

Neutral Citation Number: [2026] EWCA Civ 1090

Case No: CA-2026-001280

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE GARRIDO
FD26P00112

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 August 2026

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE ZACAROLI

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A (A Child: Article 13(b): Mental Health))

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Charlotte Baker and Emily Otvos (instructed by **Stephens Scown LLP**) for the **Appellant**
Teertha Gupta KC and Jyoti Wood (instructed by **Dawson Cornwell LLP**) for the **Respondent**

Hearing date: 28 July 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 August 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

Introduction

1. The mother appeals from an order made on 28 April 2026 by Garrido J ("the Judge") by which he ordered the summary return of a child, B, a boy then aged 4, to Australia under the 1980 Hague Child Abduction Convention ("the 1980 Convention"). On 2 July 2026, I granted permission to appeal and a stay of the order, which was to have taken effect by 7 July 2026.

2. Both parents are in their forties. The father was born in Australia and is an Australian citizen. The mother was born in the UK but became a naturalised citizen of Australia, having moved there in 2010. She is a paramedic and the father is in the Australian Defence Force. The father has an older son from a previous relationship, in respect of whom there is a shared care arrangement.

3. The parents met in Australia in 2020 and B was born there in 2021. From October 2024, the mother went on leave of absence, suffering from a work-related adjustment disorder.

4. The mother's parents lived in her childhood home in the West Country and she and B returned there regularly for visits. The most recent of these began on 16 February 2025, when they travelled to England with the father's consent. It was intended to be a temporary visit to allow the mother to help her father, who was caring for her mother, who suffers from dementia. However, as the visit became increasingly prolonged, the father made numerous requests for B to be returned. Despite that, in September 2025 the mother enrolled him at a local school against the father's wishes.

The proceedings

5. On 17 February 2026, the father made an application under the 1980 Convention. The mother opposed the making of a return order on three grounds: habitual residence, acquiescence, and Article 13(b). A hearing was listed for 27 April 2026, with a time estimate of two days.

6. By the time of the hearing, the mother had abandoned her grounds of opposition based on habitual residence and acquiescence. The court was therefore dealing with a wrongful retention, agreed to date from September 2025 at the latest, and Article 13(b).

7. The mother's case was that a return to Australia would expose B to grave physical or psychological harm or would otherwise place him in an intolerable situation. She relied on allegations of domestic abuse, the risk to her mental health if forced to return to Australia and the impact that would have on B. This was also set in the context of her desire to continue to care for her sick parents in England. The mother said in her statement of 4 March 2026 that it would be "catastrophic" for her to return to Australia with B "as there would be no one to care for my parents … and the emotional strain this will have on me would affect me mentally".

8. The mother also alleged that the father was controlling, giving the example of the father, on at least one occasion, hiding her and B's passports. She stated that the father had been emotionally, financially and sexually coercive, for example by belittling her and

trying to exert control over her through B. The flavour of her case on domestic abuse is set in this passage:

> "Towards the end of our relationship, the Applicant would be calling me derogatory names, he would kick me out of our bedroom and he would blame me for the fact that we had not had a second child. If I were to return back with B to Australia, I firmly believe that the Applicant would subject me to the same sort of behaviour. I also believe that he would control the relationship that I have with B as he does not like the fact that B and I are extremely close. This could be extremely harmful to B. I also believe that he would prevent me from leaving Australia again to see my family."

9. In respect of her mental health, the mother relied on letters from her psychologist, Ms S, confirming her previous diagnosis in October 2024 of adjustment disorder with anxiety and depressed mood and the expert report of Dr McDermott. Her case was that a return to Australia would significantly impact her mental health and her ability to be emotionally available to B.

10. The father's case, as set out in his statement dated 30 March 2026, was that the allegations relied upon by the mother were untrue. The father expressed sympathy for the mother's situation, but stated that B's home was in Australia and that alternative care arrangements could be made for her parents.

Expert evidence

11. On 13 April 2026, the court granted permission for the mother to instruct a psychiatrist, Dr Una McDermott, to file a report as single joint expert, on the basis that her report was to be served by noon on Friday 24 April, the working day before the hearing. The order provided for her to attend the hearing remotely.

12. Dr McDermott interviewed the mother on 17 April and produced her report on 24 April 2026. I cite from it in anonymised form, beginning with a summary of her answers to the questions in her letter of instruction, which are interpolated.

