Neutral Citation Number: [2024] EWHC 1879 (Fam)

Case No: FD 24 P 00728

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th July 2024

**Before** :

**MR. NICHOLAS ALLEN KC**

**(Sitting as a Deputy High Court Judge)**

**Re A (Children) (Retention: Article 13 (b): Return to Israel)**

**BETWEEN**

GL

**Applicant**

- and –

HL

**Respondent**

- - - - - - - - - - - - - - - - - - - - -

**Christopher Hames KC** (instructed by **Craig Solicitors**) for the **Applicant**
**Anita Guha KC and Helen Compton** (instructed by **Goodman Ray**) for the **Respondent**

Hearing dates: 25th – 26th June 2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 9th July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.**

**Mr. Nicholas Allen KC:**

1) I am concerned with an application brought pursuant to the Child Abduction and Custody Act 1985 (incorporating the Hague Convention 1980) for the summary return to Israel of three children namely A, B, and C who are aged 7 or younger. All three children are joint Israeli/British nationals.

2) The application is brought by the children's father, GL. It is resisted by the children's mother, HL.

3) In this judgment I shall refer to the applicant as 'F' and the respondent as 'M'. No discourtesy is intended.

4) F was represented by Mr. Christopher Hames KC (instructed by Craig Solicitors) and M by Ms. Anita Guha KC leading Ms. Helen Compton (instructed by Goodman Ray). I am grateful to counsel for the quality of their position statements and for their clear and focused oral submissions.

**Background**

5) F is in his early 30s. He is a joint Israeli/British national. M is also in her early 30s. She is likewise a joint Israeli/British national.

6) Both parties' cultural and religious heritage is from within the Chasidic Charedi Orthodox Jewish tradition (albeit from different sects) and both adhere to the religious laws of their background. The three children are being brought up likewise. The parties were introduced to each other in Israel in April 2015 when they became engaged. M moved to Israel in July 2015 where the parties married shortly thereafter. Initially they lived in area P, a suburb of Jerusalem and in December 2018/January 2019 they moved to area Q, another suburb of Jerusalem.

7) M alleges that she was subject to domestic abuse from F throughout the parties' marriage. She alleges that she suffered racist, emotional, physical and psychological abuse. She also alleges that F physically chastised the children and his abuse caused changes in the children's behaviour. F denies all these allegations.

8) On 27th March 2023 M travelled to England with C. F and the elder two children followed a week later. On 23rd April 2023 the family returned to Israel.

9) On 22nd June 2023 M and the children travelled from Israel to England to spend time with her family. There were return tickets booked for 6th July 2023. M and the children did not board the return flight.

10) On 22nd January 2024 M issued an application in the Family Court at Barnet seeking (i) a 'live with' order; and (ii) a specific issue order that the elder two children attend XYZ School. On 26th January 2024 Recorder van der Leij considered jurisdiction needed to be determined as a preliminary issue, directed service of the application on F, and listed further directions on the first open date after 1st March 2024. F was served with M's application on 31st January 2024.

11) On 18th February 2024 F filed his C67 application in England for an order for the summary return of the children to Israel. It was issued on the following day. Directions were given by His Honour Judge Simmonds (sitting as a Deputy High Court Judge) at a without notice hearing on 20th February 2024 when *inter alia* he (i) ordered the papers in the Barnet proceedings would stand as evidence in these proceedings; and (ii) listed the application on notice for further directions on the first open date after 14th March 2024.

12) On 15th March 2024 Mr. John McKendrick KC (sitting as a Deputy High Court Judge) gave directions with a further hearing listed on 9th April 2024. On that date Sir Jonathan Cohen listed a pre-trial review and a final hearing with a time-estimate of two days. The pre-trial review was heard by Mr. Justice Moor on 9th May 2024.

13) The final hearing came before me on 22nd May 2024. I acceded to an application by M's then solicitors, Bindmans LLP, made late the previous day to come off the court record on the basis they were professionally embarrassed. Thereafter I acceded to M's application for an adjournment (which was not strongly opposed on F's behalf given I had identified a relatively proximate future hearing date) so that she could instruct new solicitors and relisted the hearing before me on 25th June 2024 with a time-estimate of two days. I recorded as a recital to my order that the fact of the adjournment and the additional four-week delay would not prejudice the outcome of the substantive application.

14) F's then counsel, Mr. Paul Hepher, indicated that F (who is privately paying) would seek a wasted costs order against M's solicitors (M having the benefit of legal aid). I directed that, if pursued, I would deal with this application after the delivery of judgment. Although of course I shall determine any such application with an open mind were it to be made I have said to Mr. Hames that I do not encourage the same.

15) On 7th June 2024 M's new solicitors filed an application dated 1st June 2024 for the instruction of a geopolitical expert (as so described) to report on the situation in Israel in light of the country's current conflict with Hamas in and around Gaza. I refused this application at a hearing on 14th June 2024. My reason for so doing was that the requirement is to avoid generalities and as far as possible evaluate the particular risk to these particular children in a return to their particular area (see for example *Q v R* [2022] EWHC 2961 (Fam) per Williams J at [19] and [54] and *Re Z and X (Children: Article 13(b): Return to Kyiv)* [2023] EWHC 602 (Fam) per Mr. Dexter Dias KC (sitting as a Deputy High Court Judge) at [23]). It was therefore not necessary to obtain generic evidence of the type proposed by M in order justly to resolve this aspect of her Article 13(b) defence (being the test set out in the Children and Families Act 2014 s13(6)).

16) In advance of the relisted final hearing I was provided with (and read) an e-bundle running to 641 pages and detailed position statements from the parties' respective counsel. The bundle included four statements filed by F (dated 19th February 2024, 8th April 2024, 15th May 2024, and 20th June 2024) and three filed by M (dated 25th March 2024, 16th May 2024, and 20th June 2024) all of which I have read with care.

17) I wish to make one observation about M's first witness statement dated 25th March 2024. On 20th February 2024 His Honour Judge Simmonds directed that M's witness statement be limited to eight pages of A4, double spaced, size 12 font. Whilst the time for service of this witness statement was extended by Mr. John McKendrick KC on 15th March 2024 there is no suggestion that this restriction was relaxed in any way. When M filed her statement it ran to 25 pages (with exhibits of a further 100 pages).

18) In *WC v HC (Financial Remedies Agreements) (Rev 1)* [2022] 2 FLR 1110 Peel J began his judgment with some comments about the parties' preparation for the final hearing. He stated (at [1](i)) that whereas H's witness statement had complied with directions made at the pre-trial review and FPR 2010 PD27A as to page limits and formatting W's had not. This led him to state that:

> This is completely unacceptable, and W's legal team should not have permitted it to happen. Court Orders, Practice Directions and Statements of Efficient Conduct are there to be complied with, not ignored. The purpose of the restriction on statement length is partly to focus the parties' minds on relevant evidence, and partly to ensure a level playing field. Why is it fair for one party to follow the rules, but the

other party to ignore them? Why is it fair for the complying party to be left with the feeling that the non-complying party has been able to adduce more evidence to his/her apparent advantage?

19) In *Xanthopoulos v Rakshina* [2023] 1 FLR 388 Mostyn J at [3] cited the above and stated:

It should be understood that the deliberate flouting of orders, guidance and procedure is a form of forensic cheating, and should be treated as such. Advisers should clearly understand that such non-compliance may well be regarded by the court as professional misconduct leading to a report to their regulatory body.

20) Although the above comments were made in the context of financial remedy cases they are clearly of general application. As Sir James Munby P observed in *Re W (Adoption Order: Leave to Oppose); Re H (Adoption Order: Application for Permission for Leave to Oppose)* [2014] 1 FLR 1266 at [51] *"Orders ... must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications; they are orders."*

21) I also pre-read the expert report of Mr. Edwin Freedman, an Israeli attorney dated 7th May 2024 (prepared in accordance with a joint letter of instruction dated 17th April 2024), and his answers to M's solicitors' written questions dated (i) 16th May 2024 (in response to questions dated 9th May 2024); and (ii) 24th June 2024 (in response to questions dated 21st June 2024). Neither party applied for Mr. Freedman to attend to give oral evidence.

22) When in court M sat behind a screen with a representative from her solicitors by way of agreed special measures.

23) At the outset of the final hearing I dealt with an application on M's behalf to file a fourth witness statement dated 24th June 2024 in which she corrected and/or clarified 18 factual errors in her first witness statement of 25th March 2024. The application was not strenuously opposed on F's behalf and given the obvious need for M's written evidence to be accurate so far as she was concerned – not least because it was verified by a Statement of Truth – I acceded to the same.

24) At the outset of the final hearing I also heard an application on M's behalf (and which was opposed by F) for the parties to give oral evidence in relation to (i) the operative date of the children's retention for the purposes of Article 3; and (ii) M's position that she would not return to Israel if an order was made for their summary return.

