Neutral Citation Number: [2019] EWHC 3543 (Fam)

Case No: FD19P00525

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2019

Before :

MS C AMBROSE
(sitting as a Deputy High Court Judge)

Between :

AB — **Applicant**

- and –

CD — **Respondent**

Anita Guha (instructed by Ventners) for the **Applicant**
Cliona Papazian (instructed by Lisa's Law) for the **Respondent**

Hearing date: 15 November 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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MS C AMBROSE
(sitting as a Deputy High Court Judge)

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.

MS C AMBROSE:

1. This is the final hearing in the father's application dated 26 September 2019 for the return under the Hague Convention of his daughter Y to Belgium.

2. Y is now aged 5 and a half years. She was born on 16 May 2014. Her mother is the respondent to the application. I refer to them as F and M for convenience.

The Procedural Background

3. On 2 September 2019 F lodged an application under the Children's Act 1989 for the child's return to Belgium and a hearing took place before McDonald J on 5 September 2019. At that stage F was a litigant in person and M was represented by specialist counsel. An order was made transferring the application to the family court and a prohibited steps order was made preventing the child leaving the UK.

4. On 26 September 2019 F commenced an application under the Hague Convention. It was made on the basis that M wrongfully retained Y in Taiwan on 24 August 2019 and then retained her in England on around 31 August 2019. He is seeking her return to Belgium so that matters of her welfare can be determined in her place of habitual residence

5. On 30 Sept Cohen J ordered M to file any answer to the application and also include details of any protective measures she seeks in the event the court were to order the child's return.

6. On 10 October 2019 a hearing took place at which both parties were represented. The Children's Act proceedings were stayed. HHJ Hildyard ordered that CAFCASS should meet the child in order to prepare a child's objection report to address the child's maturity, wishes and feelings and any other relevant issues to the court's discretion to refuse a return. She ordered that the mother file and serve her answer and additional evidence she sought to rely upon by 22 October 2019, with the father to serve his response by 1 November 2019. The matter was listed for a final hearing on 15 November. The parties agreed that Y should spend every week-end between Saturday and Sunday afternoon with F.

7. On 8 November 2019 Ms Demery made a CAFCASS report after meeting Y.

8. On 14 November 2019 M issued a part 25 application for expert psychiatric or psychological evidence:

    a) on M's current psychiatric condition

    b) the impact of return to Belgium on her mental health;

    c) the impact of protective measures, what if any protective measures were necessary to be put in place to safeguard the mother's mental health in the event of a return to Belgium.

9. In M's position statement her counsel also asked for permission to adjourn to pursue:

    a) an expert report on immigration law to clarify whether she can return to and remain in Belgium;

b) advice as to protective measures available to the child where enquiries were being made as to the risk posed by F to the child, centering on his lack of appropriate boundaries with the child

c) more information required from police in respect of concerns reported by Dr Burmester.

10. In her position statement M's counsel applied for an adjournment of the hearing on grounds that it was necessary by reason of the need for instruction of the appropriate experts.

11. I gave a reasoned judgment on 15 November 2019, declining the application for an adjournment and also the application for expert evidence. In summary, I considered that the evidence was not necessary, the application was made too late, and an adjournment could not be justified as it would entail unacceptable additional delay, for at least 2 or more likely 3 months, and this would be detrimental to Y.

The issues

12. I turn to the key issues on this application.

13. M resists the application. She takes no issue with the father's rights of custody for the purpose of the Convention or with Y's habitual residence having been in Belgium when she was retained. She appears to take no issue on the allegation of wrongful retention. M's defence raises two key issues:

a) Should the court refuse a return on grounds of Y's objections?

b) Should the court refuse a return on the basis of article 13(b)?

14. Article 13 provides that:

> "the requested state is not bound to order the return of the child if the person, institution or other
> body which opposes its return establishes that—
>
> (b) *there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation …*
>
> *The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."*

15. In considering the Article 13(b) defence, the court is duty bound to consider what protective measures can be put in place. Article 11(4) of Council Regulation 2201/2003 places on the left-behind parent the burden of establishing that adequate protective measures have been made to protect the child after her return. Williams J summarised the use of protective measures thus in A (A Child) (Hague Abduction: Art 13(b) Protective Measures [2019] EWHC 649 *"A court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".*

16. In summary M says:

    a) Y objects to a return and has the requisite maturity;

    b) return would be intolerable to Y if M was to have a psychiatric collapse and M fears this would happen if she returned;

    c) the return would be intolerable for Y if she were returned without her mother;

    d) a return with the father would be intolerable for Y as he is believed to be abusive (not only arising from domestic violence he has shown to mother but also threats he has made and his volatile behaviour);

    e) a return would be intolerable to Y as father poses a risk to her, stemming from a referral by Dr Burmester to police.

