Neutral Citation Number: [2024] EWHC 2596 (Fam)

Case No: FD24P00227

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2024

Before :

THE HONOURABLE MR JUSTICE COBB

- -

Between :

	S	**Applicant**
	- and -	
	K	**Respondent**

- -

Re W and E (Habitual Residence)

- -

Tadhgh Barwell O'Connor (instructed by **Moore Barlow LLP**) for the **Applicant**
Jonathan Evans (instructed by **Brethertons LLP**) for the **Respondent**

Hearing dates: 8-9 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb :

Introduction

1. By this application, the Applicant father (S) seeks the return of his two children, who I shall refer to as Will and Ed (not their actual names), to New Zealand. Will is 12y 4m, and Ed is 10y 9m. The application is brought under the 1980 Hague Convention on The Civil Aspects of International Child Abduction ("the 1980 Hague Convention") as incorporated by Schedule 1 of the Child Abduction and Custody Act 1985.

2. The application is opposed by the Respondent mother (K); she asserts that:

   i) at the time of the alleged retention, the children were habitually resident in England;

   ii) the children object to being returned, and they have acquired an age and degree of maturity at which it would be appropriate to take account of their views;

   iii) a return of the children would expose them to a grave risk of physical or psychological harm, or would otherwise place them in an intolerable situation.

   The argument at (iii) above is founded on the assertion that the mother and children have experienced domestic abuse in New Zealand, and that the protective measures offered by the father will not adequately mitigate the risk of this continuing, and that the mother's mental ill-health would not withstand a return to New Zealand.

3. There is no dispute that at all material times, the father had rights of custody for the boys, and that he was exercising those rights.

4. For the purposes of determining this application, I have read the sizeable bundle of documents filed in the proceedings; notable among those documents are:

   i) Two statements of the parties with extensive exhibits;

   ii) The Cafcass officer's report, prepared by Ms Catherine Callaghan dated 27 August 2024;

   iii) A report from Dr McClintock, consultant psychiatrist, dated 26 September 2024.

   I also heard brief oral evidence of Ms Callaghan, and from Dr. McClintock. I have been greatly assisted by the able advocacy and presentation of the parties' respective cases, by Mr Barwell O'Connor and Mr Evans. The mother was present in court, the father nobly participated by video-link notwithstanding that the hearing took place through the middle of his night.

5. A few days' prior to the final hearing, the mother issued a C2 application seeking the court's approval for the children to be interviewed once again by Ms Callaghan. The mother asserted that the children "wanted to give more information to Cafcass"; the children had seen Ms Callaghan on 15 August 2024. The father opposed the

application. Ms Callaghan had been approached directly by the mother on 9 September to agree to this course, but had rightly declined, absent a court order. Given that the mother had placed the children's so-called 'objections' to a return at the centre of her defence to the application, I considered (on a review of the documents only, and without hearing oral argument) that it would only be right for me to accede to her application so that I could obtain the children's most up-to-date views, and could then proceed with the hearing without delay. Ms Callaghan met with the children on the morning of the hearing and helpfully prepared a concise note of their discussions which she filed.

6. I reserved judgment overnight having heard argument and the short evidence on 8 October, and circulated a draft of this judgment on 9 October 2024. For the reasons which I set out below, I dismiss the father's application for a summary return of the children to New Zealand.

Background

7. The parties initially met in New Zealand in or about 2002. They both travelled extensively between New Zealand and England for work, and started living together in this country in about 2006. They returned temporarily to New Zealand to marry in 2011, and moved there permanently in 2013. By the time of their first emigration Will had been born (in the UK), in 2012, and had spent his first year. Ed was born in New Zealand in 2014. The mother became homesick; life was not working out for her as planned, and arrangements for Will's nursery were not to her liking. Accordingly, the family returned to the UK in 2016 with a view to remaining permanently; they stayed here only about nine months (between 2016-2017: see below) emigrating a second time back to New Zealand in March 2017.

8. The father is now 50 years old; the mother is 40 years old. The father is a New Zealand national, with acquired British nationality; the mother is a British national having been born and raised here. The children with whom I am concerned have dual nationality. The mother refers in her evidence to the father having family in the UK, though this was not specifically relied on in the submissions, or referred to elsewhere.

9. It is the mother's case that throughout their relationship the father has displayed bouts of anger ("uncontrolled rage"), which has placed her in fear. The mother has provided many examples in her written evidence of the father's alleged temper, and his uncontained use of expletives and intimidating behaviour in front of the children; she contends that the children have been fearful of their father when he is angry. The mother is clear that the father has never been physically abusive towards her or the children. She says that the children:

> "… have witnessed and lived experience of [the father]'s anti-social and abusive behaviour on a regular basis, which has consistently been targeted towards them. This has significantly affected their developing sense of self."

The father disputes that he has behaved as the mother alleges: "I deny that I have ever been physically, emotionally or verbally abusive to the boys, nor to [the mother]". He accepts that the boys' relationship with him had in the last months of their life in New Zealand deteriorated, but:

> "I would say that "deterioration" was as a result, primarily, of [the mother's] attitude and behaviour, and the divisive approach she took to co-parenting. I do not consider that "deterioration" irreparable…".

10. The mother's texts/e-mails to the father are revealing in their contemporary account of the events and atmosphere in the home. Among those in the documents filed in the proceedings I note the following:

    i) (undated, to the father) "… the boys are devastated by what happened last night (and the night before) and really tired... [Ed] Was beside himself and both didn't go to bed until gone 11:00pm as they were so worried... they are really worried about how easily and how much you lose your temper. I am too… 😢";

    ii) (3.10.23, to the father) "I am really concerned that you say how unhappy you are and not in a good place… 😢… I am really worried by how much it is affecting [Will] and [Ed] not least with [Ed's] drawing to you showing a cross face last night 😢 … I am worried by how it is affecting them and physically affecting my health too. I am worried for you too";

    iii) (undated, to the father) "I feel really nervous and actually feel sick sending this. I am not really sure how to say this but it does really concern me how quick you are to lose your temper 😢. It seems you get escalated at the smallest of things and really quickly and try to control the situation by shaming people into stopping a behaviour, guilt, or by creating an atmosphere (for example throwing off the headphones, turning up the TV really loud and getting angry, storming around). It really concerns me, I couldn't get any sleep worrying about it".

