Neutral Citation Number: [2025] EWHC 795 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. FD24P00574

Royal Courts of Justice
Strand
London, WC2A 2LL

17 March 2025

Before:

Mr Justice Harrison

Re G and B (Children) (Abduction: Settlement: Grave Risk: Ukraine)

APPROVED JUDGMENT

Mr Jonathan Evans (instructed by **Oliver Fisher Solicitors**) appeared on behalf of the **Applicant Father**

Mr Michael Gration KC and **Mr Stephen Bartlet-Jones** (instructed by **National Legal Service Solicitors**) appeared on behalf of the **Respondent Mother**

Hearing dates: 6, 7 and 17 March 2025

Mr Justice Harrison :

Introduction

1. Should children be exposed to the risks of war, which include a statistically low, but ultimately unquantifiable, probability of dying or suffering very serious injuries?

2. This question, as well as others, arises in the context of an application under the 1980 Hague Convention brought by the father of five-year-old twins by which he seeks their return to Ukraine.

3. For convenience, I shall refer to the father as 'F', to the children's mother, who is the respondent to the application, as 'M' and to the twins as 'G' and 'B' (one of them is a girl and the other a boy). The parties have been represented by Mr Evans (F) and Mr Gration KC and Mr Bartlet-Jones (M). I am grateful to all of them and to their instructing solicitors for the assistance with which they have provided me in a case I have not found easy to resolve.

Background

4. F would like the children to come back to Cherkasy, a city in central Ukraine on the Dnipro River some 200 km to the south of Kyiv. This is the city in which F, now aged 37, was born and where he has lived for all of his life and now works in engineering. M, now aged 36, was also born and raised in the Cherkasy region. Until 2023, she had lived there for all of her life. All four grandparents live in the city. The parties were married there. G and B were born there and lived there until August 2023. The court in Cherkasy has already been involved in the lives of these parties; in December 2023 it dissolved their marriage on M's application.

5. Cherkasy is a city of historical importance, the origins of which can be traced back to the thirteenth century. In the twenty-first century it has developed into a thriving economic and cultural hub with a population in excess of 250,000. A cursory glance at the internet is sufficient to reveal that it is graced by beautiful buildings, parks, theatres and other cultural and recreational amenities that are a feature of modern life.

6. Since February 2022, however, Cherkasy – in common with the rest of the country – has existed under the shadow of war. That month, the existing war developed in intensity after Russia launched an invasion which it characterised as a 'special military operation'.

7. As has been widely reported, the war has caused devastation and suffering in Ukraine on a scale not witnessed on European soil since 1945. As Hayden J related in *M v F* [2024] EWHC 1689 (Fam), '*the first casualty of war is the truth*'. Reliable statistics are difficult, if not impossible, to find. Estimates as to the number of fatalities caused by the war differ substantially. They are tainted by each side's motive to release information minimising their own casualties and maximising those of the enemy. The overall number is likely to run to hundreds of thousands and may exceed a million. The vast majorities of these have been members of the military but there has also been a significant number of civilian casualties. The United Nations Human Rights Commission measures the total number of civilian deaths and injuries in the tens of thousands, but an accurate number does not exist. Similarly, there is no accurate way of measuring the extent to which the human rights of the population have been violated. Individual cases of rape, abduction and other atrocities have been widely reported in the media.

8. Not all regions of Ukraine have been equally affected by the war. The devastation has been greatest in the East, where cities and towns have found themselves on the frontline of the fighting and, in some cases, reduced to rubble. The impact of the war has been much less in other areas, especially in the West of Ukraine. There are conurbations where the civilian infrastructure remains largely intact and where urban life continues to function well. It is going too far, however, to say that it functions 'as normal'. Even parts of the country hundreds of miles from the primary theatre of war experience periodic attacks from missiles and drones. Citizens have become accustomed to living under martial law in a state of high alert and to take shelter in bunkers in response to warnings of an imminent attack transmitted by siren or text message. Power outages are commonplace. Curfews are in place.

9. War is, by its nature, unpredictable. In the days since I heard oral submissions, I have read news reports about ongoing negotiations for a ceasefire. I do not know whether this will materialise or, if so, whether any negotiated truce will last.

10. After the February 2022 invasion, women and children were permitted to leave Ukraine to take refuge in other states. Men between the ages of 18 and 60 were not. They were required to remain to assist in the war effort with the potential for conscription to the military. This remains the position.

11. Across Ukraine, thousands of families made the difficult decision to separate. Fathers were left behind to fight for the country while their wives or partners and children left to find a safe haven in other countries. Nobody knew how quickly the war would progress, some believing that Kyiv might be captured within days or weeks.

12. Amidst that climate of great fear and uncertainty, on 12 March 2022, F signed a written consent permitting M to bring the children to the United Kingdom until 31 December 2024. I infer that when the document was signed no concrete plan had been formed for their departure; rather, the document was in place to enable M to take urgent action to flee the country in an emergency.

13. In the event, M and children did not immediately leave Ukraine, instead remaining in the family home. The invasion advanced more slowly than had initially been feared. Accordingly, F changed his mind as to the need for M and children to evacuate the country.

14. About a year and a half later, on 1 August 2023, without prior warning M left the family home with the children. She did so clandestinely taking limited belongings with her (the children left with only a small backpack). The following day, 2 August 2023, without informing F she removed the children to Poland. From there she took them to Germany, where she remained for some six months. In early February 2024, M brought the children to England. Again, she did not tell F.

15. The move to England was made easier by the fact that M's sister was already living here. Upon arrival, M and children moved into the property in East London occupied by her sister, her sister's husband and their two children. They have lived there since.

16. In May 2024, the children were enrolled in the nursery section of a local primary school, moving to the reception year in September. They have now been in reception for almost two terms.

17. In the meantime, F was kept largely in the dark about the children's movements. He was able to speak to them over three video calls in September 2023, but thereafter he was denied even that limited form of communication. He made persistent enquiries through the authorities in Ukraine and came to learn that the children were in Germany in October 2023, after he was served with an application for maintenance which M had made to the court in Ukraine. In December 2023, the children's paternal grandmother was able briefly to visit in them in their German home. F could not, as he was not allowed to leave Ukraine.

18. Unaware that the children had been taken from Germany to England, in April 2024 F made an application to the German authorities seeking the children's return under the Hague Convention. It took until August 2024 for the Central Authority in Germany to inform him that the children had left the country.

19. In October 2024, F made a second application under the Hague Convention. This time it was transmitted to the Central Authority in England. Proceedings were issued on 22 November 2024. As a result of investigative orders, the children's whereabouts was discovered and F finally came to learn that they had been brought to this country.