17. M was directed to outline the protective measures that she would seek if Y was returned but she says that no protective measures can adequately meet or nullify the feared harm and intolerable situation for Y, and points to the fact that it is for the father to adduce evidence that protective measures are available.

18. Prior to the hearing it was not clear whether M would return with Y if a return order were made. At the hearing M gave instructions indicating that it was her firm position that she would refuse to return to Brussels. Her position was that she was controlled, depressed and isolated in Brussels. She relies on her own evidence and a report of Dr Burmester of 22 October 2019, detailing severe stress and anxiety that have had a physical manifestation in psoriasis. She relies on her experience of manipulating, controlling, threatening and abusive behaviour from F. Her statement also details her isolation and her unwilling financial dependence on the father which included her dependence on him for her immigration status.

19. M submits that her unwillingness to return arises from a genuine fear of the consequences of a return, including a psychiatric breakdown.

20. Father, in summary puts the following case:

    a) Y lacks the maturity to justify her objection being taken into account;

    b) a return would not be intolerable for Y or her mother;

    c) he offers protective measures including a number of undertakings, listed in F's counsel's skeleton argument, including an agreement to offer undertakings akin to a non-molestation order, financial support to cover maintenance and her own flat for a duration up to any first hearing. He also stated that he would agree that he would not report her to Belgian authorities so as to jeopardize her immigration status. F also says that Belgian law offers safeguards for victims of abuse in Belgium, including foreign language support;

    d) when the point was raised by me, his counsel indicated that if M is unwilling to come to Belgium with Y, then he would undertake to bring Y to the UK to spend time with her for up to 3 weekends a month;

e) he denies the allegations of abusive behaviour or that M was as isolated in Belgium as alleged, and disputes that Y was unhappy in Belgium as alleged.

21. The evidence before me included the following:

- Both parties' statements with supporting documents
- F's solicitor's statement served with the application
- Both parties put forward short statements from friends, and colleagues, M also put forward statements from her family.
- A letter from Dr Victoria Burmester dated 22 October 2019.
- A report dated 8 November 2019 of Ms Kay Demery a CAFCASS officer who spoke to Y and also both parents
- Open advice given to M by her solicitors regarding her immigration status both in London and Brussels.

22. Ms Demery gave oral evidence and was questioned by both sides.

The Factual Background

23. There was much common ground as to the basic facts giving rise to the application and I set out the background below based primarily on M's evidence.

24. M is aged 32 and of Taiwanese birth and nationality. She does not work and has always been Y's primary carer. M is an expert tailor and has worked ad hoc over recent years on tailoring work, as evidenced by witness statements she served from colleagues she worked for.

25. F is aged 65 and of British nationality. He is a property developer.

26. The parties met in the UK in 2013. On 16 May 2014 Y was born while the parties were living in London. The parties moved several times, by reason of F's work in developing properties. In April 2016 F decided that they should move to Brussels for business reasons. Initially they lived in a rented flat but then moved into a property he was developing which was, in part, a warehouse space. There was an issue as to how uncomfortable this property was but it is clearly a property under development.

27. In May 2017 Y started nursery in Brussels. Both M and Y found it difficult to adapt initially, with Y crying frequently for the first 6 months. There is an issue as to how well Y settled into the nursery. M says she was bullied and that once she was locked in the toilet by some big kids, and that Y said she was worried some big kids would crash into her and they played very roughly. The evidence of the CAFCASS officer was that Y said she did not like her school in Brussels as there were too many children who were rude to her but she missed one of her school friends.

28. In January 2018 the parents and Y were victims of a robbery at gunpoint on the metro in Brussels. This was a very unpleasant and frightening experience. When with the CAFCASS officer Y recalled that she was on a train in Brussels with a baddie. This

may have put her off the metro but subsequently she continued to go to school using the metro.

29. M recalled feeling very depressed n Belgium because she could not protect herself or Y and F was not there when they needed him as he was often away on business or for football. She worried about how she would call an ambulance if there was an accident.

30. In April 2018 M got a Belgian residence card and started French lessons. There was an issue between the parties as to whether F strongly discouraged her from taking French lessons but she continued with free lessons provided by the Belgian authorities. M also said that every time they had an argument, he would say whatever he wanted and leave without hearing what she had to say. She found this passive-aggressiveness to be controlling behaviour that made her scared and helpless. She experienced chest pain from time to time and felt devastated at times when he was irritated and treated her in an abusive manner. She also said that F got road rage easily and that this would scare Y and M felt that he lacked sufficient patience to care for a young child.

