon as possible to their home country so that any dispute could be determined there. Paragraph 13 makes clear that there is no provision expressly requiring the court hearing a 1980 Convention case to make the best interests of the child its primary consideration. Such proceedings are not proceedings in which the upbringing of the child is in issue but are proceedings about where the child should be when that issue is decided. Nevertheless, both judges stressed that the fact that the best interests of the child are not expressly made a primary consideration in Convention proceedings, does not mean they are not at the forefront of the whole exercise [see paragraph 14]: *"…The aim of the Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child…"*.

10. Paragraph 15 contains an important warning:

> *"Nowhere does the Convention state that its objective is to serve the best interests of the adult person, institution or other body whose custody rights have been infringed by the abduction…"*

Both judges emphasised the view that the 1980 Convention is designed with the best interests, not only of children generally, but also of the individual child concerned as a primary consideration is reinforced by the provisions of Article 11 of BIIa. Recital 12 to BIIa points out that *"the grounds of jurisdiction in matters of parental responsibility…are shaped in the light of the best interests of the child, in particular on the criterion of proximity"*. The judges concluded in paragraph 18 that both the Convention and BIIa had been devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration.

Background

11. It will come as little surprise to learn that there were massive factual disputes between the father and the mother. The background to the proceedings was complicated and what follows is not intended to be a comprehensive summary. It is moreover not a recital of the facts about which I am satisfied on the balance of probabilities. Given the level of factual dispute, I have confined myself to finding facts which are germane to my decision on habitual residence (as to which, see the relevant section of this judgment). I have studiously avoided finding facts relevant to the Article 13(b) defence, save that I must come to a view about E's presentation and needs in order to assess the defence in the way that the authorities signpost.

12. Furthermore, there was the added complexity of:

    a) Criminal proceedings against the mother in Spain in which it was alleged that she had committed a serious sexual assault on E's half-brother, these proceedings being already underway when the mother brought E to this jurisdiction;

    b) Proceedings in Spain between the mother and the father as to the care of E, these proceedings being once more under way when the mother brought E to this jurisdiction;

    c) Proceedings in Spain in which the mother alleged domestic abuse against the father but where she failed to establish her case either at first instance or on appeal;

    d) Extradition proceedings in this jurisdiction against the mother in relation to the criminal proceedings in Spain because the mother had absconded to this jurisdiction;

    e) The placement of E in a foster home as a result of the mother's arrest and detention in connection with the extradition warrant. This arrangement continued, by reason of an agreement pursuant to section 20 of the Children Act 1989, after the mother's release on bail because of LA1's concerns about E;

    f) And the subsequent replacement of the section 20 agreement with an interim care order made by Baker J (as he then was) within the 1980 Convention proceedings.

England prior to July 2016

13. The father was born in Iran and, after the Iranian Revolution, came to this jurisdiction with his parents and older sister. He now has dual Iranian and British nationality and is 46 years old. He has a degree and worked in IT. He has a child, D, a boy now aged 14 from a relationship with a woman called K. After that relationship broke down, there was litigation in 2009 about D's care resulting in D living with his father. I note that police records in April 2013 log an incident where the father was said to have broken into K's address in order to collect some belongings. He allegedly pushed her before she asked him to leave which he did. The police took no further action in respect of this incident.

14. The mother was born in Russia and is now 42 years old. There is a factual dispute about how and where she met the father. The father says that he met the mother in London in 2005 when he engaged her services as a prostitute. The mother denies she worked as a prostitute and says that they met in 2005 whilst she was still in Russia working as a sales manager for a cosmetics company. Both agree that they began to cohabit at the end of that year/in early 2006. Although the father and the mother were cohabiting, the relationship was not sexually exclusive since the father continued to be involved with, if not also cohabiting with, D's mother in 2005. In 2009 D came to live with the father and the mother in a house purchased by the father in LA2.

15. With some understatement I observe that, on each of their accounts, the mother and father had a tempestuous relationship almost from its inception. The mother alleges that, only after she started cohabiting with the father, did he tell her that he was a drug dealer. Though he was working as an IT consultant at the time, the mother alleged that the father was cultivating cannabis on a commercial scale with a variety of associates. There is some very limited support for this contention as, on 2 March 2007, the father was convicted under the Misuse of Drugs Act 1971 of cultivating cannabis and given a twelve-month supervision requirement together with an unpaid work requirement of 180 hours. The father's statement dated 26 September 2018 asserted that he cultivated cannabis for his own personal use rather than on a commercial scale. However, in a police report of an incident between the mother and the father on 4 April 2014, the father was recorded boasting to officers about how he made his money through drug dealing and how cannabis was completely non-harmful as a drug. The mother also alleged that the father took cocaine each day and I note that the father's statement dated 26 September 2018 contained an admission that the father occasionally used cocaine though he did not consider himself to be addicted to it.

16. The mother also stated that the father was physically and sexually violent to her from the outset of their relationship. On her account she was the victim of rape by the father on numerous occasions and contracted sexually transmitted diseases from him because the father was a regular user of prostitutes. The father was also said to have run an escort agency and brought women to this jurisdiction from Iran and Eastern Europe to work for him as escorts. The mother further complained of emotional abuse and asserted that E had witnessed this alongside the father's physical abuse of the mother.

17. In 2009 the father met his present wife, V, and began to have a sexual relationship with her. V's statement indicated that her relationship with the father began on the basis that the father had made a clean break with the mother. Her statement makes clear that the father confirmed this to her before they began their relationship. In contrast, the father says that he tried to finish his relationship with the mother after he met V but was

unsuccessful in doing so. What is clear is that, as with the mother of D, the father continued his relationship with the mother at the same time as his relationship with V. The father accepted he married V in 2013, at a time when the mother was pregnant with E. He allegedly told the mother about the marriage and V's pregnancy about two weeks after E was born. The father and V have a son, G, born in August 2014.

18. The father's relationship with V appears not to have been without incident. On 5 November 2014 V called the police to report that the father had smashed a laptop in front of G. He is said to have admitted to officers that he was angry as V had discovered, on checking his emails, that he was going on holiday to Dubai with a girlfriend. He was recorded as leaving their flat briefly but returned when he realised that he had forgotten his passport. He could not gain entry so kicked the door open and left once he had retrieved his passport. V told officers that she was not assaulted or threatened at any point during this incident. Further, on 1 January 2017, the police were called to the home the father and V shared. Both the father and V were reported to have been drinking and had rowed. V was reported to have called the police after the father became verbally aggressive to her, fearing that he might also become physically violent. She refused to provide more details as she did not want to get the father into trouble. The father was contacted by the police and was described as being heavily intoxicated with slurred speech. He refused to tell officers where he was and said he had no wish to return to the family home.

19. Returning to the relationship between the mother and father, by 2011 the mother's GP recorded that she seemed to be very depressed because of a poor relationship with violence. In January 2012 the police were called to the mother's flat after she complained that the father was threatening to kill her and cut her up. The mother was described as upset, crying and clearly in a state of shock but she was adamant she did not want the father to be arrested. The officers found duct tape in the bathroom and the mother eventually admitted that the father had put duct tape over her face and mouth to stop her talking or screaming. She claimed that the father had raped her and strangled her but said she loved him. The father was arrested and denied the mother's account. He was not charged as the mother refused to provide further information or support his prosecution. A further incident to which police were called took place in February 2012 when the father was alleged to have slapped, beaten and threatened to kill the mother. In September 2013 the mother's GP records show that the consultant at the Portland Hospital, where the mother was receiving ante-natal treatment, made a referral to the mother's GP. The consultant was very concerned about the mother's relationship and suspected she was a victim of violence. The mother refused to discuss this with the consultant, so a referral was made to the GP to alert him/her of these concerns.

20. E was born in January 2014. The mother alleged that two days before the birth, the father assaulted her. On 14 March 2014 the health visitor made a referral to LA2. She reported that the father was very dominating and would often answer for the mother. The mother later told the health visitor on the telephone that the father was verbally abusive to her. A few weeks later the mother said to the health visitor she was also a victim of physical abuse as well and was trying to leave the father. She told the health visitor that the father had hit her when E was about a week and a half old. E had been in her arms when this happened and was also hit on the head. Though the health visitor reported that the mother appeared to be very stressed physically and emotionally, she begged the health visitor not to refer the matter to the local authority as she was fearful

of losing her home and thought she could resolve matters herself. The mother later refused to give further details to the police about the incident during which E had allegedly been hurt, saying it was an accident caused when the father slipped. In early April 2014 the police attended the mother's flat after reports of a baby crying very loudly and of raised voices. The mother and father refused to engage with the police and officers had no concerns for E and D, her older half-brother. Two MARAC panels about the family were held in May 2014 (these being multi agency risk assessment conferences where information is shared on the highest risk domestic abuse cases between representatives of the local police, probation, health, child protection, housing and other agencies).

21. A Child Protection Case Conference took place on 17 June 2014 in LA2 and it was decided that E should be the subject of a child protection plan. D was not made the subject of such a plan as he lived in another local authority area but a referral to that authority was to be made in respect of D as well. The minutes of that conference recorded an earlier incident in when D had reported to his paternal aunt that the mother had exposed him to sexualised behaviour. The behaviour complained of is unclear but seems to have been the mother being naked in front of D. I note that a child protection investigation was undertaken by LA2 in 2012 in response to what D had said but concluded there were no concerns and the case was closed on 29 August 2012. A police report dated 15 July 2012 recorded, amongst other matters, the paternal aunt saying that D had told her of the mother pulling down her underwear and showing him her private parts. The police planned to interview D but the father refused to consent to this as he did not want D to be involved and to attend court. No further action was taken by the police.