20. An interim order was made for the children to have twice weekly video contact with F. The sessions have been recorded and viewed by Ms Gwynne, the experienced Cafcass Officer from the High Court team who has prepared a report for the court. The conversations took place in Ukrainian which Ms Gwynne does not speak, but she was able to observe that whereas the children showed an interest in speaking to F in the initial sessions, the quality of the contact has more recently declined. Video contact is a poor substitute for face-to-face meetings, especially when it is being used

to rebuild a relationship which has been ruptured; young children often find it hard to concentrate or maintain an interest in this form of communication.

21. So why did M act as she did?

22. Within the confines of this summary process, in which neither party has given oral evidence to the court, this is not a question I can answer reliably. In her written evidence, M has said that her primary motivation for leaving was to flee the war. When she discussed matters with Ms Gwynne she put a different slant on it, emphasising the need to escape a marriage which had become characterised by F's domestic abuse. Her allegations include regular incidents of physical abuse the most recent of which occurred on 25 July 2023. She asserts that some of F's behaviour was witnessed by the children who were frightened of him. She says that F's assaults left her with bruising to different parts of her body and seeks to corroborate this with photographs.

23. For his part, F denies M's allegations of abuse. In his written statements he portrays her as an alcoholic who was abusive towards him, allegations which M denies. I am not able to resolve the parties cross-allegations without hearing them tested in cross-examination. I do observe, however, that F's willingness in March 2022 to allow M to care for the children without him for the best part of two years does suggest that at that time he had at least a degree of confidence in her abilities as a parent.

24. M explains that her second move to England resulted from her inability to settle in Germany. That may be so, but without hearing her explanation tested in evidence I am not able to take it as read. I note that the move happened within two months of a visit from paternal grandmother which ended acrimoniously. M, who by then had brought proceedings in Ukraine to obtain a divorce, is likely to have appreciated that it was only a matter of time before F had recourse to the legal process to try to recover his missing children. I note also that M flew to England, not from a German airport, but from Prague. This may be, as she says, because it was a more geographically convenient route; but other motives may also have been at play.

25. What is entirely apparent is that by the summer of 2023 the marriage had become deeply unhappy to a point where the parties could not live together harmoniously in

the same household. At the end of July 2023 – just a few days before M's departure - there was an incident which led to the police becoming involved. The parties each provide very different accounts of this and I am not able resolve what happened.

26. The conclusion of this chapter in the children's lives is that they have now been away from Ukraine for over 19 months. Their relationship with their father has been ruptured and is proving challenging to re-establish through video contact. Their relationships with other family members in Ukraine are non-existent.

27. F's case is that, at present, the only realistic prospect he has of properly restoring his relationship with the children is if they return to Ukraine. He cannot travel here for contact. The possibility of him recovering a meaningful bond with the twins over video appears doubtful. The children have little or no memory of their past life with him and, thus, no foundations upon which to build.

28. But returning the children cannot be achieved without imposing upon them significant further upheaval in circumstances where they have already experienced substantial disruption to their lives over the past year and a half. A return can only realistically be achieved by compelling their unwilling and fearful mother to fly with them to Poland and then embark upon a one-to-two-day journey by bus. They would leave behind the comfort and relative peace of their present home to return to a life overshadowed by periodic missile alerts and power cuts.

29. The acutely difficult problem thrown up by this factual scenario is one which I must resolve through the machinery of the 1980 Convention. M responds to F's powerful plea for the return of the children by contending that I cannot do so without harming them. She points to the fact that F did not make his application for more than a year after the date of their removal from Ukraine and says that the children are now settled in England. She contends, moreover, that a return would expose them to risks of such gravity that such a course should not be countenanced.

The legal framework

30. The Hague Conference on Private International Law (commonly referred to by the

acronym 'HCCH') is an organisation which boasts a distinguished history dating back to the nineteenth century. It convenes regular gatherings or 'sessions', typically at four-yearly intervals. During the 1970s HCCH became concerned to address the harm to children caused by international child abduction. The problem was magnifying as result of the increased potential for international travel witnessed during the second half of the twentieth century. The harmful effects of this unwelcome trend were already well-recognised in this jurisdiction. As Buckley LJ famously put it in *In re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250:

> "To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts (offered here as examples and of course not as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country ..."

31. The Abduction Convention, as it is sometimes known, was concluded on 25 October 1980 at the Hague Conference's fourteenth session. As is apparent from Professor Eliza Pérez Vera's Explanatory Report, its conclusion was a remarkable feat of diplomacy and draftsmanship. To achieve unanimity among those initial states who first signed up to it, some of whose legal systems will have differed substantially, compromises were inevitably necessary.

32. The Convention's goal was to ameliorate the harm caused by international child abduction. It was intended to serve both as a deterrent and a means for redress for left behind parents whose children had been unilaterally removed or retained. Ultimately, it aimed to promote the interests of children, both globally and in the individual cases which might come before the court. In *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, Baroness Hale recorded that each of those two objectives was a primary consideration. The Convention's aims and objectives find

expression in its preamble and in Article 1. Importantly, the preamble records the general principle that '*the interests of children are of paramount importance in matters relating to their custody*'.

33. Other than in the preamble, the interests of the child do not find *direct* expression in the Convention. It was framed so as to create a presumption in favour of a returning a child to the State of habitual residence. As Professor Pérez Vera explains (see paragraphs 20 to 26 of her report, which I am paraphrasing), it was necessary to mitigate the judicial instinct to investigate a child's welfare before making such a decision. The delay created by such an investigation might well be inimical to the welfare of an abducted child, for the reasons articulated by Buckley LJ. Additionally, as the Professor put it at paragraph 22:

> "…it must not be forgotten that it is by invoking 'the best interests of the child that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignore the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched."

34. In order to engage the machinery of the Convention, it is necessary for the applicant to demonstrate that the child has been subject to a wrongful removal or retention (Article 3). That proposition is not disputed in this case. It is common ground that the on 2 August 2023, the children were habitually resident in Ukraine and that F held and was exercising parental rights classified under the Convention as 'rights of custody'. M's act of removing the children from the jurisdiction, without consultation, was unquestionably a breach of those rights.

35. Where, as here, a child has been the subject of a wrongful removal or retention, Article 12 gives rise to a duty upon the State to which the child has been taken (the Requested State) to return the child to the State where they were habitually resident before the wrongful removal or retention (the Requesting State).

36. The extent of the duty to return under Article 12 depends upon how quickly the application for return has been made. Where it is lodged less than a year after the date of the wrongful act, the courts of the Requested State are obliged to order the child's return 'forthwith', subject only to the exceptions in Article 13. The position is different where the application is only made after a year has elapsed. In those circumstances, the second paragraph of Article 12 provides that the authorities in the Requested State '*shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment*.' Unless the child is 'settled', the general duty to return remains, but as Baroness Hale pointed out in *In re M and another (Children) (Abduction: Rights of Custody)* [2007] UKHL 55 ('*Re M*'), at paragraph 14, there is no longer a requirement for the return to take place 'forthwith'. The exceptions in Article 13 also apply to cases where applications are made after a year.

