



Neutral Citation Number: [2025] EWHC 114 (Fam)

Case No: FD24P00232

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2025

Before:

MR JUSTICE MACDONALD

Between:

H

Applicant

- and -

O

First
Respondent

- and -

D, Y and B

Second, Third
and Fourth
Respondents

- and -

The Secretary of State for the Home Department

Intervenor

Mr Mark Jarman KC and Mr Mani Singh Basi (instructed by **Makin Dixon Solicitors**) for
the **Applicant**

Ms Anita Guha KC and Ms Naima Asif (instructed by **Stephensons Solicitors LLP**) for the
First Respondent

Mr Jonathan Evans (instructed by Cafcass Legal) for the **Second, Third and Fourth**
Respondents

Mr Mark Smith (instructed by **Government Legal Department**) for the **Intervenor**

Hearing dates: 2 December 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 29 January 2025 by circulation to
the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE MACDONALD

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 Justice MacDonald:

INTRODUCTION

1. In this matter I am required to decide, in proceedings brought under the Child Abduction and Custody Act 1985, whether to make a return order under Art 12 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter “the 1980 Hague Convention”) in respect of D, born in May 2016 and now aged 8, Y, born in August 2018 and now aged 6, and B, born in August 2021 and now aged 3. The children have been made parties to the proceedings and are represented in this case by Mr Jonathan Evans of counsel.
2. The applicant is the father of the children, H, represented by Mr Mark Jarman of King’s Counsel and Mr Mani Singh Basi of counsel. The respondent is the mother of the children, O, represented by Ms Anita Guha of King’s Counsel and Ms Naima Asif of counsel. In resisting the father’s application for summary return under Art 12, the mother relies on the exception set out in Art 13(b) of the 1980 Hague Convention, namely that there is a grave risk that the children’s return would expose them to physical or psychological harm or otherwise place them in an intolerable situation, and with respect to D and Y on the further exception set out in Art 13, namely that that the children object to being returned and have attained an age and degree of maturity at which it is appropriate to take account of their views.
3. As in an increasing number of child abduction cases coming before this court (see, for example, *Re Y and K (Children: Summary Return Application: Asylum)* [2024] EWHC 555 (Fam)), and within the context of the children and the mother having arrived in this jurisdiction in small boats operated by people smugglers, this case is complicated by the fact that the respondent to the proceedings under the 1985 Act, in this case the mother, has also made a protection claim to the Secretary of State for the Home Department. That protection claim names the children as dependants. Matters are further complicated by the fact that the mother and the children travelled to England from a safe third country in Europe, namely the Netherlands. In the circumstances, the Secretary of State for the Home Department has accepted an invitation to intervene in these proceedings and is represented by Mr Mark Smith of counsel.

BACKGROUND AND EVIDENCE

4. The mother and the father are Sudanese nationals. The father was born in Sudan on 1 January 1986. The father asserts that in 2003 his village in North Darfur was burnt by the Janjaweed militias operating in co-operation with the Sudanese government and his mother and brother were killed. The father contends that he had to flee Sudan in July 2012 having been subjected to arrest, torture and serious rights violations by the Sudanese security forces in circumstances where he belonged to the Fur tribe. The father fled to Egypt, in which jurisdiction he submitted a claim for asylum in any European country.
5. The respondent mother was born in Sudan on 16 July 1989. In her statement, the mother asserts that she is a member of a non-Arab Darfuri tribe, Tunjur, and is at risk of persecution in Sudan. She asserts that she lost her father and two siblings to the ongoing armed conflict in Sudan (the father contends that her father died of natural causes and the mother stated to the UK Border Force that her sister had been killed as well). Whilst

in Sudan, the mother asserts that she was also the victim of persecution, having been arrested as a student first in 2007 and physically abused whilst detained. The parents were married in October 2014 through a notary. The mother contends that she was arrested again in Sudan in 2015 and accused of money laundering after seeking to collect funds that the father had sent from Egypt. She states that she was tortured whilst detained and that, following her release, she was required to report to the Sudanese authorities on a weekly basis and was made the subject of a travel ban.

6. The mother contends that she had no option but to leave Sudan and travelled to Egypt. In her statement, the mother states that “I made a very careful plan as if I was caught trying to leave, it would cost me my life so I planned an alternative route after midnight when it was dark and everyone was sleeping and smugglers helped me out of the country.” However, the father asserts that the mother arrived in Egypt by commercial airline after he provided her with funds for a ticket. This latter version is what the mother told the UK Border Force officials when she arrived in this jurisdiction, the Initial Contact and Asylum Registration Questionnaire completed with the mother on 21 July 2023 confirming that “I went to Egypt by plane, own passport used.”
7. On arrival in Egypt, the mother was added as a party to the father’s claim for asylum in any European country. D and Y were born in Egypt. In 2020, the parents were notified by the United Nations that they would be relocated to the Netherlands. The family’s move to the Netherlands was facilitated by the UNHCR and the family were not required to go through an asylum process in the Netherlands. B was subsequently born in that jurisdiction in alleged circumstances which I shall come to.
8. The mother contends that following the family arriving in the Netherlands the father underwent “a 360 degree change (*sic*) in how he was”. The mother contends in particular that the father:
 - i) Committed infidelity by re-commencing a prior relationship.
 - ii) Controlled the mother by not letting her speak to anybody, including her family, not permitting her to work and stopping her from attending a language course, refusing to countenance a joint bank account, keeping her locked in the house and being unhappy with her speaking to neighbours.
 - iii) Removed the mother’s mobile phone and broke it to prevent her from contacting others.
 - iv) Raped the mother, as a result of which she became pregnant with B.
 - v) Began drinking alcohol heavily, after which he beat the mother, and became addicted to viewing pornography.
 - vi) Pulled a knife on the mother on 17 February 2021 to stab her, in an incident that was witnessed by D, and then called the police and informed them that the mother had pulled the knife.
 - vii) Informed the authorities that he wanted to divorce the mother but told her the opposite.

- viii) Beat, kicked and punched the mother, including to her head, on 26 February 2021 whilst she was pregnant with B, having previously shaved the mother's head as a punishment, in an incident witnessed by D and Y.
 - ix) Punched the mother all over her body, including her back, stomach and face on 1 March 2021 at a neighbour's property whilst she was pregnant with B and threw her phone to the floor whilst she was speaking to her brother.
 - x) Threatened the mother that he would poison her, plant drugs to make her look like a criminal, would not rest until she was jailed or would have her killed.
 - xi) Pushed Y off his bike onto the pavement, causing cuts to his legs which have left marks.
 - xii) Threatened the mother that if she did not move back in with him and the children, he would kill her.
 - xiii) From early 2023 beat the children by hitting them with shoes and belts and by hitting D if he tried to intervene when the father was hitting the mother, causing D to become incontinent at school.
 - xiv) Insisted in June 2023 that B undergo female genital mutilation, beating the mother when she disagreed.
 - xv) Assaulted the mother on 3 July 2023 after she objected to B undergoing female genital mutilation by throwing a television at her and attempting to strangle her.
9. Following the incident on 17 February 2021, the Dutch police were called. The police made a referral to Dutch social services, which became involved from that point onwards. This court has endeavoured to secure from the Dutch Police and the Dutch Child Protection Board disclosure of the records pertaining to the matters set out above. A request was made through ICACU for information to be transmitted from the Dutch Central Authority pursuant to Art 34 of the 1996 Hague Convention for (a) such documents relating to the child protection proceedings and orders obtained in the Netherlands as are available; (b) records of any police reports and domestic abuse reports in the Netherlands in respect of the parties and the children; and (c) the records in relation to the children held by the Child Protection Board.
10. The Dutch Central Authority responded indicating that the records of any police reports and domestic abuse reports in the Netherlands in respect of the parties and the children could only be requested by the parties directly. The Dutch police refused such a direct request by the parties for disclosure on the grounds that they cannot disclose any police data as a matter of Dutch law. In the circumstances, save for the police report referred to below, the court has not had access to that material. The Dutch Central Authority also forwarded the request for information to the Dutch Child Protection Board. On 7 November 2024 an e-mail was received from ICACU enclosing a report completed by the Dutch Central Authority dated 6 November 2024 and detailing the involvement of the Dutch Child Care and Protection Board with the family. The report has been translated and is contained within the court bundle.