11. Equally revealing are the mother's text messages sent to her family from New Zealand:

    i) (3.11.22 to the maternal grandfather): "… I am just getting through the days... health wise, emotion wise, finance wise… if I look ahead I feel I am drowning, so I try as best I can to take it back to step by step. I am sorry if that feels like you do not have the information you want or need. Please do always ask and I will come back to you. I am not trying to worry anyone intentionally. The reality of what I am living is not comfortable. I haven't felt emotionally safe for a very long time... there is no space to discuss things, work through things, resolve, repair things at all... it is all taken as criticism, turned around, stormed off and never resolved."

    ii) (20.4.23 to the maternal grandfather): "… [the father] is completely emotionally unsafe, explosive and manipulative, I feel I am a pawn who he fully resents every day… conversations and working things through are not wanted and anything that is spoken about is turned around on me, used against me and always becomes about how things are so hard for him. I have no one here other than the boys and [Murphy]";

iii) (undated to the maternal aunt): "I'm tired of being told I'm crap, I'm to blame, the boys are crap and all the hate being directed towards me, constantly walking on egg shells, having my heart kind (sic.) in my chest whenever I speak with [the father], crying when I go to bed, before I get up, not getting up until I know [the father] is at work... I have felt like I am drowning for so long, it has been so hard and so dark. I am exhausted of it. Yes we are very lucky, six months not living in it is great, yes".

iv) (1.12.23: to the maternal grandfather): "I feel like I will die if I stay here. I feel trapped. I feel helpless.... I can't do anything without the permission of someone who is not willing to talk things through and who plays games (with [Will] and [Ed] at the middle). It feels like he is trying to destroy me and I don't know what to do. I honestly think time apart and space will be the best thing for everyone right now which is where coming away is what we were working towards… [the father] is so angry on everything it's just awful…".

12. A psychologist report on Ed prepared in 2018 describes him as a highly anxious, 'hypersensitive', young person. He was said to have 'developed high anxiety levels which have impacted his appetite, sleep, caused hypersensitivity (especially to noise) and a significant physiological response in the form of a heightened heart rate and tummy aches'. The mother more recently described Ed (to Dr McClintock) in this way:

> "[Ed] is "such a lovely boy, he struggles to regulate his behaviour, he yells very loudly, very quickly, he's worked very hard to change that, a big change in that is being here, when he was first here, it happened a lot"…. [he is] ""very pressure sensitive". By this [the mother] meant that "if too much is asked of him, he'll go from calm to overwhelmed very quickly".

13. It was Ms Callaghan's view (which I accept) that Will and Ed appear to have been exposed to a degree of conflict between their parents, which the mother describes as having been a long-term issue, the father believes that this has been a consequence of the marriage ending. Ed in particular appears to have been more profoundly affected.

14. Dr. McClintock was asked about the text messages which I have set out above at §10 and §11; he said that they appeared to show a woman who was "under stress and overwhelmed", but he could not say that on their own they showed that she was depressed. The mother claims that her experiences in the family home affected her physical health: inflammatory bowel disease, migraines, blurring of vision and fatigue.

15. The children have been home-schooled for almost all of their lives. Will experienced a nursery in New Zealand and a couple of mainstream schools in England while here in 2016-2017. The mother says that she has never felt satisfied with the provision of education for him; in England he became a non-attender, and the mother was threatened with prosecution. Their home-schooling has plainly had some impact on their social integration both in New Zealand and in England.

16. By 2023, the marriage had deteriorated, and the parties took steps to separate. They had already sold their jointly-owned home; it had been in any event rented out since about 2020. The parties have lived together at the father's tied accommodation (which was available to him because of his employment) in recent years. The parties discussed longer-term future plans, and the mother made known her wish to return to live in the UK; the parties considered the possibility of the mother and boys coming to this country for a period of 1-2 years (the mother's case is that the father agreed this), but in the event, they agreed that the period would be 6 months.

17. Thus it was that in November 2023, the parents confirmed the plan that the mother and children would leave New Zealand in mid-December 2023, and return to New Zealand by 2 July 2024. The mother sent the father an email at that time in which she said:

> "… in terms of the travel to England, I would like to confirm that I am happy to sign a declaration to reassure you that we will return on the booked dates… of course, I am fully aware, that if we were to remain in England beyond our agreed stay that you have the added protection of The Hague convention which would enable you to issue proceedings to have (the boys) returned to New Zealand".

18. Return flight tickets were accordingly purchased. The father signed a 'Consent to Travel' document on 5 December 2023, and a 'letter of contact' agreement to give effect to important aspects of their plans.

19. In late-November 2023, the parties engaged a family dispute resolution company in New Zealand to assist them to resolve their post-separation arrangements; Will and Ed were to participate in these arrangements through a 'voice of the child' scheme. This mediation did not happen, in part because the mother had lost confidence in the chosen firm. Additionally, on 29 November 2023, the father was diagnosed with cancer (melanoma) and he underwent surgery on 6 December 2023. This inevitably and understandably shifted the focus of concern. Since March 2024, the father has been receiving immunotherapy which involves three weekly infusions.

20. The mother and boys left New Zealand on 12 December 2023. Unusually in these circumstances the family pet dog, a terrier called Murphy (not its real name), followed on a flight on the following day; no quarantining arrangements were necessary on his arrival in the UK. The boys told Ms Callaghan that Murphy is "an important member of their family".

21. The parents maintained contact across the globe but the father's twice weekly contact with the boys has periodically (especially lately) been problematic, and has not happened as the parties had agreed.