37. This is a case, as I have already recorded, where the application for return was made some 16 months after the date of the removal. M asserts that the children are '*now settled in their new environment*'. She also relies upon an exception to return created by Article 13(b), which provides that the court is not obliged to order a return where the person opposing a return establishes that '*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*'.

38. At one stage, M also claimed that F had either consented to or acquiesced in the removal, the establishment of which would trigger further exceptions to return under Article 13(a). These arguments have rightly been abandoned and I shall say no more about them.

Settlement

39. The burden of proof for establishing settlement under Article 12 lies on the respondent. The concept has been the subject of extensive judicial consideration by the higher courts. Cases in which the issue arises were described by Baroness Hale in *Re M* at paragraph 57 as '*the most "child-centric" of all child abduction cases*'. Given the amount of judicial learning there has been on the subject, it is perhaps surprising to find there remains some debate about aspects of the concept. In

this case, I have to consider (i) what it means for a child to be 'settled' in this context, and (ii) the date upon which the issue falls to be determined: is it the date of the application or the date of the hearing?

40. I begin by observing that the issue of settlement necessarily arises when a child has been away from their former country of habitual residence for more than twelve months. Thus, as Baroness Hale said in *Re M* at paragraph 47:

> "…the major objective of the Convention cannot be achieved. These are no longer "hot pursuit" cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors, … as well as [the child's] integration in her new community."

41. The concept of settlement was first considered at Court of Appeal level in *Re S (A Minor) (Abduction)* [1991] 2 FLR 1 ('*Re S*') where, in upholding a finding made by Sir Stephen Brown, P, that the child in question was not settled at the material time, Purchas LJ commented upon the mother's failure to demonstrate '*a long-term settled position in the environment in England'*.

42. In *Re N (Minors) (Abduction)* [1991] 1 FLR 413 ('*Re N*'), Bracewell J found that the word 'settled' should be given its ordinary natural meaning. She held that it was necessary for a respondent '*to establish the degree of settlement which is more than mere adjustment to surroundings*' and identified two aspects to the concept: '*a physical element of relating to, being established in, a community and an environment*' and '*an emotional constituent denoting security and stability*'. Referring to *Re S* she went on to say:

> "The phrase "long-term" was not defined, but I find that it is the opposite of "transient"; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent. What factors does the new environment encompass? The word "new" is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the mother, which has

> always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings."

43. The leading authority on what it means to be settled is widely considered to be the Court of Appeal decision in *Cannon v Cannon* [2005] 1 FLR 169. Thorpe LJ conducted a comprehensive review of previous cases decided in this jurisdiction and others, including Bracewell J's judgment in *Re N* which he described as '*a seminal* decision'. He rejected the notion that a court's focus in this context was confined to an examination of what have been termed *'the physical' aspects of a child's life'* such as the establishment of a home, enrolment in school and the development of friendships and interests in the community. He also rejected the approach known as *'equitable tolling*' adopted on some Circuits in the United States, whereby a period of delay achieved by the concealment of a child is disregarded for the purposes of calculating the twelve-month period in Article 12. Thorpe LJ's conclusions were summarised succinctly in paragraph 61, where he said:

> "I would unhesitatingly uphold the well-recognised construction of the concept of settlement in Article 12(2): it is not enough to regard only the physical characteristics of settlement. Equal regard must be paid to the emotional and psychological elements. In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased. The judges in the Family Division should not apply a rigid rule of disregard but they should look critically at any alleged settlement that is built on concealment and deceit especially if the defendant is a fugitive from criminal justice."

44. This approach has been followed subsequently. For example, Sir Mark Potter in *Re C (Child Abduction: Settlement)* [2006] 2 FLR 797 held at paragraph 46 that:

> "The word 'settled' has two constituents. The first is more than mere adjustment to new surroundings; it involves a physical element of relating to, being established in, a community, and an environment. The second is an emotional and psychological constituent denoting security and stability. It must be shown that the present situation imports stability when looking into the future."

45. Mr Evans relies upon *Cannon* to submit that there are, in reality, not two constituents to the concept of settlement (as suggested in *Re N, Re C* and other authorities) but three: physical, emotional and psychological. I accept, to some degree, this submission, but it is important also to emphasise that, identifying the different

aspects of being settled, Thorpe LJ in *Cannon* plainly was not intending to create a quasi-statutory test whereby each limb has separately to be satisfied before the Article 12 exception can be established; counsel on both sides accepted this. In many cases, there will be a considerable overlap between the emotional and psychological elements of settlement (and possibly also the physical element). In some cases, bearing in mind the summary nature of the proceedings and the probable absence of any expert evidence, the psychological aspects of settlement may be difficult to discern.

46. Black J (as she then was) warned against taking '*an unduly technical approach*' to the issue of settlement in *F v M and N (Abduction: Acquiescence: Settlement)* [2008] EWHC 1525 (Fam), [2008] 2 FLR 1270. This was a case where the child, aged 4 at the time, had been in the primary care of the father when she was unilaterally removed from nursery and then from Poland by the mother. F did not learn about the removal for some time and nearly two years had elapsed before he issued Hague Convention proceedings in England. By this time the child was aged 6. Orders for contact were made in the proceedings, but the contact was beset with difficulties. This '*troubled*' relationship did not prevent Black J from reaching the conclusion that the child was '*very well settled*' in England.

47. It is also worth remembering that *Cannon* was an extreme case where, as Mr Evans put it, the child in question had gone through a '*Day of the Jackal*-type' experience whereby in order to remain hidden from her father she had been required to assume the identity of a dead child. Singer J, at first instance, commented that '*[in] terms, therefore, of the degree of parental determination displayed to follow through the abduction and to sever the child's relationship with her father, this case is at the extreme end of the range*.' Psychological factors loomed large, but even in extreme circumstances such as these, Thorpe LJ did not determine that settlement built upon concealment and deceit could *never* be achieved; merely that the issue had to be looked at critically.

48. There is a degree of overlap between the question of settlement and the acquisition of a new habitual residence, but the two issues are not the same. The parallels between the two concepts were considered by Thorpe LJ in *Cannon*, but his analysis needs to

be read cautiously bearing in mind that since that case was decided the Supreme Court has determined that the European law test for habitual residence – '*some degree of integration in a social and family environment*' - should be imported into our domestic law: see *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2012] UKSC 60.