11. The father denies the allegations of domestic abuse and asserts that the mother has fabricated each of these incidents or was the aggressor, stating that the mother became jealous when she saw him with other women. The father's denials and his account are set out in detail in his statement. For example, he contends that it was the mother who pulled a knife on him on 17 February 2021 in order to force him to divorce her and that it was the mother who destroyed the television and pulled a knife on him on 3 July 2023, exhibiting to his statement a blurred photograph purporting to show the mother holding a knife on that date. The father strongly denies having insisted that B undergo female genital mutilation (hereafter "FGM"), asserting that he does not agree with FGM.
12. The father now further contends that the mother's care of the children is poor and that they are at risk whilst they remain in her care. In particular, the father asserts that the mother was harsh with the children, that she pulled out one of D's loose teeth by hand and that she would leave the children alone for hours and lock them in her room. Against this, a Child and Family Assessment completed in this jurisdiction concluded that the allegations by the father were likely malicious based on the quality of the mother's care. The Children's Guardian records in her final analysis that the school reports that the children have very good attendance, are always immaculately presented and that the mother engages with all parental consultations and has engaged well with B's introduction to nursery. Within this context, I note that in a Dutch police report placed before the Dutch District Court, a translated copy of which this court does have, the father is recorded as telling the police:

"I suspect my wife took my children to England. My wife has always said that she wanted to go to England via France to live in England. I think that my wife does look after my children well, but my wife thinks of herself first. My wife can react very angrily towards the children, however."

13. There is evidence before the court to support the mother's allegations of domestic abuse perpetrated by the father, some of which comes from the father himself. Following the mother's departure, the father left a number of voicemails on the phone of the mother's brother. The court has transcripts of those voicemails, which the father did not suggest were inaccurate or incomplete. The following are significant:

"Peace be upon you, F. As you may know, she has now moved to Britain. I knew every step she took during this move, and I had the means to take legal action against her from the beginning. By God, it would not have taken much to have [the mother] and the children returned and to have her resident revoked – thus leaving her alone. However, I chose not to cause her any trouble. Now, I deeply regret this decision – I realise I should have acted decisively from the start. Out of consideration for the children, I allowed them to stay with her. Despite everything she has done, I refrained from acting negatively. There were times I was firm with her, but only because I had treated her with far more kindness than was necessary from the beginning or our marital / family life."

And, in respect of the alleged incident on 1 March 2021:

"Let me be clear: from the day in 2021 when the problems began, I remained patient with her, even as she engaged in increasingly provocative behaviour."

These provocations were extreme and designed to push me to my limits. The situation escalated to the point where I asked her to allow me to enter the house to retrieve my belongings, and she refused. Even here, her refusal was not legally acceptable, but she believed that the law would support her actions, no matter how unreasonable. At that moment in time, I tried to speak with you to explain the situation, but she grabbed the phone from me and attempted to break it. In that heated moment, I struck her on the back. That was the only time I ever laid a hand on her. Apart from that incident, I have never hit her. It's unfair for her to continue lying about me, claiming that I have been abusive. She has gone to great lengths to fabricate accusations against me; she has done the unthinkable in her efforts to get me imprisoned including an incident where she shaved part of her hair and then reported to the police that I had done it to her."

14. This court also has before it a statement from a neighbour of the parents in the Netherlands, E, dated 21 August 2024. In that statement, in explaining why she needed to sign her statement electronically, E states that she has not been able to seek the assistance of her husband or step-daughter in providing the statement as:

"My husband and step daughter have always been clear that they do not wish for me to be involved in other people's issues. It is our culture that we shouldn't get involved with other people's business and they feel strongly about this. I want to help but need to do so without their assistance. If a statement were sent to me by post my husband would intercept the letter and tell me not to respond."

15. In her statement, which is disputed by the father, E avers that the mother had told her about the domestic abuse that was perpetrated against her by the father, including an incident in which the mother reported to her that the father had threatened her with a knife and an occasion when the mother arrived at E's home in bare feet stating that she had been beaten up by the father and asking for a phone with which to call the police. When E confronted the father with these matters, she states that he responded by swearing an oath that the mother was lying. E also asserts that she witnessed the father assault the mother in early 2021 whilst the mother was pregnant with B, detailing the event as follows in her statement:

"12. As indicated above, I did also witness for myself [the mother] being beaten by her husband in my home. The incident occurred sometime after her husband left the family home. It happened in front of me, my husband and my daughter in approximately early 2021 when [the mother] was pregnant. [The mother]'s two sons were also present. [The mother] had told me shortly before this incident that she was pregnant. The husband had knocked on the door of our house and asked if my daughter could attend with him at [The mother]'s address as he needed university papers and his phone back. He was saying said it was brand new and cost him 1100 euros. My daughter went to call on [the mother] to collect the belongings and hand them over to the husband. [The mother]'s brother was on the phone to help sort out the issues. My daughter and [the mother] returned to my property and did not have the belongings. [The mother] said that the papers had been burned and that the phone had been put in the wheely bin.

13. I recall that at one point [the mother]’s brother was speaking on the phone to [the mother]’s husband on speaker phone telling him that he needed to declare a divorce because of the trouble and arguments saying it can’t be tolerated [the mother]’s husband obeyed what her brother said; there was also a lot of discussion about who had taken who’s phone with accusations about the phone. The husband had another phone on charge in our house and [the mother] picked it up and threw it on the floor. The husband got very angry and started to beat her up. He was beating her on her back, her stomach and anywhere he could on her body. It was mainly punches with both fists to her back and her stomach. This happened for some time and only stopped when my husband was able to drag him off [the mother]. My daughter saw [the mother] pick up a vase and gesture towards me as to wink. I didn’t see this for myself. My peripheral vision isn’t very good as I have had surgery on my eyes.

14. My daughter and husband saw this beating and, as indicated, my daughter video recorded it on her phone. My husband called emergency services and the police attended. The female police officer took [the mother] back over the road to her home and [the mother] told me she showed them bruises on her stomach and on back.”

16. The report provided by the Dutch Central Authority with respect to the involvement of the Dutch Child Care and Protection Board, dated 6 November 2024, confirms that the Child Care and Protection Board considered that the children had been exposed to “a lot of arguments between the parents, including domestic violence.” On 25 August 2023, the Dutch District Court made supervision orders in respect of the children under Art 1:255 of the Dutch Civil Code. In its decision, a translated copy of which is before this court, the District Court expressed itself as being satisfied on the documents submitted to it that the children had “witnessed conflicts between the parents in the period during which the parents still lived together” and that “This involved arguments and domestic violence”. Within this context, I note that in the Dutch police report referred to above the father is stated to have said that the parents had started arguing “increasingly often” about money and that in March 2021 things between them “started to go very wrong”.

17. The mother has subsequently provided in this jurisdiction further accounts of the domestic abuse that she alleges. The court has copies of the documentation from the mother’s protection claim. In the mother’s Initial Contact and Asylum Registration Questionnaire, dated 21 July 2023, the mother is recorded as asserting that she has back issues as the result of an assault by the father in July 2023 and that “my husband was violent to me”. The mother told UK Border Force officials that the father had attempted to strangle her and threatened to kill her and that the abuse had commenced in the Netherlands. During the course of her asylum interview on 15 August 2024, the mother stated that the father’s sister wished B to undergo FGM and that the father hit her for refusing to permit this. She further stated:

“My body is all marked, I was violated, my hair was shaved, when the police came, they said social services will come tomorrow. They took him from the house but it didn’t solve the problem. I have been suffering so badly, threats, even the children were not happy at all. My son wee on himself at school, because of the stress he got bloating in his stomach.”

And:

“...we even started divorce, he didn’t want to divorce, he enjoys beating children and torturing me. 5 days before I left Holland he hit me with the TV until the TV broke. They didn’t take me to hospital.”