> "2.4. **(a). Does the mother currently suffer from any psychiatric or psychological condition or disorder? If so, what is the level of severity of any such condition or disorder?**
>
> The mother is currently in a highly vulnerable state of mental health. She is at risk of becoming clinically depressed in the event of her current stressors continuing or increasing. She presented as hugely stressed, seriously anxious and profoundly worried about her immediate future as it relates to crucially important figures in her life, her son, her mother and her father. Her mood, sleep, appetite, and energy are significantly disturbed in an on-going way. She describes herself as 'exhausted' and 'in survival mode.' She strives to keep herself calm.

2.5. **(b). Please confirm, if possible the causation of any disorder/difficulties that the mother may be experiencing that affects or impacts upon her mental health and wellbeing.**

At this point in time, the cause of the deterioration in the mother's mental health is; the threat of a possible forced return to Australia of her son B, and her commitment that in such a case she would return to Australia with him, and her knowledge that in so doing she would leave her ailing parents to the uncertain care of unknown others.

2.6. **(c). What is the likely impact, if any, upon the mother's emotional and psychological health if the child were to return to Australia and she were to accompany him? What is the impact, if any, on her ability to parent the child?**

In the event of B returning to Australia, the mother has stated definitively that she would accompany him. Because, as a consequence, she would be having to leave her ailing, vulnerable mother and terminally ill father to the uncertain care of others she would, in my opinion, be at serious risk of developing a clinical depression of significant degree. Depending on the degree of her depression, if moderate to severe, which it could become, more likely than not there could be negative consequences to her [emotional] availability to, and responsiveness towards, B.

2.7. **(d). If such a return resulted in the separation of the child from the mother, what impact could this separation have on the mother's mental health?**

The mother is adamantly certain that she would not allow B to be separated from her, because she believes that their close relationship as his main carer since birth is of crucial importance to B's emotional health, wellbeing and development.

2.8. **(e). In your opinion are there any supports or treatment plans which may ameliorate any risk to the mother's mental health were she to return to Australia with the child?**

In view of the profound significance and meaning to the mother of her having to leave her vulnerable mother at the end of her life and also to leave her terminally ill father at this time, there would not be any realistic supports, or treatment, which would ameliorate the virtually inevitable risk to her mental health were she to have to return to Australia. An appropriate place to live would have to be found as she has said the relationship with the father has 'fully broken down'.

2.9. **(f). Please comment on the treatment/resources previously and ongoing offered to and taken up by the mother in Australia and the appropriateness of same and if necessary what would need**

> **to be in place on or shortly after any order for return to safeguard her mental health?**
>
> Currently, the mother is having on-going therapy sessions (virtual) with a psychologist, Ms S, which is, entirely appropriate to support her mental health challenges. It would be crucial to have an intensification of sessions, in the event of a return to Australia. In the event of the mother being placed on an order to return to Australia she would need ready access to a psychiatrist, in addition to the psychologist Ms S who should have a high index of suspicion for the development of a [clinical] depression.
>
> 2.10. **(g). If possible, please advise as to the prognosis for recovery or relapse and what effect relapse would have on the mother's ability to parent and on her mental health and wellbeing.**
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> In the event of the mother being under order to return to Australia the prognosis in terms of risk of a significant deterioration in her mental health would be high. More likely than not, she would suffer a clinical depression of significant degree which, if persistent and unresponsive to psychological/psychiatric treatment(s) *could* result in a negative impact on her ability to parent. [italics in original]
>
> 2.11. **(h). Please comment on any other issues within your expertise.**
>
> I note that the mother has recently changed her mind about her wish to return to live in Australia. She is now saying that she wishes to live with B in England, permanently."

13. It can be seen that the issues on which the doctor's opinion was requested were structured in this way: (a) diagnosis, (b) causation, (c) prognosis if returning with B, (d) prognosis on separation from B, (e) prospects of ameliorating symptoms in England if a return order were made, (f) treatment requirements in Australia, and (g) prognosis for effect on parenting. I deal further below with my analysis of (e) because this element of Dr McDermott's evidence formed a significant part of the mother's case on this appeal, and was advanced on the basis that it had a different effect.

The hearing before the Judge

14. Both parents were represented by counsel (not appeal counsel) and were in court. Dr McDermott was standing by, as directed. The court had skeleton arguments bearing the date of the hearing and the day before. In the mother's counsel's skeleton argument, the recency of the expert report was noted and it was said that "limited evidence from Dr McDermott may be of assistance to the Court in light of the contents of her report."