31. M's evidence is that Y missed her family and friends from London, especially F's grandchildren, who are her age and who she often played with when in London. She looked forward to coming back to London.

32. M planned to develop her career in tailoring as part time work and made clothes for Y in her spare time. There was an issue as to whether F had discouraged her efforts generally, used cruel words when M had applied for an internship and been angry and controlling about M's taking steps to develop a career, for instance saying that a designer would only use her as free labour. M felt that F wanted her to be in his control.

33. In August 2019, M took Y back to Taiwan on holiday, as they normally did every year. By this stage Y's hair was very long and in M's opinion it was far too long and Y was begging for a haircut. M took her for a haircut and Y loved it. However, when M and Y Facetimed F on 19 August he got extremely angry in her parents' presence. M felt very frightened and he told her she could stay in Taiwan but he would bring Y back. The main communication is stated in an SMS exchange between the parents which began with a picture of the new haircut:

M: She is very happy with her hair.

F: Yet again you decide to do something without consulting me…is this some sort of joke to you….Y has never ever mentioned she doesn't like her hair….don't put it onto her….this is something you decided to do…as far as I'm concerned, it's the last time. I think it might be better for you to stay in Taiwan…I will organise to fly over and pick her up…you can visit when you want…but it's over this is an absolute insult.

F: I don't want to talk to you…please do not ring me.

34. M then tried to call him over three days but he refused to talk and just asked for flight details. M was frightened and she missed her originally scheduled flight. There was an issue as to whether she gave the flight details for the flight she did take on 31 August 2019. When they arrived in Gatwick the speakers were announcing her name and police met them outside as father had made a report. M then stayed in a hotel for a few days and they met F on 2 September 2019 in a café.

35. F then issued proceedings and M enrolled Y in a private school in London and found a two bedroom flat (currently funded by her parents). F has not contributed to childcare and M feels that he has used finances to control her and make her dependent.

36. M stated that she has experienced anxiety, stress and breathing difficulty whenever she thinks of life with abuse from F in Brussels and the ongoing torture of going to court to face him. She consulted her GP and was recommended to see a psychologist.

37. She visited Dr Burmester on 19 October 2019 for a single consultation. Dr Burmester set out in a letter (served by M) a summary of that meeting. M described to Dr Burmester manipulative, controlling and abusive behaviour from F, including, *inter alia*, that he does not permit her to spend time with her friends or to earn pocket money, that he becomes angry if she disobeys him, and that he became very angry when she enrolled in free French course and he would abuse her with name-calling. She also recounted M's account that F had flown into an uncontrolled rage during the facetime session following the haircut. Dr Burmester states that M reports being traumatised and depressed and that M reported that psoriasis on her legs appeared as a result of stress. M reported symptoms of severe stress such as chest tightening, dizziness and being unable to sleep. Dr Burmester advised that emotional abuse is a crime and that she should talk to the police about her situation and that she could seek therapeutic support from a free counselling service in Merton, and they discussed strategies for coping with the stress.

38. M's position was that her immigration position was uncertain since it had previously been contingent on her relationship as the partner of an EU national. She produced an email of advice coming from her lawyers who had researched the position in Belgium indicating that for her to stay in Belgium she would need to remain a carer of an EU national child and be in work. She also produced a letter from her lawyers dealing with her UK status indicating that she would be able to stay in the UK only as the primary carer of a UK national child.

39. Ms Demery, the CAFCASS officer reported that Y was a very charming, bright and chatty child with a good sense of humour. Y made it clear that she wishes to remain in London living with her mother. Y's message to the court (when Ms Demery asked her for one) was "I want to live here with mummy". Ms Demery considered that Y probably understood that there were two options, either to live with M in London or to live with F in Brussels.

40. Ms Demery reports that she wants to spend time with her father and is not opposed to visiting Brussels but does not want to live there. Ms Demery considered that at this stage in her life, Y does not have capacity to make decisions in her best interests and is likely to express views that will meet her emotional need to remain close to the parent who is providing care. The events over the last 3 months including moving to another country from her home and her parents separating and changing school, without her being given any clear narrative to explain what is going to come about, were seismic for Y.

41. Ms Demery considered it is possible that Y has been influenced by her mother's negative views about Brussels and was confident that she had not been shielded from the parental conflict. Y told her that F did not want her to go to Taiwan because he wanted her to stay in Brussels and that F's face is always angry and bossy at her mummy.