18. The Child and Family (“CAF”) Assessment, completed in this jurisdiction by the local authority on 1 March 2024 details a Health Visitor’s consultation with the mother on 2 February 2024 in which the mother asserted to the Health Visitor that she was subjected to domestic abuse and the children were subjected to physical abuse by the father, that she had come to the UK as she wanted to escape war and conflict and then her husband and that she had not been supported by the authorities in the Netherlands. The mother was assessed in the CAF assessment as presenting as open and honest about her past experiences when alleging she had been subjected to domestic abuse and the children had been subjected to physical abuse, presenting as upset and tearful when discussing the abuse and the difficulty of travelling to the United Kingdom. The CAF assessment states as follows in this context:

“I explored with [the mother] around the claims of domestic abuse and what this looked like for her and the children. [The mother] explained that her husband was physically and emotionally abusive to her. She explained that the abuse started when she was pregnant and continued through all the pregnancies. She told me that [the father] has burnt her and her hair, hit her with objects, his hands and threatened her with knives. She reports that he is always having affairs too and she concerned about his drug and alcohol misuse. She reports that she does not know what he would take or drink, but that she could tell when he had been using as this is when the abuse became worse. She told me that she would often fear for hers and the children life’s (*sic*) as he used to threaten to kill them all to. She told me that the police were always called and they would take photos of her injuries. She tells me that I if made contact with them, they would have evidence of this and photos of her black eyes and body covered in bruises. She tells me that there was another time the police were called and this was witnessed by her neighbours – she explained this time, he chase her with a knife, her and the children and she had to lock herself in the bathroom until the police care (*sic*). [The mother] advised that the LA advised her that he was not allowed to see the children and he moved out of the family home. She explained that [the father] remained in contact stating he had changed and that he wanted support and medication. [The mother] explained that she did forgive him, but that he was not true to his word and the abuse continued – I unpicked [m]ore about the abuse that the children received and she told me that he would always hit the children with sticks, belts and shoes. She reports that Y still has marks on his body from this – these were not seen as he was at school.”

19. On 2 May 2024 and 10 June 2024, the general practitioner records before the court demonstrate that the mother told her general practitioner that she had been the victim of domestic abuse by the father over several years in the Netherlands, which had resulted in musculoskeletal injuries requiring physiotherapy. The latter was prescribed.
20. In her statement to this court, the mother reiterates her allegations. She points to the risk she took in placing the children and herself in the hands of people smugglers for

the hazardous, and potentially fatal, channel crossing as indicative of the extreme nature of the domestic abuse from which she was trying to escape and from which she was trying to protect the children. In her statement, the mother asserts that the children were exposed to both physical and psychological harm, D having been hit by his father when seeking to protect his mother, D having witnessed the father threaten to stab the mother with a knife and the children having been witness to the mother being beaten by the father on repeated occasions. The mother contends that the father is not capable of parenting the children on his own.

21. The older children have also spoken of experiencing domestic abuse. During the course of the Children’s Guardian ascertaining the children’s views, and in response to questions about whether the children would like phone or video contact with the father, D stated “No, he beat us” and Y stated “No, he kicked us”. An attempt by the Children’s Guardian to engage D and Y in talking about their father, and any happy memories they had of him, was met with a shaking of heads and insistence that there were no good things to tell her about their father. In her report, the Children’s Guardian details the following exchange with Y:

“19. I showed Y photos of him and his siblings with their father and asked him to tell me who everyone was. Y was able to tell me who each was however on two of the photos he said that it was not his father, saying it was a friend and not his dad. I asked him about spending time with his father, referring to the photograph of him and D with their father outdoors. Y said “he is not my father”. Then he said, “one time he took us out” followed by “no, zero times, he never took us anywhere”.

.../

21. I attempted to explore with Y his feelings about the Netherlands and England, however he refused to go into any detail, shaking his head and saying “no” at any mention of the Netherlands and saying “yest” that he wanted to remain living in England. When I asked Y to consider his father missing him and saying that he would like to see him, Y immediately said “daddy would not say that, he did not spend time with us”. Y was very quietly spoken and at times I had to ask him to speak louder, however his English appeared to be good, and I am confident that he understood what I had asked him.

22. When I asked him why he did not want to see his father again, Y said, “he kicked us out of the house”. When asked how he would feel if the Judge said that he should return to live in the Netherlands, Y said, “I would be angry, I want to stay in England”. Y then refused to engage in any further conversation and sat with his head lowered until I suggested that he go back to class with his teacher and he smiled”.

22. In her report, the Children’s Guardian further details the following exchange with D:

“24... I asked D what the differences of living in Holland and England were and he said, “we lived in a house before and now we live in a hotel. The school is different, the food is different”. D then said, “I want to stay here as this place is good, and I have lots of friends”.

25. D continued, “I want to stay here, I do not want to go back to Holland, I have friends at school here. At school in Holland, people were mean to me, here only Z is not my friend and is not nice to me, everyone else is nice to me”. I asked D what the best thing about his school was and he replied, “school is fun, the best thing is the slide.” D confirmed that his mother takes him to school and picks him up, adding, “unless she has somewhere to go and then she gets her friend to pick us up.” When I asked D what his favourite subject is at school, he replied, “science” and when asked what job he would like to do with he is older, he explained, “I would like to be a doctor, at a hospital because you can held people when you are a doctor.”

26. I asked D about how he would feel about spending time with his father in the future. He replied, “No, he beats my mum”. I asked him if he ever saw his father do this and he said “Yes, I saw him do it, more than one time”. I asked D if he had spoken to anyone about what he has seen and he said “yes, I talked to mum”. I asked him whether he was worried, and he replied, “yes, worried about my mum”. I asked D if he could tell me about whether anything happened when he was with just his father and he explained, “once he told me and my brother and sister to go upstairs quickly”. When I asked him why that was, D replied, “because he was watching television”, before adding “he did not spend time with us, I saw him for one week only”. When I asked him if he meant every week, he said “no, just for one week”.

27. I asked D how he felt about speaking with his father, on the phone or via video call, he said “no, he is trying to kill my mum.” I asked D how he would feel if the Judge said that he would have to return to the Netherlands. He responded by saying “I would feel very sad.”

23. The Children’s Guardian states that she found no indicators to suggest that Y and D’s maturity was not commensurate with their chronological ages. In her report, the Guardian opined that whilst “it was evident that their views are aligned with those of their mother”, she did consider that the children were reflecting on their own previous experiences and their views were authentically their own. The Children’s Guardian noted that the children did not talk in any detail about specific incidents when they were in the care of their father but noted that their physical demeanour changed when their father was mentioned and they seemed worried. Cross examined by Ms Guha, the Children’s Guardian was clear in her view that both Y and D had witnessed domestic abuse by their father.
24. Finally, with respect to the allegations of domestic abuse, on 23 July 2024 D and Y were seen at school by the social worker. When asked if they had any worries, Y said he did not know and D said no, stating “I forgot” when asked if there was anything that made him scared. Neither D or Y raised any concerns of their own volition. I note that on this occasion, D described his family as being his mother, sister and brother. In her statement, the mother asserts that:

“After the social worker came to see them recently and spoke to them they were having flashbacks and nightmares. Y woke up in the middle of the night terrified. He said he had a nightmare. There was a monster beating him and crushing him and it looked like his dad. He said he couldn’t go back to sleep and needed to be with me.”

In his statement, the father concedes that D was wetting himself at school but ascribes this to “the mother’s behaviour towards the children and her chaotic lifestyle”.

25. Within the foregoing context, the mother asserts that she reached a point where she decided to attempt to reach England with the children following the alleged incident of domestic abuse on 3 July 2023. The father states that he last saw the children on 5 July 2023. The children did not attend school on either 6 or 7 July 2023, the latter date on which the children were due to break up from school for the summer holidays. The school reported their absence to the Child Care Protection Board. The father attempted to contact the mother who did not respond to his telephone calls. The father went to the mother’s home on 8 July 2023 to collect the children for the scheduled contact, however, upon arrival, he discovered that neither the mother nor the children were there. A next-door neighbour informed the father that the mother had gone on holiday with the children. On 8 August 2023, the father issued divorce proceedings, the divorce being subsequently granted on 16 February 2024.
26. On or around 6 or 7 July 2023, the mother wrongfully removed the children from the jurisdiction of the Netherlands. The mother travelled with all three children to Belgium and subsequently onto a migrant camp in Calais. On or around 18 July 2023, and without the mother, the two boys crossed the English channel from France to this jurisdiction on a small boat operated by people smugglers. The mother and the daughter made the same journey separately on or around 20 July 2023. The mother acknowledges the danger inherent in taking the course she did with the children. However, the mother seeks to justify her decision to place the children in a dinghy on the grounds that she “knew we might die on the crossing to England but I thought that we were going to die anyway so felt we had nothing to lose.” The boys were reunited with their mother and sister approximately a week after they had arrived in this jurisdiction at a hotel in London. The Home Office subsequently provided accommodation for the family.
27. The father reported the children as missing to the Dutch police on 24 August 2023. On 25 August 2023, on the application of the Child Protection Board, the Dutch District Court made supervision orders in respect of the children placing them under the supervision of the Jeugdbescherming West child protection region. Those orders remained in force until 25 August 2024. The effect of the supervision order was to place the children in care for a period of one year. With regard to the current status and enforceability of this order, on 29 August 2024 the Dutch Child Care Protection Board is recorded as providing a report dealing with the request of the Jeugdbescherming West child protection region to terminate the supervision orders following the discovery that the children were now in the jurisdiction of England and Wales. That report is recorded as stating as follows:

“...because the mother went abroad with the children, [Jeugdbescherming West] has not been able to determine whether the concerns mentioned by the Children’s Court in the order have been removed (domestic violence, no stable parenting situation, frequent somatic complaints in the children, abdominal pain, bad teeth). [Jeugdbescherming West] has serious concerns about this. By moving abroad (having de facto abducted the children), the mother did not act in the children’s best interests... The period leading up to the Order involved a lot of arguments between parents, including domestic violence. [the Dutch Child Care Protection Board] and [Jeugdbescherming West] have no insight into how the children are doing now... [the Dutch Child

Care Protection Board] is not sufficiently reassured that the parents, in particular the mother, are adequately meeting the minors' needs, as it has no insight whatsoever into the children's educational situation. Given the circumstances, [the Dutch Child Care Protection Board] considers that the Order is not enforceable"

28. The mother asserts that following her arrival in England, the father took a number of steps to locate her whereabouts. Within this context, she contends that she received a WhatsApp message from the father in August 2023 which the mother alleges stated as follows (there is no copy of the message in the bundle):

"If you think you are in England and nice and safe I will find you and kill you and I will make sure social services come and take the children"

29. Upon arriving in this jurisdiction, the mother made a protection claim. Her application for asylum was refused by the Secretary of State. The mother lodged an appeal against that decision on 25 September 2024, which is yet to be listed. Within this context, the Secretary of State has in these proceedings maintained her position that the implementation of a return order made pursuant to Art 12 of the 1980 Hague Convention does not need to await for the determination of the mother's appeal against the dismissal of her protection claim as the Netherlands is a safe third country. The Secretary of State has further made clear within these proceedings that, should the mother's refugee status and/or right to reside in the Netherlands cease, the mother would be likely be treated by the Secretary of State as a Sudanese national and lone female and that either refugee permission or humanitarian protection in the United Kingdom would be the likely outcome once the particular circumstances of her case, including the mother's ethnic background, have been investigated.
30. The father now applies for the summary return of the children to the jurisdiction of the Netherlands. His application was issued on 13 June 2024. A without notice hearing took place on 14 June 2024 where disclosure orders and a location order were made. The location order was executed by the Tipstaff on 26 June 2024 and the mother was served with the Court papers and a list of panel solicitors on 27 June 2024. The father contends that he is able to care for the children and that a place at the children's previous school in the Netherlands remains open for them. The father does not accept that the children are at risk of grave physical and psychological harm if returned to the Netherlands. However, with respect to protective measures, the father offers the following:
- i) An undertaking, given on the basis of no admissions, not to use or threaten violence, intimidate or harass the respondent or the children.
 - ii) An undertaking, given on the basis of no admissions, not to pursue FGM in respect of B.
 - iii) An acceptance that he will not be informed of the mother's home address and the address of the children's school in the Netherlands, provided that the Dutch social services and Court are aware of those addresses.
 - iv) The suspension of any order for contact between himself and the children until the first *inter partes* hearing before the Court in the Netherlands when a decision as to contact can be made.

- v) To pay the mother two months' rent and assist with any furniture for the benefit of the children.
 - vi) To pay as much maintenance as he can afford for the children.
 - vii) To submit to an order preventing him from removing the children from the mother's care and control until the first *inter partes* hearing in the Netherlands.
 - viii) To pay for the costs of the children's direct flights to the Netherlands and to not attend the airport upon the children's return.
 - ix) Not to institute and/or support any civil or criminal proceedings in the Netherlands in relation to the abduction.
31. The mother submits that the protective measures proposed by the father are not sufficient to nullify the grave risk of physical or psychological harm or otherwise intolerable situation that the mother submits is established on the evidence for the purposes of Art 13(b). In advancing this position, the mother relies on her contention that the Dutch authorities failed to take appropriate steps to protect her and the children following her reports of domestic abuse, causing her a complete lack of confidence in the ability of the Dutch authorities to keep either herself or her children safe.
32. A consistent feature of the mother's account is what she alleges was the absence of effective action from the Dutch authorities in response to her allegations of domestic abuse, with an inconsistent approach as between the Dutch police and the Dutch social services. On the mother's account, the police would attend the property and compel the father to leave but the social worker would then attend the next day and inform the mother that she had to let the father back in because it was a shared property and the father had a right to contact with his children. The mother further contends that Dutch social services repeatedly failed to assist her when she informed them directly of the domestic abuse perpetrated by the father against her. The mother states that, in the circumstances, she stopped reporting matters to the police because there "seemed no point" in doing so. The mother relies in support of her contention that the Dutch authorities did not take seriously her allegations of domestic abuse on the conclusion of the District Court on 28 August 2023, in the context of the serious domestic abuse alleged by the mother, that what was required by the family was consideration of "what is needed to improve communication between the parents and bring their relationship into calmer waters."
33. Finally, with respect to the question of protective measures, the Children's Guardian concludes that it would not be appropriate for the children to be transferred to their father's care upon any return to the Netherlands given the nature and extent of the allegations of domestic abuse in this case, that it would be "very concerning" were the children to be separated from the mother and that the address and school details of the children and the mother should be withheld from the father should a return order be made until such time as a "full welfare assessment is undertaken by Dutch social services". The mother accordingly contends that any protective measures would need to provide sufficient enforceable protection for B with respect to FGM, to protect the children from removal from the mother's care and control, to ensure confidentiality of the whereabouts of the children and the mother, to provide financial security and ongoing financial support for the mother and the children in the Netherlands and to

protect the mother from prosecution in the Netherlands for any criminal offence or liability for any civil penalty relating to the abduction. In her oral evidence, the Children's Guardian said:

“If an order is made, I would agree with the position of the mother, there needs to be a clear plan in place, in terms of status, ability to return, benefit support, accommodation and a safeguarding plan to be put in place to be implemented by children's services in the Netherlands.”

34. The mother further asserts that, particularly in the circumstances outlined in the preceding paragraph, the uncertainty and insecurity of her immigration status in the Netherlands were she to return to that jurisdiction with children in circumstances where the children could not be placed immediately in the care of the father, would further and fatally undermine the efficacy of any protective measures that this court put in place.
35. With respect to the question of the mother's immigration position in the Netherlands, the court has before it evidence indicating that the Dutch authorities have confirmed to the Secretary of State that the father has refugee status in the Netherlands, that the mother's status in the Netherlands is dependent on the refugee status of the father, as is the status in the Netherlands of Y and D, and that the status of B in the Netherlands is dependent on the mother's status. These statuses are valid until 4 December 2025. In the context of this information, the court also has the benefit of a report from Marianne Wiersma, a Dutch Attorney, as the single joint expert to assist the court on the question of the parties' and children's immigration status in the Netherlands. The report was received on the 18 October 2024. Addendum reports provided following further questions. The key points to be drawn from the reports are as follows:
 - i) In circumstances where the mother has a Dutch asylum residence permit based on her residing with the father, who has asylum status, and B has an asylum residence permit based on her residing with her mother, neither the mother nor B has refugee status in the Netherlands.
 - ii) The Dutch asylum residence permits of the mother and B can, independent of the outcome of her protection claim in this jurisdiction, be revoked (a) where there has been a transfer of her principle residence outside the Netherlands or (b) where there has been a breakdown of her marriage and cohabitation with the father. Until revocation of the permit, the immigration status of the mother and the children in the Netherlands remains available to them.
 - iii) The Dutch residence permits of D and Y may also be revoked where there has been a transfer of the mother's principle residence outside the Netherlands.
 - iv) There is no legal time limit for the revocation of a Dutch residence permit. Revocation can take place in weeks or months if it is requested, or a year or longer if further investigation is required. At the present time, deportations from the Netherlands to Sudan are suspended due to the ongoing conflict in Sudan.
 - v) The mother has the right to lodge an objection against the revocation of her asylum residence permit. If her objection is declared unfounded, then the mother can appeal to the District Court, with a further and final right of appeal

to the Administrative Law Division of the Council of State. The mother is able to pursue the appellate process from the jurisdiction of England and Wales. The appellate process may take several years, with any right to remain pending a decision depending on the circumstances of the case. Where the ground of revocation relied on is the breakdown of the mother's marriage and cohabitation with the father however, an objection to revocation will have no prospect of success absent a reconciliation.