49. In the passage from *Re M* which I have cited above at paragraph 40 of this judgment, Baroness referred, in the context of settlement, to the child's '*integration into her new community*'. Despite the similarity of her formulation with the test that later came to be adopted for habitual residence, she was not in that context seeking to compare the two concepts. Plainly, in my judgment, it is necessary to demonstrate a greater degree of integration in a new environment to establish settlement than may be required to show that a child's habitual residence has changed. Article 7 of the 1996 Hague Convention, for example, envisages a situation in which a new habitual residence can be acquired without settlement being achieved. Whereas a new habitual residence can be acquired in a single day, it is difficult to conceive of settlement being achieved other than over a period measured in months, at least.

50. In common with Williams J in *AH v CD* [2018] EWHC 1643 and Robert Peel QC (as he then was) in *AX v CY (Article 12 Settlement)* [2020] 2 FLR 1257, I consider that the question of settlement should be considered 'holistically', not in stages. The court must take into account all of the relevant circumstances bearing in mind that within the confines of a summary process the picture is likely to be incomplete. Information about the child's circumstances prior to an abduction can be relevant to the issue. The court's primary focus is on the question of whether settlement has been achieved '*in a new environment*' as opposed to with the abducting parent. Concealment and deceit are highly relevant to the issue, but not determinative. The severance of a pre-existing parental relationship is also very relevant, but again not determinative (as demonstrated, for example, by Black J's decision in *F v M and N*). The court must consider whether the child has become established in a new environment on a permanent or long-term, as opposed to transient, basis: *Re N.*

51. So far as the relevant date for determining settlement is concerned, I was surprised to learn from both counsel that there is no binding authority on this point. In the

majority of cases, whether the issue is considered at the outset of the proceedings or the date of the final hearing is highly unlikely to yield different results.

52. In *Re N*, Bracewell J held that settlement falls to be considered at the date of commencement of proceedings '*as otherwise any delay in hearing the case might affect the outcome*'. On the facts of that case, the issue was academic and does not appear to have been fully argued. Mr Gration KC and Mr Evans informed me that, with one exception, *Re N* has been consistently followed by other judges at first instance although I was not shown any authority in which that conclusion has been fully reasoned or one in which it made a difference to the outcome.

53. The outlier, as both counsel characterised it, is *E v L (Abduction: Settlement)* [2022] 1 FLR 1285. In that case, Mostyn J came to the opposite conclusion from Bracewell J, and held that the question of settlement falls to be decided at the date of the hearing. While it may be an outlier, I find Mostyn J's analysis persuasive and agree with it. His interpretation of Article 12 makes sense linguistically (see paragraphs 61 and 62 of his judgment), but more importantly it is consistent with the child-centric nature of the exception emphasised in *Re M* and the aim of the Convention more generally to operate so as to promote the interests of children. As Mostyn J put it at paragraph 63:

> "The interpretation of Bracewell J might result in a child who was not settled as at the date of the commencement of proceedings, but who had become settled by the date of trial, being [automatically] sent back. This would be completely perverse."

With the addition of my word in square brackets, I respectfully agree.

54. The issue may well become significant in cases which are remitted following an appeal or which otherwise have been subject to lengthy delays (perhaps because of a concurrent asylum claim). In my view, it would be absurd and wholly inconsistent with the child's interests, if the court was required to examine an historical position and ignore more recent information. It could also create real forensic difficulties, bearing in mind that in settlement cases the most important evidence relating to the issue is usually a report from Cafcass which examines the child's circumstances as they presently are. So far as I am aware, it has never been suggested that issues such as a child's objections or questions of intolerability must be examined at the date

proceedings commence. I can see no logical reason for adopting a different approach to the question of settlement.

Article 13(b): grave risk

55. Just as with settlement, the burden of establishing the grave risk exception lies on the respondent to an application.

56. The 1980 Hague Convention was given legislative effect in this jurisdiction as a schedule to the Child Abduction and Custody Act 1985, which came into force in 1986. Although I have not undertaken a comprehensive trawl, I do not think it is much of an exaggeration to say that for the first two decades of its operation the number of reported cases in which the Article 13(b) exception was found established could be counted on one hand. Respondents faced significant obstacles in proving the existence of the requisite grave risk. The threshold was very high and even when met, courts retained a discretion to order a return and would only refuse to do so in exceptional cases. Respondents who refused to return, thus causing children to be separated from them, were given short shrift by the application of the 'coach and four' principle first articulated in *C v C (Abduction) (Rights of Custody)* [1989] 1 WLR 654. It was virtually taken as read that undertakings would offer sufficient protection to ameliorate any perceived risk without proper (or usually any) consideration as to whether these would have any impact at all in the Requesting State.

57. One major obstacle arose from the burden of proof. It was only in rare cases that the court would permit oral evidence to be heard. But without oral evidence, establishing the existence of a risk on the basis of disputed allegations was almost impossible. The difficulty for respondents was encapsulated in the following passage from the Court of Appeal decision in *In re F (A Minor) (Child Abduction)* [1992] 1 FLR 548:

> "If a judge is faced with irreconcilable affidavit evidence and no oral evidence is available or, as in this case, there was no application to call it, how does the judge resolve the disputed evidence? It may turn out not to be crucial to the decision, thus not requiring a determination. If the issue has to be faced on

> disputed non-oral evidence, the judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the judge is entitled to reject it. If, however, there are no grounds for rejecting the written evidence on either side, the applicant will have failed to establish his case."

58. The approach which the courts today adopt to Article 13(b) is very different from that which I have just described. Change was brought about through a series of judgments given in the House of Lords and the Supreme Court, primarily by Baroness Hale, and in the Court of Appeal, primarily by Moylan LJ. The effect of these was to refocus Article 13(b) in order to achieve its intended purpose of protecting vulnerable children from being exposed to serious harm.

59. The leading authorities now are *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 (‘*Re E*’) and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10. The core principles expressed in those cases have been refined by the Court of Appeal in subsequent cases. A helpful summary of the key principles and the approach now adopted was set out by Baker LJ in *Re IG (A Child) (Child Abduction: habitual residence: Article 13 (b))* [2021] EWCA 1123 (‘*Re IG’*) at paragraph 47:

> “(1) The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".
>
> (2) The focus is on the child. The issue is the risk to the child in the event of his or her return.
>
> (3) The separation of the child from the abducting parent can establish the required grave risk.
>
> (4) When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.
>
> (5) In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b)

and so neither the allegations nor their rebuttal are usually tested in cross-examination.

(6) That does not mean, however, that no evaluative assessment of the allegations should be undertaken by the court. The court must examine in concrete terms the situation in which the child would be on return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do.

(7) If the judge concludes that the allegations would potentially establish the existence of an Article 13(b) risk, he or she must then carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to the risk.

(8) In many cases, sufficient protection will be afforded by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there.