42. Ms Demery considered that it was vitally important that Y is able to spend significant periods of time with both parents. She assessed Y to be a resilient child. However, she considered that should the court make a return order and her mother refused to accompany her, then Y would find it very difficult to be separated from her mother. When asked whether a return would be harmful if she returned without M's care Ms Demery considered that this would depend on what arrangements were made to spend time with M. Ms Demery did not know whether M was able to stay in the UK or whether she would have to return to Taiwan. For M to return to Taiwan and not to be in Y's life would be immensely difficult for Y. Ms Demery considered that any measure to ensure that Y carries on spending time with M would mitigate that difficulty. She considered that it would be harmful to Y if she lost her relationship with her mother and it would be difficult for her to understand why her mother was not there. Ms Demery also considered it would be harmful to Y if she lost her relationship with her father.

43. At the hearing M also raised a new issue regarding F's personal care for Y, and in particular regarding toileting and hygiene. M indicated that she considered that F's personal care of Y was unnecessary and that she spoke to Dr Burmester about this and that Dr Burmester considered that there was a child protection issue and had allegedly made a referral to the police regarding this issue.

Relevant law

44. There was considerable common ground on the law to be applied. The leading authority is the decision of Supreme Court in Re E (Children)(Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144. This case deals with balancing the Hague Convention obligations with Article 8 of the European Convention on Human Rights, and also addressing the summary nature of the decision-making process under Hague Convention cases, in particular in the context of disputed allegations of domestic abuse and risks of future psychological harm arising from them.

45. The relevant principles are helpfully summarised by Macdonald J in *Uhd v McKay* [2019] EWHC 1239. As with most of the related authorities, it refers to the most typical example of a mother alleging domestic violence.

> *"The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in Re E (Children)(Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144. The applicable principles may be summarised as follows:*
>
> *i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.*
>
> *ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.*
>
> *iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as*

'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.

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

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

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

46. Most of this summary flows naturally from the wording of Article 13(b). However, to the uninitiated, the discussion of anxieties based on objective risks comes as something of a surprise. This follows from *Re E* where the Supreme Court emphasised (at #49) that a risk to M's future mental health may arise as a result of objective reality or the mother's subjective perception of reality. In a later case, *Re S* [2012] UKSC 10 the Supreme Court further emphasised the point:

"27. In In re E [2012] 1 AC 144 this court considered *the situation in which the anxieties of a respondent mother about a return with the child to the state of habitual residence were not based upon objective risk to her but nevertheless were of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to the point at which the child's situation would become intolerable. No doubt a court will look very critically at an assertion of intense anxieties not based upon objective risk; and will, among other things, ask itself whether they can be dispelled. But in In re E it was this court's clear view that such anxieties could in principle found the defence.*

…

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

47. Both parties referred to the explanation by McDonald J in *Uhd v McKay* as follows:

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

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

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

48. These cases (*Re E, Re S,* and *Uhd v McKay*) involved situations where the abducting parent alleged that returning with the child would present a grave risk of an intolerable situation for the child. A further situation arises where the abducting parent says that she is unable or unwilling to return with the child. This may be a separate point to the risk of harm arising out of a return but is likely also (as in this case) to follow from an assertion that the parent and child face an intolerable situation if they return.

49. In this context, assistance is provided by the decision of Macdonald J in *AT v SS* [2015] EWHC 2703 where the mother refused to return with her child and relied on the separation of the child from her as establishing a risk that return would be intolerable. McDonald J considered that he could not compel M to return with the child and the following principles emerge:

a) Separation from a primary carer can amount to a defence but it depends on the facts.

b) *Re E* shows that once it is established that situation on return will be intolerable then the source of that risk is irrelevant, (for example a deterioration in parenting will be sufficient to found an article 13(b) defence even if the anxieties are not based on objective risk and might appear unreasonable).

c) However, in deciding whether the situation on return will be intolerable, the source of the risk is relevant. As Lord Wilson stated in *Re S:* "The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned."

d) A conscious refusal to return which in itself creates the situation the party seeks to rely on will be a relevant consideration to whether article 13(b) is met. A court will be reluctant to allow a party deliberately to frustrate the operation of the Hague Convention. Butler-Sloss LJ explained this in *C v C* [1989] 1 WLR 654 on grounds that otherwise any party with a young child could frustrate the Convention by relying on their psychological situation.

e) However, the fact that a party has brought about the risk by their own conduct will not inevitably lead to the conclusion that the defence cannot be made out. Sir Mark Potter in *S v B* [2005] EWHC 733 (Fam) made clear at paragraph 49 that where a party's own conduct has created the adverse conditions relied on this will not preclude the defence under 13(b). This is because wrongful conduct is a given for the application of the defences and the defences are directed at grave risks of harm to the child on her return, not the parent's wrongful conduct.

f) The primary focus is on the risk of harm to the child. The situation 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 have to face those risks of harm.