22. In April 2024, the father sent the mother a WhatsApp message in which he set out a plan to buy a house in New Zealand for the mother and children to live in upon their return. The mother replied indicating that Will and Ed were worried by this proposal. The father wrote to the mother clarifying that he did not agree for the boys to remain living overseas: "I agreed for you to travel with them on the basis that we agreed they would be home on 1 July 2024". At about the same time, the mother consulted a GP

in England in respect of her mental health and was prescribed zopiclone; the mother also engaged counselling support to address her fears of return.

23. On 10 May 2024, the mother emailed the father advising him that she had "grave concerns" about the thought of returning to New Zealand; she said that the boys were "repeatedly" saying that they wished to remain in the UK; she said that she had reservations that it was no longer in the boys' best interests for them to return to New Zealand. On 13 May the father responded, reiterating the parties' agreement for the boys to return to New Zealand, and setting out his proposals for support in mediation upon their return.

24. On 17 May 2024, the mother contacted the father again, and on this occasion advised him that she had no intention of returning to New Zealand with the boys; she said that the boys were "adamant" that they do not wish to return to New Zealand. The father asserts that this amounted to a 'repudiatory retention' of the children in England.

25. On 11 June 2024, the father issued his application under the Hague Convention for a return of the two boys to New Zealand.

26. At the first directions appointment before Arbuthnot J, a direction was given that an officer of the Cafcass High Court team should provide a report on the issue of the children's views/objections, such report to be filed by 20 August 2024. An order was made for interim contact, which was to take place twice per week by way of video/audio call.

27. In August 2024, the father visited the UK for one week to see the boys; the mother imposed restrictions on the father's time with the boys, but the days they were able to spend together appear (on all accounts) to have been a success. On one of the days the maternal grandfather accompanied the father and the boys to 'support' the contact; the maternal grandfather wrote to the father following the visit and said that the father's relationship with the boys was "wonderful to see", urging him not to 'give up' (I include for completeness the plaintive reflection of a grandparent contained in the same text: "I can't tell you how sad I feel about this").

28. On 29 August 2024, the mother made a Part 25 FPR 2010 application for the Court's authorisation for the instruction of a psychologist or psychiatrist to advise on her mental health, and specifically on the effects on the same in the event that a return order were to be made to the jurisdiction of New Zealand. In her application, the mother asserted a history of anxiety, stress, and depression which she attributed to her relationship with the father. This application was explicitly crafted to support her case that her mental health would deteriorate to such an extent if she were to return to New Zealand that it would impact upon the care that she could provide to the children, placing them in an intolerable situation. This application was granted by Henke J at the pre trial review, and a report from Dr. Tom McClintock, Consultant Forensic Psychiatrist, instructed as a Single Joint Expert.

29. During September 2024, the mother arranged counselling for the children.

The essential legal framework

30. Article 3 of the Hague Convention reads as follows:

> "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". (Emphasis added)

Article 12 provides:

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

Where were the children habitually resident as at 17 May 2024?

31. Given that my ultimate decision in this case is founded upon my conclusion that by 17 May 2024 the children were habitually resident in England, I set out the law in a little detail.

32. Counsel agree on the applicable law in this case in relation to habitual residence. It is essentially a question of fact. The cardinal principles underlying that assessment of fact (which I have applied in this case) have been drawn from a number of authorities including but not limited to: *Proceedings brought by A* Case C-523/07, [2010] Fam 42, *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22, *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60 [2013] 3 WLR 761, *Re LC (Children)* [2013] UKSC 221; *Re B (A Child)* [2016] UKSC 4, [2016] AC 606; *Re B (A Child)(Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam) also at [2016] 4 WLR 156; *Re J (a child) (Finland: habitual residence)* [2017] EWCA Civ 80, *Proceedings brought by HR* [2018] 3 W.L.R 1139, at [54] and [45]; *Re M (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, and finally Moylan LJ in *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659.

33. A useful distillation of many of these cases is provided by Hayden J in *Re B (A minor)(Habitual Residence*) [2016] EWHC 2174 (referenced in the list above) at [17] and [18][1] who set out and approved a summary which had been provided to him by counsel in that case. This summary has been reproduced with approval many times since. It reads more or less as follows:

[1] See also the judgment of the Court of Appeal in *Re M (Children)* [2020] EWCA Civ 1105.

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 sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (*A v A, 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 lose a pre-existing habitual residence at the same time as gaining a new one (*Re B*); (emphasis added).

viii) 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*).

ix) 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).

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

xi) 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*).

xii) 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).

34. Hayden J went on ([18]) to emphasise that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child.

35. Subsequent caselaw has cautioned against an undue reliance on the shorthand of "sufficient degree of integration" in the summary: see *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659 in which Moylan LJ stated:

> "…this is a shorthand summary of the approach which the court should take and that "some degree of integration" is not itself determinative of the question of habitual residence. Habitual residence is an issue of fact which requires consideration of all relevant factors. There is an open-ended, not a closed, list of potentially relevant factors."

And thereafter:

> "[17] As Baroness Hale DPSC observed at para 54 of *A v A*, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce."

36. How does this apply here? There is no doubt in this case that the children were habitually resident in New Zealand up to December 2023. It is the father's case that the children have retained their habitual residence in New Zealand. He is pleased that the children have engaged in social activities in England since December last year, and would not have wished them to go without the opportunity to participate in a range of entertaining, child-focused pursuits. However, he argues, this does not mean that the children's habitual residence has changed. It is the mother's case that by the time that she repudiated the agreement to return, the children's habitual residence had changed, and that they were habitually resident in England.

37. In considering this issue I have centred my enquiry by specifically considering the circumstances of the children's lives, with a particular focus on those aspects of the case which are relevant to their social and family environment, and their integration of the same.

38. Undoubtedly, the boys' visit to this country was only ever intended to be for six months; equally clear is the father's opposition to the visit being extended. It is of some (but limited) significance that the parents were initially discussing a 1-2 year visit for the boys and the mother to England, which illuminates (to a limited degree) the father's consideration (at least) of the boys being away from New Zealand for a particularly prolonged time. That said, this 1-2 year period was not ultimately agreed, and I have of course considered the actual facts on the undisputed evidential basis that the parental agreement was for a 6-month stay in England.