- vi) Were the mother's asylum residence permit to be revoked, the mother may be eligible for a regular residence permit to enable her to remain with the children. An application would cost between €393 and €2,728 in fees and legal costs, depending on eligibility for legal aid. The application for a regular residence permit could be considered during the proceedings dealing with any objection by the mother to the revocation of her asylum residence permit. Such an application has a fair chance of success where the mother has access to or cohabits with the children (assuming the children keep their residence permits or receive new permits). The mother may also apply for a regular residence permit on the ground that she was maltreated during her marriage, provided she is able to provide evidence of that maltreatment. The children would be eligible for a non-asylum residence permit to remain with the mother.
- vii) Were the mother's asylum residence permit to be revoked, the mother may also be eligible for independent refugee status or subsidiary protection. That application *cannot* be made from the jurisdiction of England and Wales. The application must be made in the Netherlands and, subject to an application to reside with close family members, the mother would have to remain in the asylum seekers centre pending the outcome of the application. Such an application would, depending on the circumstances of the case, have a greater opportunity for success in circumstances where the mother is from Sudan. It would take between six months and two years to determine.
- viii) Pending the determination of an application by the mother for independent refugee status or subsidiary protection, the mother and the children have the right to receive health care and state benefits of approximately €70 per week and the children have a right to regular education. However, the mother would *not* be entitled to social housing, even were the children to remain with the mother. Once again, the mother and, if in her care, the children would be required to remain in an asylum centre during the currency of the mother's application and any appeal of the refusal of the asylum application unless permitted to stay with a close family member.
- ix) Pending an application for a regular residence permit, the mother will not be entitled to social housing, state benefits or health care other than emergency aid. The children would, however, be entitled to state benefits of approximately €70 per week if residing with the mother and would be entitled to regular education and health care.
- x) Were the mother to be granted an asylum or regular residence permit she would be entitled to social housing (and thereby entitled to a subsidy with respect to rent where the monthly rent is less than €880 per month), full state benefits and health care. Whilst waiting times for social housing are lengthy, the mother may

be entitled to a certificate of urgency if she able to demonstrate that her divorce was related to domestic abuse.

36. The Secretary of State has confirmed with the Dutch Authorities that those authorities have now commenced the process of revoking the immigration status of the mother and the children in the Netherlands on the basis that the children and the mother are no longer resident in the Netherlands. There is at present no timescale for the finalisation of that process.
37. In addition to her reliance on Art 13(b) of the 1980 Hague Convention, the mother further asserts that D and Y object to returning to the Netherlands for the purposes of Art 13 of the 1980 Hague Convention. In addition to relying on the statements made by Y and D to the Children’s Guardian, as set out above, in her statement the mother asserts that both children have said to her that they do not want to return to the Netherlands “because their dad beats them up”.
38. At the pre-trial review, the court directed the Children’s Guardian to consider the issue of the children’s objections in more detail, in circumstances where her analysis was not wholly clear from the report. In response, the Children’s Guardian confirmed that B is not capable of objecting for the purposes of Art 13 given her age and level of maturity, that Y did not express any detail about the Netherlands and that D’s views presented as an objection to contact with his father, rather than an objection to return to the Netherlands. The Children’s Guardian further considered that both Y and D lacked the maturity to fully understand what they were objecting to. The Children’s Guardian stated that both Y and D found it difficult to provide a balanced view of life in the Netherlands and England as their experiences were very much linked to them having negative views of their father, who both children are aware remains living in the Netherlands. In her report she opined that:

“If what the children told me, about their father, that “he kicked use out of the house” (Y) and “he beats my mum” and “he is trying to kill my mum” (D) is an accurate reflection of their experiences, it is unsurprising that this would lead them to have negative views of returning to the Netherlands. It is also likely as young children of age eight and six, that Y and D are going to align themselves with the views of their mother, who is their primary care giver.”

39. During the course of her short oral evidence to the court, the Children’s Guardian stated her view that D associates the Netherlands with his father and does not want to go to Netherlands because he does not want to have contact with his father, with his concerns being based on what he has previously witnessed and been told by his mother, who both Y and D are very much aware wishes to remain in this jurisdiction. The Children’s Guardian considered that D’s views about return to the Netherlands were dominated by his view of his father.

RELEVANT LAW

Harm

40. The mother relies on the harm exception set out in Art 13(b) of the 1980 Convention, which provides as follows:

“Art 13

“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.

.../

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.”

41. The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2012] 1 AC 144 . The applicable principles may be summarised as follows:
- i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
 - ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.
 - iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.
 - iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.
 - v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court

will be concerned not only with the child's immediate future because the need for protection may persist.

42. In *Re E*, the Supreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process.
43. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further 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 grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.
44. The methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 WLR 721), and this process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.
45. In evaluating whether the narrow exception to summary return provided by Art 13(b) is of application, an integral part of the court's general process of reasoning in its appraisal of the exception is deciding whether protective measures are capable of meeting the level of risk reasonably assumed to exist on the evidence before the court. In undertaking that evaluation, the authorities make clear that the court will be guided by the following principles:
 - i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.
 - ii) In deciding what weight can be placed on undertakings as a protective measure, 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, in the absence of compliance.
 - iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.
 - iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.

- v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.
 - vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.
 - vii) With respect to undertakings, what is required is not simply an indication of what undertakings are offered by the left behind parent as protective measures, but sufficient evidence as to extent to which those undertakings will be effective in providing the protection they are offered up to provide.
 - viii) Within the foregoing context, there is an imperative need for the applicant's proposals for protective measure to be included in the directions for the applicant's statement, including the terms of the undertakings being offered.
46. Whilst the court retains a discretion to order the return of the subject child where the exception provided by Art 13(b) is established, where the court has concluded that the harm exception is made out and that no protective measures can be put in place that will sufficiently meet the level of risk assumed to exist, it will ordinarily not be appropriate to exercise that discretion in favour of making a return order notwithstanding those conclusions.

Child's Objection

47. Art 13 of the 1980 Hague Convention also incorporates the second exception relied on by the mother. In so far as it is relevant, Art 13 provides as follows:

“Art 13

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 -

.../

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.”

48. In evaluating whether the exception under Art 13 based on the child's objections is made out, the court adopts a two stage approach, examining first whether, as a matter of fact, the child objects and has attained the age and degree of maturity at which it is appropriate to take account of his or her views and second, if so, whether the court

should, in its discretion, order the return of the child notwithstanding his or her stated objection. Within this analytical framework, the authorities enjoin the court to have regard to the following principles:

- i) The gateway stage should be 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.
- ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.
- iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion.
- iv) Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.
- v) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.
- vi) At the discretion stage there is no exhaustive list of factors to be considered.
- vii) The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available.
- viii) The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.
- ix) The court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to the child's welfare, as well as the general Convention.
- x) In applying these tests, the court is enjoined by the Court of Appeal not to adopt an over prescriptive, over intellectualised approach to the 'gateway' stage and not to adopt an over engineered approach to the 'discretion' stage.

Effect of Protection Claim

49. Finally, with respect to the relevant law, the Secretary of State contends that notwithstanding the decision of the Supreme Court in *G v G* [2021] UKSC 9, the implementation of a return order does not need to wait for the asylum claim to be finally determined as the Netherlands is a safe third country. The position advanced by the Secretary of State is based on the approach taken by Gwynneth Knowles J in *Re A and Others (Care Proceedings: Inherent Jurisdiction: Order for Return to Austria)* [2024] EWFC 178. In light of my conclusions regarding the outcome of the father's

application, however, I am satisfied that it is not necessary in this judgment to elucidate and address further the legal principles relevant to this question.

DISCUSSION

50. Having considered carefully the evidence and submissions in this matter, and on a fine balance, I am satisfied that the father's application for a summary return order must be dismissed. My reasons for so deciding are as follows.
51. The following matters relevant to the determination of an application under the 1980 Hague Convention are not in dispute between the parties:
- i) The subject children are all under the age of 16.
 - ii) The father had and was exercising rights of custody in respect of each of the children immediately before their removal from the jurisdiction of the Netherlands.
 - iii) At the date of the removal of the children from the jurisdiction of the Netherlands by the mother each of the children was habitually resident in the jurisdiction of the Netherlands.
 - iv) The removal of each of the children from the jurisdiction of the Netherlands by the mother was wrongful for the purposes of Art 3 of the 1980 Hague Convention.
52. Within the foregoing context, the issues in this case are threefold. First, does one or both of the exceptions to summary return relied on by the mother under Art 13 of the 1980 Hague Convention apply in this case. Second, if one or both of the exceptions to summary return apply, should the court in any event exercise its discretion to make a return order under Art 12 of the 1980 Hague Convention. Third, if none of the exceptions to summary return apply, or one or more of the exceptions applies but the court chooses to exercise its discretion to make a return order, can that return order be implemented pending the determination of the mother's appeal against the refusal of her protection claim. I deal first with the question of harm under Art 13(b).