50. The firm and obvious message is that a party's reasons for alleging the risk of harm, including evidence as to the source of the risk, will be highly relevant in determining whether that risk exists. The reasons put forward will also usually be of critical importance to whether protective measures can be put in place to ensure that the child will not face that situation.

51. In deciding a defence under Article 13(b) the issue is whether a grave risk has been established on the balance of probabilities, and whether the risk can be averted by protective measures. The discussions in the authorities on subjective anxieties or subjective or objective risks may not be the key concern in many cases. All anxieties are based on a personal point of view (and accordingly subjective), and a perceived risk may also be an actual risk. In practice, it is somewhat unlikely that a risk would be asserted on the basis of unreasonable or irrational anxieties without objective foundation. This could, in principle, satisfy Article 13(b) but the same burden of proof

applies and it is unsurprising that the court will look critically at the evidence on which it is based.

52. More commonly, both parties are presenting diametrically different accounts of whether there has been a risk of harm to the child in the past, whether there will be a risk to the child in the future, and whether it can be avoided. They will both be pointing to the facts that they rely on as giving rise to a real risk (or denying it). In a summary determination the court cannot carry out a full investigation of the facts. The key concern is whether the court must accept a disputed assertion of risk that is not yet proven or investigated, or that has limited factual basis.

53. *In re C (Children) (Abduction: Article 13(b))* [2018] EWCA Civ 2834 (relied on by both parties) Moylan LJ explained how the court is not bound to evaluate the risk by taking disputed allegations (for example on domestic abuse) as if they were true, as proposed in *Re E.* The court can evaluate the underlying allegations within the confines of a summary process, and should do so if this is necessary properly to determine whether there is a risk and whether protective measures are adequate. Lewison LJ also considered that a requirement that the risk be assessed on the basis that the allegations are true would be inconsistent with the burden of proof on Article 13(b). Moylan LJ explained as follows (as explained further by McDonald J in the explanation set out above in *Uhd v McKay*):

36. The "general scheme" was recently addressed by Lord Hughes in Re C and Another (Children)(International Centre for Family Law, Policy and Practice Intervening) [2018] 1 FLR 861 *. He referred to the "very limited exceptions" to a return being ordered, to the obligation on States to "act fast" and that "the return is summary", at [3].*

37. It has also long been recognised that the need for expedition and the summary nature of the process militate against the court hearing oral evidence. Accordingly, in Re K (Abduction: Case Management) [2011] 1 FLR 1268 , Thorpe LJ said, at [13], that "oral evidence in Hague cases is very seldom ordered" because "Hague applications are for peremptory orders to be decided on written evidence amplified by oral submissions".

38. Likewise the summary nature of the process means that the court will typically not be in a position to make findings about any disputed allegations in particular allegations made to support an Article 13(b) defence. In the judgment of the court in Re E, given by Baroness Hale and Lord Wilson JJSC, it was said, at [32]:

"... in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under article 13(b) and so neither those allegations nor their rebuttal are usually tested in cross-examination."

At [35] the point was made that "art 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country". The judgment then returned to the approach the court should take to factual disputes.

"36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where

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

39. In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course, a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations. In Re W (Abduction: Intolerable Situation) [2018] 2 FLR 748 , I referred to what Black LJ (as she then was) had said in Re K (1980 Hague Convention: Lithuania) [2015] EWCA Civ 720 when rejecting an argument that the court was "bound" to follow the approach set out in Re E . On this occasion, I propose to set out what she said in full:

"52. The judge's rejection of the Article 13b argument was also criticised by the appellant. She was said wrongly to have rejected it without adequate explanation and to have failed to follow the test set out in §36 of Re E in her treatment of the mother's allegations. In summary, the argument was that she should have adopted the "sensible and pragmatic solution" referred to in §36 of Re E and asked herself whether, if the allegations were true, there would be a grave risk within Article 13b and then, whether appropriate protective measures could be put in place to obviate this risk. That would have required evidence as to what protective steps would be possible in Lithuania, the submission went.

53. I do not accept that a judge is bound to take this approach if the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13b risk. That is what the judge did here. It was for the mother, who opposed the return, to substantiate the Article 13b exception (see Re E supra §32) and for the court to evaluate the evidence within the confines of the summary process."