39. The father's agreement that the boys should return after six months is of course highly relevant to my determination on habitual residence, as is the fact that by reason of their separation across continents, he was left significantly outside of the boys' orbit over the first five months of this year. These points militate against a finding of a change of habitual residence. I further take into account that the boys and the mother were in temporary, rented, accommodation at the point of the repudiation; the relative insecurity of her tenure (she was indeed required to leave the property, in June 2024, after six months) plainly lacked permanence, but also inherently lacked a degree of

stability too. I note that the boys did not bring all of their belongings when they travelled to this country, but merely brought suitcases of clothes.

40. Despite the points referenced above, following a careful review of all of the facts, I have found myself in broad agreement, albeit on a fine balance, with the mother's case that the boys' habitual residence had indeed changed by mid-May 2024.

41. First, let me consider what the boys had left behind. It is clear from the evidence (the parties indeed agree) that the mother and children lived reasonably isolated lives in New Zealand; the children were home-schooled; it seems likely on the evidence that the mother was diffident about arranging social activities for them. The boys undertook some sports including hockey, and made friends in that way, though it was notable that in his recent discussion with Ms Callaghan, Will said that he had "not really" kept in touch with his friends in New Zealand since being here. The father's own evidence shines a light on the family situation:

> "… [the boys] have had relatively sheltered lives being largely home-schooled with limited outside interests and friends".
>
> "… [the mother]'s decision to home-school the boys has largely been influenced by her desire to keep them close to her. She cannot bear to be separated from them … [the mother] refused to go anywhere to meet people or make friends, making the boys her life. She always treated them as her "property" and as such, they became extremely insular and overly reliant upon [the mother]".

The father appears to have accepted that the boys had fewer activities in New Zealand than they have enjoyed in England, as the mother was "reluctant" to arrange them; he separately spoke of the mother's emotional dependence (he implied *over*-dependence) on the children, and her tendency to "keep them close to her". The mother described the situation thus:

> "… there was less structured activities in New Zealand, and although we lived a 10 mile drive from [town X] and 20 minutes from [town Y] we spent the majority of our time at the library or walking the dog [Murphy]. It felt an incredibly isolated existence…".

42. Secondly, the family home had been rented out and then sold in New Zealand; the parents and the children were living in tied accommodation connected to the father's work. Given the parents' imminent separation upon the breakdown of their marriage, such stability and security which the boys would have derived from the continuation of their familiar home surroundings in New Zealand would thereby be lost; this was more than a symbolic loss of an enduring connection with the place where they had for the last few years been raised, it was a very real severance with their familiar environment there. Their extended family in New Zealand was not geographically particularly close (a 4-5 hour drive away) and I did not get the impression from the evidence filed that the boys were particularly emotionally close to their paternal extended family either; the mother deposed to the fact that they have made "little to no contact" with the boys since they have been in England. While I am convinced

that the boys adore their father, his probable flashes of temper (as I find, on the documents) had (it would appear from the mother's contemporaneous accounts, see above) at times caused them distress, and it was likely that they would have experienced at least transient periods of emotional insecurity even within their home environment. Will's recent comment about his mother's sadness in New Zealand (see below) may have contributed to a lack of confidence in the stability of the domestic arrangements. The father accepts that the parents had "different approaches to parenting", and accepts that he had at times "raised my voice" to discipline the children; Dr. McClintock spoke of the need for the family to develop "more settled functioning" should they return, suggesting a lack of 'settled functioning' in the past. Thus, while the boys had spent almost all of their childhoods habitually resident in New Zealand, for the reasons set out in this and the foregoing paragraph, I was left with the impression that their roots were laid there in somewhat unnourishing and emotionally impoverished turf.

43. Thirdly, over the first five months of this year, the children re-kindled relationships with the maternal family, including notably their maternal grandparents who lived close by. The wider maternal family (specifically and aunt and uncle) also lived close to the home which the mother had rented; the boys were able to forge bonds with their similar-age maternal cousins, which I am satisfied they have done. The mother describes a community of friends surrounding the boys (and her) on their return to this country, with whom the boys comfortably and easily related. The boys expressed to Ms Callaghan, and to their GP (attendance in June 2024), how much they preferred (and continue to prefer) life in England ("really enjoying it": per GP) which indicates a degree of subjective integration. I take into account the father's case that the mother may have sought to influence the boys in the expression of their views; however, Ms Callaghan is satisfied, and I do not doubt on the evidence presented, that this is their genuine view; the absence of cogent reasoning for this view reflects, perhaps, their relative lack of maturity.

44. Fourthly, had the boys been in mainstream schooling in England over the first five months of this year, this would be likely to have buttressed a finding of social integration in their new environment; they have of course been home-schooled in this country (as they were in New Zealand), and this argument does not therefore arise. Indeed, the home-schooling arrangement in both countries creates an essentially neutral factor in my overall evaluation. That all said, the evidence reveals that the boys have become part of a wider friendship group of young children in the locality in England, many of whom are also home-schooled, whom they meet at least weekly; they attend a 'Home Education Group' of young people from fourteen families. Will attends two 'young engineers' groups which together meet twice per week, where he has made friends; both boys attend a 'Ninja' activity group once per week.

45. Fifthly, it is of some significance that these boys are dual nationals, born to an English mother. It is also relevant that the mother herself – the children's primary carer – was, over the first five months of this year, considerably happier, more relaxed and settled than she had been in New Zealand. Will noticed this. This will probably have impacted favourably on the boys' experience of their first few months here and helped them to settle.

46. Sixthly, I attach some significance to the fact that Murphy travelled with the boys and the mother to England (albeit on flight one day later); the decision to bring the

beloved family pet on this visit reflects an unusual degree of commitment on the part of the entire family to the success of the temporary relocation for the mother and the boys. The boys are plainly extremely attached to Murphy, and describe him as a member of the family; his presence in their lives in this country has served, as the boys themselves have described, to facilitate their sense of being 'at home', and has enhanced their sense of belonging to their new environment.