22. Both the mother and father agreed with the 2014 child protection plan which stated, amongst other matters, that both parents were to stop their verbal and physical fights. Notwithstanding that aspiration, in October 2014 the father complained to the police that the mother had broken into the home he shared with V. He said she had made false allegations against him after she learned of his relationship with V. He said he had no contact with E and told officers about the child protection plan. He did not wish to pursue matters but just wanted his concerns about the mother's alleged behaviour recorded.

23. A Review Child Protection Conference took place on 12 March 2015 although the minutes do not appear to be in the bundle. It appears that E was no longer thought to need a Child Protection Plan but did require a Child in Need Plan. E was said not to have seen her father since she was about 5 months old. There were no concerns about the mother's parenting of E but it was thought the mother remained vulnerable because it had been difficult for her to let her past life with the father go. On 20 April 2015 the mother's GP records stated that the mother had been severely physically abused by her ex-partner. She was said to have been hit multiple times to her face. The entry in the records also referred to a previous assault about two years earlier which had left the mother with facial bruising and other injuries. On examination the mother was said to be unable to smile fully or blow her cheeks and there was some drooping of the corners of her mouth. She was referred to a plastic surgeon by the GP. The incident which led to this consultation with the GP does not appear to have been reported to the police or to the local authority. On 28 July 2015 LA2 closed the case as the family were said to have moved abroad.

24. At about this time in spring 2015, the police records contain an entry in which the mother of D alleged that the father was physically abusive to the mother and had made threats to kill her and E on either 5 March 2015 or 5 February 2015. K said she had told the local authority of her concerns and had tried to persuade the mother to get help from the police. She also said that the father had been violent to her during their relationship. The police went to the father's home and he confirmed that he had not seen the mother in over seven months and did not know where she lived. Eventually the mother was spoken to by the police and confirmed the account given by K which had been reported to her. She said she was very scared of the father though she had no contact with him and did not wish to take matters further. There is one further entry concerning D's mother, K, in May 2015 which is found in the local authority records. She was reported to be the victim of a sexual assault by the father who she said harassed her and touched her private parts. She did not want to make a formal complaint or have him spoken to.

25. The father vehemently denies the allegations of domestic violence and claimed that the mother was physically abusive to him. He stated in his second statement that he knew she had a drink problem which made her aggressive and violent. Both he and V describe behaviour by the mother amounting to a campaign of sustained harassment once she became aware of the seriousness of the relationship between the father and V. V complained that the mother posted sexually explicit pictures of her (from her time working as a glamour model) to the father and to his friends and family. She is also alleged by V to have shown this material to D when he was a very young boy. On more than one occasion, the mother was also said to have entered the building where the father and V lived and gained entry to their flat where she destroyed personal possessions.

26. Following a period of comparative calm, on 4 February 2016, the local authority records noted that the father was referred to MARAC after it was said the mother had bitten him on his stomach. This followed a complaint by the father to the police in December 2015. The father was also said to have showed police videos he had taken of the mother being very drunk whilst caring for E. The mother was arrested later in February 2016 for being drunk in charge of E after the father visited her home and found her slurring her words. She fell and the father rang the local authority who then called the police. E was placed in her father's care following this incident. A local authority record dated 9 March 2016 noted that the father had, at some point, told police officers that E and her mother were in Russia and would return at the end of the month. He was later recorded to have said to social workers that he did not know where the mother and E were and to have been verbally abusive and threatening. On 5 March 2016 the mother called the police after the father allegedly took E's passport. She appeared to police to be drunk but she made no claim that she had been assaulted by the father or that she was in fear of him. The police took no further action as it appeared to them that both parents were calling the police for any minor disagreement, the purpose being to log evidence against each other to gain custody of E. There was said to be a family court hearing on 22 April 2016.

27. On 8 March 2016 the father and his sister signed a written agreement with LA2. This recorded concerns about (a) E being at significant risk of harm whilst the mother was under the influence of alcohol and (b) that the father had been staying at the mother's home address when, given the history of severe domestic violence, it was not considered safe for the parents to be together. The father agreed (a) to live at his sister's

address with E until risk assessments had been completed; (b) that his sister would supervise his day-to-day care of E; and (c) that he would not take E to her mother's address. A referral was made to the supervised contact service on 23 March 2016 so that E could have contact with her mother.

28. An undated risk assessment of the father, completed at some point between the written agreement being signed and the referral for supervised contact, was positive. It stated that, as he had no convictions for violence, the current risk of harm was low in relation to him caring for E. However, it was thought this risk would increase significantly if the mother and father were alone together. He was said to be a risk to women but not to a child. He was noted to have acted protectively by reporting his concerns about the mother and caring for E. Positive interaction was observed between the father and E – she did not appear frightened of him and went to him for comfort and affection. The father agreed to attend a parenting course and attend the Caring Dads programme and recognised that he should work with the local authority.

29. During the assessment, the father stated that he was not happy with V's attitude to E whom he described as very protective over their son, G. He said E was his priority and if V could not come to terms with E living with him, he would live separately from her and may need to divorce. He denied hurting E as alleged in 2014 but admitted hitting the mother in retaliation after she hit him several times in the face. He said they had many arguments but that most of the allegations had been fabricated. He accepted that he had not seen E for nine months after the initial Child Protection Conference in June 2014 which had really upset him. Though committed to caring for E, the father wanted her to live with her mother if her mother could stop drinking. He had taken E to see her mother four times in the previous fortnight at various play areas and reported that the mother had not been drinking for a fortnight.

30. On 13 April 2016 LA2 sent the father and the mother a letter before care proceedings. This invited them to a meeting on 19 April 2016 and warned that if they did not co-operate, LA2 would begin care proceedings to protect E. The letter noted that the agreement signed on 8 March 2016 was terminated very quickly as the local authority in the area where the father's sister lived had advised that he should not stay at her address with E. LA2 listed various things the father was expected to do in order to avoid care proceedings, including attending a parenting course and a course aimed at preventing further abusive behaviour towards partners. He was not to permit E to have unsupervised contact with her mother when her mother was drunk. Both parents attended the meeting on 19 April 2016 with their respective legal representatives and agreed to E having supervised contact with the mother. The mother agreed to attend alcohol counselling and domestic abuse support groups and the father agreed to attend the Preparing to Change Programme. The father also agreed to apply to the court for a child arrangements order and to ensure E did not have unsupervised contact with her mother. On 22 April 2016 the mother was convicted of being drunk in charge of a child and given an 18-month conditional discharge.

31. LA2's records indicated that little came of the programme required of the parents. LA2's records show that contact arranged on 5 May 2016 was not attended by either E or her mother and I can find no record of any other arranged supervised contact between E and her mother. On 9 May 2016 the father told the local authority that the mother had gone to Russia to care for her father and he did not know when she would return. The

local authority tried to contact the mother but she failed to respond to any text or phone messages. On 28 July 2016 the father informed LA2 that he had moved to Spain with E on a permanent basis and refused to provide his address to the local authority on the basis of legal advice he had received. A fortnight later, the father told LA2 that the mother and E were in Spain with him and once more refused to provide his address. That information prompted LA2 to try, without success, to report E as a missing person and on 25 August 2016 LA2 made a referral to the Spanish Consulate in order that (a) the family might be located and (b) social workers might assess the risks to E.

Spain, 2016-2018

32. Border Agency checks recorded that on 24 July 2016 E travelled on Eurostar to France but there also appeared to be a trace of her boarding a ferry with her mother from Dover to France. E and her mother were said to be in Spain on 27 July 2016. The mother alleged that she made the move to Spain under duress from the father.

33. The family lived in a number of rented houses in Spain, the mother alleging that the father failed to pay the rent on time and left her to deal with the landlords who would demand payment from her. In August 2017 the mother sent texts to the father saying she was stressed, lonely, needed a car and money and wanted to go to the dentist. In November 2017 D joined the family in Spain and started going to school. In her statement dated 9 October 2018 the mother alleged that the father raped her in November 2017 when E was present.

34. Whether or not the move to Spain was intended to be a fresh start, by March 2017, the father was making enquiries of the Foreign and Commonwealth Office ["FCO"] in order to obtain a passport for E. LA2's records indicated that this request was prompted by a domestic incident between the parents and that the father wished to return with E to the UK. He told the FCO in an email that E's life was in danger if she was allowed to return to her mother whilst her mother was "*in this state*". He threatened to take E to Iran if he was prevented from obtaining UK travel documents and said he wanted the UK authorities to be involved so they could be sure E was being looked after. The FCO refused to issue travel documents without the mother's consent and made a referral to LA2 which included details of the father's address in Spain. Upon learning of the father's address, LA2 contacted the Spanish local authority in whose area E resided to alert them to their concerns about the family and to ask for a welfare visit to be made to E. LA2 also made contact with the father who told them he was willing to work with LA2 to keep E safe and sent them some videos of E and her mother. It is not entirely clear what the father sent though, in an email sent to the FCO, LA2 considered that the videos had been highly edited. LA2 informed the FCO that it was really worrying to see the father filming the mother in this state with E present which suggested that neither parent was putting E first. LA2's records from 2014 indicate that the father showed the social worker a video in which the mother appeared to be masturbating but it is wholly unclear if the video material sent to LA2 in 2017 was the same as the 2014 video or something entirely different. The FCO informed LA2 on 17 March 2017 that social services and the police in Spain had been asked to undertake a check on the family and the FCO maintained its refusal to issue travel documents as requested by the father.