Conclusions on the issues

Should the court refuse a return on grounds of Y's objections?

54. I accept that Y objected to a return to Brussels. I accept Ms Demery's evidence that she lacks the maturity to make decisions about her future and that she is at a level of maturity when she will express views that meet her emotional need to remain close to the parent who is providing her care.

55. I am not satisfied that Y has the age and maturity at which it is appropriate to consider that her views are to be taken into account. Under Article 13(b) and also *Re M [*2015] EWCA Civ 26 her age and maturity do not justify me exercising a discretion to refuse a return on grounds of her objection. Even if she had sufficient age and maturity to justify me taking her views into account, I do not consider that they justify a refusal of a return order. This is because her views have been influenced by M and Y appeared to express her view on the basis that she either lived with M in London or F in Brussels, with no middle way. She is also a young child more heavily influenced by the person

looking after her at the time, so that her objections carry less weight than those of an older child whose voice will be given more weight.

Should the court refuse a return on the basis of article 13(b)?

56. M has decided that she will not return to Belgium if a return order is made and made her case on that basis. This is a choice she is entitled to make. I consider the application and defence on that basis but also take into account the possibility that she may later choose to return to Belgium with Y, and her reasons for currently choosing not to return. Her counsel suggested that there should be a cooling off period following judgment in case she wants to reconsider her position. I consider that this would be appropriate.

57. The primary question I have to consider is whether Y is at a grave risk of facing an intolerable situation if there is an order for her return under the Hague Convention. It is important to take into account that any order would be for her to return so that her longer-term situation is decided in her place of habitual residence (see e.g. *AT v SS* [2016] 2 FLR 1116). It is not a final decision on where she lives and how she spends time with her parents.

58. Most of M's allegations (for example that Y had been bullied at school) arose as reasons for refusing a return under Article 13(b) whether M was willing to return to Brussels or not, and I have similarly considered them on either basis. The central point that arose on the basis that M chose not to return to Brussels was that it would be intolerable for Y to be separated from the person who has always been her primary carer (this is dealt with below).

59. A central point that would arise if M were willing to return to Belgium with Y was whether it would be an intolerable situation for Y because of the feared risk of a psychiatric breakdown. In M's statement she referred to feeling depressed in Belgium, and that "*whenever I think about Brussels and the environment, I connect it with fear, loneliness, mental abuse from J and emotional close down. It is intolerable for me to be back there. I have no one there, only an ex-partner who would continue his attempt in controlling or threatening/ bullying me. I cannot face the depressed feeling in Brussels again. It will affect my normal functioning…. Lately I have experienced more anxiety, stress and feelings of breathing difficulty whenever I think about life with abuse from J in Brussels and the ongoing torture to court to face him. I had consulted my GP and I was recommended to see a psychologist."*

60. The GP mentioned was said to have been in Taiwan. On returning to the UK, M saw a psychologist once and relied on the evidence of that consultation. Dr Burmester stated that M reported severe stress, and being traumatised and depressed. There was no diagnosis by Dr Burmester of any psychiatric illness or disorder although she proposed that M seek therapeutic support from a free counselling service. M does not appear to have sought or been given treatment at any stage other than this consultation. M has no history of mental illness or depression. She indicated that she felt unable to consult a GP in Brussels due to language barriers, but there was no evidence to show that she had consulted a doctor regarding depression (or any mental illness) attributable to F or living in Brussels when she returned to London on visits or since the beginning of September 2019.

61. I am not satisfied that M's evidence, even if true, establishes that there is a grave risk that M would suffer a psychiatric breakdown if she returned to Brussels or that M's parenting would otherwise be destabilised to such a level that Y would be exposed to a grave risk of facing an intolerable situation. The alleged risk of psychiatric breakdown was a mere assertion that only arose a couple of days before the hearing. It was not supported by the evidence which only went as far as saying that M was severely stressed by her relationship breakdown and the proceedings, and feared that being back in Brussels would make her depressed and affect her normal functioning. M may genuinely fear for her mental health if she returns to Brussels and may (having discussed the matter with counsel) now perceive that she could suffer a psychiatric breakdown but I do not accept that this gives rise to a grave risk to Y if M returns with her. First, the evidence before me does not support the existence of a risk of a breakdown or even a fear of such a breakdown. M did not go as far as asserting such a fear in her statement evidence. It is one thing for a parent to say that she cannot face or tolerate a place, or that it makes her depressed, it is another to say that she believes she will suffer a psychiatric breakdown causing her to be unable to care for her child. It is significant that the allegation only arose in counsel's position statement.