25) I gave an *extempore* judgment refusing the application. I considered (i) *Re B (Children) (Abduction: Consent: Oral Evidence) (Article 13 (b))* [2023] 1 FLR 911 per Moylan LJ (in which the Court of Appeal was critical of *ES v LS* [2021] EWHC 2758 (Fam) per Mostyn J and *Re IK (A Child) (Hague Convention: Evidence Consent)* [2022] 2 FLR 888 per Peel J and which had been relied upon by the Deputy High Court Judge at first instance) and in particular paragraphs [55] – [67] thereof; (ii) *E v D* [2022] EWHC 1216 (Fam) per MacDonald J; and (iii) *Re C (A Child) (Child Abduction: Parent's Refusal to Return with Child)* [2021] EWCA Civ 1236. Having done so I concluded (per *Re B* at [64]) that it was not *"necessary to hear oral evidence in order to be able fairly to determine this central issue of fact in the context of what is a summary process and in the context of the available documentary/written evidence"* for the following reasons:

a) in relation to the first issue (i) although the date of retention is an issue of fact which is binary and in respect of which the court has to make a finding (and which is what as was made clear in *Re B* per Moylan LJ at [58] distinguishes it from the Article 13(b) exception which is an assessment of risk and where the *Re E (Children) (Abduction: Custody Appeal)* [2011] 2 FLR 758 approach to take the allegations *"at their highest"* is available) there was sufficient written/documentary evidence upon which I could decide the same; and (ii) Ms. Guha principally identified alleged deficiencies in F's written evidence and it was to M's advantage

and not disadvantage for her counsel to be able to highlight these in submissions rather than F being able to ameliorate the same. It is relevant in this context that in *Re B* Moylan LJ stated at [66] that *"the purpose of oral evidence is not to assist the parties to cure any deficiencies in their written evidence but, when necessary, to put the court in a better position to decide the issue fairly"*; and

b) in relation to the second issue I considered I could fairly determine the same through a combination of M's written evidence and Ms. Guha's submissions.

   I was fortified in this view by *Re C* where an abducting mother made such an assertion in respect of the parties' young child returning to France. In upholding Mr. Justice Cohen's decision not to require oral evidence (albeit I accept that in contrast to this case neither party either applied for or suggested the mother be called to give oral evidence) Sir Andrew McFarlane P observed at [59] that *"it is clear that there is no reported authority on the point in this context"* and at [60] rejected the submission made on M's behalf that any oral evidence that the mother might have given would have been short as *"[o]n the contrary, it would seem likely that, if the mother were to be asked 'why?' she would not return to France, her testimony would have opened up and led to her listing all of her complaints about the father's past behaviour. Such a development would be wholly contrary to the approach taken to Hague cases in this jurisdiction."* Given the extensive narrative about the parties' marriage in M's first witness statement of 25th March 2024 I consider it likely that the same would have happened in the present case. Further, at [61] Sir Andrew McFarlane P stated *"[w]hilst, in a case such as this where the issue is one of whether a parent is, or is not, likely to return to the home country with their child if the child is ordered to do so, it may be open to a court to receive oral evidence from that parent on the point, to do so is by no means a requirement."* As a consequence Cohen J was not open to criticism for making his determination in the absence of oral evidence.

26) I also took into account the *Practice Guidance - Case Management and Mediation of International Child Abduction Proceedings* issued by the President of the Family Division dated 1st March 2023 and in particular at paragraph 3.14 that (i) the *"ordinary rule"* is that the court will be *"very slow"* to make a direction for oral evidence to be given; (ii) it *may* (original emphasis) be necessary to hear oral evidence where *inter alia "(d) there is an issue as to where the child is habitually resident, the determination of which would be assisted by hearing oral evidence"*; and (iii) any party seeking to rely on oral evidence *"should raise the issue at the earliest available opportunity and no later than the pre-hearing review"*. In relation to this last point Mr. Hames said it had never been previously raised. Ms. Guha's explanation for this failure – that her solicitors had only been instructed on 22nd May 2024 and such proceedings are often prepared for in something of a rush - did not explain satisfactorily why this had not been raised at any time prior to the final hearing not least because M had been in receipt of legal aid since 29th February 2024. Likewise although on 9th April 2024 the final hearing had been listed with a time-estimate of two days this did not in my view mean (contrary to Ms. Guha's submission) it was likely the giving of oral evidence had been contemplated when there was no reference to the same in that (or indeed any) order.

27) Having refused M's application I heard submissions on 25th and 26th June 2024. At no point during the hearing did I consider I had reached the incorrect conclusion in refusing M's application for oral evidence. I remained (and remain) satisfied that I was able fairly to determine the issues of fact in the context of the available documentary/written evidence. Thereafter I reserved judgment.

28) In this judgment I have not referred to every argument raised by the parties in their written and oral evidence or in their counsel's submissions. I have however borne all that I read and was said to me in mind.

29) I remind myself that the burden of proof is on the party who makes a particular allegation/seeks a particular finding. In this case this means that the burden of proof is on F in respect of Article 3 (wrongful retention) and on M in respect of Article 13(b) (grave risk of harm). The standard of proof is the balance of probabilities; no more and no less.

**<u>The pleaded exceptions/defences</u>**

30) In M's Answer dated 14th March 2024 she raised five exceptions/defences:

a. Article 3: F has not established that he has rights of custody in respect of the children. Consequently, it is not accepted that his rights of custody have been breached in accordance with Article 3 of the Convention;
b. Article 3: In any event, the children were not wrongfully retained as F and I were engaging in discussions and there was no agreement reached;
c. Article 4: The children were habitually resident in this jurisdiction at the relevant date and in any event immediately before F alleges that his contested rights of custody were breached;
d. Article 13(a): F acquiesced to the children remaining in this jurisdiction; and
e. Article 13(b): A return to Israel will expose the children to a grave risk of physical and/or psychological harm or will otherwise place them in an intolerable situation.

31) On 15th March 2024 Mr. John McKendrick KC (at paragraph 7 of his order) *"requested the parties to consider what the essential and necessary defences are in this matter in order that the issues could be narrowed by or at the directions hearing."* On 9th April 2024 it was recorded at paragraph 7 of the order of Sir Jonathan Cohen that M *"continued to pursue all of the defences as set out in her answer."*

32) Having instructed new solicitors and counsel it was confirmed by Ms. Guha that M did not seek to pursue the defences relied upon in the Answer of rights of custody and acquiescence.

33) Mr. Hames was critical of what he described as a 'kitchen sink' Answer. Ms. Guha's response was that M was reliant on the advice of her solicitors having taken her instructions. I accept this.

34) There are therefore now two main issues in this case that I shall deal with in turn.

<u>Articles 3 and 4</u>

35) Article 3 provides:

> The removal or the retention of a child is to be considered wrongful where:
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention ..."

36) Article 4 provides *inter alia*:

> The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

37) A removal or retention is therefore only wrongful for the purposes of Article 3 if it is breach of rights of custody and those rights of custody were being exercised at the time of the removal or retention. As I note above, rights of custody were conceded by Ms. Guha on M's behalf at the outset of the final hearing.

38) A removal will only be wrongful for the purposes of Article 3 if, immediately prior to the retention or removal of the child, that child was habitually resident in the State from which the removal or retention took place.

39) The factual issue before me was not directly either rights of custody or habitual residence. It was the date of wrongful retention and as a consequence habitual residence that was in issue.

40) On F's behalf it was said by Mr. Hames that the position was simple and straightforward: the date of wrongful retention was 6th July 2023. F had agreed for the children to be in England for two weeks on the basis that they would return on that date: there was nothing "*unfixed, undefined or temporary"* about the same. F had never agreed to a day longer and the failure to return was solely down to M's decision not to board the return flights. This distinguished the case from those without such fixed dates (e.g. *JM v RM (Abduction: Retention: Acquiescence)* [2022] 1 FLR 243 per Mostyn J and *Z v Z* [2023] EWHC 1673 (Fam) per Peel J).

41) On M's behalf it was said by Ms. Guha that the position was not straightforward. Although it was accepted that there was a 'retention' of the children as of 6th July 2023 it was said that this was not 'wrongful' because the position on the ground was *"fluid and continually evolving"*. The relevant date was therefore said to be either 22nd January 2024 when M issued her application in the Family Court in Barnet or (less likely) – but perhaps consistent with *JM v RM* – 19th February 2024 when F issued his application for summary return as this was the first occasion that he asserted his right to insist upon the children's return to Israel. It was submitted that by these dates the children were habitually resident in England.