15. We have a note (not a transcript) of the hearing. In opening, father's counsel said that he did not wish to question the expert. The Judge expressed the view that the hearing should proceed without oral evidence, and that it would be unusual to suggest oral evidence on the Article 13(b) exception. The mother's counsel expressed surprise at the father's position, as the expert had emphasised the need for psychiatric support, yet

there was evidence to show that the mother could not obtain psychiatric services through her employer. The Judge distinguished this from more generally available services and said that he thought that he could manage without hearing the psychiatrist. Counsel referred to three matters that might need to be drawn out of the doctor, but that it was really a matter for the Judge. The Judge restated his position, and counsel having taken instructions, did not pursue the application for Dr McDermott to give evidence. The expert was therefore stood down, even though there was abundant time for her to have given any useful focused evidence. The hearing proceeded with some two hours of submissions and the Judge reserved his decision until the following day.

16. The order, drafted by father's counsel and agreed by mother's counsel, contained this recital:

> "4. On day one, the Court heard an oral application made by the mother for Dr McDermott to give oral evidence. This application was refused. The Court then heard submissions from the parties' counsel."

I would accept that the Judge did not formally refuse an application for the expert to give oral evidence, as to have done so he would have had to give a ruling, but it could be said that his statements so clearly discouraged the proposal that it is as if he had refused an application. In the light of matters raised in the course of submissions on this appeal, I think it would have been better if there had been brief oral evidence to enable the parties to explore what were clearly only a small number of points that arose from Dr McDermott's written report. These would no doubt have been the subject of written questions if the report had been filed a good while before the hearing, but as there was no time for that, the doctor was available to assist.

17. Annexed to the order are two undertakings by the father and a number of "Other Agreements". The father gave what would be described in England and Wales as a non-molestation undertaking and also undertook not to instigate proceedings for B's wrongful retention. The agreements included that the father agreed not to remove B from the mother's care save for contact as agreed between the parties or ordered by the court and that he would support the mother accessing support for psychological and psychiatric services where available through his employment.

The Judgment

18. There is an agreed note of the judgment, which has been amended and approved by the Judge.

19. At the outset, the Judge stated that "the 1980 Convention is predicated on the basis that the wrongful removal or retention of a child from their place of habitual residence without consent is harmful to them and they should be promptly returned upon request via the Central Authorities following a summary process".

20. The Judge then recorded that, "given … this is a summary process, there has been no need for oral evidence", before going on to set out some of the background. He stated that he had seen a "wealth of evidence about the maternal grandparent's poor health", which he did not need to consider in detail as this was not contested by the father. Rather, the father's case was that the mother should "put in place arrangements for her parents so that she can return B to Australia as planned and where, if she wishes, mother

can then make a fully considered application for relocation following the local court's determination of B's best interests". The Judge noted that he was "not blind to the difficulties that can be encountered in arranging social care for ill and ageing parents", but that the local authority had a duty to provide social care.

21. The Judge referred to *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2011] 2 FLR 758 ("*Re E*") and then summarised the legal principles relevant to Article 13(b). He expressly identified, correctly, that the "evidence must be considered fully and as a whole"; that "the focus is and must always be on the child. The issue is the risk to the child in the event of his or her return"; that it "is necessary for it to be proved that the risk has reached a level of seriousness where it can be properly characterised as grave"; that "[i]ntolerable is a strong word but when applied to a child must mean the particular circumstances that a particular child should not be expected to tolerate"; and that "[i]f a risk of harm is found to exist, the source of the risk is irrelevant", including that the "[r]isk can arise from a parent's own subjective version of events leading to fear or anxiety on their part that goes on to have an intolerable consequence for the child". He also referred to the fact that the "situation that a child will face depends often and crucially on the protective measures or soft landing provisions that can be put in place to ensure that the child will not be called upon to face an intolerable situation, having returned to his country of habitual residence".

22. Having regard to aspects of the mother's case on this appeal, I set out the following paragraphs from the judgment in full:

> "[20] In circumstances where serious allegations are raised by one party and denied by the other, I should first consider whether the allegations would, if true, give rise to the grave risk/intolerability of which I have spoken. In analysing whether allegations are of sufficient detail and substance to give rise to a grave risk, I need to consider whether the evidence enables me to confidently do that. I must be careful when undertaking this evaluation based only on the paper evidence. I should not therefore discount allegations of harm simply because I have doubts about their validity or cogency.
>
> [21] If a grave risk/intolerable situation is likely to exist, I must then ask how the child can be protected from that risk/situation by considering what protective measures are available and their efficacy. The appropriateness of such measures and their efficacy will depend on the particular facts of the case and the relevant country involved. It is, as I have already said, necessary to examine the situation that the child will face upon return and undertake that examination in very concrete and practical terms."