62. Even if there were an independent report from a psychiatrist indicating that there was a risk of breakdown or illness, and that report attributed such risk to living in Brussels (rather than factors that could be addressed by protective measures) it would not justify refusing a return because the mother firmly indicated that she would not return to Brussels even if Y returned. She can choose where she lives (and it is fair to presume that the choice would have been the same if a psychiatrist had expressed a view that there was a risk of breakdown or illness in Brussels). This would mean that the alleged risk of psychological harm to the mother from living in Brussels is not a risk that Y faces. Further, as explained below, the risk of an intolerable situation for Y arising out of being separated from her mother can be sufficiently mitigated by ensuring that Y spends time with M in London.

63. I turn to the more general points against a return. M raised concerns as to physical and emotional abuse from F. I did not consider that M put forward evidence of past actual or threatened physical violence. I accept that she was seriously alarmed by his communications over the haircut incident but his position in refusing to talk for a few days afterwards could not have been regarded as physically threatening. The allegations of emotional abuse cannot be determined on a summary basis but the alleged abuse was not of such a serious level as to give rise to the risk of an intolerable situation for the child once M is living apart from F. Even taking M's evidence at its highest I am satisfied that any grave risk of physical and emotional abuse was sufficiently mitigated by F's proposed protective measures. I am satisfied that Belgium would offer adequate safeguards against coercive or abusive conduct and enforcement is certainly not an issue, not least since F continues to return to the UK.

64. M's position is that it would be intolerable for Y to return because her home in Brussels was uncomfortable, she was unhappy at school, she was homesick, and frightened of going out and about, including being frightened of being driven by F due to his road rage and driving over the speed limit. Taking careful account of M's evidence regarding Y's school and home situation and also Ms Demery's account of Y's views and account of her home and school life in Brussels, I do not accept that the situation would be intolerable for Y. I consider that Y has been influenced by M's views of Brussels and life there. This is unsurprising and there was clear evidence that Y had been exposed to M's views affecting the disputed issues about where she spends time

(for example what she reported regarding her passport or the relative safety of trains in different cities). I also consider that the fears did not present a grave risk: she is of an age when she is likely to talk of baddies or monsters or bossy children without it being a cause for grave concern. M alleged that F could be verbally abusive and rude to Y. This was largely based on what Y told Ms Demery in saying "*She misses her dad a little, but he is rude to her by saying things about her mum and that she should live with her mum"*. Even taking M's evidence as true I would not have regarded it as establishing that there was a grave risk that the situation would be intolerable for Y if she were to return to Belgium (whether alone or with M).

65. Overall, the upheaval and anxiety to Y of having to return to her home and school in Brussels is real but it does not pose a grave risk of an intolerable situation. The authorities acknowledge that some psychological harm is going to be suffered by a child subject to abduction and the Hague Convention remedies for dealing with abduction, and that every child has to put up with a degree of discomfort and distress (see *AT v SS* #60). Y's parents have separated and she has been moved her from her home. The parents currently want to live in different countries and have failed to agree on a compromise pending a decision on where Y lives long term. Unfortunately, Y has already faced a significant level of disruption due to this (as evidenced by Ms Demery's opinion). The discretion under Article 13(b) is not designed to mitigate past harm: I can only refuse an order for return if satisfied that it exposes Y to a grave risk of an intolerable situation in the future.

66. At the hearing it was suggested that F's care of Y, in particular regarding her toileting and hygiene raised child protection issues that had been reported to the police by Dr Burmester. It was said that he lacked appropriate boundaries with the child. This was potentially a very serious allegation and it was unsatisfactory that the conduct complained of was not even identified. The allegation only emerged in closing submissions. Dr Burmester's report made no mention of risks of sexual abuse of Y and only mentioned that M should talk to the police about emotional abuse to M such as coercion and controlling behaviour. Dr Burmester had no contact with Y so she could only be reporting what M told her. M has made no report to the police and her statement made no mention of F posing a risk to Y of sexual abuse or inappropriate boundaries of that sort. It is relevant that M has been willing for Y to spend a night with F every week-end and had agreed that she spend a week in F's care over the October half term. The evidence before the court provides no real support for M's new allegation. I reject it and discount the possibility that the allegation gives rise to an article 13(b) risk (whether taken on its own or with the other allegations).