42) In *JM v RM* it was argued before Mostyn J on the mother's behalf that retention as a concept required there to be an operative agreement between the parents that one of them can take the children to another Convention country for a *"fixed", "stipulated" or "limited*" period with a *"due date"* of return (with the words placed in quotation marks because they were all used by the Supreme Court in *Re C And Another (Children) (International Centre for Family Law, Policy and Practice Intervening)* [2018] 1 FLR 861. In that case it was argued that although the holiday in England began with such an agreement in place, that agreement was frustrated by the Covid-19 pandemic and thereafter there was a tacit understanding, a form of stand-off, between the parents that the stay in England would be open-ended and not be governed by a *terminus ad quem* and which only ended when the father made it clear the children had to return by which time they were habitually resident in England. At [31] Mostyn J stated that this was not an easy issue to resolve but with some hesitation *"a wrongful act of retention … requires there to be, as a matter of fact, a clearly agreed due date of return … In my opinion it is implicit in the concept of wrongful retention … that the wrongful act must take place within, or immediately following, an agreed finite period of care by the retaining parent."*

43) In *Z v Z* at [15] Peel J stated that Mostyn J had referred to the need for *"an agreed due date for return"* and continued "*I do not read him as stating that there must in every case be fixed calendar dates. Each case must be judged on its specific facts. Thus, for example, rather than a specified calendar date, the agreed or anticipated date for return may be referable to an agreed crystallising or triggering event, the precise date of which is unknown to the parties at the time of departure."* However "*there must be some ingredient to indicate that the departure from one country to another is intended to be temporary rather than permanent or potentially permanent, even if the precise date of return is not fixed. Thus, it is hard to conceive of a wrongful retention where the departure from the outward country is agreed to be open ended with no determining or triggering event …"* and he endorsed the observations of Mostyn J at [32] where he had tested the correctness of his proposition. On the facts, as the agreement was for the mother and the children to remain in England until conclusion of her medical treatment and that event had not yet come to pass there had, accordingly, been no wrongful retention.

44) Ms. Guha submitted that likewise in this case there was no fixed date of return. She stated that although M had booked return flights there is no evidence on F's part that after 6th July 2023 had come and gone he complained about the same nor insisted on a substituted date (he never said, for example, *"you missed the flight, what happened, bring the children back on x date"*) and

that save for an agreement to participate in mediation after July 2023 (albeit there was disagreement as to whether this should take place in England as M sought or Israel as F sought) there was little or no detail as to what F said or did between July 2023 and January 2024. This demonstrated an agreement to the children remaining in England on an open-ended basis during this period. The wrongful retention only took place on either 22nd January 2024 or 19th February 2024 by which date the children were habitually resident in England. As such, and as Lord Hughes stated at paragraph [34] of *Re C "[t]he Convention cannot be invoked if by the time of the alleged wrongful act, whether removal or retention the child is habitually resident in the state where the request for return is lodged. In such a case … there is no room for a mandatory summary return elsewhere …".*

45) I do not accept Ms. Guha's arguments for the following reasons:

a) I am satisfied from a review of the documentary evidence that there was a fixed date of return. In her first witness statement dated 25th March 2024 at paragraph [37] M stated that she and the children arrived in England *"on a pre-agreed holiday"* and that "*[i]t is true that return flights were booked for me and the children … We were told by our travel agent this was the most cost effective option. [F] and I had a conversation that I wasn't sure we would return on that date. We wanted to have some flexibility in case [F] could join me like he had in April and therefore, extend our time in England for the whole summer like usual. When we discussed with the travel agent they told me that the most cost effective thing to do would be to book return flights and then move them if we needed to extend the trip."* This suggests that the parties had discussed the need for potential flexibility for the return date but that booking return flights at the same time as outbound flights was more cost effective and this was why they had been booked.

   However, at paragraph [13] of M's fourth statement of 24th June 2024 this was corrected to state *"it was only me who spoke to the travel agent and was told that the most cost-effective thing to do was to book one-way tickets because I had hoped [F] would join me later in England. I was told that it would be cheaper to book a return flight at a later stage as the travel arrangements were flexible."* My reading of this (with which Ms. Guha agreed) was that M deliberately chose to book the more expensive non-flexible return tickets. This is more consistent with F's case that when the tickets were purchased it was expected that M and the children would return on 6th July 2023. Ms. Guha accepted this but said cases such as this are never decided solely on the flight tickets alone (which of course I accept) and I should be careful to cherry-pick one aspect of M's evidence in F's favour when he otherwise disputes M's evidence and her credibility. Again I accept this as a general proposition but this does not prevent me accepting this aspect of M's evidence;

b) the argument (in effect) puts a positive burden on F to have done something after the date of (wrongful) retention. I deliberately put wrongful in brackets because as I have said above it is M's case that although there was a retention on 6th July 2023 it did not become wrongful until either 22nd January 2024 or 19th February 2024. Ms. Guha submitted it was incumbent on F to have insisted on a substitute date after 6th July 2023 had passed for the retention to have been wrongful. However I agree with Mr. Hames that there is no requirement for the 'left behind parent' to have to assert that (s)he wants the abducted child returned. Article 5 (a) states that *""rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence"*. This was construed by the House of Lords in *Re D (Abduction: Rights of Custody)* [2007] 1 FLR 961 as a right of veto and as a consequence F had the right to prevent the removal of the children from Israel. However, F exercised his rights of custody to allow the children to be removed from Israel until 6th July 2023. The question is therefore did he prior to this date exercise his rights further to grant or agree further extension? My answer to this is 'no'. Hence it became a wrongful retention as at that date and thereafter it is not incumbent on the 'left behind parent' to do anything. By doing nothing such a parent may of course be at risk of the acquiescence

exception in Article 13 (a) being satisfied but that is a separate issue. If there is no such obligation when there has been a wrongful retention there cannot be a greater obligation to do so where there has merely been (on M's case) a retention; and

c) this argument is (as Ms. Guha accepted) in effect one of 'acquiescence' but at the same time M no longer advanced acquiescence under Article 13(a) as a defence to the application. This was because it was accepted that M's application to the Family Court at Barnet dated 22nd January 2024 - in which her witness statement said at paragraph [10] that if aware the application had been made F *"would make an urgent application to the Court in Israel"* and that once jurisdiction had been established in England she did *"not oppose [F] being informed of the proceedings"*. I agree with Ms Guha that this showed that M was not in fact asserting acquiescence on F's part. I struggle to see that if a party is not pursing 'acquiescence' as an exception/defence they can still argue 'acquiescence' in this context.

46) In my judgment there was an agreed due date for return. F agreed to M and the children travelling to stay with M's family in England on the condition that they would only stay for two weeks. There was no agreement either prior to 22nd June 2023 (the day they flew to England) or between 22nd June 2023 and 6th July 2023 (the day they were due to return to Israel) that the stay would be extended whether on an open-ended basis or otherwise. Taking M's case at its highest it is that the parties had discussed the possibility that the parties may extend the trip <u>if</u> F subsequently came to England to join M and the family which of course did not happen.

47) I am fortified in this conclusion by the following:

a) as I understand it the parties agree that the elder children's school were only asked for (and only gave) permission for the two older children to be out of school for the two-week trip (although I acknowledge (per g) below) the letter from the school suggests that it was not *"officially"* informed even of a temporary absence);

b) on 21st July 2023 M emailed F in which she stated *inter alia* that I *"want to apologise for the pain you felt regarding me not coming home after two weeks. I know it must be confusing and hurtful to you".* There would be no need for such an apology if F had agreed with M in this regard prior to that date. In the same email M also stated *"[w]hen I arrived here I felt some emotional relief and I soon realized that I needed to be here longer to work things out."* This is consistent with paragraph [38] of M's first witness statement of 25th March 2024 (*"On arriving in this jurisdiction I realised how difficult my and the children's lives were in Israel and with [F]. It was like a weight had been lifted off all of our shoulders"*) and both suggest the choice not to return on the pre-agreed date was made once M had come to England;

c) on 23rd July 2023 F emailed M and stated *inter alia "I agreed with you, and I was expecting you, and it was simple for me, that a word is a word and that you would be here two and a half weeks ago, and since then every day that passes is a new disappointment and frustration that the word did not happen"* and also referred to *"a state of frustration and disappointment and depression about the promise that didn't happen tile (sic) I am in a place that I am not able to deal with …"*. This suggests that M breached the parties' agreement by not returning with the children to Israel on 6th July 2023;

d) at paragraph 5b of M's C100 filed in the Family Court at Barnet dated 22nd January 2024 it was said that M "*came to the UK with the children in June 2023 and chose not to return to Israel due to the domestic abuse she has been subject to and the physical abuse the children have also been subjected to by the Father"*. This suggests the choice not to return on the fixed date was made once M had come to England. At paragraph [3] of M's undated statement filed in support of her application M stated *"In June 2023 I brought the children to London to visit my family. Whilst I was away in London I have had the opportunity to reflect on my marriage and the behaviour of my husband towards the children and me, and I have chosen not to*