23. The Judge then turned to consider the mother's case. He accepted that, as advanced by counsel on behalf of the mother, he should consider the domestic abuse allegations cumulatively with the other issues. He then summarised the mother's allegations as referred to above.

24. He went on to record that he had considered Dr McDermott's report "as a whole very carefully". He summarised her opinion:

> "[27] It is the doctor's opinion that mother is currently in a highly vulnerable state of mental health where she is at high risk of clinical depression in the event of existing stressors continuing or increasing. Mother is reported as presenting as hugely stressed, seriously anxious and profoundly worried about her immediate future as it relates to crucially important figures in her life, namely her mother, her father and her son. Mother's mood, sleep, appetite and her energy are significantly disturbed in an ongoing way. Perhaps unsurprisingly given the circumstances that she finds herself in, mother is reported as being exhausted and in survival mode.
>
> [28] Dr McDermott was asked about the likely impact on mother's emotional psychiatric health if B returns to Australia and on her ability to parent B in those circumstances. She gave the opinion that, given mother would return with B to Australia if a return were ordered and as a consequence she would leave her sick and vulnerable mother and terminally ill father to what she regards as uncertain care by others, mother would be at serious risk of developing a significant degree of clinical depression. Depending on the degree to which that depression developed, if it became moderate to severe, then more likely than not there could be negative consequences to her emotional availability to, and responsiveness towards, B. Of course, this would all be in the context of the extent to which any moderate to severe depression is capable of being ameliorated in some way by treatment. The doctor further opined that in the event that a return is ordered, there is a high likelihood of a significant deterioration in mother's mental health and it is more likely than not that she would suffer some form of clinical depression to a significant degree. If that depression was persistent and untreated or unresponsive to treatment, it could result in a negative impact on her ability to parent B.
>
> [29] In contrast to that, if B is not required to return, mother's mental health prognosis is assessed to be 'good'."

25. The Judge then set out the father's case. The father submitted that none of the domestic abuse allegations reached the high threshold under Article 13(b) and were, in any event, related to the past and so not relevant to the future arrangements that the Judge was required to consider. The father also pointed to his strong bond with B, which the mother had recognised in her evidence. The Judge noted that "father has expressed appropriate sympathy for mother's position in respect of her unwell parents and the account that she has given of two unwell elderly people. His understanding is reflected in the delay he tolerated in taking these proceedings". Nonetheless, the father's case was that there were alternative care arrangements. Whilst it may be the mother's preference to care for her parents herself, B's interests had to be considered and the Australian courts were best placed to decide whether he should relocate to England.

26. In relation to the mother's mental health, the father acknowledged her previous diagnosis of adjustment disorder and depressed mood in Australia in 2024. He pointed out that the mother did not say that B was adversely affected at that time. The conclusions of Dr McDermott were "highly qualified", and "the consequences for B depend… [on] the degree of depression, whether moderate or severe, and the lack or failure of treatment". There was no evidence that the mother would not respond to treatment and she had responded well to treatment in the past.

27. The Judge then turned to consider protective and soft landing measures. He said, again correctly, that:

> "[37] … I must take into account where relevant the extent to which they are likely to be effective in terms of compliance, as well as remedies available in the absence of compliance. So the issue is the effectiveness of any undertaking or intended soft landing. A distinction needs to be drawn between practical measures and any other measures needed to protect a child on return. The efficacy of the latter must be addressed with real care."

Adding:

> "[38] Unless the contrary is proved, which in my judgment it has not been in this case, the assumption must hold that the administrative, judicial and social services in Australia are equally adept at promoting the welfare of, and protecting, a child as they are here in England and Wales. Considering enforcement, I note that Australia is a signatory to the 1996 Hague Convention."

28. The Judge addressed aspects of Dr McDermott's evidence which had dealt with measures she considered would need to be available or in place if the mother returned to Australia. The first was that the mother would need an "appropriate place to live". The Judge noted that the mother owns a property in Australia which was occupied by tenants to whom two months' notice would have to be given. The second was that the mother "would need ready access [in Australia] to services to treat any clinical depression". The Judge went on to say, in paragraph 40:

> "Although I have received some evidence that a psychiatrist may not be available through her employment or father's employment healthcare schemes, nevertheless mother was able to access therapy in Australia and continues to do so, and it has not been seriously suggested that Australia lacks appropriate services to treat depression that mother will be able to access, even if she has to self-fund."