47. The mother raised a range of other factors which, she argued, demonstrated integration of the boys within their new environment in England. For instance, the children were registered with medical, dental and optician services, and attended for appointments and vaccinations; additionally, the boys have attended a 'Teens in Crisis' counselling group. These points offer some, though even cumulatively relatively limited, support for my ultimate conclusion. The mother raised other points (not discussed here) which for completeness I should say have not affected my conclusion whatsoever.

48. A point which has troubled me while reflecting on the evidence for the purposes of this judgment is whether the mother misled the father about her intention to return to New Zealand when they agreed the six-month visit and she set off with his blessing in December 2023; specifically I have considered whether it was always in her mind that she would not return to New Zealand. I found nothing which pointed to a deception of this nature; indeed, while I am satisfied that she was unhappy in New Zealand particularly in the tail-end of 2023, I consider it more likely than not that she saw the six-month visit to England as a respite (see her messages to her family above) and it was only when she had arrived in this country did she start to see her and the boys' longer-term future differently.

49. Finally in this regard, I wish to emphasise that the conclusion I have reached in relation to the boys' habitual residence as at 17 May 2024 is specific to these facts. Had any (even minor) aspect of this case been different in any material way, I could well envisage having found differently – namely that the boys had remained habitually resident in New Zealand, even after their five months' stay in England. Thus, my decision should not offer any encouragement to a parent on an extended visit to this country to argue that habitual residence changes by virtue of the passage of time, and/or by reference to any one or more of the other factors which have been relevant in my decision here.

The children's views/objections and their level of maturity

50. Counsel has addressed me on the law in relation to this issue. I have paid particular regard, as invited, to the judgment of the Court of Appeal in *Re M (Republic of Ireland) (Child's Objections) (Joinder of children as parties to appeal)* [2015] EWCA Civ 26:

    i) It is appropriate to break down the exercise into two parts – the "gateway stage" and the discretion stage (§18);

    ii) the gateway stage has two parts in that it has to be established that (a) the child objects to being returned and (b) the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views (§18); the gateway stage represents a fairly low threshold (§70);

iii) the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. Sub-tests and technicality of all sorts should be avoided (§69);

iv) whether a child objects to being returned is a matter of fact, as is his or her age (§35);

v) the degree of maturity that the child has is also a question of fact (§35); it is now recognised that children as young as 6 can be of sufficient maturity to have their objections taken into account (§67);

vi) the child's views have to amount to objections before they can give rise to an *Article 13* exception (§38); there must be more than a mere preference expressed by the child (§39);

vii) the child has to object to returning to the country of habitual residence rather than to returning to particular circumstances in that country, although it has been clear from early on that there may be difficulty in separating out the two sorts of objection (§42);

viii) the objection must be to returning to the country, although it may be difficult to extricate that from a return to the parent; the wording of *article 13* does not inhibit a court from considering the objections of a child to returning to a parent (§44);

ix) the fact that a child objects to being returned does not determine the application (§46); the child's views are *not* determinative of the application or even presumptively so (§63);

x) The child who has suffered an abduction will very often have developed wishes and feelings to remain in the bubble of respite that the abducting parent will have created, however fragile the bubble may be, but the expression of those wishes and feelings cannot be said to amount to an objection unless there is a strength, a conviction and a rationality that satisfies the proper interpretation of the Article (§54);

xi) an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process is to be discouraged (§77).

51. Let me take first the issue of the boys' maturity. Will is 12, and Ed is 10. Will was described by Ms Callaghan as sensitive and articulate; both boys are described as sociable. Ms Callahan described them as having age appropriate understanding of the proceedings, and their respective levels of maturity were generally consistent with their chronological ages. She felt that both boys were quite "balanced" when talking about their parents. I find that they both have acquired an age and degree of maturity at which it would be appropriate to take account of their views.

52. It is clear that from an early point in their visit here that the mother was raising with the father that the children wanted to remain in this country. Her e-mails to the father in May 2024 described, in increasingly strong language, the views of the boys, expressing that they were, by 17 May 2024, "adamant" that they would not return. Hence the importance of Ms Callaghan's independent (and I may say impressive) assessment.

53. Ms Callaghan saw the children on 15 August 2024. Her report contains the following important passages concerning the views expressed by Will:

> "… dad thinks that we should go back to New Zealand, but I like it more here'"…. "[Will] said, 'I quite like how it snows more here and it is colder. I like the cool places we go walking. In New Zealand I did not like where we were staying, it was noisy with the cows'".
>
> "I asked [Will] if he could think of any negative aspects of living in England and he stated, 'the bad thing is that we didn't have enough room to bring the Lego that I wanted to bring with us'. [Will] went on to say, 'It is a big decision where we live that will affect us and [Murphy], and I would like it if we could live here'".
>
> "I feel now that if I went back I wouldn't like it" … "It is quite cool here, there are more fun things to do. I would like to stay here a lot'".
>
> "I asked [Will] to score how he felt about going back to New Zealand, with 1 being very happy and 10 being extremely unhappy and he replied, '8'".
>
> When asked if he had any particular worries about returning to New Zealand: "'I wouldn't like to go as I have made friends here now. I go to the Lego Club in town'"…. "'there is a new video game coming up, Legend of Zelda and they don't do it in New Zealand, I had not heard of it before coming here, a new friend I made told me about it. [Murphy] enjoys being in England, he did not like his walks in New Zealand, he could get an electric shock of the fence and other dogs were mean to him in New Zealand but now he likes his walks'".
>
> "[Will] told me, 'I want to stay in England, not because it is what mum wants, that is not why. I am happier being here as well. I don't want to go and live in New Zealand'".