*return to Israel at this time and have established our home in London and hold a tenancy to rent a property and I'm employed."* At paragraph [7] M stated *"On coming to London in June 2023 I had an opportunity to reflect on the relationship and the father's behaviour …".* Both of these statements again suggest M's decision was made after she had come to England. There is no suggestion that M remaining in England beyond 6th July 2023 was ever an agreed plan, nor any notion of F consenting or acquiescing thereto;

e) at paragraph [10] of M's undated witness statement she stated (as I have noted above) that she was making the application without notice to F because if he were to be put on notice *"he would make an urgent application to the Court in Israel in competition with my own application"* but once jurisdiction has been established *"I do not oppose [F] being informed of the proceedings."* This suggests that M was aware that F may involve a different jurisdiction which is consistent with the parties having not agreed whether before or after 6th July 2023 to an open-ended retention in England and M being aware of the same. Likewise her explanation in the same paragraph as to her address remaining confidential as M said she was *"afraid [F] may attend our home uninvited or seek to remove the children from my care."*;

f) exhibited to F's second statement dated 8th April 2024 is an undated handwritten letter from Rabbi D who was one of several intermediaries who facilitated indirect communication between the parties after 6th July 2023. This records F having explained that he *"wants [the children] to return to Israel"* which does not suggest any agreement to the contrary;

g) exhibited to F's second statement dated 8th April 2024 is a letter from the elder children's school, JKL School, dated 18th March 2024 which records that the school has *"not received any official notification regarding [the children's] absence, not even temporarily, and whenever [F] was asked about their return his answer would be that there are delays and that he hopes they will return soon"*. Again this does not suggest any agreement to the contrary;

h) M's choice of language in her first witness statement dated 25th March 2024 where (at paragraph [40]) she states that the parties *"came close to agreeing"* on her and the children staying in England for a few more months and (at paragraph [41]) on 4th July 2023 the parties had *"almost"* come to such an agreement. Logically this suggests that there was no agreement to the children staying for a few months;

i) at paragraph [41] M states that at one point during the parties' conversation on 4th July 2023 F stated *"he could force the children to come back."* Although Ms. Guha fairly cautioned me against placing undue reliance on one particular sentence in one witness statement and that M's statement then states *"I can't really remember the specifics"* I agree with Mr. Hames that these words (or anything like them) are inconsistent with there having been an agreed consensual extension;

j) there is no suggestion in M's email to Mr. E (M's brother-in-law) of 21st September 2023 that the parties had agreed an open-ended/indefinite stay (and/or that F was now seeking to renege on the same) and the same is true of the email M's sister wrote to F's sister on 22nd September 2023; and

k) I do not read F's email of 31st January 2024 sent to M after she had informed him that the parties' marriage was over and she would be staying in England as his acceptance of M's wish to remain in England not least because it states *"[w]e have adorable children who are waiting for us, and I will do everything so they have a complete and serene house, and happy and serene mother and father."* In other words I do not consider M's view of this email (as set out at paragraph [54] of her witness statement of 25th March 2024) that *"[t]his email doesn't ask for the children and me to return to Israel. It doesn't say that he doesn't agree*

*with the position I have taken. In total honesty, I took this email as acceptance of my wish to remain in England"* to be an objectively fair one.

48) Whilst there is no doubt (and indeed it is common ground) that (i) the parties' marriage was in difficulty by this time; and (ii) once in England M sought that the parties engage in therapy with which F was willing to engage (with the disagreement being whether it should be in England as M sought or once M had returned to Israel with the children as F sought) this does not suggest any change to the agreed date of return or that F agreed to the children remaining in England for the time being (indeed his position in relation to in which country therapy should take place suggests the opposite). In other words to adopt the phraseology used in *JR v RM* by Mostyn J although there may have been *"a form of stand-off"* between the parents as to where therapy should take place this was both after the agreed date of return had passed and there was no *"tacit understanding"* that the stay in England would be open-ended. The original return date was not as Ms. Guha submitted simply a *"nominal"* date for return.

49) As a consequence the date of wrongful retention was 6th July 2023.

50) It is unarguable (and the contrary was not argued on M's behalf) that the children's habitual residence changed over the course of a two-week holiday. This is an example of a *"simple paradigm case of wrongful retention"* as identified in *Re C and Another (Children) (International Centre for Family Law, Policy and Practice Intervening)* [2018] 1 FLR 861 per Lord Hughes at [11]. The children were therefore habitually resident in Israel as of that date.

51) If I am wrong about the foregoing, I accept Mr. Hames' secondary date of wrongful retention as being the date when M took a 12-month tenancy of a three-bed property on 29th September 2023 (M having been staying with her mother prior to that time).

52) Habitual residence is a question of fact which requires a global analysis of all the relevant circumstances. The legal principles originate in the decision of the CJEU in *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22 and were expounded in a series of decisions of the Supreme Court. The core legal principles were then summarised in *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam) per Hayden J at [17] (a summary of the law described as *"helpful"* in *Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2021] 2 FLR 69 per Moylan LJ at [63] save in respect of viii) which was to be omitted (original emphasis)):

   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*, adopting the European test);
   ii) the test is essentially a factual one which should not be overlaid with legal subrules or glosses. It must be emphasised that the factual inquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (*A v A, Re KL*);
   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* (para 42) applying *Mercredi v Chaffe* 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 (*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 (*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 (*Re KL, Re R and 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 (*Re B*);

viii) [Omitted];

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 (*Re R* and earlier in *Re KL* 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 (*Re R*) (emphasis added);

xi) the requisite degree of integration can, in certain circumstances, develop quite quickly (Article 9 of BIIR envisages within three months). It is possible to acquire a new habitual residence in a single day (*A v A; Re B*). In the latter case Lord Wilson referred (para 45) to 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 (*Re R*); and

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 an 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 an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former"* (*Re B supra*).

53) Applying these principles and acknowledging this is a balancing exercise I would have found the children remained habitually resident in Israel immediately before 29th September 2023 for the following reasons:

a) M and the children were staying with M's mother prior to when she signed for the tenancy;

b) M was clear in an email she sent on 21st September 2023 to Mr. E, M's brother-in law, who was assisting the parties that she continued to see her stay in England as a temporary one and she wished to return to live in Israel. She said *inter alia "I love Eretz Yisroel and it's where I yearn to be … I will continue working towards building a beautiful life there as there is no other place I would want to live … I love the Kedusha of Eretz Yisroel and feel a close connection to it and it's the only place that I want to build my home"*. This is just eight days before she signed the tenancy agreement;

c) M's sister wrote an email to F's sister one day later on 22nd September 2023 in similar terms stating *"[M] loves Eretz Yisroel and has no intention or will to live in England as far as I understand it is just a temporary measure under the circumstances"*;

d) M did not start to receive Universal Credit and Child Benefit until October 2023 (the Universal Credit decision letter is dated 13th November 2023);

e) the children were not enrolled in a local GP practice until the end of 2023;

f) the two elder children were initially home schooled. On M's own case (which F refutes) M did not ask for F's consent to enrol the elder two children in the XYZ School until mid/late January 2024 (which they did not in fact start attending until 3rd May 2024 after F agreed the same after the hearing before Mr. John McKendrick KC on 15th March 2024); and

g) the children did not (as M stated at paragraphs [34] and [73] of her first witness statement of 25th March 2024) travel to England on average three times a year nor spend their summer months in England every year. As M corrects at paragraph [12] of her fourth witness statement of 24th June 2024 the children travelled to England three times a year on one occasion and it was only some years that they spent their summer months in England. This is relevant to the question as to how quickly the children were likely to have achieved some degree of integration in England.

54) I have considered the factors set out by Ms. Guha at paragraph [26] of her position statement which it is said evidence that the eight-month period between July 2023 and January 2024 allowed the children *"to put down roots in England and their habitual residence shifted to this jurisdiction"* but do not consider that individually or collectively they lead to a conclusion that the children had acquired an habitual residence in England by 29th September 2023.

55) I may well have found that the children had achieved the necessary degree of integration in the social and family environment to have become habitually resident in England by 22nd January 2024 but I do not consider that they had the degree of integration/sufficient stability of residence to have become habitually resident in England immediately before 29th September 2023. Prior to that date (and in accordance with her own evidence) M was planning to return to Israel with the children but had put off the date during the time of the community mediation and whilst the parties were discussing relationship therapy pending the return. In my judgment over the weeks and months that followed from the missed flight on 6th July 2023 there was nothing (or nothing sufficiently) sure and fixed about what the future held for the children.

56) As a consequence, Articles 3 and 4 are satisfied in this case. The retention of the children on 6th July 2023 was wrongful as the children were (i) habitually resident in Israel immediately before a breach of F's rights of custody under Israel's laws immediately before the retention; and (ii) at the time of retention those rights were actually exercised.