29. The mother's case on protective measures focused on Dr McDermott's opinion that the risk to the mother's mental health on return would be "virtually inevitable" and could not realistically be prevented by support or treatment. However, the Judge noted that "it is important to consider Dr McDermott's evidence as a whole when assessing the

risk to mother's mental health, how it may be treated and what, if any, impact it may have on B".

30. The Judge then set out the father's proposals, such as agreeing not to remove B from the mother's care and supporting her in accessing psychiatric services, commenting that they were "the type of appropriate measures that might usually be expected to be seen in a case such as this."

31. The Judge then turned to his analysis, reminding himself of the burden of proof and the importance of assessing the situation to which B would return. He determined that, "for all the reasons given by father that I have already rehearsed in this judgment, I do not find that the allegations of domestic abuse or the evidence of the consequences of return for mother, taken at their highest, come anywhere near discharging the burden of establishing the article 13(b) exception". There had been "a significant passage of time since then without complaint about father's conduct … and on return, the parents will not be living together and need not come into direct contact". In addition, the father had offered to give undertakings not to harass, intimidate or threaten the mother. In these circumstances, the domestic abuse allegations "fall far short of establishing the exception". I would note that the Judge commented that the father's undertakings "will be enforceable".

32. As to the maternal grandparents, whilst the Judge acknowledged the "difficult and unenviable position" the mother would be in on return, his "focus must be on B and not on her parents' needs".

33. He then turned to consider the issue of the impact on B of the likely consequences for his mother's mental health if his return was ordered. He assessed these in three paragraphs:

> "[47] As I have already rehearsed in this judgment, the overall balance of Dr McDermott's opinion, that I accept, is nuanced. Her opinion is that there is a 'high risk that mother will develop clinical depression' or a 'serious risk of developing a significant degree of clinical depression'. That of itself does not generate a grave risk/intolerable situation for B. She qualifies her opinion by saying only that untreated or unresponsive moderate to severe clinical depression "could" impact mother's ability to parent B. In my judgment, that amounts to a mere possibility (not probability) of an impact on B in a limited combination of circumstances. There is no evidence to establish that mother would be unresponsive to treatment nor unable to obtain treatment, even if her depression became severe. In these circumstances, the likely impact on B is remote, and not sufficiently evidenced to justify a finding that the Article 13(b) exception has been established.
>
> [48] Nevertheless, if I am wrong about the absence of a grave risk/intolerable situation, the proposed protective measures/soft landing provisions are, in my judgment, more than adequate to ameliorate any such risk, in combination with my confidence that mother will be able to access appropriate medical, judicial and administrative services in Australia. As for housing for her and B in Australia, if she is right about the shortage of rented accommodation

> and the delay in evicting the sitting tenants from her own house, my intentions for a delayed return date will meet those concerns if she acts now.
>
> [49] Finally, when considering B's return to Australia, there is of course a discretion for the court to exercise, but it is clear to me that any discretion should not be exercised to prevent a return for the following reasons. In my judgment, the court should uphold the public policy considerations of the Convention where there has been, as here, a wrongful retention and mother has the ability to apply to the Australian court for
> relocation on welfare grounds. Further, non-return will result in the continued separation of B from his father and from his half-sibling … without any welfare analysis of whether that may be in B's best interests. My clear conclusion is that B should be returned summarily in accordance with the 1980 Convention to Australia where future decisions about his welfare can be properly made."

34. The Judge ordered that B should be returned by 7 July 2026, the delay of over two months being designed to enable him to see out the summer term, to allow the mother to make arrangements for her parents and to enable her to recover her Australian property from its tenant.

35. Very sadly, the mother's father died on 15 June 2026.

The grounds of appeal

36. The mother advances the following grounds of appeal. I take the non-sequential numbering as it appears in the amended grounds of appeal:

> 1. The Judge was wrong to prevent Dr McDermott from giving oral evidence at the final hearing and, in doing so, adopted a process that was unjust and a serious procedural irregularity.
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> 2. The Judge was wrong to find that the mother had failed to establish an Article 13(b) defence because:
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> (a) his approach to the issue of domestic abuse was flawed in a number of respects;
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> (b) his conclusions on the mother's mental health and risks on return were not supported by the evidence;
>
> (c) his approach to the relevance of the mother's parents' ill-health was flawed.
>
> 5. In the light of Dr McDermott's report and the allegations made by the mother in respect of the father's behaviour, the Judge was wrong not to examine, in concrete terms, the situation that would actually face the child on return and erred in not undertaking a

clear evaluation of the risk to the child of a deterioration in the mother's mental health on return.