54. The report contains the following important passages concerning the views expressed by Ed:

> "'I want to stay in England, I really like it here'. When I asked why, [Ed] replied, 'there are cool places to visit and it

> feels like the right place to live, it feels like the right place for us'. [Ed] went on to say, 'I wouldn't mind if dad comes here, it is fine for him to live here or visit. I have no problem spending time with dad, but I would want it to be in England'".
>
> "I asked [Ed] how he would feel if the Judge determined that he return to New Zealand and he replied, 'I would feel mad at the Judge because I want to stay. I don't want to go back'. When I asked again why that was, [Ed] said, 'I do like my friends and activities there, but it doesn't feel like the place to live, it is not the place where I want to live. What I want is to stay in England'".

55. Ed told Ms Callaghan that, in the event of a return order, he would not board the return flight; it is difficult to know whether this was ten-year old bravado or a genuine statement of intent. Ms Callaghan's view was that Ed *would* board the plane if encouraged by his mother to do so, and that it was his mother's responsibility to encourage him (a point on which, I may add, I firmly agree). His older brother Will did not make the same threat to Ms Callaghan, and there is no reason to suspect that Will harboured any intention not to comply with a return order.

56. Ms Callaghan expressed the view that the children's stated preference to remain living in England is genuinely held by them both; she did not get any sense of the boys having been influenced by their mother in respect of what to say; they did not make any critical or negative comments about their father or about New Zealand. She concluded:

> "Whilst it is evident that [Will] and [Ed] hold a preference to remain living in England, it is for the court to decide whether the strength of any of their opposition amounts to an objection. From what [Will] and [Ed] told me about their previous lives in New Zealand I did not consider either of them to have raised concerns about their home life or to be particularly negative about New Zealand. Their reasons for wanting to stay in England appeared to centre round the 'cool' places they are able to visit and being able to see their maternal family".

57. As I mentioned above, the mother requested that Ms Callaghan see the boys a second time and she did so with my permission immediately before the hearing, so that they could "give more information to Cafcass". Notwithstanding the father's opposition, I agreed with this course; I felt that these young people of this age and maturity need to be heard on issues of this importance; they also need to feel that they have been heard.

58. Ms Callaghan reported Will's contemporaneous comments (8 October 2024) thus:

> "'so, I still don't want to go back to New Zealand'. I asked him if there was anything in particular he would be worried about and he replied , 'not really'."

> "I again asked if there was anything he was worried about if he was to return to New Zealand. [Will] thought for a while and then said, 'well, I have made quite a few friends here so I would not want not to see them'. I asked whether he has kept in touch with his friends in New Zealand that he played hockey with, and [Will] replied, 'no, not really'.
>
> "I again asked [Will] if there was anything he would be worried about if he had to return to New Zealand. [Will] thought and said, 'I am not sure'."
>
> "I said to him that [Ed] had told me that their father used to yell at them. [Will] said, 'yeah, he did yell quite often'. I asked [Will] if he could tell me why his father yelled. [Will] explained, 'he used to get cross, not sure why, what he was yelling about'.
>
> "'I enjoy living here, so dad should let us stay. I wouldn't like to have to go back'. I asked if he had told his father how he feels. [Will] replied, 'yes, he didn't really listen, he kind of said that we should be living in New Zealand'."

59. Ms Callaghan reported that Ed told her that he had come to court to speak with her again because he wished to give her "more information"; he expanded

> "like, I really, really don't want to go to New Zealand so much, I really didn't like it there'. I asked [Ed] if he could tell me why he felt that and he replied, 'dad was yelling at me and me and my brother have a better friendship here'…. [Ed] then said, 'I really didn't like it there and I really love it here'. … [Ed] told me that since I had last met him, he now feels stronger and has decided that he likes it more in England. I asked [Ed] if he had thought about why his dad wants him to return to New Zealand and he replied, 'I am not very sure why'.
>
> I asked [Ed] if he would feel differently, he would be living in a different house and different location and not living with his dad. [Ed] replied, 'still no, New Zealand is not the right place for me, if the judge says I have to go I will not get on the plane'.
>
> I asked him if he could tell me on a scale of 1 being very happy and 10 being very unhappy, how he feels about returning to New Zealand. [Ed] smiled and said, '100 unhappy'. I asked [Ed] if there was anything in particular, he would be worried about if he had to return to live in New Zealand. He replied, 'that our dad would act the same and that the friendship between my brother and me would end'. I asked [Ed] why he thought he and [Will] had a better

> friendship in England. He replied, 'it is because we are a lot happier here than we were in New Zealand'. I asked [Ed] if he could tell me what made him unhappy in New Zealand and he replied, 'our dad being unkind and I didn't like where we lived, the house and the location, it was not right for me'.

60. In her oral evidence Ms Callaghan confirmed that the use of the word 'preference' in her report had been deliberately chosen (in contrast to 'objection'), because "they were not saying anything particularly negative about New Zealand. They *preferred* the activities in England" (my emphasis). She told me that, having seen the content of the form C2 (by which the mother sought the further interview, having described therein some extreme agitation of the children and hostility to the notion of a return) she was surprised by the presentation of the children on the first morning of the hearing:

> "[Ed] said that he felt stronger than previously. I would not describe it as intense reactions from either of them. I was quite surprised; they were quite calm, and they were not really telling me anything more from what they had told me in August."

61. It is the father's case that the mother has negatively influenced the children against him, and that concern has grown since the mother's wrongful retention of the boys in England.

62. Taking the evidence as a whole, (key passages having been summarised above) I am satisfied on balance that the 'fairly low threshold' required (see above) has been crossed in Ed's case, and that Ed indeed 'objects' to a return to New Zealand; as I have indicated above, he has expressed himself to be '100' out of '10' "unhappy" about the prospect of returning, and has said that he would be "mad" at 'the judge' if an order for return is made. His exaggerated expressions reveal to some extent his immaturity, but the strength and underlying message contained within these expressed views are nonetheless authentic and unambiguous.