57) Article 12 therefore places a mandatory duty on the court to order the return of the children to Israel forthwith in circumstances where Article 3 applies (which I have found that it does) and where less than a year elapsed between the wrongful removal and the date that proceedings for the return of the child were commenced (which is likewise satisfied).

58) This is of course subject to a party's pleaded exceptions to summary return to which I now turn.

Article 13(b)

59) Article 13(b) states:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -
>
> …
>
> (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.

60) The burden of proving, on a balance of probabilities, that there is an exception lies with the party asserting it as a defence. As I have previously stated the standard of proof is the ordinary balance of probabilities.

61) The Supreme Court examined the law in respect of the harm exception in *Re E* and *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 FLR 442. More recently in *MB v TB (Article 13: Alleged Risk of Oppressive Litigation)* [2019] 2 FLR 866 at [31] MacDonald J summarised the applicable principles derived from the authorities 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 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).

62) At [32] MacDonald J further stated:

> The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures.

63) In *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 Moylan LJ made clear that it is not the case that the court has to accept allegations made without conducting an assessment of the credibility or substance of the allegations:

> [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 …

64) Article 13(b) was also considered in *Re IG (A Child) (Child Abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123 per Baker LJ in which he summarised at [47] the applicable principles to be as follows:

> (1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".
>
> (2) The focus is on the child. The issue is the risk to the child in the event of his or her return.
>
> (3) The separation of the child from the abducting parent can establish the required grave risk.
>
> (4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish 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 establish how the child can be protected from the risk.
>
> (5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.
>
> (6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.
>
> (7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.
>
> (8) In many cases, sufficient protection will be afforded 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.
>
> (9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.
>
> (10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks.

65) I also remind myself that the section is referring to the harm likely to be caused to the child, not the adults. It is, however, clear from *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 FLR 442 at [34] that the subjective anxieties of a respondent whether reasonable or unreasonable will amount to an Article 13(b) defence 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.

66) I am also entitled to have regard to the purpose and policy aims of the Hague Convention. In *Re W (Abduction: Intolerable Situation)* [2018] 2 FLR 748 Moylan LJ stated:

[46] Child abduction is well-recognised as being harmful to children. As was noted in *Re E (Children) (Abduction: Custody Appeal) [*2011] 2 FLR 758, the *'first object of the Convention is to deter either parent ... from taking the law into their own hands and pre-empting the results of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any disputes can be determined there'.*

67) If I find Article 13(b) satisfied, I retain a residual discretion to return.

68) M's Article 13(b) defence is premised upon the following individual and cumulative factors (as set out at paragraph [29] of Ms. Guha's position statement):

a) she is a victim of longstanding domestic abuse in her marriage to F;
b) she is isolated and unable to seek the emotional and practical support she craves and requires in Israel;
c) M does not speak Yiddish, the primary language of the Ultra-Orthodox Jewish community and Hebrew, which is the primary Israeli language. This compounds her feelings of seclusion and disenfranchisement;
d) in contrast M has returned to live in her community in neighbourhood R, in North London, where six of her sisters live;
e) M feels powerless and has acute anxiety about the fact that F will carry out his longstanding threat to divorce her in the rabbinical court which will result in her being ostracised from the Orthodox Jewish community and her children being separated from her and placed in F's care;
f) M believes that she will be trapped in Israel as F would not allow her to take the children back to England to spend time with their family;
g) M has adduced evidence about the threatening and intimidating conduct of F towards her sister and brother-in-law to deter them from offering M support;
h) F has labelled M as mentally unstable to her friends and claimed that she needs to be institutionalised; and
i) M has acute subjective fears about the scale of the conflict taking place on the frontline only 60 miles away from the family home in Jerusalem.

69) It was conceded by Ms. Guha that in light of Mr. Freedman's answers dated 24th June 2024 M accepted that she could not (per f) above) be *"trapped"* in Israel. Mr. Freedman stated that any travel ban must have a legitimate purpose. In other words it was akin to a prohibited steps order that might be made by an English court. Mr. Freedman also stated that once the parties are divorced, it was unlikely that there would be any basis for a travel ban against M.

70) With this one caveat I shall take M's allegations against F (and the consequent risk of harm) at their highest and thereafter if satisfied that the risk threshold is crossed go on to consider whether protective measures sufficient to mitigate the harm can be identified. Although it was made clear in *Re B* per Moylan LJ at [71] that it is not *necessary* (original emphasis) for a judge to undertake the *Re E* approach as a two-stage process (because the question of whether Article 13(b) has been established requires a consideration of all the relevant matters including protective measures), absent the court being able confidently to discount the possibility that the allegations give rise to an Article 13(b) risk, conflating the *Re E* process creates the risk that the judge will fail properly to evaluate the nature and level of the risk(s) if the allegations are true and/or will fail properly to evaluate the sufficiency and efficacy of any protective measures. In other words the judge may fall *"between two stools"*.

71) I also remind myself that as stated in *Re B* per Moylan LJ at [70] that:

… the court is evaluating whether there is a grave risk based on the allegations relied on by the taking parent as a whole, not individually. There may, of course, be distinct strands which have to be analysed

separately but the court must not overlook the need to consider the cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk(s) that might potentially be established as well as the protective measures available to address such risk(s).

72) I have some doubts as to whether several of M's allegations against F even if taken at their highest would be sufficient to ground a grave risk of harm that the children would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. I say this cognisant of the caution expressed in relation to a paper-based evaluative assessment of risk in *Re A (Children) (Abduction: Article 13(b))* [2022] 1 FLR 1 per Moylan LJ at [92]-[99] and as previously expressed by the same judge in *Re C*. Although I bear in mind *Re S*, whilst M speaks of her concerns and anxieties around returning to Israel, many do not equate to placing the children in an intolerable situation or otherwise at grave risk of harm. There is also force in Mr. Hames' submission that there is nothing in the contemporaneous emails in the months following 6th July 2023 that suggests M was contending that F was unsafe or unfit to be near the children or otherwise presented a risk to them (and her permitting F to have unsupervised contact with the children when he has been in England is consistent with this), or that a return into their community in Israel would for the children be intolerable. M's issues principally revolved around the state of her marriage and her expectations of F.

73) However, notwithstanding my reservations in looking at the allegations cumulatively (as I must) I shall proceed on the basis that they are sufficient to ground a grave risk of harm. I need therefore to go on to consider whether the protective measures offered are sufficient to mitigate this potential harm. The protective measures offered by F on 19th March 2024 were as follows:

a) not to molest, pester or harass or interfere with, or use or threaten violence against M, or encourage anyone else to do so;
b) not to support, whether by himself or through his lawyers, agents or any other person, any criminal or civil proceedings for the punishment of M arising out of the retention of the children in England;
c) not to separate or cause the separation of the children from M's care without an order of the Israeli court or agreement between the parties;
d) to pay the reasonable costs of the children's and M's flight back to Israel;
e) to continue to pay the children's and M's health insurance on the same basis as hitherto pending any order of the Israeli court;
f) to continue to pay the children's school fees at the school in Jerusalem they attended hitherto pending any order of the Israeli court;
g) to co-operate in any court proceedings in Israel regarding the children's care and support to ensure that an agreement or order can be made quickly and without undue delay; and
h) to provide separate accommodation for the children and M pending any order of the Israeli court.

It was said that F was also willing to agree to mirror orders and to lodge undertakings in the same terms as the protective measures with the family court in Israel.

74) In his position statement at paragraph [79] Mr. Hames stated as follows:

> [F] has offered to [M] to add to the undertakings he is prepared to give such further undertakings as she might reasonably request. He will for example not attend at the airport on her and the children's arrival back. He will not approach wherever she might live (within a radius of 25 metres) save with her express consent or order of the court (for example for the purposes of pre-arranged contact). He will be bound by strictures placed on his contact with the children as may be required, namely promising not to remove the children from the care of [M] or any third party, save by express written agreement or order of the court. He will repeat the undertakings given here not to molest, pester or harass [M] himself or through any third party …

75) Through Mr. Hames F has also offered to add to the so-called 'soft-landing' provisions to meet M and the children's interim maintenance requirements. If M did not want to resume occupation of the former family home he offered to pay rent on an alternative two-bed property of ILS6,175 pm (c. £1,300 pm) which was said to be reasonable for a family of this size and gender division (the family home being two-bed) and global spousal and child maintenance of ILS4,000 pm. It was also said that F would continue to pay the children's school fees of ILS1,600 pm and he would also continue to meet the health insurance premiums. This support was offered for three months by which time the matter would be before the Israeli secular court. It was said that as F's income was ILS7,300 pm he would continue to need financial assistance from his family and the local Charedi community.