6. The Judge was wrong to conclude that the undertakings and agreements endorsed in his order were enforceable and therefore effective or that they were sufficient to meet or ameliorate the risks identified in relation to the mother's mental health.

Fresh evidence

37. The mother has applied to rely on fresh evidence. This comprises, principally, of an updating statement from her and an updating letter from her treating psychologist which sets out that the mother's mental health has declined. Without formally admitting this evidence, I have considered it but I do not consider that it materially changes the effect, in particular, of Dr McDermott's evidence that the mother was "at high risk of becoming clinically depressed in the event of her current stressors continuing or increasing". The psychologist has been able to continue to provide the mother with therapeutic support which the psychologist describes as being a critical factor in allowing the mother to maintain her caring role.

Submissions

38. I am extremely grateful to counsel for their focused but comprehensive submissions. They were advanced forcefully but with appropriate moderation.

39. As to ground 1, Ms Charlotte Baker, for the mother, submitted that, because Dr McDermott's report came in so late, there had been no opportunity for the mother to ask clarificatory questions which she was entitled to put pursuant to r. 25.10 of the Family Procedure Rules 2010. Dr McDermott had attended the final hearing remotely, as directed, and the Judge had ample time to hear her evidence given the matter was listed for two days and the sole issue was the mother's Article 13(b) defence.

40. By refusing to allow Dr McDermott to give evidence, the Judge had unfairly restricted the mother's ability to present her case and to discharge the burden of proof and prevented himself from being able properly to undertake the required risk assessment. His conclusion that Article 13(b) had not been established was made on the basis that "the likely impact on B is remote, and not sufficiently evidenced", but the Judge had not permitted that element of the mother's case to be drawn out through oral evidence, particularly in relation to the nature of the risk posed to B, the likelihood of it materialising and the consequences if it did so.

41. As such, the Judge's case management decision was wrong and procedurally irregular, even allowing for the very wide discretion allowed to him (*Re TG (A Child)* [2013] EWCA Civ 5; [2013] 1 FLR 1250).

42. Ms Baker took grounds 2 and 5 together. Her overarching submission was that the Judge had not undertaken the task required of him in order properly to be able to determine whether Article 13(b) was established. His analysis section in the judgment was unduly brief and there was no separate section considering Dr McDermott's evidence.

43. In respect of ground 2, as referred to above, the mother's case was advanced under three sub-headings.

44. First, under 2(a), Ms Baker relied on *In re B (Children)* [2022] EWCA Civ 1171, [2023] Fam 77 ("*Re B* [2022]") and submitted that the Judge wrongly considered the mother's case in respect of domestic abuse separately, rather than alongside, her case in respect of her mental health. The mother's domestic abuse allegations needed to be considered "in the context of the evidence of psychiatric harm". She also submitted that the Judge was wrong, effectively, to discount the mother's allegations of domestic abuse, relying on the passage of time and the fact that there would be physical separation between the father and the mother on return. Ms Baker submitted that the Judge seemed to have been heavily influenced by the husband's proposed non-molestation undertaking which the Judge viewed as "enforceable". The protective measures required a significant level of dependence by the mother on the father and there was no binding commitment not to separate B from her. The potential for the father to continue to exert control, and the significant ramifications for the mother's mental health, meant that this aspect of the mother's case required closer consideration.

45. Under 2(b), Ms Baker submitted that the Judge's decision, in respect of the mother's mental health and the risks on return, was based on a series of conclusions about the risks which were not open to him on the evidence. The crux of the Judge's decision was at paragraph 47 (quoted above) where he set out his conclusion that there was "a mere possibility (not a probability) of an impact on B in a limited combination of circumstances". This did not accurately reflect the substance of Dr McDermott's evidence which had identified that the mother was at "serious risk of developing a clinical depression of significant degree" and that it was "more likely than not [that] there could be negative consequences to her [emotional] availability to, and responsiveness towards, B".

46. The Judge had relied heavily on Dr McDermott's answer in response to the question about the prognosis for recovery or relapse (paragraph 2.10(g) quoted above) when she had said that, if the mother's depression was "persistent and unresponsive to … treatment(s) [it] *could* result in a negative impact on her ability to parent". The Judge wrongly treated this as a qualification of Dr McDermott's "stark response" in paragraph 2.8(e), namely that there were *no* "realistic supports, or treatment, which would ameliorate the virtually inevitable risk to her mental health were she to have to return to Australia". Ms Baker submitted that this latter evidence was a most critical part of the expert evidence and had not been properly grappled with by the Judge.