Harm

53. I am satisfied on the evidence currently before the court, and having considered carefully the submissions of the parties, that there is in this case in respect of each of the children a grave risk that their return to the Netherlands would expose each of them to physical or psychological harm or otherwise place them in an intolerable situation for the purposes of Art 13(b) of the 1980 Hague Convention.
54. Adopting the discipline articulated by the Supreme Court in *Re E*, this court should assume the risk of harm to each of the children at its highest and then, if that risk meets the test set out in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified. The assumptions I make in this context must be reasoned and reasonable assumptions based on a careful evaluation of the relevant admissible evidence before the court, albeit an evaluation that falls to be undertaken in

a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.

55. I acknowledge that there are some aspects of the mother's account that must give the court pause with respect to her credibility. In particular, it would appear that the mother has not been frank with this court when she implies in her statement that she was forced to leave Sudan in a clandestine manner when, as she informed UK Border Force officials, she left on a commercial airline using her own passport. Against this, however, I am satisfied that the court has before it strong evidence with respect to the perpetration by the father of serious domestic abuse against the mother, on occasions in the presence of the children, in the form of material that corroborates her account of domestic abuse and controlling behaviour.
56. Whilst I acknowledge that the father disputes the mother's allegations of domestic abuse and controlling behaviour, there is evidence of at least one occasion where he concedes that he was physically abusive to the mother, that occasion also being corroborated by an independent witness who asserts that the mother told her of the father being violent to her on other occasions. In his voicemail to the mother's brother, the father stated in early 2021 "In that heated moment, I struck her on the back" (in an earlier voicemail, the father refers to there being "times I was firm with her" and of treating the mother with "far more kindness than was necessary"). The witness, E, whose evidence I consider I can rely on in circumstances where it has been given reluctantly for the reasons she sets out, corroborates this account in stating that in early 2021 and in the presence of others:

"The husband got very angry and started to beat her up. He was beating her on her back, her stomach and anywhere he could on her body. It was mainly punches with both fists to her back and her stomach. This happened for some time and only stopped when my husband was able to drag him off [the mother]."

In this context, I am also satisfied that I can rely on E's evidence that the mother had told her about the domestic abuse that was perpetrated against her by the father, including an incident in which the mother reported to her that the father had threatened her with a knife and an occasion when the mother arrived at E's home in bare feet stating that she had been beaten up by the father and asking for a phone with which to call the police.

57. It is clear that, from February 2021, the mother sought the assistance of the Dutch police, who in turn made a referral to Dutch social services. Whilst only limited information has been forthcoming from the Netherlands, it is plain that both agencies proceeded on the basis that domestic abuse was occurring in the family home. The report provided by the Dutch Central Authority with respect to the involvement of the Dutch Child Care and Protection Board, dated 6 November 2024, confirms that the Child Care and Protection Board considered that the children had been exposed to "a lot of arguments between the parents, including domestic violence." As I have noted, on 25 August 2023 the Dutch District Court made supervision orders in respect of the children under Art 1:255 of the Dutch Civil Code. In its decision the District Court expressed itself as being satisfied on the documents submitted to it that the children had "witnessed conflicts between the parents in the period during which the parents still lived together" and that "This involved arguments and domestic violence".

58. I further bear in mind that the mother has maintained largely consistent accounts of domestic abuse and controlling behaviour by the husband since her arrival in this jurisdiction, including to this court, as I have summarised above. Further, as Cobb J had cause to in *Re Y and K (Children: Summary Return Application: Asylum)* [2024] EWHC 555 (Fam), I accept the mother's contention that the risk she took in placing the children and herself in the hands of people smugglers for the hazardous, and potentially fatal, channel crossing constitutes corroborative evidence as to the nature and extent of the domestic abuse from which she alleges she was suffering and from which she was endeavouring to protect the children.
59. Finally, I am satisfied that statements made by the children to the Children's Guardian are corroborative of the mother's account of domestic abuse by the father. In response to questions about whether the children would like phone or video contact with the father, the Children's Guardian records that D stated "No, he beat us" and Y stated "No, he kicked us". The Children's Guardian further records that D stated, in response to being asked about spending time with his father in the future, "No, he beats my mum" and in response to being asked if he ever saw his father do this "Yes, I saw him do it, more than one time". When asked whether how he felt about speaking to his father by telephone or video, D is recorded as responding "no, he is trying to kill my mum." Whilst I acknowledge that the Children's Guardian considered that their views are aligned with those of their mother, the Children's Guardian *also* considered that the children were reflecting on their own previous experiences and their views were authentically their own.
60. In the circumstances I have set out, I am satisfied that this court can place weight on the matters summarised at paragraph 8 above when evaluating whether there is in this case a grave risk that returning the children to the Netherlands would expose them to physical or psychological harm or otherwise place them in an intolerable situation. Acknowledging that Art 13(b) looks to the future, in that it focuses on the circumstances of the children upon return, having regard to those matters I am satisfied that taken at their highest they ground a risk that the children will be exposed to physical and psychological harm or placed in an intolerable situation on return to the Netherlands. I am further satisfied that, assessed at its highest, the risk of exposure to physical and psychological harm or an intolerable situation attains a level of seriousness that can be properly characterised as 'grave'.
61. As made clear in the HCCH Guide to Good Practice on Art 13(b), the specific focus of the grave risk analysis in cases of this nature is the effect of domestic abuse on the children upon their return to the requesting state, and whether such effect meets the high threshold of the Art 13(b) exception. The incidences summarised above include alleged rape, controlling behaviour designed to limit the mother's ability to speak to others, her ability to work, her ability to integrate into Dutch society and her ability to attain financial independence, violence including serious assault by beating in the presence of third parties and requiring third party intervention to stop and the threatened use of weapons and threats to kill. In addition, the mother alleges the physical abuse of the children by the father, which the children corroborate, albeit not in detailed terms, and the threat of FGM in respect of B. The impact on the children of these circumstances set out above is well evidenced. When making a supervision order on 24 August 2023, the Dutch court was satisfied that the development of D, Y and B was seriously at risk in the context of the domestic abuse they had witnessed. In particular,

there is some evidence that D developed enuresis at school as a result. In the circumstances, I am satisfied that the matter relied on by the mother are of such a nature and of sufficient detail and substance that when considered cumulatively they constitute a grave risk for the purposes of Art 13(b).

62. Having so concluded, the task of identifying the situation as it would be if the children were returned forthwith to the Netherlands depends crucially on the protective measures (as distinct from the practical arrangements for the children's return) which can be put in place to ensure that they will not be exposed to the grave risk of physical and psychological harm and the intolerable situation identified by this court. As it was put by Cobb J in *Re A and R (1980 Hague Convention: Return to Australia)* [2024] EWHC 2190 (Fam), the court must consider whether those protective measures would be truly effective to meet the needs of the children and the mother. In considering efficacy, the court will necessarily need to bear in mind the nature and extent of the physical or psychological harm or intolerable situation that there is a grave risk the children will be exposed to.
63. Each case will turn on its own facts. However, in the context of the recognised adverse impact on children of domestic abuse, including the inability of a parent exposed to its pernicious effects to provide for their children's needs, I am satisfied that in a case involving domestic abuse the question of whether protective measures would be truly effective falls to be considered having regard to the *dicta* of Hale LJ (as she then was) in *TB v JB (Abduction: Grave Risk of Harm)* [2000] EWCA Civ 337; [2001] 2 FLR 515 at [44] concerning the relevance of the domestic abuse and maltreatment of the taking parent (emphasis added):

“It is important to remember that the risks in question are those faced by the children, not by the parent. But those risks may be quite different depending upon whether they are returning to the home country where the primary carer is the ‘left-behind’ parent or whether they are returning to a home country where their primary carer will herself face severe difficulties in providing properly for their needs. Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, *if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it.*”

64. The behaviour which the mother describes, and as summarised above, corresponds with the domestic definition of domestic abuse contained in s.1(3) of the Domestic Abuse Act 2021, being behaviour that consists of physical or sexual abuse; violent or threatening behaviour; controlling or coercive behaviour; economic abuse; or psychological, emotional or other abuse. Accepting that there are certain difficulties in adopting language that ascribes a level of severity to conduct that is *always* unacceptable and to be deprecated, and acknowledging once again that this court does not engage in a formal fact finding exercise in the present context, the incidences of domestic abuse and controlling behaviour set out above fall at the serious end of the spectrum of such abuse. The alleged domestic abuse and controlling behaviour extends in this case, at its highest, to rape, controlling behaviour designed to limit the mother's ability to speak to others, her ability to work, her ability to integrate into Dutch society and her ability to attain financial independence, violence including serious assault by beating in the presence of third parties, the threatened use of weapons and threats to

kill, the physical abuse of the children by the father and the threat of FGM in respect of B.