76) After the hearing I sought clarification from Mr. Hames as to F's proposal in relation to the 'soft-landing' provisions as on a review of my notes I thought I may have inaccurately recorded the rental figure or conflated it in some way with the interim maintenance offered. On 1st July 2024 Mr. Hames replied and I believe I have now accurately stated the position as above. In any event Mr. Hames informed me that F had had a further opportunity to reflect on the housing particulars which I was sent after the hearing (and to which I refer further below) and now proposed the following monthly financial measures for three months (by which time the matter can be reviewed by the Israeli family court) and which should be registered in the Israeli family court:

a) ILS8,100 pm for rent for a suitable property in central Jerusalem reasonably close to the boys' current school;
b) ILS4,000 pm in global maintenance;
c) ILS288 pm to the upgrade the family health insurance; and
d) ILS1,635 pm to pay the school fees for the boys at the school they previously attended.

77) I must analyse the nature and extent of the protective measures offered/required and ask whether any such measures sufficiently ameliorate or negate the risk(s) which the allegations potentially create, in a concrete or effective way, so that the children would not be exposed to a grave risk within the scope of Article 13(b). As Baroness Hale of Richmond and Lord Wilson of Culworth said in *Re E* at [52] *"[t]he clearer the need for protection, the more effective the measures will have to be"*.

78) When considering what weight can be placed on undertakings as protective measures the focus is on the extent to which they are likely to be effective in terms both of compliance and of the consequences, including remedies, in the absence of compliance. In other words with respect to undertakings, what is required is not simply an indication of what is offered by the 'left behind parent' as protective measures, but sufficient evidence as to the extent to which those undertakings will be effective in protecting the children from an Article 13(b) risk and not a focus confined solely to the enforceability of the undertakings.

79) The expert evidence of Mr. Edwin Freedman as set out in his report of 7th May 2024 so far as is relevant to the enforceability of undertakings/protective measures can be summarised as follows:

a) for F's undertakings to be rendered enforceable in Israel they must be in the form of an Israeli court order (ideally in place as a condition for the return);
b) an application for enforcement of the English order in Israel to mirror it as an Israeli court order would need to be filed in the local Family Court (local to the parents' former family home – namely in Jerusalem) and not the religious/rabbinical court;
c) this procedure, if by consent, usually takes one to two weeks (costing $3,000 to $4,000);

d) once ratified by an Israeli court, Fs undertakings will be enforceable in Israel as any other Israeli court order; and
e) if F then breaches those undertakings, he would be subject to contempt of court proceedings in Israel.

80) As part of M's Article 13(b) defence I must consider the likelihood that if an order for summary return of the parties' three children is made M will not accompany them back to Israel. In *Re A (Children) (Abduction: Article 13(b))* [2022] 1 FLR 1 Moylan LJ observed at [88] that *"the effect of the separation of a child from the taking parent can establish the required grave risk"*.

81) In her first statement dated 25th March 2024 M stated at paragraph [84] that she found this was *"really difficult to decide"*. She said that she was *"terrified"* of returning to Israel and it was *"not something I can really bear to think about"*. She said she was *"extremely traumatised"* from what she went though there and *"it wouldn't be safe for me to return"*. At [85] she stated that F could lawfully put in place a mechanism whereby the children could not ever leave Israel without him. At [86] she raised concerns about returning to her former community which would be *"nearly impossible"* as *"[d]ivorce is shunned"*. At [90] she stated that if she did return the children would be placed in F's care either through the community or the rabbinical court. At [99] she stated she was "*struggling to decide"*, *"cannot bear the thought of being separated from our children*" and *"[i]f faced with a decision, I am not sure I could definitely let them return to another country without me"*. I have no doubt whatsoever this would be an invidious decision for any parent to make.

82) In her second statement of 16th May 2024 (a statement directed to be limited to addressing an incident in a delicatessen on 17th April 2024 to which I refer below) M stated at paragraph [10] that following this incident "*I fully believe there aren't any protective measures that would guarantee my safety on a return to Israel ... [F's] breach of undertakings in current proceedings before the High Court has caused me to decided (sic) that I am fearful of a return to Israel. For this reason should a return of the children be directed, I confirm I will remain in England where I know I will be safer. This hasn't been an easy decision to come to. I feel I have no other option. It would be devasting to be separated from our children, and I strongly oppose the children being place in [F's] care because of the risk he poses to them, but I feel I will be placed in an extremely dangerous situation should I return."*

83) This is of course the second issue upon which M invited oral evidence which I refused as not being necessary. I have summarised my reasons for doing so above.

84) In order to answer this question I must assess M's evidence and seek to determine the reality of what she will do. Will she return to Israel or not? As Cohen J observed in *Re C* (as set out at [22]) the test is not what it is reasonable for her to do. In this context what protective measures can be put in place to ameliorate the situation? Again as Cohen J observed I have to look at that, not so as to determine whether objectively M's expressed refusal to return to Israel is reasonable, but to determine what impact those measures will have on her reasoning, and whether they are likely to lead to her returning. Framing the question in this way was said by Sir Andrew McFarlane P at [63] to be the *"clear and correct setting of the question"*.

85) Having considered all the evidence I am satisfied that on the balance of probabilities M will return to Israel with the children if I order their return. F accepts that M is a good mother, who loves her children to whom she is committed. He is right to do so. She has only ever left the two elder children in F's sole care for one week in March 2023 and the parties' daughter has never been left in his sole care. This was not a point raised by M until relatively late. Whether or not this was (as Mr. Hames submits) a tactical move on her part, at the last moment (an attempt to bolster her case, to hold the court to ransom to what she says she would do, in forcing the

children, notably C, to be separated from her if she does not get her way), I consider that M will in fact return with the children and would not choose to be separated from them for any sustained period. I simply do not accept that M, who is clearly a loving and devoted mother, would separate herself from children that she loves and for whom she has been their primary carer throughout their young lives. In my view the protective measures offered are also likely to lead to M returning to Israel.

86) In relation to M's argument that it would be all but impossible for her return to her former community in Israel as she would be shunned as a divorcee this is either not true as F states at paragraph [53] of his witness statement of 8th April 2024 ("*[w]hile there is some stigma attaching to divorce in Jewish law, it is also our tradition that no-one should be trapped in an unhappy marriage. There are plenty of divorced people in Israel, and many in the Charedi Community"*) or the extent that this is true I accept Mr. Hames' submission that the views of the Charedi community in London are likely to be the same as in Israel.

87) That said, I accept, as Mr. Hames stated, that if M were to decline to return with the children, or simply follow on later, F will come to England to return to Israel with the children and look after them, pending M's return. He is more than able to do so. Likewise if M were then to choose not to return to Israel at all, I accept that F is perfectly competent to look after the children with the assistance of his own support network which includes the children's paternal grandmother and they would of course be returning to their previous school and community. Whilst, as Mr. Hames accepted, that may not be best for the children, it would not establish an Article 13(b) risk.

88) On 7th October 2023 Hamas organised a large-scale terrorist attack on Israel and there has been an ongoing conflict between Israel and Hamas in and around Gaza since this time. Part of M's Article 13(b) defence is that as a result there is a grave risk to the children as a result of this conflict. Aside from the real risk of physical harm, it is said that there is a risk of psychological harm to the children of residing in a city under constant threat of attack. M relies *inter alia* on the following:

a) the front line of the fighting is around the town of Sderot which is about 60 miles or an hour and 20-minute drive away;
b) the Foreign Commonwealth and Development Office advises against all travel to parts of Israel (although M's statement said the advice was against all travel to Israel which is not the same). The parties live in an area where the advice is against all but essential travel;
c) whilst Jerusalem has not been successfully targeted by rockets, the risk of terror attacks is high. On 30th November 2023 four people were killed and five injured by Hamas in a shooting at a bus stop in Jerusalem. On 22nd February 2024 a shooting attack at the checkpoint between Jerusalem and the West Bank settlement city of Ma'ale Adumim resulted in one fatality and 11 casualties. On 6th March 2024 a man was stabbed in Jerusalem in a terror attack. On 22nd April 2024 there was a car ramming incident, injuring three people, in a neighbourhood close to the family home. In May 2024 there were reports that residents in North Jerusalem experience gunfire, arson and firebombs being thrown from the adjacent Arab neighbourhood of Shuafat on a regular basis; and
d) as a result of the Gaza conflict, there have been an increase in attacks on Israel by other countries. In April 2024 Iran launched an aerial attack on Israel which lasted five hours. There were explosions and air raid sirens heard in Jerusalem. Hezbollah has also launched several rocket attacks in Northern Israel.

89) When I pressed Ms. Guha about what it was about the present conflict that was of relevance to these particular children returning to their present home (or close to) she relied upon (i) the increased incidences of terror attacks as a result of Gaza conflict; (ii) the frequency of air raid alerts; (iii) the children being injured by shrapnel from air raid attacks; and (iv) a heightened

uncertainty from a perceived sense of danger and the psychological impact. She acknowledged in this context, however, that if this was the only factor *"it would be an entirely different case"*.