35. A report from Social Services in Spain confirmed that the father had approached them in April 2017 to inform them about the "*negligence and abandonment"* being experienced by E. He said he had separated from the mother and had two children with another partner who was residing in England. Spanish Social Services advised the father to seek custody of E via the court. During the meeting the father said he had to travel to Iran and that the mother would be caring for E whilst he did so. Following the father's visit, Spanish Social Services tried to visit the mother and E without success. They were eventually told by a maintenance person that the mother was no longer living at the address provided by the father.

36. On 22 November 2017 the father travelled to Iran, planning to return on 25 January 2018. On 19 December 2017 the mother was arrested by Spanish police for an alleged sexual assault on D. The mother is alleged to have forced D to touch her sexually and forced him to have vaginal intercourse with her. She was bailed on 20 December 2017 when a restraining order made by the Spanish court prohibited any contact with D. On 21 December 2017, the Spanish court, of its own motion, made an order for Spanish Social Services to protect E though, somewhat surprisingly, she remained in her mother's care. A police report dated 20 December 2017 referred to the conditions in the mother's home as being untidy, unhygienic and smelly when she was arrested. After the father's return to Spain, Social Services interviewed both parents following the court's referral. The mother denied problems with alcohol and alleged that the father had subjected her to physical and psychological abuse. She said she had not reported this as she feared he would take E to Iran. She said the father was taking drugs and drinking alcohol. She described herself as being financially dependent upon him. The Social Services report does not detail the interview with the father but recorded that contact had been made with his lawyer in December 2017 who said that no application for E's custody had yet been made. Social Services later visited the mother's home and agreed with the mother what she should do to make it clean, tidy and habitable. The last home visit established that the property had improved in terms of cleanliness.

37. The father returned to Spain on 24 December 2017 and made efforts without apparent success to see E who was still living with her mother. His first statement recorded that he saw E about three times after his return to Spain and that the mother kept making excuses to prevent him seeing E. In December 2017 the father began proceedings in the Spanish court with respect to E and that court accepted jurisdiction on 17 January 2018 and listed an inter partes hearing on 17 April 2018. It is noteworthy that the father was, at that point, suggesting that the mother have staying, unsupervised contact with E. On 7 February 2018 the father discovered that the mother and E had moved out of the Spanish property and reported the matter to the Spanish police. It transpired that the mother and E had flown to this jurisdiction on 29 January 2018 to stay with D's mother, K.

38. Parallel with the children proceedings in Spain, the mother made a complaint to the domestic abuse court on 28 December 2017 in respect of the father's behaviour to her and sought a protective order against him. That order was refused on 29 December 2017 on the basis of the prosecutor's submission that there was no objective situation of risk for the mother. The mother appealed the court's refusal and a chronology of alleged abuse was produced to the court by the mother's lawyer on 8 January 2018 which included allegations that the father would beat E when he thought she had behaved badly. On 27 June 2018 the appeal court dismissed the mother's appeal and any further

investigation by the criminal court into the mother's allegations against the father came to an end on 12 July 2018.

39. On 5 September 2018 the criminal court in Spain issued a European Arrest warrant for the mother's arrest because she had absconded and was no longer resident in Spain. She was charged on 8 November 2018 with a sexual assault on D. There are extradition proceedings afoot in this jurisdiction for the mother to be returned to Spain in order to stand trial. The mother denies that she sexually assaulted D and claims that this allegation has been fabricated by D on the instruction of the father. She is resisting her extradition to Spain. The extradition proceedings have been adjourned to a hearing listed on 4 April 2019.

40. The father's application for custody of E was granted by the Spanish court on 6 September 2018. Parental responsibility for E was to be shared by her mother and father and she was to live with her father and have supervised contact with her mother at a contact centre on alternate weekends. The mother was not present at the hearing and has not appealed this court's decision.

England, January 2018 onwards

41. On the mother's return to this jurisdiction, she and E stayed with D's mother, K, for a few weeks but left after K's kitchen window and car window were smashed. Because of this, the mother said she was worried that the father might have found out her location and, on or about 28 February 2018, she and E moved out to live in a succession of different refuges.

42. On 22 June 2018 LA1 received a referral from a third local authority expressing concerns about the mother's care of E. These included: frequent changes of address; the mother's poor mental health; E's poor diet and inability to eat solid food; E's exposure to domestic violence; and the mother's inability to provide stimulation and behavioural boundaries. The mother herself alleged to social workers that D used to masturbate in front of E. LA1 undertook a child and family assessment which resulted in E being placed on a Child in Need Plan. The mother did not tell the local authority about the criminal proceedings in Spain and it was not until 30 August 2018 that this information was made known to LA1 by the police. As a result, E was removed from her mother's care on 31 August 2018 and placed with foster carers. The mother agreed to E being accommodated pursuant to section 20 of the Children Act 1989 but she withdrew her consent for that placement in mid-September 2018. On 18 September 2018 Baker J (as he then was) made an interim care order in favour of LA1. LA1 issued care proceedings on 20 September 2018 which were stayed by my order dated 18 October 2018. E remains the subject of a protective measure pursuant to section 5 of the Child Abduction and Custody Act 1985 ["CACA"] which has placed her in the interim care of LA1.

43. On 28 June 2018 a worker at the refuge where the mother and E were living contacted LA1 to advise that another resident in the refuge had reported that E had told her that her brother used to put his fingers in her vagina. The resident made a handwritten note of what E said which recorded that E had spontaneously stated her brother had touched her bum and gestured with two fingers behind her bottom. The resident spoke to the

mother who said she was aware of this. When spoken to by a social worker on 29 June 2018, E did not repeat what she had said to the refuge resident.

44. E has remained in the same foster home since 31 August 2018. She has had regular contact with her mother at a contact centre which is supervised. Unfortunately, it has not been possible for E to resume contact with her father for reasons which will become apparent later on in this judgment.

45. The mother's mental health was thought to be fragile and on 13 September 2018 Baker J (as he then was) ordered that the mother undergo a psychiatric assessment. The report of Dr Kolkewicz dated 25 October 2018 concluded that the mother was suffering from (a) a mental and behavioural disorder arising from the use of benzodiazepines; (b) post-traumatic stress disorder; and (c) a severe depressive episode without psychotic symptoms. Her symptoms were of a severity that impaired her day to day functioning, including her parenting, to the extent that she was then unable to accompany E to Spain unsupported if an order were to be made for E's return. However, the mother's legal representatives became concerned about her apparent unwillingness to give them instructions and on 19 October 2018 I approved the instruction of Dr Kolkewicz to assess the mother's capacity to litigate these proceedings. Dr Kolkewicz's report dated 9 November 2018 concluded that the mother's presentation had altered since her last assessment of the mother on 17 October 2018. The mother was now showing a range of psychotic symptoms including persecutory delusional beliefs (a) that the father's friends were driving past her house to laugh at and torture her and they were tooting their car horns to signal that they knew everything; (b) that social workers and lawyers in the case were being bribed by the father; (c) that the father was forging the statements being used in the proceedings; and (d) that the father was using black magic against her and others. Dr Kolkewicz considered these beliefs to be well systematised and to interfere with the mother's ability to believe what was said to her by professionals and others involved in the proceedings. Additionally, the mother displayed signs of formal thought disorder which worsened when she felt anxious or under pressure. Dr Kolkewicz concluded that the mother had developed a paranoid psychosis in addition to the mental health problems identified in the earlier report dated 25 October 2018. The symptoms of this disorder meant she lacked the capacity to conduct the proceedings. With appropriate treatment, she had the potential to regain litigation capacity. In consequence of Dr Kolkewicz's conclusions, the Official Solicitor was appointed by me to act as the mother's litigation friend as there was no other suitable person who could so act.

46. In my order dated 14 December 2018, I directed Dr Kolkewicz to provide an updating report on the mother's litigation capacity, her capacity to make a witness statement and to give oral evidence at the substantive hearing fixed to commence in January 2019. Rather later than anticipated, Dr Kolkewicz provided a report dated 17 January 2019 which concluded that the mother's symptoms of depression had significantly decreased; the symptoms of thought disorder, though still present, had reduced in intensity; and her persecutory, delusional beliefs were less extensive and held with less intensity. Thus, the mother had regained litigation capacity though this status was described as fragile. Her improvement had been driven by a recent move to another area rather than by taking anti-psychotic medication (which she had not commenced). Her capacity to conduct the proceedings would be strengthened and be less likely to fluctuate if she were to take anti-psychotic medication. In the light of this report, I discharged the

Official Solicitor from acting as the mother's litigation friend at the start of the substantive hearing on 21 January 2019.