47. Under 2(c), Ms Baker submitted that the Judge had been wrong to focus in paragraph 46 (quoted above) on the question of whether alternative care arrangements could be made for the mother's parents and their needs, rather than confronting the impact on the mother's mental health of having to leave her parents. It was her subjective perception which was the relevant issue, as set out in *Re S*.

48. In respect of both ground 2 and ground 5, Ms Baker submitted that the Judge had failed, at any stage, to undertake the three-stage test referred to in *Re B (a child) (abduction: article 13(b): mental health)* [2024] EWCA Civ 1595; [2025] 2 FCR 207 ("*Re B* [2024]"), at [51]. He did not at any point undertake a clear evaluation of the nature of the risk, the likelihood of the risk materialising and the consequences of the risk materialising for B. There is no examination, in concrete terms, of the situation that B

would actually face on return. This, she submitted, meant that his decision was not sustainable.

49. As for ground 6, Ms Baker submitted that the Judge's approach to the issue of protective measures was flawed in a number of respects. Plainly, the five "agreements" included in the order were not capable of enforcement. In particular, the agreement that the father would not remove B from the mother's care was insufficient having regard to Dr McDermott's evidence that "a removal of B from the mother's care, could only happen in enforced circumstances and would, more likely than not, result in a major mental collapse in the mother".

50. Further, the Judge was wrong to deal with the issue of psychiatric support for the mother on return in a broad-brush way. There was no evidence that she would be able to obtain psychiatric treatment and, if the Judge had considered that the position was unclear, he should have adjourned the case to allow further information to be obtained. Finally, Ms Baker again relied on paragraph 2.8(e) in Dr McDermott's report which demonstrated that none of the proposed measures "would ameliorate the virtually inevitable risk to her mental health".

51. I propose to summarise the father's submissions more briefly.

52. Mr Gupta submitted that it was not being said that the Judge had misdirected himself as to the law, so the central issue was whether the Judge had properly applied those principles. He acknowledged that the Judge's ultimate analysis was brief but he submitted that, read as a whole, there was sufficient in the judgment to show that the Judge had properly applied the law *and* that he had reached a decision that was clearly open to him on the evidence. In making these overarching submissions, he relied on what Lord Reed had said in *AR v RN (Habitual Residence)* [2015] UKSC 35, [2015] 2 FLR 503, at [18] and on a number of other well-known cases.

53. In respect of ground 1, Mr Gupta submitted that the recital in the court order was wrong. He relied on two notes of the hearing, including a note prepared by his solicitors, both of which made clear that the mother's then counsel told the Judge that she did not seek to pursue her application for Dr McDermott to give evidence. In any event, neither party had challenged Dr McDermott's evidence so there had been no need for her to give additional oral evidence at the hearing and the Judge, as he had said, had accepted her evidence.

54. In respect of ground 2(a), Mr Gupta submitted that the Judge had treated the mother's allegations of domestic abuse as being true (in paragraph 45) and had been entitled to decide that they did not meet the grave risk threshold. This did not mean that the Judge had failed to consider the overall effect of the mother's case because the Judge had been entitled to assess the expert medical evidence within the context of the wider evidential picture.

55. In respect of ground 2(b), Mr Gupta submitted that the Judge had come to reasonable and appropriate conclusions on the evidence relating to the mother's mental health, taken as a whole. The Judge had been right to describe Dr McDermott's evidence as nuanced and, Mr Gupta submitted, it was heavily caveated in places, such as when she said that there *could* be a negative impact on the mother's ability to parent *if* the mother's depression was persistent and unresponsive to treatment. There was no

suggestion that appropriate treatment could not be obtained in Australia. The reference in the expert report to "mental collapse" was specifically in response to the question about the impact on the mother of being separated from B.

56. Mr Gupta submitted that an unspecified "negative impact" on B would not be sufficient to establish a grave risk of harm or an intolerable situation within Article 13(b). As had been said in *Re B* [2024], at [62]:

> "… the evidence undoubtedly establishes that "there is a significant risk of deterioration or relapse" in the mother's mental health but it does not establish that the nature or extent of any such deterioration or relapse would be likely to expose A to a *grave* risk of psychological harm or otherwise place her in an *intolerable* situation. The nature of the risk to A, as expressed in Dr Ratnam's evidence, is that depression *can* impact on the ability of a parent to respond "consistently" and *can* affect attachment with A which *could* impact on A's own emotional wellbeing. In these terms, the nature and extent of the potential impact on A are not such as to bring this case within Article 13(b)." (emphasis in original)

57. As to the maternal grandparents' ill-health, the Judge had expressly reminded himself that a parent's subjective fears can create an intolerable situation. The Judge had also expressly reminded himself of the need to examine the situation for B on return.