90) I agree with Mr. Hames that notwithstanding the current situation in Israel M has adduced no evidence that demonstrates a particular risk to these particular children in the circumstances they would return to in Israel. Contrary to what M says at paragraph [3] of her third statement of 20th June 2024 there is no evidence to support her assertion that *"it is clear that the risk for A, B and C returning to Israel is grave and it includes not only the real possibility of being killed or seriously injured, but also the psychological effects of being subjected to the effects of war"*. I am fortified in this view by the letter from the elder children's school dated 18th June 2024 which confirms that classes have taken place as usual since November 2023 save for 14th April 2024. I agree with Mr. Hames that if the children's school considered there was a grave risk to the children if they were returned they would have said so.

91) M also raised in her third statement of 20th June 2024 at paragraphs [14] and [15] her concern that should the children be returned to Israel F would be unable to care for them as he will likely be drafted for war. It was said that these concerns stemmed from the ongoing Supreme Court proceedings regarding the drafting of ultra-orthodox Jews into the army and a current bill which is being considered in parliament which if approved would lower the current age of exemption from mandatory service for Charedi men from 26 to 21 and a larger number of Charedi Jews would be required to enlist. If M did not return to Israel with the children this would mean they would be left without either parent to care for them. However Mr. Hames stated that F has an exemption certificate from service in the army and this was not challenged on M's behalf.

92) I also take into account that it is clear from both the contact notes from the RS Contact Centre and (to her credit) that M has permitted F to have unsupervised contact with all three children when he has been in England that they enjoy a very good and close relationship with F and he behaves appropriately with and towards them.

93) In my view the proposed protective measures (and the SJE evidence in relation thereto) are therefore sufficient to address or sufficiently ameliorate the risk(s) which M's case taken at its highest potentially creates save in two respects. This relates to the amount of money that F offers to contribute towards M's and the children's rent and for how long.

94) M exhibited three incomplete sets of property particulars to her witness statement of 25th March 2024 one at a cost of ILS13,500 pm (c. £2,840 pm) (but this was solely a short-term rental for Passover/Pesach), one at cost of $4,400 pm (c. £3,490 pm) (but this seemed to relate to a listing in 2016) and one at a cost of $5,000 pm (c. £3,970 pm). Both were said to support a cost *"higher than £3,000 pm"*. It was accepted on M's behalf that although the competing figures for rent were £3,000 pm (as sought by M) and £1,300 pm (as offered by F) neither party had put forward two-bed particulars (which is what the family home is) in a suitable neighbourhood.

95) I therefore directed at the conclusion of the hearing on 26th June 2024 that both parties were to send me no more than four sets of suitable property particulars by 4 pm on 27th June 2024. This direction did not offend against *AR v ML (Financial Remedies: Finality of Judgment)* [2020] 1 FLR 523 per Mostyn J as my decision to permit further evidence in relation to property prices comes before rather than after judgment. It was also consistent with *Butler v Butler* [2023] EWHC 2453 (Fam) per Moor J at [42] that the judge *"would have been subject to considerable criticism ... particularly if the only way to obtain evidence of property particulars had been to start doing his own research online to fill the gaps in the evidence"*.

96) M's four sets of two-bed property particulars were ILS8,000 pm (c. £1,685 pm), ILS9,000 pm (c. £1,895 pm), ILS11,000 pm (£2,315 pm), and ILS12,000 pm (c. £2,525 pm). F provided a long list of available rentals currently on the market in area Q and neighbouring suburbs ranging

from ILS3,100 pm – ILS12,000 pm with the four closest to elder children's school highlighted at a cost of ILS 6,800 pm (c. £1,430 pm), ILS8,000 pm (c. £1,685 pm), ILS8,600 pm (c. £1,810 pm) and ILS9,000 pm (c. £1,895 pm).

97) There is therefore a helpful overlap in the parties' respective figures. Having considered the particulars and the list in my view the appropriate rental figure is ILS9,000 pm (c. £1,895 pm) and this is the figure I shall substitute as being the necessary protective measure in this regard in place of the ILS8,100 pm (c. £1,705 pm) offered.

98) As to the appropriate time period, I consider this ought to be six months (rather than three months offered) or such earlier date as the Israeli family court has made its own order(s) in relation to interim financial support.

99) For completeness I should record that on 17th April 2024 the parties and children encountered each other in a delicatessen shortly before a contact session at the RS Contact Centre was due to commence. On 8th May 2024 M filed an application seeking permission for the parties to file statements in relation to what occurred. The application was opposed by F but permission was granted by Mr. Justice Moor at the pre-trial review on 9th May 2024.

100) M's second statement dated 16th May 2024 and Ms. Guha's submissions in relation thereto sought to argue both that F breached his undertakings dated 28th March 2024 (which included (i) not to seek any direct contact with M/the children unless the dates of contact are agreed; (ii) not to remove, nor seek to remove, nor encourage anyone else to remove the children from M's care or anyone to whom M entrusts their care; (iii) not to threaten, harass, or pester M, the children, or any third parties and not instruct nor encourage anyone else to do so; and (iv) not to come within 25 metres, nor instruct anyone else to come near M and her home) – and ones in very similar form were then given to Sir Jonathan Cohen on 9th April 2024 - and/or he would not abide by the protective measures that he offered. It was said by M at paragraph [9] of her statement that *"I really fear that [F] will not stop at anything. He has no respect for me or the undertakings he provided to this court. I have no confidence that [F] will comply with any undertakings he gives or orders made."*

101) In my view the meeting in the delicatessen was by chance and in any event none of F's actions that day demonstrate that he has not and/or will not abide by his undertakings to the court nor put in place the protective measures that are offered.

102) I should also record that I do not accept the suggestion that F would move out of the family home (which is a kind of duplex with the parties and the children living on the fifth floor and F's parents living below) to be (as was submitted) a demonstration of him seeking to control where M and the children should live on their return. I accept that this was motivated by F's belief that it would be best for the children if they returned to their own home and that (as he stated at paragraph [61] of his statement of 8th April 2024) *"if [M] does not want to live with me, I am prepared to move out of our family apartment so that she and the children can live there".*

103) I acknowledge (as was submitted by Ms. Guha on M's behalf) that the protective measures that are to be put in place may not compensate for any pervasive sense of isolation and insecurity that M may feel living in Israel away from her home and support network. I also accept the impact of current conflict between Israel and Hamas and risk of terror attacks is magnified upon a person who may (I emphasise 'may') have no desire to live in that country and feels unsafe and unsupported. However, and again cognisant of *Re S*, these feelings are insufficient to ground an Article 13(b) exception.

104) It is also appropriate to record that F has said (i) he has never taken any steps to apply for a divorce and has no current intention of doing so; and (ii) if M wished to be divorced he would give her the Get.

105) Israel is not a signatory to the Hague Convention 1996. As a consequence the necessary measures of protection are not automatically recognised by operation of law. It was however accepted by Ms. Guha (rightly in my view) that the mechanisms identified by Mr. Edwin Freedman in his report of 7th May 2024 (and his subsequent answers to M's written questions) for the orders to be recognised and enforced in Israel are sufficient enough in this regard.

106) Given my conclusion that an exception is not made out the discretion to order the return of the children does not arise. If I had concluded that the harm exception was made out I accept that it would ordinarily not be appropriate for me to exercise the discretion in favour of a return order and I would not have done so.

107) I also record that the Convention principles – and particularly that questions regarding a child's welfare should be determined in the country of a child's habitual residence – militate in favour of a return of the children to Israel. All three were habitually resident in Israel until the date of their removal and had lived their entire life in that country. Likewise the objects of the Convention as stated in Article 1 namely (i) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (ii) to ensure that rights of custody and of access under the law of one Contracting State were effectively respected in the other Contracting States.

**Conclusion**

108) It follows that F's application for the summary return of the three children to Israel succeeds on the basis of all the undertakings/protective measures that have been offered by him as amended as to the amount of rent and the duration of the interim financial provision. They are to be translated into a mirror order in the appropriate civil/secular court in Israel to take effect before the date of the children's return. This is a pre-condition to my order. F is to commit to funding the costs of registration in the Israeli civil/secular court and provide evidence of the same prior to the children's return.