(9) In deciding what weight can be placed on undertakings, the court has to take into account the extent to which they are likely to be effective, both in terms of compliance and in terms of the consequences, including remedies for enforcement in the requesting State, in the absence of compliance.

(10) As has been made clear by the Practice Guidance on "Case Management and Mediation of International Child Abduction Proceedings" issued by the President of the Family Division on 13 March 2018, the question of specific protective measures must be addressed at the earliest opportunity, including by obtaining information as to the protective measures that are available, or could be put in place, to meet the alleged identified risks."

60. Further guidance as to the gravity of the risk needed to satisfy Article 13(b) can be found in *Re E*, where Baroness Hale said at paragraphs 32 and 33:

"…the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.

…the words "physical or psychological harm" are not qualified. However, they do gain colour from the alternative "or *otherwise*" placed "in an intolerable situation" (emphasis supplied). As was said in *Re D*, at para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a

> situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent…"

61. In the majority of Article 13(b) cases, the asserted risks arise from allegations of domestic abuse which, typically, are denied by the applicant and incapable of resolution through a summary process without oral evidence. The guidance as to the importance of identifying protective measures and ensuring their effectiveness, summarised in *Re IG*, is aimed primarily at cases of this type.

62. Not all risks, however, arise from the alleged conduct of the applicant parent; in some cases they may have nothing to do with him. In *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, for example, Baroness Hale made clear that a lengthy delay in the bringing or resolution of proceedings can give rise to the level of intolerably contemplated by Article 13(b). This principle was applied in *RS v KS* [2009] EWHC 1494 (Fam), a case where by the time of the hearing the child has been in England for some two years and become settled, but the 'settlement' exception did not arise as the proceedings had been issued within the requisite twelve month period. Her decision was later approved on the facts by the Court of Appeal in *Re L-S (A Child)* [2017] EWCA Civ 2177, although McFarlane LJ (as he then was) highlighted the need for great caution '*with respect to the extent to which the mere passage of time may be deployed in establishing an intolerable situation sufficient to satisfy Article 13(b)*' and held that *'[t]he passage of time in that context, rather than being a simple matter of calculation, must… be viewed through the lens of the requirements of Article 13(b)*'. In cases such as these, the risks are difficult to ameliorate with protective measures. The court's essential task is to evaluate whether they have reached such a level that they can properly be classified as 'grave'.

63. The conflict in Ukraine is the first time that a Contracting State to the 1980 Hague Convention has been afflicted by war. The risks arising from a war are, to say the

least, challenging to evaluate. I have already highlighted the point made by Hayden J in *M v F* as to the absence of reliance information.

64. In this jurisdiction, the risks presented by the war in Ukraine have been considered by a number of judges at first instance: *Q v R* [2022] EWHC 2961 (Fam) (Williams J); *Re Z and X (Children: Article 13(b): Return to Kyiv)* [2023] EWHC 602 (Fam) (DHCJ Dexter Dias KC (as he then was)); *Re N (A Child) (Ukraine: Art. 13(b))* [2024] EWHC 871 (Fam) and *Re N (A Child) (Ukraine: Art. 13(b)) (No 2)* [2024] EWHC 1282 (Fam) (DHCJ McKendrick KC (as he then was)); *M v F* (Hayden J); *Re Z and X (Visit to Ukraine)* [2024] EWHC 314 (Fam) (Cobb J). The overarching theme of those authorities is that each case is intensely fact-specific; the existence of the war is not *per se* a reason to refuse to return a child, although for obvious reasons it is highly relevant. The court must scrutinise with care the circumstances of the proposed return.

65. I draw from those authorities that the matters of potential relevance to the issue of risk under Article 13(b) include (i) the part of Ukraine to which the child is to return; (ii) the age of the child; (iii) the circumstances of the parents; (iv) whether the child's primary carer is the person who wishes the child to return; and (v) the overall circumstances of the child both in this jurisdiction and in Ukraine. This is not intended to be an exhaustive list.

Analysis and conclusions

Settlement

66. I begin by recording once again the fact that the children have now been absent from Ukraine for 19 months. The first part of that period was, however, spent in Germany. Their 'new environment' is in England where they have been for just over a year.

67. Mr Evans makes the point that when the application was issued the children had been in England for less than twelve months; it is only because of the initial period in Germany that the exception is available at all. Whilst this is true, I think it is of limited relevance to the factual issue I have to decide.

68. I do consider it relevant that from the day of the children's arrival in England they have been able to live in the same home with M's sister and her family. This is a five-bedroom property of which M and children occupy two. I accept Mr Gration KC's submission that the fact that M knew in advance her intended destination allowed for some pre-planning to take place. It has meant that the children were registered with a GP quickly (on 10.2.24) and were able to start at nursery school in May 2024, within about three months of their arrival. They have been registered with a dentist since June 2024. I also consider it to be of some significance that the children have been staying with members of their own extended family. M has been able to work, leaving the children to be cared for by their aunt with whom they are likely to have a stronger bond than, say, a childminder. The sister's children are adults and I have little information about them in evidence. I assume though that, through living in the same household, they too will have formed relationships with their young cousins.

69. By contrast, I reject Mr Gration KC's submission to the effect that, as a consequence of the children's relationship with F having become severed while they were in Germany, the continued absence of the contact following the move here did not have a material impact on the ability to become settled. In my judgment, the opposite is more likely to be true: F's prolonged absence from the children's lives, at their young ages, may have been destabilising for them. I need to be cautious, however, about attaching too much weight to this; Ms Gwynne was careful in her evidence to point out that the extent to which F's absence may have adversely affected the children is likely to depend upon the truth or otherwise of M's allegations of domestic abuse, which I am not in a position to resolve. I also note that M did facilitate contact by video in September 2023. On her case, she stopped the contact as F was using the calls to undermine her and make negative comments about her to the children. Without oral evidence, I cannot assess whether she is telling the truth about this.

70. Whether or not M's allegations are true, it does seem to me relevant to have regard to the fact that the children have been subjected to two moves: they were removed from Ukraine when they were aged not yet four and then subjected to a further move six months later. This period of prolonged disruption is likely to have destabilised them and made it more difficult to become settled.

71. Mr Evans rightly reminded me that this a case where the children's whereabouts have been concealed from the father. *Cannon* is authority for the proposition that this remains a factor of relevance, even in circumstances less extreme than those considered by Thorpe LJ. Although there has been a degree of concealment here, it is right to bear in mind that this is not a case where the mother and children have been in hiding. M has not been living as a fugitive from justice; nor has her immigration position been precarious (M secured visas under the Ukraine Settlement Scheme). I must also take into account that, although she has not revealed to F where she is living, she has not taken active steps to keep the children concealed. The fact that M moved in with her sister will have made the children easier to trace.