The 1980 Convention Proceedings

47. The father issued his application for the return of E to Spain on 18 April 2018. Despite the making of a location order, the mother and E's whereabouts were not ascertained until 13 July 2018. Notwithstanding Article 11.3 of BIIA which provides that proceedings to which BIIA applies must be completed within six weeks except where exceptional circumstances make this impossible, the determination of the father's application has been substantially delayed. The first final hearing was due to take place on 14 September 2018 but this was adjourned on 31 August 18 when E was placed in foster care and the mother was arrested. The second final hearing was then listed for 25-26 October 2018. On 13 September 2018 the final hearing was once more adjourned and listed on 5-6 November 2018 in order to allow Dr Kolkewicz to prepare a psychiatric assessment of the mother. On 31 October 2018, when it became clear to the mother's legal representatives and to this court that it was necessary to assess her litigation capacity, the final hearing was once more adjourned to 20-23 November 2018. On 13 November 2018, when it became clear that the mother lacked litigation capacity and required the Official Solicitor to act as a litigation friend in the proceedings, I adjourned the final hearing to 21-25 January 2019. Thus, final hearings in these proceedings have been listed on no less than five separate occasions.

48. On 11 September 2018 E was joined as a party to the proceedings by Baker J (as he then was) and she has been represented by CAFCASS Legal through her Guardian, Mrs Kay Demery.

49. On 24 July 2018 Hayden J ordered the mother to make E available for video contact with her father once a week. This contact was to be facilitated by the mother's social worker or another independent person arranged in consultation with the social worker. There were difficulties in identifying a suitable person and the mother sought assurances from the father and his legal representatives that her location would not be disclosed to the father. By an application made on 15 August 2018, the father sought enforcement of the order for video contact as no such contact had taken place. On 4 September 2018 Russell J directed the Cafcass High Court Team to make enquiries of LA1 as to its position in relation to contact between E and her father. By the time of the hearing before Baker J on 13 September 2018, the local authority was said to be considering the father's wish to have Skype contact with E.

50. These proceedings were allocated to me by Baker J on 13 September 2018 and I have conducted all subsequent hearings, the first being on 19 October 2018. At that hearing I directed that, if the father sent to the local authority a card containing a simple message for E and, if he so wished, a video recording of himself alone directed to E, the local authority should show such of that material to E as was, in the professional opinion of the relevant social worker, deemed to be appropriate. I directed that a report on E's reactions to this material should be served upon the parties to the proceedings. This staged approach to the reintroduction of the father's contact was influenced by the local authority's statement dated 17 October 2018 which described E as a much traumatised child who was smearing faeces in her foster home; crying for no apparent reason; sobbing and saying "*I'm sorry, I'm sorry*"; and suddenly switching from tearful and

upset to pretending to be a ballerina or a fairy. Given the concerns about E's presentation, I concurred with the views of LA1 and E's Guardian that the reintroduction of the father to E should take place in a careful and considered manner.

51. The father sent a card to E which was shown to her and two video recordings, one of which was shown to her. A statement from the allocated social worker dated 12 November 2018 indicated that E showed little reaction at the time to seeing the card from her father. However, over the weekend, E smeared faeces once more. Though initially smiling when shown the video of her father and saying that she would like to speak to him on a video and tell him that she loved him, E had subsequently refused to play in the playroom which was where she had viewed her father's video and had spoken to her foster carer about concerning behaviour between her parents and concerning behaviour between her and her father. On 21 November 2018 I approved, with the agreement of all the parties, the instruction of a child psychologist, Dr Teper, to provide an initial assessment of E's current psychological functioning and her emotional and therapeutic needs together with an assessment of the impact upon her of her experiences to date. In addition, Dr Teper was instructed to advise about the nature and frequency of contact (direct and indirect) between E and her parents and, if it was her view that contact between E and her father should be restarted, how that might best be managed. Dr Teper was directed to provide an interim report for the court hearing listed on 14 December 2018.

52. On 14 November 2018 I gave a short judgment on interim contact between E and her parents. In summary, I accepted the view of the local authority and of the Guardian that E presented as a highly vulnerable child whose experienced foster carer described her as the most traumatised child she had cared for. Though she had achieved some stability in the foster home, I considered it to be desirable that there were as few changes as possible to E's circumstances. There was evidence that contact between E and her mother had been less beneficial for E than it ought to have been. The mother had often been late for contact and had missed contacts without warning. Her persistent focus on providing food and feeding E was to the detriment of her interaction with E. Latterly, E herself was asking if it was time to go well before the contact with her mother had ended. Though it would be a change, I decided that contact between E and her mother should reduce from three times each week to once a week. Turning to the contact between the father and E, I decided that the best way forward was to invite Dr Teper to report on contact prior to the December hearing. I considered it would be helpful if the father wrote another card which Dr Teper could explore with E and provided another video which could also be used by Dr Teper when she assessed E. The father had provided a toy which might also be a means of assessing whether contact between E and her father could be reintroduced. It was for Dr Teper to use her common sense to decide how to deploy this material in coming to her view about contact with the father.

53. Dr Teper produced an interim report on 10 December 2018 which described E's presentation as fragile. She recommended that no changes were made because maintaining stability for E must be prioritised given her troubling behaviours and the need for considered assessment. In an email dated 13 December 2018 Dr Teper noted that, following her first session when she had asked E questions about her family, E had smeared faeces once more. I note that smearing faeces was a behaviour which had, by then, decreased in frequency during the time E had been in foster care. Dr Teper wondered whether the smearing behaviour might have been a reaction to questions

about her parents. She felt that it was simply too soon to introduce either the father's card, video or toy to E but she intended to work towards this over the forthcoming weeks. She was very clear that E required stability and predictability in her life since, whatever had occurred in her critical, formative years, seemed to have been deeply traumatic for her. There should be no changes made for the time being.

54. At the hearing on 14 December 2018, I adjourned the father's application for immediate face-to-face contact with E making it clear that direct and/or indirect contact was permitted at the discretion of Dr Teper if she considered the same to be appropriate. I directed that Dr Teper should meet with the father for the purpose of enabling her to obtain such further information as might assist her to answer the questions raised within her letter of instruction. Following the hearing, Dr Teper expressed reservations about meeting only with the father, and I indicated in an email to the parties on 21 December 2018 that, if Dr Teper felt she needed to meet with the mother as well as with the father to report on E's needs, she should do so. I made it clear that I expected Dr Teper to be in a position to provide assistance to the court in January 2019 about E's needs including her need for contact with both her mother and her father.

55. I address the contents of Dr Teper's substantive report below when I consider the Article 13(b) defence raised by the mother and on behalf of E.

Habitual Residence

The Law

56. In Re B (Habitual Residence) [2016] EWHC 2174 (Fam), Hayden J reviewed five successive Supreme Court judgments on habitual residence and distilled 13 principles set out in para.17 of his judgment as follows:

> *"i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A and Another (Children: Habitual Residence (Reunite International Child Abduction Centre and others intervening) [2013] UKSC 60, [2014] 1 AC ["A v A"], adopting the European test);*
>
> *ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A; In Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 75, [2014] AC 1017 ["In re L"] ;*
>
> *iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (para 80(ii)); Re B (A Child) (Habitual Residence: Inherent Jurisdiction) [2016] UKSC 4, [2016] AC 606 ["In re B"] (para 42) applying Mercredi v Chaffe (Case C-497/10PPU) EU:C:2010:829, [2012] Fam 22 at para 46);*
>
> *iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent:*

In re R (Children) (Reunite International Child Abduction Centre intervening) [2015] UKSC 35, [2016] AC 76 ("In re R");

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (In re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] UKSC 1, [2014] AC 1038 ("In re LC"). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration;

vi) Parental intention is relevant to the assessment, but not determinative (In re L, In re R and In re B);

vii) It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one (In re B); (emphasis added);

viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (In re B – see in particular the guidance at para 46);

ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (In re R and earlier in In re L and Mercredi);

x) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (In re R) (emphasis added);

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; In re B). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (In re R).

xiii) The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have a habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, 'if interpretation of the concept of habitual residence can reasonably yield

both a conclusion that a child has a habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former'(In re B supra)"

57. I have taken these principles into account in reaching my decision on this issue.

The Parties' Positions

58. The father contended that E was habitually resident in Spain in January 2018 when her mother took her to this jurisdiction. He relied, in particular, on the facts that (a) neither E nor her mother had retained a home or indeed any ties in this jurisdiction; (b) the FCO in March 2017 had regarded E as resident in Spain; (c) there was no evidence that E had returned to this jurisdiction between July 2016 and January 2018; and (d) E's registration with a medical practitioner in Spain and her attendance, albeit brief, at a local nursery school. In contrast, the mother asserted that E was not habitually resident in Spain because she had not integrated into her family and social environment in that country at the date of her removal on 29 January 2018. The mother argued the move to Spain had taken place under duress from the father and that her life and that of E was circumscribed and divorced from the social and family environment in Spain. The Guardian and LA1 were neutral on this issue.

Discussion

59. The significant factual dispute between the parents has not made this exercise straightforward. To echo the words of Hayden J in paragraph 16 of Re B, E's habitual residence does not reveal itself instantly. I have exercised considerable caution in evaluating the accounts given by both parents about E's time in Spain. I have looked for corroborative material where possible and I have drawn such inferences from the material as I consider are justified. I have also taken into account that the material on which the court might draw to come to its conclusion on this issue varies according to the age of the child concerned. The lives of very small babies might not be capable of much separation/differentiation from those of their primary carers but this changes as a child gets older and goes to school or nursery/playgroup. It is crucial in my judgment to always focus on the child's circumstances and not be distracted by those of the adults.