63. I do not consider on the evidence that Will 'objects' to returning. He is, as Ms Callaghan said, rather equivocal.

64. Ed's 'objection' would open the gateway for me to exercise my discretion whether to make an order for summary return in his case. I can say that, had this been the only determinative point in the case, I would have had little hesitation in making the order for return. There would be a large number of factors in play in the exercise of discretion; among them (specific to the objection itself) would be that:

    i) The articulation of Ed's opposition is essentially immature; there is no coherent or convincing basis laid out for the objection;

    ii) Will, the older brother, does not object, and the Article 13 exception therefore does not apply to him; it would be contrary to the boys' mutual interests to treat them separately.

Would a return of the boys place them at grave risk of psychological harm / intolerable situation?

65. Once again, the law in respect of this exception to return is uncontroversial.

66. Article 13(b) of the Hague convention provides that the court is not bound to order a return of the child if the person who opposes the 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".

67. The legal principles engaged on an application under the 1980 Hague Convention where Article 13(b) is raised are well-established. They were extensively discussed in *Re A (Children) (Abduction: Article 13b)* [2021] EWCA Civ 939, ("*Re A*"). In his judgment in that case Moylan LJ drew from the Supreme Court decisions of *In re E (Children) (Abduction Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 ("*Re E*") and *Re S (Abduction: Article 13(b) Defence)* [2012] 2 AC 257 ("*Re S*"). I have also found particularly useful the judgment of Baker LJ in *Re IG (Child Abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123, and Moylan LJ in *Re C (Article 13(b))* [2021] EWCA Civ 1354 ("*Re C*").

68. The following principles emerge from these authorities, relevant to the 1980 Hague application:

i) Article 13(b) is, by its very terms, of restricted application: [§31: *Re E (Children)*]; the defence has a high threshold;

ii) The focus must be on the child, and the risk to the child in the event of a return;

iii) The burden of proof lies with the person, institution or other body which opposes the child's return. The standard of proof is the ordinary balance of probabilities, subject to the summary nature of the Hague Convention process: [§32: *Re E (Children)*];

iv) The risk to the child must be "grave" and, although that characterises the risk rather than the harm, "there is in ordinary language a link between the two": [§33: *Re E (Children)*];

v) "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. Amongst these are physical or psychological abuse or neglect of the child: [§34: *Re E (Children)*];

vi) Article 13(b) is looking to the future, namely the situation as it would be if the child were to be returned forthwith to his home country: [§35: *Re E (Children)*];

vii) In a case where allegations of domestic abuse are made:

> "… the court should first ask whether, *if they are true*, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison Judges are so helpful." [§36]: *Re E (Children)* (Emphasis by italics added).

viii) In this case, I have noted in particular the passage in §34 of *Re S* (Lord Wilson):

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

ix) The court must examine in concrete terms the situation in which the child would be on a 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;

x) 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. Thus:

> "… the clearer the need for protection, the more effective the measures will have to be" [§52: *Re E (Children)*].

69. Moylan LJ in *Re C* [2021] (citation above) emphasised that the risk to the child must be a *future* risk (§49-50). He cited from the Good Practice Guide to emphasise that:

> "… forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That said, past behaviours and incidents are not per se determinative of the fact that effective protective measures

> are not available to protect the child from the grave risk". (§50)

70. Thus, an assessment needs to be made of the

> "… circumstances as they would be if the child were to be returned forthwith. The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence" (§50).

He added:

> "It is also axiomatic that the risk arising from the child's return must be *grave*. Again quoting from *Re E*, at [33]: "It must have reached such a level of seriousness as to be characterised as 'grave'". As set out in *Re A*, at [99], this requires an analysis "of the nature and degree of the risk(s)" in order to determine whether the required grave risk is established" (emphasis in the original).

71. I am clear that my role is not to engage in a fact-finding exercise, but as Moylan LJ went on to observe:

> "… unless the court properly analyses the nature and severity of the potential risk which it is said will arise if the child is returned to the requesting State, the court will not be in a position properly to assess whether the available protective measures will sufficiently address or ameliorate *that* risk such that the grave risk required by *Article 13(b)* will not have been established. As set out in *Re E*, at [36], the question the court is considering is "how the child can be protected against *the* risk" (my emphasis). The whole analysis is contextual and forms part of the court's process of reasoning, as referred to by me in *Re A*, at [97], adopting this expression from *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257, at [22]". (§58)

72. I also have regard, as I must to the definition of domestic abuse contained in section 1(3) of the Domestic Abuse Act 2021 and PD12J FPR 2010.

73. It is relevant, in a case in which the mother has raised both domestic abuse and mental health issues, that I look at the allegations cumulatively and not independent of each other. In *In re B (Children)* [2022] 3 WLR 1315, Moylan LJ said:

> "[70] The authorities make clear that the court is evaluating whether there is a grave risk based on the allegations relied on by the taking parent <u>as a whole, not individually</u>. 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)." (emphasis by underlining added).

74. Given the existence of the mental health concerns, I have further had regard to *Re S (a child) (abduction: article 13(b): mental health)* [2023] EWCA Civ 208 and to my own decision in *Re A (Article 13(b): Mental Ill-health)* [2023] EWHC 2082 (Fam).

75. The mother's case on this Article 13(b) exception can be articulated thus:

    i) that she is psychiatrically unwell (Dr McClintock), with a reactive depression which is symptomatic and currently untreated;

    ii) that she remains vulnerable to what she perceives to be the father's controlling and coercive conduct towards her and the boys;

    iii) that if I were to order the boys to return to New Zealand under the 1980 Hague Convention, she would feel compelled to return with them given her role as their primary carer for the whole of their lives;

    iv) she would not be well enough to return for at least six to eight weeks (possibly more) in any event (per Dr McClintock: she needs to be "reliably compliant with this [antidepressant] treatment for at least six weeks … before returning" and she would need "at least six sessions" of CBT before leaving to put her "in a better position to be able to learn techniques to help deal with her anxiety"), given her current poor mental state;

    v) once back in New Zealand, her mental health "will" deteriorate but this is unquantifiable (Dr. McClintock, see below);

    vi) once back in New Zealand, Ed would be likely to present significant challenges to her given his opposition (as I have found it) to returning to New Zealand, and his history of anxiety, hypersensitivity and general psychological vulnerability (see §12 above);

    vii) that the mother is largely emotionally unsupported in New Zealand (undisputed), and appears to have a somewhat dependent relationship on the boys themselves (Dr. McClintock);

    viii) that the mother would (given her own fragile mental state and lack of support) be ill-equipped to meet the boys' (particularly Ed's) needs emotionally and possibly physically.