72. M says in her first statement that since coming to England the children have '*settled into life*'. She points to the fact that a report from their nursery in June said that they had settled in well, although I attach limited weight to this as it seems to me that the word '*settled*' being used by the nursery in that context cannot be equated to the type of settlement contemplated by Article 12. She says that the children have made friends and provides photographic evidence of them enjoying karate club and spending days out. As well as making friends, M also says that the children have an established routine with her extended family members (some of whom, of course, they live with). M says that she has '*an incredible support network*', more extensive than that which she previously had in Ukraine. M also describes the children as being 'much happier' in England '*without fear of war*', adding that the '*sense of safety has positively impacted their emotional wellbeing, allowing them to thrive in their new environment*'. Although this is difficult for me to assess, I have no reason to doubt that M will have felt fearful living in the shadow of a war, with regular alerts and evacuations to shelters. I think it is likely that, on some level at least, these young children will have experienced her fear. Although what she says about the children's '*sense of safety*' is forensically expedient, it also makes sense and is likely, in my view, to have a degree of truth to it.

73. I have received important evidence about the children's lives in England from Ms Gwynne of Cafcass, both though her written report dated 11 February 2025 and her

oral evidence. Overall, and subject to a caveat I identify in the next two paragraphs, I found her evidence to be nuanced, balanced and helpful.

74. Ms Gwynne's involvement came about pursuant to a direction for Cafcass to report in relation to (a) whether the children are now settled in England, and (b) whether the children should be joined to the proceedings. With the benefit of hindsight, I consider it may have been better for point (a) to have been expressed more openly. The question of settlement is one of fact for the trial judge and it may create difficulties for a Cafcass officer if their remit is phrased in terms which invite them to express a conclusion on that issue. By way of comparison, Cafcass Officers are no longer asked to report in Hague proceedings on whether children 'object' to returning to a particular country; the standard direction is for them to report as to their 'wishes and feelings', as whether these amount to an objection is a matter for the court.

75. In this case, Ms Gwynne undertook an analysis in which she considered separately the children's physical, emotional and psychological settlement, presumably based upon her understanding of what is required under the relevant authorities. In my judgment, her approach was somewhat over-compartmentalised. I gained the impression that from her perspective a child cannot be settled for Article 12 purposes without separately satisfying each of the three aspects of settlement. In relation to the children's psychological settlement she said:

> "Furthermore, I do have concerns around the psychological aspect of settlement due to the children's separation from their father and the lack of a meaningful spending time arrangements with him. There is an argument that the children can never be settled in England without a secure and purposeful relationship with their father in Ukraine. The difficulty of reestablishing that relationship is that the father is unable to see the children in person and there is no known timeframe as to when that might change if they are to remain in England. In the absence of the children's relationship with their father or a certain plan of how this could be achieved, it is difficult to conclude that they are fully psychologically settled."

I accept Mr Gration KC's submission that requiring a child to achieve the type of 'full psychological settlement' to which Ms Gwynne referred in order to satisfy the test in Article 12 sets the bar too high. While, therefore, I found the points Ms

Gwynne made to be individually insightful, I am more cautious when it comes to the weight I give to her ultimate conclusions.

76. Ms Gwynne was able to make contact with the children's school, which she describes as '*an established and positive aspects of their lives*'. After starting in the nursery year in May 2024, they moved to reception in the main school in September 2024 and have now completed nearly two terms there. They are well-presented in school and their record of attendance and punctuality is good. As Ms Gwynne points out, the transition within the same school will have brought '*continuity and familiarity*' for them.

77. In line with the school's policy for twins, the children have been placed in separate classes within their year group. It appears that since moving to reception they have had contrasting experiences. B is reported to be working at the expected attainment levels for his year and has '*lots of friends and interacts well with other children*'. By contrast, G is working below the expected level. When outdoors, she will only interact with her brother. She does not talk to or play with other children or adults. Despite '*daily interventions*' (which Ms Gwynne explained are likely to entail spending one-to-one time with the teacher), she still does not speak English. The school's perception is that she has become less confident since moving from nursery, where she was in a class with her brother.

78. Ms Gwynne has been able to visit the children at home and reported as follows:

> "There is a warm home environment and they are supported by their maternal aunt and her family. There are toys in their room and their artwork adorns the walls. There have been days out during the weekends and school holidays."

79. On the basis of observations such as these, Ms Gwynne expressed the following view:

> "I was left with the impression that the children are generally happy and physically settled in England and, almost a year on from their arrival in this country, regard London as their home. Given their age and the fact that they previously spent six months living in fairly transitory circumstances in

> Germany, they appear to have very limited memories of their former lives in Ukraine."

80. Notwithstanding her conclusion that the children are physically settled in England, Ms Gwynne describes her analysis in relation to their emotional settlement as being '*more nuanced*'. She says that their security and stability has '*largely been achieved*' pointing out that both M and the children have settled into an established routine. M works part-time and receives state benefits. There are no safeguarding concerns. The children's interactions with M are '*warm*'. B is clearly doing well at school and has made friends independently. G, as I have already noted, is finding things more difficult and '*relies heavily on her twin in school*'. This all leads Ms Gwynne to conclude that B '*is further along the spectrum of emotional settlement*' than his sister.

81. Ms Gwynne also draws attention to the fact that the children's family life is '*culturally Ukrainian*'. They do not currently attend clubs or activities outside school, although they were previously enrolled in a karate class which was cancelled because the time clashed with F's video contact.

82. Ms Gwynne is most hesitant when she considers '*the psychological aspect of settlement*'. As I have already pointed out, the children's separation from F and the lack of any meaningful contact arrangements led her to express the view in her report that it is difficult to conclude that the children '*are fully psychologically settled*'.

83. Ms Gwynne had the opportunity to watch videos of the contact which has been taking place remotely between the children and F since December 2024. Her ability to analyse the quality of the interactions was somewhat limited as the conversations took place in Ukrainian. Nevertheless she found the children's tone of voice and body language to be illuminating. Their first video call took place on 7 December 2024, some 15 months after the previous time the children had had any form of contact with F. Ms Gwynne observed that the children became engaged as soon as F answered the call and they appeared to respond in an animated fashion to his questions. Ms Gwynne opines that this initial exuberance suggests that *'[F] remains an important adult for [the children] and that they have core memories of spending time with him*'. I agree with this and would add that these initial interactions also tend

to suggest that over the period when there was a gap in contact M did not seek to influence the children against their father. F described to Ms Gwynne his initial calls with the children as *'awesome*'.