60. I am satisfied that E and her parents left this jurisdiction in July 2016. The father's email to the local authority on 28 July 2016 made clear this was a permanent move. To that end, there is no evidence that the mother and E retained a property in this jurisdiction to which they could have returned if the move to Spain was but a trial move. I also bear in mind that the involvement of LA2, who had sent both parents a letter threatening care proceedings, may have been an additional incentive for a permanent move abroad.

61. I cannot come to a determination on the facts as to whether the mother made this move under duress from the father, but she and E lived in properties rented by him in Spain where he also from time to time resided. The passage of time in Spain – some 18 months – is not in itself determinative since it is E's integration into life in Spain which is important.

62. E lived with her mother and, from November 2017, with D as well. I am unclear how much time the father spent at the family home in Spain as there is evidence of him being in this jurisdiction in January 2017; of a plan to travel to Iran in spring 2017; and of travel to Iran in November 2017 for what was intended to be a period of two months.

The father exhibited to his statement dated 29 October 2018 evidence that E was privately insured for health care in Spain and, according to her medical records from Spain, she certainly attended hospital on three occasions in 2017/2018 for a cough/fever. There were two further appointments in May 2017 and October 2017 with a paediatrician which do not appear to have been prompted by sickness. The records of these consultations read as if these were general check-ups.

63. E's education in Spain was erratic. When D arrived in Spain in autumn 2017, he went to an international school called Swans. In November 2017 the school confirmed that it also had a place for E but it recommended that E attend nursery first as she was still eating bottled, pureed food and would thus have been unable to eat with the other children. In consequence, E was enrolled at the Moonlighting Nursery in October/November 2017 for morning sessions from Monday to Friday. Both parents agreed that she did not attend regularly though the reasons for this differed. The mother said E had been unwell though the father said the mother was making excuses because she neglected to take E to nursery. A record of Spanish Social Services involvement with the family dated 7 November 2018 noted that the Moonlighting Nursery confirmed E's erratic attendance for health reasons and commented about her eating habits and impulsive behaviour. I do not know whether the nursery was for international children or not but it is beyond doubt that E did not learn to speak Spanish whilst she lived in Spain and attended nursery. This will have inhibited her ability to socialise with other children for play dates outside school though I have no reason to believe that she did not socialise and play with other children during her time at nursery despite her lack of Spanish. Had she not done so, I consider it likely that the nursery would have commented about such unusual behaviour when asked by Spanish Social Services about E.

64. The mother accepted that she took E to the local playground but said that otherwise E had no friends and lived an isolated life with only her mother for company. The father in contrast suggested that E played with other children in the playground and exhibited some pictures in his statement to confirm this. He also exhibited pictures of E at the birthday party of the family's housekeeper's daughter. It seems to me that E probably had more contact with other children when the father was present. The mother's lack of Spanish and her other problems made it, in my view, less likely that she would promote E's opportunities for play with children outside the immediate family.

65. Mr Hames QC has suggested that the allegedly abusive relationship between the parents was an important factor in the mother's lack of integration into Spanish life and thus of similar relevance when determining E's habitual residence. Though I accept – in the ways I have outlined – that the mother was isolated, the reasons for that do not seem to me to be solely attributable to the father. Personality, language problems and the like may all have played their part. Even if I am wrong about that, it is E's situation which must be my focus rather than that of her mother. For slightly different reasons, I do not regard as conclusive the FCO's view that E was habitually resident in Spain. I must make my own assessment centred on what I can find is known about E's life in Spain – the view of the FCO is of little relevance in that exercise especially as the reasons for its conclusion as to habitual residence are unknown.

66. Standing back and looking at matters in the round, I have concluded, albeit on fine balance, that E was habitually resident in Spain by January 2018. She had achieved

some degree of integration in a social and family environment by attending nursery even if this was erratic. She was medically insured and received treatment including regular check-ups from medical staff. She had contact with other children outside the nursery environment although this was more often when her father was present. Though there was a move to another address in May 2017, her residence in Spain was stable in that she did not return to this jurisdiction and remained living in the same Spanish town throughout.

67. In the light of my conclusions on habitual residence, I turn to consider the Article 13(b) defence. There is no dispute that E was wrongfully removed from Spain by her mother in breach of the father's rights of custody which he was exercising or would have so exercised were it not for E's removal. Article 12(1) of the 1980 Convention requires me, subject to the exceptions in Article 13, to order the return of E to Spain forthwith.

Article 13(b): Grave risk of harm/intolerable situation

The Law

68. Article 13(b) provides that the authorities of the requested state are not bound to order the return of the child where "*there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation*". In Re D (Abduction: Rights of Custody) [2007] 1 AC 619 Baroness Hale delineated the ambit of Article 13(b) as follows [paragraph 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". It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus the English courts have sought to avoid placing the child in an intolerable situation 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. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so. In Hague Convention cases within the European Union, article 11.4 of the Brussels II Revised Regulation (Council Regulation (EC) No 2201/2003) expressly provides that a court cannot refuse to return a child on the basis of article 13(b) "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return". Thus it has to be shown that those arrangements will be effective to secure the protection of the child. With the best will in the world, this will not always be the case. No one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm".

69. MacDonald J helpfully set out the court's approach to Article 13(b) in BK v NK (Suspension of Return Order) [2016] EWHC 2496 [paragraph 45]:

"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) (Child Abduction: Custody Appeal) [2011] 2 FLR 758. 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 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, as in this case, Art 13(b) of BIIa applies, the court cannot refuse to return a child on the basis of Art 13(b) of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return). 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 the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b)."*

70. In GP (A Child) [2017] EWCA Civ 1677, the Court of Appeal considered the application of the test in Article 13(b) and stated [paragraph 61-62]:

"In order to decide whether this test was satisfied, it was in my opinion necessary for the judge to examine in concrete terms the situation that would actually face GP on her return to Italy. What would happen when she and her mother stepped off the plane? Would her mother be arrested? Where would they go, and what would they live on?...

62. The judge had no answer to these questions, although he was rightly satisfied that the transition for GP would inevitably be uncomfortable. He said that the mother would have to bear some of the costs, but did not explore at all what those costs would be, or

how in practice she would be able to meet them, both in the period immediately after their arrival, and in the short to medium term while GP's custody and welfare were under consideration by the Italian court. In my opinion these matters all needed careful examination, and although it was not incumbent on the judge to set out the evidence in detail, it was necessary for him to state the conclusions he had reached about how GP could reasonably expect to be accommodated, maintained and educated upon her return to Italy, and what would happen to her if the mother was imprisoned."

71. The Court of Appeal in Re C (Children) (Abduction: Article 13(b)) [2018] EWCA Civ 2834 once more considered Article 13(b) and stated the following with respect to protective measures [paragraph 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)."

72. MacDonald J in AT v SS [2015] EWHC2703 (Fam) considered the position where the mother refused to return with a child to the Netherlands and it was likely that the child would, as a result, be placed temporarily in foster care. Paragraph 34 contains his analysis of the approach the court should adopt and the relevant parts read as follows:

"…Having regard to the principle of comity, it is well established that in judging whether there is a grave risk following return for the purposes of Art 13(b) of the Hague Convention, the court should accept that, unless the contrary is proved, the administrative, judicial and social services in the requesting State are as adept as protecting children as they are in the requested State (see Re H (Abduction: Grave Risk) [2003] EWCA Civ 355, [2003] 2 FLR 141, Re M (Abduction: Intolerable Situation) [2000] 1 FLR 930 and Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433). As regards a return to a placement in care in the requesting State, where the requesting State has adequate procedures for protecting the child, and accepting that each case must turn on its own facts, it is unlikely that a parent will be able to successfully oppose a return on the basis that the child is being returned into temporary public care pending the courts making a substantive welfare decision (see Re M (Abduction: Intolerable Situation) [2000] 1 FLR 930 and Re S (Abduction: Return to Care) [1999] 1 FLR 843). Once again however, each case will turn on its own facts."

73. Paragraph 36 of Re E [(Children) (Abduction: Custody Appeal) [2011] UKSC 27 sets out the court's approach to allegations of domestic abuse in 1980 Convention proceedings:

"…The court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected

against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measure, the court may have no option but to do the best it can to resolve the disputed issues…"

That approach must also extend to other allegations of abusive behaviour, for example, towards children themselves.

The Parties' Positions

74. The mother opposed the return of E to Spain though, realistically, she did not argue that E should be in her care either in this jurisdiction if I refused a return or in Spain if I so ordered. Any return, whether to the father's care or into Spanish state care, would create a risk of physical and/or psychological harm and/or place E in an intolerable position. There were no adequate protective measures available. E's Guardian supported this position. LA1 remained neutral.