65. It is in the foregoing context that the father asserts that the protective measures sufficient to mitigate any risk identified by the court can comprise undertakings by him, given on the basis of no admissions, not to use or threaten violence, intimidate or harass the mother or the children; not to pursue FGM in respect of B; to pay the mother two months' rent and assist with any furniture for the benefit of the children; to pay as much maintenance as he can afford for the children; to pay for the costs of the children's direct flights to the Netherlands and to not attend the airport upon the children's return; to submit to an order preventing him from removing the children from the mother's care and control until the first *inter partes* hearing in the Netherlands; and to institute and/or support any civil or criminal proceedings in the Netherlands in relation to the abduction. In addition, the father informs the court that he accepts that he should not be informed of the mother's home address and the address of the children's school in the Netherlands (provided that the Dutch social services and Court are aware of those addresses) and accepts the suspension of any order for contact between himself and the children until the first *inter partes* hearing before the Court in the Netherlands when a decision as to contact can be made.
66. Where, in examining the efficacy of protective measures, the court must examine what, in *concrete* terms, will be the position of the children on return to the requesting state, obtaining sufficient information on protective measures to answer this question can present a challenge, particularly where the status of the taking parent in the requesting country is uncertain. This case is no exception. The following particular difficulties arise:
- i) In cases involving the 1980 Hague Convention, it is well established the court should accept that, unless the contrary is proved, the administrative, judicial and social services in another Contracting State are as adept at protecting children as they are in this jurisdiction (see *Re H (Abduction: Grave Risk)* [2003] 2 FLR 141, *Re M (Abduction: Intolerable Situation)* [2000] 1 FLR 930 and *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433). Accordingly, the court will ordinarily proceed by giving appropriate weight to the principle of comity (broadly construed) as it pertains to judicial and social care arrangements in different jurisdictions. In this case however, the mother seeks to demonstrate that the Dutch police and social services did not protect her sufficiently in the circumstances described above. The court has not been successful in obtaining information from the Dutch authorities that would have assisted it to further interrogate the mother's assertions in this regard. The mother offers no evidence on this point beyond her own statement and her assertion that the conclusion of the District Court on 28 August 2023, that what was required was consideration of "what is needed to improve communication between the parents and bring their relationship into calmer waters", demonstrates a deficit of protection on the part of the Dutch authorities.
 - ii) In providing her opinion to the court, the Children's Guardian asserts firmly that, in the context of the evidence before the court regarding domestic abuse and physical abuse of the children, protective measures would need to provide sufficient enforceable protection for B with respect to FGM and for the children with respect to removal from their mother's care and control and would need to

provide financial security and ongoing financial support for the mother and the children in the Netherlands. In this context, the Children's Guardian is further clear that, given the nature and extent of the allegations of domestic abuse, protective measures would need to ensure confidentiality of the whereabouts of the children and the mother until such time as a full welfare assessment is undertaken by Dutch social services leading to a clear plan being in place, in terms of immigration status, ability to return, benefit support and accommodation. However, there is no evidence before the court that the Dutch authorities would be willing to undertake such an assessment or the timescales for the same. Whilst the court has before it general information, contained in the decision of the Secretary of State, regarding the Dutch national police force, Dutch policies and legal measures with respect to domestic abuse and child abuse and the outlawing of FGM it has no specific evidence, and in the context of the mother contending that the Dutch authorities insisted on returning the father to the family home after his removal from by the police, of the availability of orders ensuring confidentiality of the whereabouts of the children and the mother until such time as a full welfare assessment is undertaken.

iii) Almost all, if not all, of the protective measures that the court is required to consider in this case comprise bare undertakings offered to the English court by the father. In circumstances where there is a need for caution when relying on undertakings as a protective measures, where there should not be a too ready acceptance of undertakings which are not enforceable in the requesting state and where, in the circumstances, the court needs sufficient evidence as to extent to which the undertakings will be effective both in terms of compliance and in terms of enforceability, there is a paucity of information before the court. There is, for example, no evidence before the court as to the extent to which the Dutch court would enforce undertakings given to the English court, or mirror those undertakings with orders of its own. Whilst both the United Kingdom and the Netherlands are parties to the 1996 Hague Convention, there in any event remains a lack of clarity as to whether undertakings given before, or injunctive orders made by the courts in one Contracting State will constitute necessary measures of protection taken in a case of urgency and enforceable in another Contracting State under Art 11 of the 1996 Hague Convention.

67. Overarching these issues, and of significance in this case, is the mother and the children's immigration status in the Netherlands. The expert evidence before the court demonstrates that the immigration position of the mother and the children in the Netherlands is at present uncertain, if not precarious, and that there is no confirmed timeline for the resolution of that significant uncertainty.

68. In particular, although the mother and the children *at present* have immigration status in the Netherlands, where there has been a transfer of her principal residence outside the Netherlands and where there has been a breakdown of her marriage and cohabitation with the father, that status could be revoked at any time, steps having already been put in place in that regard by the Dutch immigration authorities. Were the mother to seek to reinstate her immigration status and that of the children, the timescales for this are indeterminate and if seeking to do so by way of her own asylum permit, subject to an application to reside with close family members, the mother would have to return to the Netherlands and remain in the asylum seekers centre pending the determination.

Pending the determination of such applications, the mother's financial circumstances would be limited by, in the case of an application for her own asylum permit, the right to receive health care and state benefits of approximately €70 per week and the children's education, and in the case of an application for a regular residence permit no entitlement to social housing, state benefits or health care other than emergency aid and state benefits of approximately €70 per week for the children. The court has before it no evidence of whether and to what extent the foregoing matters will impact on the availability or efficacy of the protective measures proposed by the father.

69. Having regard to the matters set out above, including the nature and extent of the grave risk of physical and psychological harm or otherwise intolerable situation that the court has identified and the uncertain, if not precarious, immigration status of the children and mother in Holland, I am not satisfied that the protective measures proposed by the father would be truly effective to meet the grave risk of physical and psychological harm and intolerable situation in this case I am satisfied the children would be exposed to if returned to the Netherlands.
70. In considering the sufficiency of the protective measures, I acknowledge that in her decision of 13 September 2024 the Secretary of State concluded that, applying the principles set out by the House of Lords in *Horvarth v Secretary of State for the Home Department* [2001] 1 AC 489, the authorities in the Netherlands are able to provide effective protection for the mother to the standard set out in *Horvarth* (namely, a practical standard taking into account the duty owed by a state to its own nationals). That conclusion was based on the presence of the Dutch national police force, Dutch policies and legal measures with respect to domestic abuse and child abuse and the outlawing of FGM in the Netherlands. However, the *Horvarth* criteria were formulated in the context of the Convention and Protocol relating to the Status of Refugees. This court is required to undertake its own evaluation applying the principles of the 1980 Hague Convention, albeit that the material considered by the Secretary of State may be relevant to that latter exercise, provided that material is properly admitted in evidence.
71. The grave risk of exposure of the children to physical or psychological harm or an intolerable situation extends in this case, at its highest, to exposure to witnessing rape, controlling behaviour towards the mother designed to limit the mother's ability to speak to others, her ability to work, her ability to integrate into Dutch society and her ability to attain financial independence, violence to the mother including serious assault by beating, the threatened use of weapons and threats to kill, in addition to the risk of the physical abuse of the children and the threat of FGM in respect of B. In this case, the court has cogent corroborative evidence of the nature and extent of domestic abuse alleged by the mother. It is of particular note that that evidence demonstrates that during at least one incident of serious domestic abuse the father does not appear to have been deterred by the presence of third parties from seriously assaulting the mother and that the alleged assault ended only upon the intervention of a third party. Whilst it would not be appropriate for this court to comment on the competence of the agencies of another Contracting State, given the extended period with which the court is concerned it is plain that, whatever the position taken by the Dutch police and social services, those agencies were not able to prevent ongoing incidents of domestic abuse. Following the mother's departure from Holland, the evidence further suggests that the father communicated with her with WhatsApp messages containing threats to kill, sought to reach her through her brother and sought to identify her whereabouts and the

whereabouts of the children through third parties. The father does not appear to have been deterred from this course by ongoing proceedings. There is no evidence that the father has withdrawn his police complaint or taken steps to do so or as to how this situation may impact the mother's immigration status in the Netherlands