84. More recently, however, the quality of the calls has declined such that '*the children are barely interacting with their father and move away from the screen entirely'*. Ms Gwynne identifies that there is a spectrum of possible reasons for the '*marked deterioration*' in the quality of the calls, ranging from the initial novelty of the calls having worn off to M having sought natively to influence the children. Although it is difficult to identify where along the spectrum the cause may lie, Ms Gwynne makes the following observation in this context:

> "I note that the children were not able to share any detailed information with me about their father when I met with them and there was no 'script' from them about his perceived failings, as is sometimes the case within Hague proceedings when a Cafcass officer is concerned that the child has been influenced to speak negatively about a left-behind parent."

85. Although within this summary process the evidence I have is limited, this observation, combined with Ms Gwynne's description of the initial calls, leads me to conclude that, despite M's failure to promote contact over an extended period of time, this is not a case where she has sought actively to alienate the children from F. I also bear in mind that, having initially abducted the children, M did at least allow some video contact to take place on three occasions in September 2023, before this was stopped for reasons which are disputed. She also permitted the paternal grandmother to visit the children in Germany in December 2023.

86. Ms Gwynne was asked in her evidence about the impact which a lack of contact with F may have had on the children's ability to feel secure and stable. She responded that this was difficult to analyse without determining M's allegations of domestic abuse. Her point was that if, as M contends, the children had been living in a home where they were exposed to the harmful effects of domestic abuse, removing them from that environment is likely to have had a positive impact on their feelings of security and stability. I consider that there is force in this. To my mind, it illustrates the difficulty of trying to come to reliable conclusions about a child's psychological settlement within the confines of a summary process. The difficulty is all the greater when, as

here, the court is dealing with young children whom it is difficult to interview and who will obviously not be as forthcoming in describing life from their perspective as a teenager would. As Ms Gwynne put it in her oral evidence, '*talking to children that age is difficult, especially with an interpreter*'. Her interview with G and B lasted for some 25 to 30 minutes, and within that short period there was a limit to '*what [she] was able to do*'.

87. In determining whether the children are settled for the purposes of Article 12, my task is to consider the matter holistically. Focussing first on B, the evidence that he is settled in England is considerable. He has had a stable home with members of his extended family for over a year. He and his twin sister share a nice bedroom in the home. He has a regular routine which involves spending meaningful time with his aunt. He appears to be happy and thriving at school. He has developed friendships and his English is improving. He may not currently attend clubs outside school, but he was previously enrolled in a karate club. He has an especially close bond with his twin sister which may mean that he has less need for a wide circle of friends and activities outside school than other children his age. The last 13 months of his life have been stable and peaceful, following a period where his day-to-day life will have been clouded by the war and a further unsettled period in Germany.

88. I have already referred to the main factors which point the other way. Of these, the most significant is the absence of contact with F but, in my judgment, this absence has not prevented B from becoming settled. On the contrary, having weighed this factor and others, such as the children's concealment, against the matters set out in the preceding paragraph I have come to the conclusion that B is now settled in his new environment for the purposes of Article 12. It is likely that I would have come to a different conclusion if the evidence had suggested that M had been actively seeking to alienate the children from F. This is not the case.

89. So far as G is concerned, the evidence suggests that she has been finding life at school significantly more difficult than her brother. She is not thriving socially, as he appears to be, and academically she is struggling. I need to be cautious about attaching too much weight to her difficulties at school, bearing in mind that there could be a number of reasons for this. She settled in well in her nursery class and

some of her more recent issues may have been caused by being separated from her twin, to whom she is obviously close. Nevertheless, if I were considering her position in isolation, the evidence overall would have led me to the conclusion that she was not now settled. In circumstances where I have concluded that B is settled, however, it seems to me artificial to reach the opposite conclusion in relation to his twin sister. When I stand back and examine the position of both children in the round by considering the totality of the evidence, I am satisfied that they are both settled for Article 12 purposes. In any event, there can be no question of separating the twins. To do so would plainly be intolerable given the close bond they evidently have.

90. The fact that the children are settled for Article 12 purposes means that I have a discretion as to whether they should be returned to Ukraine. I address this separately below.

Article 13(b)

91. Mr Gration KC and Mr Bartlet-Jones begin their skeleton argument by citing the well-known proposition from *Re E* that, for Article 13(b) purposes '*a relatively low risk of death or really serious injury might properly be qualified as "grave"*'. I remind myself, however, that Baroness Hale said only that such a risk 'might' meet the threshold, not that it would necessarily do so. Otherwise, it could be suggested that activities such as skiing or even driving a car fall within the ambit of the article.

92. Mr Gration KC and Mr Bartlet-Jones highlight the risks which the children would face in Cherkasy and submit that:

> "the mother's evidence (both specific and general) in relation to the situation in Cherkasy demonstrates a significant risk to the children (and the family as a whole) as a consequence of the conflict. The summary within her recent statement … demonstrates that Cherkasy remains subject to regular and frequent attacks which have caused injury and damaged buildings, including one on the building next to that in which the father lives... There is no protection that this court can put in place against indiscriminate acts of violence against the whole community, and the consequences for the children of facing such an attack could be extremely serious including through serious and perhaps lifechanging injury or death."

I should record that in oral submissions, Mr Evans told me on instructions that F maintains that the building which sustained damages was in fact some 3 km away from his home (not next door). F did not put this in evidence when he responded to M's most recent statement, but the precise location of the building does not much matter; the point is that nowhere in the city is entirely safe from attack.

93. Mr Gration KC and Mr Bartlet-Jones also drew to my attention recent news reports that between 11 and 18 February 2025 there were four missile and drone attacks in the Cherkasy region. One alert is said to have lasted for almost six hours. There have reportedly been casualties of the attacks as well as damage to buildings.

94. My attention was drawn to the advice issued by the Foreign, Commonwealth and Development Office ('FCDO') in relation to travel to Ukraine. Cherkasy sits well inside the red zone where the FCDO advises against all travel. This contrasts with the yellow zone in the West of Ukraine where the advice is to avoid all but essential travel.

95. By contrast, F paints a very different picture of life in Cherkasy from that described by M. Despite the fact that it was produced late and without permission, I allowed him to adduce evidence from a lawyer, Mr Nykitenko, who sets out that: the courts system continues to function well in Cherkasy; schools continue to operate; shops remain open without shortages; cultural venues are open; energy supplies are stable; during air raids, schools (and other establishments) stop operating and people are provided access to bomb shelters; public transport is functioning; roads are being repaired; hospitals and clinics are operational. I have no reason to doubt what Mr Nykitenko says, but I must treat his letter with a significant amount of caution as it is not a neutral document and its late production put M in a position where she was unable to respond. Moreover, the letter is described as a '*legal analysis*' and focuses primarily upon the legal and regulatory structures in place as opposed to describing in detail what is happening on the ground. Some such information is provided but it is unclear whether this is based upon Mr Nykitenko's personal knowledge or whether he is simply quoting other sources or making assumptions on the basis of the laws, orders, decrees and directives to which he refers. Mr Nykitenko makes the point that 92% of missiles and drones are successfully intercepted by the defence systems

in place. The corollary of that, however, is that a small but significant number still get through; some of those which are intercepted may also pose risks from falling shrapnel.