109) In his comments dated 8th July 2024 on the draft version of this judgment (circulated on 2nd July 2024) Mr. Hames drew my attention to the following part of Mr. Freedman's opinion of 7th May 2024 in relation to an application for a mirror order:

> Costs are a function of whether or not the motion is made by consent. If it is made by consent, legal fees should be in the $3,000- $4,000 range, plus VAT (presently 17%) depending on the extent of the material to review.
> A contested motion could result in legal fees of at least $10,000, depending on the extent of the material involved and the court procedures. An appeal would also exist by right against a final decision.
>
> If the motion for the mirror order is made by consent, the procedure is usually completed within two weeks. It should be noted that there am no specific provisions regarding the manner in which the motion is to be made nor is there a timeline for the procedure. As mirror orders have been established by case law, the timelines depend on the individual judge who is assigned to the case. In most cases, the court will issue the order based on the submissions without the need for a hearing.

110) In light of the above Mr. Hames stated that as the costs are much lower and the timescale much shorter if M consents he invited me to consider adding a sentence *"that M should undertake to co-operate in the making of a consent order (always at F's expense) in order to keep costs and delay down"*.

111) I cannot require a party to offer any particular undertaking and I am not aware of any power I would have to make an order in these terms absent an agreement by M to offer the same. I would however encourage M to offer such an undertaking (one that I shall accept if she does) as I consider that it is in the best interests of the children for the necessary orders to be made by the Israeli courts with the minimum of delay and at minimum cost.

112) It shall hereafter be a matter for Israel's courts to consider and determine what is in the children's best interests in respect of issues relating to their welfare and long-term future. The evidence is that the courts are now functioning as normal. In his answers to M's most recent set of written questions on 24th June 2024 Mr. Edwin Freedman stated that *"f]or a period of two months subsequent to October 7, the courts only heard emergency petitions. Since December 7, the courts are functioning without restrictions due to the current conflict"*. I observe in this context that in *G v D (Art 13(b): Absence of Protective Measures)* [2021] 1 FLR 36 (quoted with approval in *Re C (A Child) (Abduction: Article 13(b))* [2021] EWCA Civ 1354 per Moylan LJ at [60]) MacDonald J stated at [39] that *"it is well established that courts should accept that, unless the contrary is proved, the administrative, judicial and social service authorities of the requesting State are equally as adept in protecting children as they are in the requested State …"*.

113) In reaching this conclusion I remain aware of M's serious allegations of domestic abuse against F. All the allegations are of course denied by F. I have made no findings of fact in relation thereto. I observe, however, that the Domestic Abuse Act 2021 and the introduction of FPR Part 3A (and PD3AA) have rightly increased the Family Court's focus on domestic abuse and its pernicious effects. This will be an issue for the Israeli courts to consider. It does not downplay the serious nature of the allegations (and I emphasise that they are no more than allegations at this stage) that I am satisfied that the combination of F's undertakings and the protective measures that are to be put in place prior to the children's return mean that the parties will not come into contact with each other on their return to Israel (assuming M does return with the children) and that this will provide M with sufficient short-term (again a word that I emphasise) protection from the allegations of domestic abuse.

114) In this context I emphasise what was observed in *B v B (Abduction: BIIR*) [2014] EWHC 1804 per Mostyn J at [3] namely that all an order for summary return under the Convention decides is the child(ren) should be returned for the specific purpose and limited period to enable the court of their homeland to decide on their long-term future.

115) During the hearing it was said on M's behalf that if an order is to be made for the children's summary return and given that it is anticipated that it is likely to take around three weeks for the appropriate order to be registered in the Israeli civil/secular court that M be given 17/18 days from the date of my judgment to decide whether or not return with the children to Israel. This was rightly not objected to on F's behalf and I shall permit the same.

116) If M does decide to return to Israel the practical arrangements in relation to her and the children's new property (assuming that she does not wish to return to the family home and for F to vacate the same) are also to be made prior to their return to Israel so that they all know in advance where they will be living. In the event that M decides not to return to Israel, F should travel to England and collect the children and be responsible for the implementation of my return order.

117) The first of the interim payments should also have been received by M before her return to Israel (assuming she does so).

118) I would be grateful if counsel could please seek to agree a draft order reflecting my decision and submit it to me for my approval.

**Addendum**

119) When I handed down this judgment on 9th July 2024 I raised with counsel its potential publication and gave the parties an opportunity to make representations in relation thereto and (if so) as to anonymisation. I drew both parties' attention to the *Practice Guidance: Transparency in the Family Courts: Publication of Judgments* issued by the President of the Family Division on 19th June 2024.

120) In response it was said on F's behalf that the judgment should be published in an anonymised form.

121) M opposed the same on the basis *inter alia* that (i) even with anonymisation there was a high risk of identification of the parties and the children which would not be in their best interests; (ii) the court needed to be mindful of the sensitivity of the issues in the case; and (iii) M was already concerned that she would be isolated and/or ostracised within the community if she returned to Israel and publication of the judgment would heighten her fears. It was also said the parties live in a small community and M was concerned that F has been speaking about the situation to people within that community.

122) In her further submissions filed by M's behalf by Ms. Compton on 15th July 2024 it was said (i) the interests of the parties' children are a primary (albeit not paramount) consideration; (ii) for the published judgment to be intelligible and its integrity preserved a number of basic facts still needed to be included and M's concerns are that given the small and tightknit community within which the family live (both in Israel and the UK) there was a high risk of identification of the family by members of the community; (iii) the facts of the judgment (which include details of the parties' family life, M's actions, and her concerns regarding the community) would, if they became known within the community, have severe consequences for M and further risk her isolation and/or exclusion; and (iv) M's concern was that when the children age, there is a likelihood that they would be able to identify themselves within the judgment and given the sensitive matters canvased in the judgment this would likely cause them emotional harm.

123) It was further said that publication of the judgment, even in an anonymised form, would cause M extreme stress and fear. It is said (rightly) that when considering the right to respect for private and family life, this can encompass the wellbeing and psychological integrity of the individual. It was said M is considering whether to return to Israel and the publication of this judgment *"will have a material impact on how she feels about such a return"*.

124) I have given all the submissions made on M's behalf considerable thought. However, having (i) considered the *Practice Guidance* (and in particular paragraphs 3.1 – 3.16 and 5.1 – 5.5 thereof); and (ii) carried out the *"balancing exercise"* espoused in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 (and helpfully summarised in *Re J (A Child)* [2014] 1 FLR 523 per Sir James Munby P at [22]) which has regard to the interests of the parties and the public as protected by ECHR Articles 6, 8 and 10 (and, as set out in *Re S* per Lord Steyn at [17] there must be *"an intense focus on the comparative importance of the specific rights being claimed in the individual case"*) I am satisfied that in balancing the competing interests engaged – and it is a balance - it is appropriate for this judgment to be published and for it to be so on an anonymised basis. I am satisfied that the amendments made to the judgment for publication (and I should state that in light of Ms. Compton's submissions I have made a number of further anonymisations/redactions to those proposed on F's behalf) have reduced the potential for identification and impact on M and the children to the lowest reasonable level and they have minimised interference with Article 8 to a sufficient extent that justifies publication (and I also bear in mind *ZH (Tanzania) v Secretary of State for the Home*

*Department* [2011] 1 FLR 2170 at [33] in this regard). In reaching my conclusion I have also given particular thought and scrutiny to what I state at paragraph 113) above.

125) After handing down this judgment I noted that *M v F* [2024] EWHC 1689 (Fam) per Hayden J dated 1st July 2024 had been published on The National Archives. The case concerned the issue of summary return of the parties' daughter to Ukraine. I had been informed by M's then counsel, Mr. Mark Jarman KC and Ms. Mehvish Chaudhry, on 14th June 2024 that Hayden J had permitted the instruction of a (so-called) geopolitical expert in an ongoing case and the judgment was awaited. The judgment includes the following:

> [38] The force of much of F's documentation was to advance what I will, for convenience, call a 'pessimistic' view of life in Kyiv, emphasising the risk to S of returning there. One of the consequences of filing this lengthy material was that the lawyers acting for M sought to counter it by seeking to instruct an expert who could advise on the realities of day-to-day life there. The agreed instructions, which I will return to below, went wider than that. To achieve parity between the parties and because I perceived there to be some potential utility in this line of enquiry, I granted leave for Dr Yedeliev to be instructed. I have explained how the expert came to be instructed in this case because I wish to signal, in the clearest possible terms, that such instructions should, in my judgement, be regarded as exceptional and rarely necessary. The key elements of the evidence and those upon which I have relied, were largely available directly from the parties and could, to my mind, have been presented, succinctly, in their own statements. … All this, however, simply indicates that the issue we are concerned with is, of itself, likely to be unreceptive to expert assessment.

Further at [48] Hayden J stated that *"I do not find myself relying heavily on Dr Yedeliev's report."*

126) The above fortifies my view that my decision on 14th June 2024 to refuse the instruction of a geopolitical expert in this case was the correct one.

127) There have been a number of issues in relation to the drafting of the order arising from this judgment. With the agreement of both parties' counsel I have dealt with these issues by email rather than by way of a supplemental judgment.

128) That is my judgment.