72. In the circumstances set out above, I am satisfied that the protective measures offered by the father in terms of undertakings (i.e. his promises to this court), which comprise the totality of the protective measures he proposes, are not sufficient to meet the grave risk of physical and psychological harm or intolerable situation identified. I accept that there is no evidence before the court of additional protective measures that might be secured from the Dutch authorities. However, and having considered whether to adjourn the case to see if further information could be obtained, I am satisfied that the uncertainty and insecurity of the mother and the children's position if they returned to the Netherlands is likely, in circumstances where protective measures will form the central element of risk mitigation for the children, to reduce the efficacy both of the protective measures proposed by the father and of such additional protective measures that might be possible. For example, secure, confidential housing is pre-requisite to the children and the mother benefiting from protection afforded by the Dutch police and social services. It is entirely unclear whether this would be available to the mother and the children, particularly were the mother to address any revocation of her current Dutch asylum permit by an application for independent refugee status. It is equally unclear what effect the revocation of the mother's asylum permit would have on her ability to access that protection in the interregnum.
73. In the foregoing circumstances, were the children to be returned to the jurisdiction of the Netherlands, I am satisfied that the concrete situation they would face on the ground would be one of a grave risk of physical and psychological harm or intolerable situation as the result of domestic abuse in the context of protective measures that are, on the evidence available to the court, uncertain in their reach and enforceability and further undermined by the uncertainty and insecurity of their immigration status and that of their mother. In that context, I am satisfied that the protective measures before the court would not be truly effective in meeting the concomitant grave risk to the children. Applying the principles of the 1980 Hague Convention and according due respect to the policy of that Convention, I am accordingly satisfied that the exception to summary return provided by Art 13(b) is made out in this case.
74. Whilst the court retains a discretion to make a return order notwithstanding that the exception under Art 13(b) of the 1980 Hague Convention is made out, I am satisfied that it would not be appropriate to do so in this case. As Baroness Hale made clear in *Re M (Children)(Abduction: Rights of Custody)* [2007] UKHL, [2008] AC 1288, it is not the policy of the 1980 Hague Convention that children be put at serious risk of harm or placed in intolerable situations, having made clear in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619 that:

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

Children's Objections

75. I am not satisfied that on the evidence currently before the court, and having considered carefully the submissions of the parties, that the Y and D object to returning to the jurisdiction of the Netherlands for the purposes of Art 13 of the 1980 Hague Convention.
76. On behalf of the mother, Ms Guha and Ms Asif submit that Y and D's stated views on returning to the Netherlands meet the requirements of Art 13 of the 1980 Hague Convention as the fact that those views are inextricably bound up with the children's views of their father, and their witnessing his perpetration of domestic abuse, do not prevent those views amounting to objections for the purposes of the 1980 Hague Convention. In support of that submission, Ms Guha and Ms Asif rely on the decision 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, [2015] 2 FLR 1074.
77. In *Re M* the court was concerned with three children in a case in which Art 13 was relied in the context of allegations of domestic abuse. The 13-year-old subject child presented as extremely distressed and recounted incidents of domestic abuse in the family home. The 11-year-old subject child presented as more resilient, but expressed concerns about the mother and his siblings when asked about returning to the requesting State. The 6-year-old subject child was also able to report incidents of domestic abuse and expressed herself to be scared of the father. In concluding that the judge at first instance had been wrong to conclude that the children were not objecting to return to the requesting State in the Art 13 sense, Black LJ (as she then was), making clear that there is no fixed age below which a child's objections will not be taken into account, acknowledged by reference to *Re R (Child Objection: Acquiescence)* [1995] 1 FLR 716 at 729 that whilst the objection must be to being returned to the country of the child's habitual residence rather than to a living with the left behind parent, there will be cases in which those factors are so inevitably and inextricably linked that they cannot be separated.
78. These principles are well established, but in this case I am satisfied that, beyond the evidence of the Children's Guardian that both Y and D lack the maturity to fully understand what they are objecting to, there is a more fundamental difficulty with the mother's case on child's objections under Art 13. Namely, the difficulty created by the limited nature of Y and D's engagement with the Children's Guardian. Both children were reluctant to, and did not engage in any detailed discussion with the Children's Guardian with respect to the situation in the Netherlands, their views relating to their father or how those views affected their opinion on returning to the Netherlands. Neither are recorded as having uttered more than a few words concerning the Netherlands, those words centring on their views about having contact with their father. Whilst it is clearly established that there will be cases in which the objection to returning is so inevitably and inextricably linked to an objection to living with the left behind parent that they cannot be separated, I am wholly satisfied that it would not be possible or safe to extrapolate from the *very* brief exchanges that took place between the Children's Guardian and Y and D an objection for the purposes of Art 13.

Effect of Protection Claim.

79. Finally, in light of my conclusion that the exception to summary return provided by Art 13(b) is made out in this case, it is not necessary in this case to consider the helpful submissions of the Secretary of State and the parties with respect to the current state of

the law regarding the implementation of return orders pending the determination of a protection claim at first instance or on appeal.

CONCLUSION

80. I have not found this an easy case to decide. The policy of the 1980 Hague Convention is to facilitate the prompt return of the subject to child to his or her jurisdiction of habitual residence so that courts in that jurisdiction can determine any welfare issues in respect of the child. The exceptions to that course of action provided by the 1980 Hague Convention are narrow. Further, this court does not conclude lightly that it cannot be satisfied that sufficient protective measures can be deployed in another Contracting State to meet the grave risk of harm that the court has identified. However, for the reasons set out above and on a fine balance, I am satisfied that the father's application for summary return of the children to the jurisdiction of the Netherlands must be dismissed. I will invite counsel to draw an order accordingly.
81. The observation of Hale LJ (as she then was) in *TB v JB (Abduction: Grave Risk of Harm)* that "We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it" pre-figured the evolution that has taken place in this jurisdiction over the past three decades in the understanding of the impact of domestic abuse on children. In 2000, Dr Claire Sturge and Dr Danya Glaser provided in *Contact and Domestic Violence – The Experts' Court Report* [2000] Fam Law 615, a detailed analysis of the impact of domestic abuse on children. That evolution in understanding continued through FPR PD12J and the Domestic Violence Act 2021. Whilst it has been observed, not inaccurately, that there has been a historic reluctance to refuse return orders in cases under the 1980 Hague Convention on the basis of allegations of domestic abuse, the courts in this jurisdiction have in appropriate cases refused to make return orders by reason of a grave risk of physical or psychological harm centred on domestic abuse (see for example *Re F (A Minor)(Abduction: Custody Rights Abroad)* [1995] Fam 224). There are also examples from other Contracting States, including the United States (*Walsh v Walsh* 221 F.3d 204, 220 (1st Cir 2000) and *Blondin v Dubois (Blondin IV)* 238 F 3 d 153 (2nd Cir 2001)), Canada (*Achakzad v Zmaryalai* [2011] WFP 2 and *Pollastro v Pollastro* (1999) 171 DLR (4th) 32), Australia (*State Central Authority, Secretary to the Department of Human Services v Mander*, 17 September 2003, Family Court of Australia) and New Zealand (*Mok v Cornelison* [2000] NZFLR 582).
82. Within this context, bald generalisations with respect to the judicial approach to particular types of case under the 1980 Hague Convention are unhelpful. With respect to cases involving alleged domestic abuse and coercive and controlling behaviour, there is no rule that such a case cannot satisfy the requirements of Art 13(b) or that it must do so. If, on the proper application of the approach set out by the Supreme Court in *Re E*, the court concludes that the threshold in Art 13(b), of a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, is met *and* that there are not sufficient protective measures to meet the grave risk identified, the court can, subject to its remaining discretion, refuse to make a return order. To repeat, each case will turn on its own facts.