96. As I have already made clear, the probability of being a casualty of war is impossible accurately to estimate. In the absence of reliable information, the best and most neutral evidence I have in relation to the risks posed in Cherkasy is the FCDO guidance. I take on board the note of caution sounded by Hayden J in *M v F* against placing too much reliance upon FCDO advice, in circumstances where it is not aimed at Ukrainian nationals. In my view, however, the warning it provides against all travel to that part of the country is something to which I should nevertheless give weight, even though it is not determinative of the issue of risk. Different judges have reached different conclusions as to whether the risks posed by a return to Kyiv and its environs would be sufficiently grave to fall within Article 13(b) (DHCJ Dias KC and DHCJ McKendrick both found that a proposed return to that part of the country satisfied the article whereas Hayden J reached the opposite conclusion).

97. Each case ultimately is fact-specific. The situation of the children with whom I am concerned is very different from that of the child dealt with by Hayden J in *M v F*. B and G were not yet 4 when they were removed from Ukraine and after 19 months they no longer have any memory of their former lives there. In *M v F* it was the children's primary carer mother who wanted to return to Ukraine with the child and, thus, the child would be fully supported in her return. This will have made the transition back from England immeasurably easier than in a situation such as the present one where the children would be returning under compulsion with a mother likely to be fearful about the prospect. At the age of 5, the children will have limited comprehension about what war entails. They would, however, be exposed to their mother's anxieties and fears and immersed in the overall state of high alert experienced by the population at large. Their environment in Ukraine would be in stark contrast to the peaceful and stable existence they have experienced in England over the past 19 months.

98. In my judgment, the risks to these children of uprooting then from their present established environment to one overshadowed by war are not ones which, to

paraphrase Baroness Hale, they should be expected to tolerate. The amount of disruption to their lives and the climate of apprehension and fear to which they would be exposed are likely to have enduring consequences for them which, in my view, can properly be characterised as grave, even leaving aside the statistical risk of becoming a casualty of war. Although I acknowledge that Ms Gwynne was not directed to report in relation to Article 13(b), I nevertheless consider that there is force in the point she makes at paragraph 45 of her report when she says:

> "The children left Ukraine as three-year-old toddlers and at that stage would have had scant comprehension of what war entailed. If they are to return at their current age and stage of development, it is likely that each child will have a greater capacity to be emotionally impacted by the situation around them as they adapt back to daily life in their hometown and attend kindergarten alongside other children and teaching staff who will be likely to share their own fears and experiences with them. In the event that their mother was to return with them and is fearful of the war and the daily impositions that it brings to life in Ukraine, it is likely that the children would also soon experience her anxiety. We know that [M] has spent the last 18 months actively trying not to live in the country. It is likely that much of how children of this age experience the war is at least in part derived from either the reticence or robustness of the key adults around them."

99. In *M v F* the family was fortunate to have very considerable resources and the mother was exceptionally well-placed to protect the children from the risks of war. By contrast, this mother's resources are far more limited. It is also highly unlikely that F would be willing to confer on M the type of authority she previously had to depart from Ukraine in the event of an escalation. I do not suggest that F would wish his children to be exposed to danger, but, as their respective stances in these proceedings illustrate, each of the parties is likely to have a very different perception as to the acceptable level of risk for the children. In the absence of parental co-operation, M's only recourse if she perceived the need urgently to leave the country would be to make an application to court. I can foresee obvious difficulties in obtaining a resolution within a timescale compatible with a sudden escalation in the fighting. M is likely to feel trapped in that situation adding to the anxieties to which the children will be exposed.

100. I bear in mind also the serious allegations of domestic abuse which are presently unresolved. If these allegations were the only matter which I had to

consider in relation to Article 13(b), the risks arising from them could be sufficiently ameliorated through protective measures of the type proposed by F (although in the absence of information as how undertakings are viewed in Ukraine, I would have framed at least some of the protective measures as orders and required them to be registered before any return order could take effect). Even with protective measures in place, the children would upon their return to Ukraine be caught in the middle of an acrimonious parental conflict. Although this factor is insufficient by itself to satisfy the requirements of Article 13(b), as part of the overall picture it reinforces my conclusion that returning the children would be intolerable for them.

101. In undertaking my Article 13(b) analysis I have been careful to resist the tug of welfare for the reasons articulated by Professor Perez Vera. I am entirely satisfied that the risks to which these children would be exposed are grave.

102. F's alternative case is that I should adjourn the proceedings to enable consideration to be given to facilitating a return to a town or city with the FCDO yellow zone in the West of the country. I am not attracted to this option. Although the yellow zone would be statistically safer than Cherkasy, it would remain intolerable in my view for the children's established lives to be uprooted in the manner proposed. Although safer, towns in the yellow zone do also experience attacks. Returning the children to any part of Ukraine would result in them being suddenly immersed into a life so fundamentally different from their established lives in England that I consider it would be intolerable for them. Whereas M would have the support of her family in Cherkasy, this would be lacking in any other part of Ukraine. Moreover, F's proposal is at present inchoate. Allowing an adjournment for him to be able to articulate a different case would create additional delay before the proceedings could be resolved. This would not be in the children's interests. Given my conclusions on the issue of settlement, such a delay would not serve any purpose.

Discretion

103. As Mr Evans rightly accepts, given the conclusion I have reached in relation to Article 13(b), it is inevitable that I will exercise my discretion so as to refuse an order for the children's return.

104. On the basis of my conclusions as to settlement alone I would have exercised my discretion against ordering a return. After this length of time, Convention considerations carry far less weight than in other cases. In this case, the children's welfare strongly militates against their lives being uprooted again on a summary basis. They are very young and would find returning to a country of which they have almost no memory very hard to process. Their sudden exposure to a climate of apprehension and fear is likely to be harmful to them. It is also relevant that, although M acted wrongfully, bringing the children for a prolonged period to England to protect them from the war was a course of action to which both parties had previously agreed.

105. The issue which causes me greatest concern about my refusal to return the children is the need to restore their relationship with their father. As to this, I consider that there will probably need to be an urgent fact-finding hearing so that future decisions as to their welfare can be made from a solid evidential foundation. The fact that I have determined that the children should not be returned to Ukraine within this summary process does not of course preclude the court from reaching a different conclusion following a full welfare evaluation. Nor will it prevent the court in future from requiring the mother to travel to Ukraine with the children – either to Cherkasy or perhaps somewhere nearer the Polish border - in order to facilitate contact. These are not decisions I can make at present but they will remain open for consideration as part of any welfare investigation.