67. A critical question arises out of the fact that if M does not return to Belgium with Y, then she would be returning without her mother and her mother would not be her primary carer pending any determination of who she lived with. I take careful account of the fact that M has been Y's primary carer all her life and Ms Demery's opinion outlined above (which I need not repeat here). I accept Ms Demery's opinion. Her evidence makes clear that it would be immensely difficult for Y if she was returned to Brussels without her mother and lost her relationship with her mother or stopped spending time with her directly. It also makes clear that the risk of harm for Y would be mitigated if Y continued to spend time with her mother.

68. If M chooses not to return with Y (which is her current position) Y will face upheaval and anxiety in adjusting to having her father as her primary carer and losing her mother as a primary carer. However, I am not satisfied that there is a grave risk that a return

would expose Y to an intolerable situation if she continues to spend a significant amount of time with her mother (such as alternate week-ends). Ms Demery's evidence was that losing M as her primary carer would be difficult but this could be mitigated by ensuring that Y spends time with her mother. Ms Demery concluded that it was vitally important that Y spend significant periods of time with both parents, not that she remain in the primary care of her mother. Ms Demery also considered that F had been heavily involved in the care of Y (for example often taking her to school and doing the bedtime routine). Y is already used to spending every Saturday night or a recent week's holiday with her father (and without her mother). I am satisfied that he is able to care for her and he has already made some change to his work pattern to take account of her needs since she has been in London. Y has already made the transition to having separate care from each parent. Having had the benefit of detailed evidence from both parents and also the evidence of Ms Demery I am satisfied that the transition to having her father care for her during the week, and spending alternate week-ends with her mother does not pose a grave risk that her return would expose her to an intolerable situation.

69. I take into account that Y has moved around a fair amount in her life so far, living in both London and Brussels, and having attended schools in both places. All the evidence suggests that she is a bright, resilient child with a strong talent for languages (English, French and Mandarin). It appears that she has travelled back and forth to see her family in London, usually by Eurostar. She travels on an annual basis to Taiwan. Her parents are of different nationality and currently want to live in different countries so her family situation may well be split between the care of her parents in two separate places. In circumstances where M has chosen not to accompany Y, I do not consider that the prospect of Y living with F and having to travel twice a month between London and Brussels in order for her to spend time with her mother to be an intolerable situation.

70. I take careful account of the evidence and concern raised regarding M's immigration status in this country and in Belgium if a return order were made. Again, it is important that the court is looking at the situation where the return is made so that the parties can formalise any change in the child's situation in her place of habitual residence. If M were to return to Brussels with Y I am not satisfied that M faces deportation or would be otherwise prevented from living in Belgium prior to any determination of where Y should live permanently. She has a valid 5 year residence permit and would be living there as Y's carer. If M is willing to return to Brussels with Y the evidence regarding her Belgian immigration status provides no basis for concluding that M is likely to be refused entry or continuing residence (this case is quite different from *Re W* where the mother required a visa in order to enter the requesting country).

71. I am similarly confident that the evidence regarding her UK immigration status does not establish that if she continues living in London she would be facing the risk of deportation to Taiwan before Y's residence could be formalised, especially if Y lives with her for at least two week-ends per month. The fact that she also has the ability to return to Belgium on a valid Belgian residence card is also a relevant consideration in considering M's situation under potential worst-case scenarios of her immigration status in the UK.

72. M suggested that she could not work in the UK if she was not here as Y's primary carer. It was her evidence that she had not previously worked and that her family were currently supporting her (whether by loan or otherwise). I can understand if she now wants to find employed work and be financially independent. If so, she will probably need to clarify her right to work (whether in London or Belgium) whatever order is

made. However, uncertainty as to whether she can work in the UK does not give rise to grave risks to Y justifying me refusing an order under Article 13(b).

Conclusion

73. I am satisfied that there is no grave risk of an intolerable situation for Y if a return order were made and her objection does not justify refusing a return.

74. I conclude that I should make the return order requested with the undertakings offered. This takes account of M's current choice that she would not return with Y and F's proposed protective measures, including his undertaking that if M does not return to Brussels with Y he will bring her over to London to spend at least 2 week-ends per month with M. The 3 trips per month offered by the father would probably be too much travel for Y and any direction or undertaking could be limited to 2 trips to the UK per month (unless holidays or special occasions merit a further trip). However, I am willing to leave the parents to see whether the undertaking can be agreed, and whether school holidays can also be agreed. The undertakings should also include provision that F will take no steps to contact the authorities in both Belgium or England to jeopardise M's immigration status.

75. M's counsel proposed a two-week period before any return to allow M to reconsider her position. Given the circumstances are somewhat unusual I consider this would be appropriate for Y, and that it would be easier for Y if any return were to take place immediately after the end of her school term.