75. The father conceded realistically that Article 13(b) was engaged on the evidence before the court. There was evidence of concerning instability with respect to both parents and the evidence of Dr Teper established the extent of E's current psychological and emotional difficulties, such that E could not be moved anywhere without there being a risk of grave harm. Given the difficulties in establishing contact between E and her father, Mr Turner QC accepted that a return to Spain could not take place shortly after the conclusion of the hearing. However, Mr Turner QC submitted that the risks of return to Spain could be ameliorated by delaying E's return for a relatively short period of time so that (a) suitable arrangements could be made to safeguard her well-being in the father's care and (b) re-introducing direct contact with a view to her being placed in the father's care. In the alternative, Mr Turner QC submitted that the order for E's return should be stayed or deferred for a much longer period whilst the reintroduction of contact was progressed alongside a variety of assessments of the type which might be contemplated by the local authority if the care proceedings were live. Mr Turner QC submitted that the mechanism under which such deferred orders might properly be made was section 5 of CACA.

E's Presentation

76. Aged 4 and a half years at the time she was placed in foster care, E's presentation has been of significant concern to LA1 and to her Guardian. E's very experienced foster carer described E as having *"massive attachment issues"* and said she was the most traumatised child she had cared for. On first being placed, E would go for days without speaking and did not know how to eat solid food. She had to be taught how to chew food. E did not want to eat and would make herself vomit. Early on in her placement she smeared faeces over walls, radiators and windows yet her hands and clothing were clean because E had washed herself. The local authority considered E to be a very traumatised child who should remain with her current carer as moving her would be severely detrimental to her emotional and psychological well-being. Smearing remained an issue for E as she had smeared after receiving a card from her father and following Dr Teper's first visit when she had been asked some questions about her family.

77. Dr Teper's report was based on a number of play-based sessions with E as well as discussion with her foster carers and her nursery school teacher. What follows is but a summary of Dr Teper's careful analysis of this highly unusual child.

78. E struggles to regulate and make sense of her emotions and her reaction to emotional challenges appears to be smearing of faeces. Her smearing behaviour was odd in that she herself was entirely clean after she had smeared. E had a notable absence of stranger anxiety which was unusual in a child her age and suggested the possibility of an attachment disorder. She had an unusual attachment style across all environments, being over-familiar in the foster home as well as with complete strangers in the street. E actively avoided conversation and discussion about both her parents which was unusual in a normally developing child. When she did speak about her parents, all her comments were negative. Dr Teper's oral evidence about E's dissociation into the persona of Princess Sparkle was striking and persuasive. Princess Sparkle was hypothesised by Dr Teper to be an imaginary safe figure E turned to when upset in order to detach herself from and to avoid emotional pain. Dr Teper told me that this dissociation was a worrying phenomenon in a young child. E was at an extremely fragile and critical time given her disordered attachments and unusual psychological presentation. It was crucial that E had a period of stability and consistency so she could begin to build attachment relationships which were predictable and safe.

79. Dr Teper told me that there were significant risks to E of a move at the present time. This would sever her attachment to her foster carer which was just beginning to develop. E was, in any event, bordering on the age when she would no longer be able to form healthy attachments. Any move would have a negative impact on her self-esteem, interpersonal relationships, anger management, mood and anxiety. She was at high risk of significant emotional and psychological harm given the number of losses she had already experienced in her life. Dr Teper's firm recommendation was that E should not be moved from her current placement at this time. If the developing healthy attachment to her foster carer was severed, E would be at serious risk of developing an attachment disorder with potentially adverse consequences for her emotions and her ability to form healthy relationships in future. Any change to E's environment should be minimised at this moment in time. The reintroduction of her father must be taken in stages and be subject to review: E was not ready for a reintroduction now which might cause her emotional harm. It was difficult to state with any precision when a reintroduction might be possible. E required regular and urgent play therapy with an experienced play therapist.

Article 13(b): Discussion

80. Given the concession made by Mr Turner QC and the case advanced by Mr Hames QC, it is not necessary for me to dwell on the allegations of domestic abuse made by the parents against each other. I accept the submission made by Mr Edwards that, without ascribing blame to one parent or the other, there is ample evidence of the utterly chaotic environment to which E was exposed throughout her life by both her parents. As the background summary illustrates, the evidence from police and LA2's records support many of the assertions made by each parent against the other. It is inappropriate for me to make findings of fact about the parents' conduct given the summary nature of 1980 Convention proceedings and I do not do so. However, I must scrutinise carefully the

risk to E herself which may manifest itself if I were, without more, to make an order for her immediate return to Spain.

81. The material before me raises a concern that, in February 2014, E was assaulted with a blow to the head by her father when she was a small baby. In March 2014 the mother withdrew that allegation, but that retraction does not wholly allay the court's concern about E being a victim of physical harm if placed in her father's care. The mother's application on appeal to the Spanish domestic abuse court in January 2018 stated that the father would beat E when she behaved badly. Though that court dismissed the mother's appeal, I am not wholly persuaded that this is an allegation I can put out of my mind in the assessment of risk or harm to E. Dr Teper's report recorded E talking about her father hitting her, for example hitting her head and making it bleed and kicking her in the tummy. Analysis of what E has said about her father's behaviour requires a cautious approach because there seems to me to be some aspects of E's account which are fantastical or imagined such as her telling Dr Teper that her father had poured boiling water on her legs [there being no medical evidence of injury to her legs occasioned by such an incident]. In addition I bear in mind that, as Mr Turner QC submitted, E may be repeating things which have been said in her presence by the mother. Nevertheless, I have concluded that I cannot exclude a risk of physical harm to her from her father though, of itself and absent other matters pertaining to risk, that risk would not satisfy the grave threshold test required in an Article 13(b) defence.

82. Rather more worrying is the emotional or psychological harm to which E might be exposed if she were returned to Spain. Dr Teper's evidence was clear and unequivocal about the profound emotional and psychological harm in both the short and long term which might flow from any move of E from her foster carer at this current time. What is striking about E's complex and worrying presentation is that it seems, in my opinion, to have arisen in consequence of the chaotic and unstable environment to which she was exposed by both her parents over a lengthy period. Allied to E's obvious fragility is evidence that her father appears to have failed to protect her despite making serious allegations about the mother's care. Prior to the move to Spain, the father was fully aware of the mother's problem drinking in early 2016. Yet even after E was placed in his care, he permitted the mother to have unsupervised contact and then eventually returned E to her care. Additionally, despite knowing of LA2's concerns which were serious enough to invoke the pre-care proceedings protocol, the father moved with the mother and E as a family to Spain. Although in 2017 the father made a variety of allegations to both the FCO and to Spanish Social Services about, variously, E's life being in danger in her mother's care and the mother being negligent and abandoning E, he then apparently left E in the mother's sole care on a number of occasions, for example, in January 2017 when police records place him in this jurisdiction; in April 2017 when he told Social Services in Spain he was due to travel to Iran; and in November 2017 when he left for a visit to Iran (originally planning to return in late January 2018). Notwithstanding the serious matters raised about the mother's conduct with D and her neglectful care of E, the father's application for custody made in December 2017 suggested that the mother should continue to have overnight staying and unsupervised contact with E. This history raises a very serious question mark about the father's ability to protect E which is barely acknowledged in his own statements. It also calls into question both his understanding of E's needs at a very fundamental level and his ability to meet those needs were she to be returned to his care.

83. Mr Turner QC suggested that, were contact to be reintroduced between E and her father, there were some grounds for optimism about the father-daughter relationship given the positive observations in the 2016 assessment by LA2. Additionally, he relied on similar positive comments in an email from the father's Spanish lawyer who, on 28 December 2017 when the mother and father attended court in Spain, saw a happy-faced E run to try and embrace her father. The mother forcefully prevented her from doing so and took E to another room. The lawyer observed that E appeared to be upset, and she could be heard mentioning her father for several minutes inside the room. For the following reasons, I do not share Mr Turner QC's optimism.

84. First, the history is less than clear about the role the father actually played in E's care. In March 2015 the father claimed not to have seen E for 7 months and in November of that year the father told the police he lived between two addresses with two different women. In January 2017 a police report placed the father in England and in April 2017 he told Spanish Social Services E would be cared for by her mother whilst he travelled to Iran. In November 2017 he left E with the mother at the start of what was planned to be a two- month trip.

85. Second, the 2016 risk assessment of the father made little reference to other sources of information about the family such as the police call-outs following incidents of alleged domestic abuse between the father and all of his sexual partners (namely K, the mother and V) or a letter from the mother's GP dated 7 March 2016 which reported that the mother was seen in Accident and Emergency on 27 February 2016 "*after she was assaulted by her partner and punched in the left eye*". It is clear that, in June 2016, LA2 noted that it had never received reports of domestic abuse between the father and V. The assessment reported what the father told the social worker but there was no interview with the mother to cross-check the father's account of family life. Remarkably, the social worker concluded that, though the father had been a risk to women, he was not a risk to E. Mr Edwards on behalf of E's Guardian described that conclusion as shocking given what is generally known about the effect of domestic abuse on children. Unsurprisingly, the positive conclusion of this assessment was undermined by subsequent events. For example, although the risk assessment recorded the father agreeing it was not appropriate for him to supervise E's contact with her mother, LA2's records showed that, by 29 April 2016, the father was permitting the mother to have contact with E in his presence. He admitted permitting the mother to have unsupervised contact with E on 25 April 2016 and on 28 April 2018 the mother told the social worker she was having daily contact with E and the father. I thus approach the contents of LA2's 2016 risk assessment with considerable caution. Its investigative and analytic flaws mean that I am wary about the report of a positive relationship between E and her father – I cannot ascribe to the risk assessment the weight Mr Turner QC invites me to do. Further, the report of the father's Spanish lawyer is but a snapshot to which I can attach relatively little weight.