    The combination of these factors would be likely to place the boys in an intolerable situation.

76. What is the evidence? In relation to domestic abuse, I draw on the material which I set out above under 'Background'. I cannot 'confidently discount the possibility' that

the allegations give rise to a possibility of a grave risk of harm. The mother makes serious allegations of abuse which also involve the children.

77. In relation to mental illness, this is provided in the main by Dr. McClintock. The mother told Dr McClintock that she was "petrified about the possibility of returning to New Zealand with the children and extremely concerned about the repercussions from [the father] and his family's behaviour towards me and the children". The mother presented for interview looking "thin", her hair was unkempt "and she was distressed with a visible tremor". Dr. McClintock assessed that the mother was in his professional assessment psychiatrically "unwell".

78. Dr McClintock opined in writing as follows:

> "[The mother] presents with marked symptoms of anxiety, low mood, she has prominent thoughts about how she perceives she was treated and continues to be treated by [the father] and there has been a disturbance of her sleep pattern. In my opinion she has experienced an adjustment disorder, also known as reactive depression, in response to the stresses which arose in the relationship with her former partner, her attempts to extricate herself from that relationship and to build a new life for herself and the children in the United Kingdom. When the current proceedings commenced, this acted as a further stressor and at interview she was clearly distressed, very anxious, there was some evidence of a relative lack of personal care and the thought of returning to New Zealand has compounded her distress…
>
> … I was not provided with information which suggested her day to day care of the children had been impaired to such an extent that, for example, there had been any concerns expressed by child and family social work staff. Although it is for the Court to decide on how the parents have treated one another, I did not feel that the clinical picture was one of, for example, post traumatic stress disorder and instead, the most prominent symptom was one of anxiety, with prominent thoughts of how she had reportedly been treated by the father and a concern about how she would cope if required to return to New Zealand".

79. He added:

> "It is important that [the mother] return to the general practitioner, perhaps with a copy of my report, so that she could be prescribed a different type of medication to help improve her mental state. Antidepressant medication is often used for patients who have marked levels of anxiety and such medication has the bonus of helping to treat any underlying depressive episode which may not have been apparent to the clinician. The choice of antidepressant is up

> to the general practitioner to decide upon, but it should be prescribed, at a clinically effective dose, over at least the next year as [the mother] deals with the stress of the current proceedings and the impact of the decision regarding where the children should be placed….
>
> [The mother] is already in contact with counselling services, this needs to continue until either the conclusion of these proceedings or until she is required to return to New Zealand. The focus should be on cognitive behavioural techniques to provide her with mechanisms to better deal with her anxiety…"
>
> "I would not anticipate a resolution of her symptoms until she had the opportunity to psychologically come to terms with the decision of the court regarding residence of these children, wherever that may be. If she is permitted to remain in the United Kingdom with the children then it is highly likely that this combination of medication and talking therapy would lead to a significant clinical improvement, probably over a period of a small number of weeks".

80. Further he said:

> "[The mother] is likely to experience a deterioration in her mental health if required to return to New Zealand, but it is impossible to quantify how unwell she could become. I would stress that her current symptoms are at a level which would generally be treated by a general practitioner, with support from counselling services and there would be no indication for a referral to, for example, local psychiatric services."

81. Dr McClintock added that there was nothing in the mother's presentation which suggested that a referral to social services would be indicated and that a "very significant deterioration" would be expected before that situation arose. Dr McClintock was of the view that if the mother is required to return to New Zealand, "there will be a deterioration in her mental health but I cannot quantify it"; as I mentioned in §75 above, Dr. McClintock was clear that the mother would need to undergo some intensive chemical and talking therapy in the next few weeks before she would be well enough to return to New Zealand. The success of that therapy could plainly not be assured. Dr. McClintock also advised that, in the event of a return, it would be beneficial for there to be an assessment of the family unit conducted by a child psychiatrist or psychologist, with a view to addressing in particular the father's concerns that the mother and children have perhaps a particularly strong emotional mutual dependency. He hoped that a child mental health expert could make recommendations about, for example, family based therapy with a view to achieving "more settled functioning".

82. The father has offered a wide range of protective measures to mitigate any intolerability in the children's situation. It is unnecessary for me to rehearse these

proposed measures here; they responsibly and appropriately meet many of the concerns of the mother, but they ultimately would have failed to address the significant vulnerability of her particular situation given the combination of factors which I have set out at §75 above. I can confirm that the mother's case in relation to Article 13(b) was, in my judgment, on balance established. There was a significant question mark over whether she would ever have been well enough to return to New Zealand; had I been required to exercise my discretion in light of my findings in this regard, I would not have returned the children.

Conclusion

83. This is a complex, and in many respects a delicately balanced case. I have set out my reasoning on the many aspects of this case as fully as time permits, so that the parties can see my views on their competing arguments.

84. I recognise that the outcome of the application will be profoundly upsetting to the father, particularly in light of his current physical ill-health. I am convinced that he has a vital role to play in the lives of these two young boys. I hope that he is able to reflect on some of the evidence which has been filed, which describes his behaviour, and (although I realise that he disputes it) consider how he may address what the mother has said. I am hopeful that he can build on the success of his recent trip to England to see the boys, by making further visits here over upcoming months. It would be wrong for me to make any comment about the mid to long term future for this family, which is likely to be the subject of further discussion, possibly mediation, and in the event of continuing dispute, further litigation.

85. It has been suggested that it may be helpful for me to make myself available to speak with the boys, following my decision, and they have provisionally indicated a preference to do so by video link. I confirm that I would be pleased to speak with either or both of the boys, and if this is set up, I will take the opportunity to explain my decision to them directly.

86. That is my judgment.