86. Finally, perhaps the most telling material which inclines me to caution about the father-daughter relationship is what E herself has communicated during Dr Teper's assessment. Dr Teper was struck by E's active avoidance of conversation and discussion about her parents and that when she did speak about them, all her comments were negative. She considered this to be very unusual in a child of E's age. I conclude that, given the history, the father-daughter relationship is more complex and far less straightforward than Mr Turner QC suggests.

87. I have already made passing reference to the father's apparent inability to protect E from the mother about whose care he was so critical from 2016 onwards. That failure to appreciate E's needs for safety and security is coupled with the father's apparent failure to accept and act upon advice given to him by statutory agencies in both England and Spain charged with child welfare. He appears to have flouted advice from LA2 not to supervise contact between E and her mother having purportedly agreed at the conclusion of the risk assessment that he would not do so. It is clear he knew he should not have done so having received the pre-proceedings letter on 13 April 2016 and having attended the planning meeting on 19 April 2016. Further, in April 2017 the father reported serious concerns about the mother to Spanish Social Services and was advised to issue an application for custody of E. He did not do so until late December 2017 in the aftermath of the mother's arrest for the alleged sexual abuse of D. Finally, the family's relocation to Spain in July 2016 has the distinct air of being a means to avoid LA2's involvement and the possible issue of care proceedings.

88. As with his relationship with K and with the mother, the father's relationship with V has not been without incident. There have been two occasions when V called the police because of the father's behaviour, one in November 2014 and one in January 2017. Her statement in these proceedings dated September 2018 makes no mention of these incidents and speaks of only one row with the father which was apparently caused by the mother. The father's statements dated 26 September 2018 and January 2019 do not mention these incidents or suggest there were or are any difficulties in his relationship with V.

89. There is some evidence that E may have been exposed to sexually inappropriate behaviour by D. E's remarks in June 2018 about D touching her inappropriately are echoed by her mother's account to Spanish Social Services that D would masturbate in front of E. I have taken into account that E did not repeat her allegations to a social worker and that the mother had every incentive in December 2017 to attribute sexually inappropriate behaviour to D himself. If returned to her father's care, E would be living under the same roof as D. This material represents a further potential risk factor in what is already a fraught family situation though, as I concluded with respect to the risk of physical harm, this risk alone would not satisfy the grave threshold test required by Article 13(b).

90. Standing back and evaluating the above matters in the round, I am satisfied that, in combination, the above permits me to conclude that there is a grave risk that E's return to Spain would expose her to physical and psychological harm or otherwise place her in an intolerable situation.

91. However, before I come to a definitive conclusion on the Article 13(b) defence, I must examine in concrete terms the situation which would actually face E on her return to Spain. I cannot refuse to return E on the basis of an Article 13(b) defence if it is established that adequate arrangements have been made to secure E's protection after her return.

Protective Measures

92. This case is wholly unlike the vast majority of 1980 Convention cases where a return order is made and the child returns to the requesting state with the abducting parent. In

such cases, some well-recognised protective measures are offered by the left behind parent, the aim being to create a barrier between the parents until the court of the requesting state can make decisions about the child's welfare. Typically, such measures include non-molestation undertakings; the left behind parent not attending at the arrival airport; the left behind parent agreeing not to separate the child from the abductor save for agreed periods of contact or as ordered by the court; and the provision of accommodation/finance together with a promise by the left behind parent to stay away from this accommodation. None of these measures are appropriate in this case given that the mother does not suggest she should return to Spain and care for E.

93. The two alternatives for E are either to place her in the care of her father or in Spanish public care. I will deal with the latter first.

Public Care in Spain

94. I accept that comity requires the signatory States to both the Convention and BIIa to assume that other signatory States are equally competent to deal with child protection. However, this principle does not mean that I should transfer E, a child with complex needs who does not speak Spanish, to the care system in Spain without having information about the nature of her placement and how her needs might be met. To do so would abrogate my responsibility to examine in concrete terms the situation E would actually face on her return.

95. The Guardian has made enquiries via the United Kingdom Central Authority ["ICACU"] of the Central Authority in Spain in an effort to establish what arrangements might be made for her if she were placed in public care on her return. The initial questions posed to the Spanish Central Authority were precise and comprehensive. I envisaged that a response would be provided relatively early, following on from which more detailed enquiries, informed by the disclosure of relevant reports about E, might then be made. The initial request was made on 9 October 2018 and I regret that, to date, no response at all has been received from the Spanish Central Authority. Mr Edwards produced a helpful chronology of the chasing efforts made by those who represent E from which it is clear that the Spanish Central Authority had (a) information about the Spanish Social Services previously involved with the family and (b) information about the dates of the relevant final hearings. A further chasing email was sent to ICACU in the week of 21-25 January 2019 without any success. At the hearing in December 2018 I expressed real concern at the lack of response from the Spanish Central Authority and undertook to liaise via the European Judicial Network in an effort to elicit a response to the court's enquiries. I did so with the assistance of the International Family Justice office based at the Royal Courts of Justice. That effort was unsuccessful as the matters about which the court sought information were considered matters for the Spanish Central Authority to address rather than the relevant Network Judge in Spain.

96. The questions posed by the court via the Guardian remain unanswered. There is no information about who would transport E to Spain; the nature of any placement there including whether E would be placed in an English-speaking environment; which authority in Spain would initiate any public law proceedings; what services would be available to meet E's needs; or about the nature and frequency of any contact arrangements between E and her parents. No party invited me to adjourn further to obtain this information. Indeed, Mr Edwards submitted that the Guardian had no

expectation that this information would be provided within a reasonable time period. Having considered the sustained efforts made to obtain this information, I respectfully agree.

97. Article 56 of BIIa requires me to have the consent of the Spanish authorities before I decide to place a child in public care in Spain. Not only is that consent missing in this case, but I have a total absence of information about the situation E would face if I decided to return her to public care in Spain. I have concluded that this protective measure is not practically available to me to facilitate E's return to Spain.

Care by the Father

98. The father's most recent statement suggested that he would be willing for his care of E to be supervised/monitored by Spanish social services. He was also prepared to arrange and pay for E to have sessions with a suitable therapist and for her to be seen regularly by a child psychiatrist/psychologist. Additionally, he would lodge E's passport with his lawyers in Spain and would undertake not to apply for any further or replacement passport for E without the permission of a court of appropriate jurisdiction. Neither he nor his wife worked and so both would be available to care for E. Nevertheless, the father accepted that it would be necessary for a monitored and successful reintroduction of contact to E to happen before she could return to his care in Spain.

99. I have thought very carefully if the protective measures proposed by the father would be adequate to protect E if she were to return to his care either immediately or in a period of about 4-6 weeks as Mr Turner QC has suggested might be appropriate. That short period of deferral would permit a considered reintroduction of E to her father and allow for concrete arrangements to be made, for example, for E to have therapeutic support and for the relevant Spanish Social Services authority to be notified of E's return. Mr Turner QC suggested, in the alternative, that an even longer period of deferral might be appropriate, and I will address this issue in due course.

100. In my judgment, none of the protective measures proposed by the father are sufficient to obviate the grave risk of physical or psychological harm or intolerable situation faced by E if she were returned to the father's care either immediately or after a period of some 4-6 weeks. On my analysis, E would be exposed to a grave risk of psychological harm if moved from her current carers at this time. In fact, it is very unclear when she might be ready for such a move or if any reintroduction to her father might enable her to be placed in his care with any degree of confidence. None of the protective measures truly address what might be described as the serious concerns about the father's parenting of E where, on the evidence before me, the father does not appear to accept his past parenting was at fault and did not previously follow advice given to him by statutory agencies charged with E's welfare and protection in both this jurisdiction and Spain. None of the protective measures address the concerns about the father's relationship with V in circumstances where (a) neither the father nor V appear to accept there have been or might be problems in their relationship and (b) the father denies any abusive behaviour to the mother or to D's mother, K.

101. Leaving aside the concerns about physical and sexual harm to E, the practical situation which would face E on a return to Spain is a placement with a parent who seems to have a long history of failing to meet her needs and who appears to have failed to take

on board advice given by child protection agencies about how he should care for her. For the reasons I identified earlier, E's relationship with her father is more complex and less positive than Mr Turner QC suggested and, in my judgment, is not a firm foundation at this time for any move to her father's care. E would furthermore be at great risk of significant developmental harm on Dr Teper's evidence, having been separated from her foster carer at what is a crucial stage in her emotional and psychological development and placement with her father, however well-managed, would not be enough to redress that harm. Put simply, E would be in an intolerable situation which she should not be expected to tolerate.

Deferral/Stay for an Uncertain Period

102. Mr Turner QC realistically acknowledged that E could not be returned to Spain at the present time as this would expose her to the grave risk of harm contemplated by the Article 13(b) defence. He asked me to consider whether there was a realistic basis upon which I might conclude that a return to Spain in the father's care could be possible and suggested that section 5 of CACA might be used to test whether E could in fact return to her father's care. He invited me to make an order to the effect that E should be returned forthwith to Spain, but the implementation or enforcement of that order should be deferred until further order with liberty to the parties to apply on notice to set-aside or vary. In the meantime, there would be directions as to the reintroduction of contact with the father and for assessments of the type commonly seen in care proceedings. These might include, for example, a parenting assessment of the father and V; a parenting assessment of the mother; assessments of extended family members who might be able to offer E a permanent home and the like. Such an order would reflect the desirability of the return of an abducted child and encourage and require the taking of all steps that could enable such a return without resulting in an Article 13(b) situation. It would, however, contain sufficient conditions and protections to ensure that a return did not take place if, in the event, such a return would result in an Article 13 (b) situation. Both the mother and the Guardian opposed any such deferral or stay.

The Law

103. Section 5 of the Child Abduction and Custody Act 1985 ["CACA"]is entitled "**Interim Powers**" and reads as follows:

> *"Where an application has been made to a court in the United Kingdom under the Convention, the court may, at any time before the application is determined, give such interim directions as it thinks for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to determination of the application."*

Its ambit was considered by the Court of Appeal in Re A (Abduction: Interim Directions: Accommodation by Local Authority) [2010] EWCA Civ 586 [see paragraph 38]. In summary, Thorpe LJ concluded that the language of section 5 and the construction of that language needed to be extensive in order to achieve the objectives of the 1980 Convention and to safeguard the welfare of children whose vulnerability is generally magnified by the effects of abduction. Singer J in the earlier case of Re C (Abduction: Interim Directions: Accommodation by Local Authority) [2003] EWHC 3065 (Fam) came to the same overall conclusion that the powers contained in section 5

were very broad and were to be used in the interim pending the determination of the 1980 Convention application [see paragraphs 14 and 15]. In each of the aforementioned cases, the court used section 5 of CACA to require a local authority to provide accommodation to a child.

104. Article 12 of the 1980 Convention provides, inter alia, as follows with respect to the return of an abducted child, that:

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

In BK v NK (Suspension of Return Order) [2016] EWHC 2496 (Fam) MacDonald J considered the power to stay or suspend the operation of a return order pending steps being taken in the court of the child's habitual residence, which steps may result in the child not returning to the jurisdiction of habitual residence. He noted this was a power to be exercised only in exceptional circumstances.

105. MacDonald J reviewed the then extant case law [JPC v SLW and SMW (Abduction) [2007] 2 FLR 900; F v M and N (Abduction: Acquiescence: Settlement) [2008] 2FLR 1270; and R v K (Abduction: Return Order) [2010 1 FLR 1456]. I derive the following principles from my own analysis of these decisions and that of Macdonald J:

a) In all these cases the court had made an order for the child's return to the country of habitual residence either because the abducting parent had failed to establish one of the 1980 Convention defences or because the court had exercised its discretion to order a return;

b) In each case the suspension or stay of the return order was for the purpose of steps being taken and orders obtained in the **courts** of the State of habitual residence [my emphasis];

c) The length of each stay/suspension was relatively short and circumscribed: until a "*swift hearing*" in the Irish court [JPC v SLW and SMW]; an application by the mother for the Polish court already seised of proceedings to bring the child to this jurisdiction on a temporary basis which it was thought could be dealt with speedily [F v M & N]; a limited amount of time was permitted to the mother to settle her affairs in this jurisdiction prior to returning to Poland with the child and seeking interim permission from the Polish court to remove the child to this jurisdiction [R v K]; and a period of 10 weeks to permit the mother to make an application to the Polish court for interim permission to remove the child to this jurisdiction [BK v NK].

106. Finally, the time scales for implementing an order for return, identified by Butler-Sloss LJ (as she then was) in Re M (Abduction: Undertakings) [1995] 1 FLR 1021, were to be fixed with the following in mind:

"It is perhaps helpful to remind those engaged in Hague Convention applications about the position of undertakings or conditions attached to an Art 12 order to return. Such requirements are to make the return of the children easier and to provide for their necessities, such as a roof over the head, adequate maintenance, etc, until, and only until, the court of habitual residence can become seized of the proceedings brought in that jurisdiction. In Re C (A Minor) (Abduction) [1989] 1 FLR 403 Lord Donaldson MR said at p 413: 'Save in an exceptional case, our concern, i.e. the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country, Australia in this case, can resume their normal role in relation to the child.' This court must be careful not in any way to usurp or be thought to usurp the functions of the court of habitual residence. Equally, the requirements made in this country must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations, as was suggested by Sir Thomas Bingham MR in Re M (A Minor) (Child Abduction) (above at p 397). Undertakings have their place in the arrangements designed to smooth the return of and protect the child for the limited period before the foreign court takes over, but they must not be used by parties to try to clog or fetter, or, in particular, to delay the enforcement of a paramount decision to return the child. It would be helpful if realistic time-limits for the compliance with undertakings were included in the orders to return the child, but in the absence of a specified time, clearly the court would consider a reasonable time and not allow the case to drag on with repeated applications to the court."

Discussion

107. The course suggested by Mr Turner QC is an unusual one. It does not fit easily within the ambit of section 5 of CACA which applies to interim measures before the 1980 Convention application is determined. Here, I am invited to determine the father's application and make an order for return but to give directions for assessment as if all the options for E's future were still available. That strikes me as tautologous. Further, as Mr Turner QC conceded in answer to my enquiries, for meaningful assessments to be undertaken, a court in this jurisdiction might in the near future have to grapple with the serious factual dispute between the parents and make findings of fact about it, in order to provide an agreed platform for assessments by experts or other professionals. That course would undermine the very purpose of the 1980 Convention supplemented by the BIIa which, by Article 16, constrains the judicial authorities of the contracting state to which the child has been removed/retained from deciding on the merits of the rights of custody until it has been determined by those authorities that the child is not to be returned under the Convention. The result contended for by Mr Turner QC would, in my judgment, stretch section 5 to breaking point.

108. I have also considered whether Mr Turner's suggested order might fall more easily within the ambit of the authorities on deferral or stay of return orders. It does not. Those authorities make clear the limited purpose for which deferral or stay might be appropriate namely, to await the outcome of either an application to or a determination by the courts of the state of habitual residence. In any event, the potentially indefinite or uncertain timescales envisaged by Mr Turner' QC's order goes well beyond the timescales envisaged in those authorities or the parameters recommended by Butler-Sloss LJ in Re M (Abduction: Undertakings) [see above].

109. For the above reasons, Mr Turner QC's suggested order fails to commend itself to me. Though, as provided for by such an order, there would be an advantage to E remaining in the current placement, her future wellbeing would be very much up in the air notwithstanding the making of a return order to Spain. If the aim of the proposed order is to permit a full understanding of E's needs and an exploration of E's welfare in a wide sense alongside efforts to reintroduce contact to her father, those aspirations are undermined by the making of a return order. Assessments would be undertaken on the basis that a return order has been made rather than on the basis of the wide flexibility Mr Turner QC suggested in submissions might be possible. I cannot see the justification for such compromised assessments and observe that the outcome of any such assessments would not bind a court in Spain if E was eventually returned there. The proposed order seems to me to be crafted from the perspective of the father rather than from that of a highly vulnerable child who requires a decision in these proceedings to be made as soon as possible. Put simply, I find the Article 13(b) defence made out which militates against a return order to Spain either immediately or at some uncertain point in the future.

110. Mr Turner QC drew my attention to a decision by the Court of Appeal in Re W [2018] EWCA Civ 664 where that court directed that the provision in a return order providing for the return of children to the USA without their mother should be discharged unless the mother obtained a visa allowing her to enter the USA. He contended that this condition precedent – the obtaining by the mother of a visa to the USA – might never be fulfilled and suggested that this was directly analogous to the position in this case where an order for return might never come to pass if, for example, the reintroduction of E to her father proved to be damaging to her wellbeing. In my view, that case was factually very different from this one. The order sanctioned by the Court of Appeal in Re W contained only one condition precedent to a return whereas Mr Turner QC's proposed order is likely to contain a number of precedent conditions aimed at addressing risk issues, some or all of which might never be fulfilled. In my judgment, that very fact requires the court to scrutinise most carefully in this case whether it should make a return order in circumstances where risk issues remain so clearly at large. How might a court in future when seised of an application on E's behalf to set aside the return order determine which condition precedent applied or did not? Could the order for return be set aside if the father were having direct contact but was otherwise thought to be an unsuitable carer? Suppose E spoke of very serious physical or sexual abuse involving either her father or D which was not accepted? I doubt that drafting the order proposed would deal with such eventualities which may not be fanciful given the history I have summarised. I fear precisely that about which Butler-Sloss LJ warned in Re M (Abduction: Undertakings) [see above], namely protracted investigations and hearings arising from an over-elaborate order implementing a return. For all these reasons, I do not find the Re W order a helpful analogy in this particular case.

111. I decline the invitation by Mr Turner QC to make a deferred order for E's return to Spain at an uncertain time.

Conclusion

112. It follows that I find the Article 13(b) defence made out. Having so found, I decline to exercise my residual discretion to return E to Spain and dismiss the father's application pursuant to the 1980 Convention. By reason of Rule 12.52(4)(a) of the Family

Procedure Rules 2010, the dismissal of the father's application automatically resurrects the care proceedings stayed by my order dated 19 October 2018. I will consider further directions in those proceedings at the next hearing.

113. That is my decision.