58. In respect of ground 6, the Judge had been entitled to decide that the protective measures the father had put forward and which were available in Australia were sufficient to protect B from the risk of grave harm.

Legal Framework

59. This case does not raise any novel points of law, so I propose to set out a very brief summary of the relevant legal framework.

60. Article 13(b) of the 1980 Convention provides as follows:

> "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."

It is well established that Article 13(b) has a high threshold, not because it is to be narrowly interpreted, but because "[b]y its very terms, it is of restricted application": *Re E*, at [31]. Those terms include the words "grave" and "intolerable".

61. It is also well established that, in the context of asserted risks to the returning parent's mental health, "a respondent's merely subjective perception of risks could, as a matter of logic, found the defence": *Re S*, at [31]. The critical question which a judge must consider is set out in *Re S*, at [34]:

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

The focus is, therefore, to put it in the terms of Article 13(b), on whether the impact on the returning parent's mental health is such that there is a grave risk that the child's return would expose him/her to physical or psychological harm or would otherwise place him/her in an intolerable situation.

62. As set out in *Re B* [2024], at [51], the effect of the approach set out in *Re S* is that:

> "the court must assess the nature of the risk, the likelihood of the risk materialising and the consequences of the risk materialising for the child. In a case such as the present, for the purposes of determining whether the circumstances set out in Article 13(b) have been established, this will involve consideration of the nature or extent of any potential deterioration or relapse in the mother's mental health and the nature or extent of any potential impact on [the child]."

63. Answering this critical question also requires the court to consider what, if any, measures are available or can be put in place which can address or sufficiently ameliorate the asserted or established grave risk so as to protect the child from that risk: see, for example, *In re A (Children) (Abduction: Article 13(b))* [2021] EWCA Civ 939, [2021] 4 WLR 99, at [96]:

> "If the judge concludes that the allegations would potentially establish the existence of a grave risk within the scope of article 13(b), then, as set out in *In re E*, at para 36, the court must 'ask how the child can be protected against the risk'. This is a broad analysis because, for example, the situation faced by the child on returning to their home state might be different because the parents will be living apart. But, the court must carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to a grave risk within the scope of article 13(b). And, to repeat what was said in *In re E*, at para 52: 'The clearer the need for protection, the more effective the measures will have to be.'"

I would just note that a judge can undertake this exercise in two stages, first considering grave risk and *then* the question of protective measures, or the judge can consider them together for the purposes of deciding whether Article 13(b) has been established. Although, if a judge adopts the latter course, I would draw attention to what I said in *Re B* [2022]:

> "[71] Secondly, I agree with Mr Turner that it is not *necessary* for a judge to undertake the *In re E* approach as a two-stage process because, as set out in my judgment in *In re W (Children)* [2018] EWCA Civ 664; [2019] Fam 125, para 48: "The question of whether article 13(b) has been established requires a consideration of all the relevant matters, including protective measures …" However, as that case also demonstrated, quoting from Black LJ, as she then was, in *In re K (A Child) (1980 Hague Convention) (Lithuania)* [2015] EWCA Civ 720, at [53], absent the court being able "confidently to discount the possibility that the allegations give rise to an article 13(b) risk", conflating the process set out in *In re E* creates the risk that the judge will fail properly to evaluate the nature and level of the risk(s) if the allegations are true and/or will fail properly to evaluate the sufficiency and efficacy of any protective measures."

64. I would also point out that protective measures can include general as well as particular measures. As was referred to in *Re T (Abduction: Protective Measures: Agreement to return)* [2023] EWCA Civ 1415, [2024] 1 WLR 2896 ("*Re T*"), at [48], they "may take many forms". As described in the *Guide to Good Practice Child Abduction Convention: Part VI - Article 13(1)(b)* published by the Hague Conference on Private International Law in 2020 ("the Guide"):

> "[43] …They cover a broad range of existing services, assistance and support including access to legal services, financial assistance, housing assistance, health services, shelters and other forms of assistance or support to victims of domestic violence, as well as responses by police and through the criminal justice system.
>
> [44] Protective measures may be available and readily accessible in the State of habitual residence of the child or, in some cases, may need to be put in place in advance of the return of the child.

65. I should also refer to the passage in *Re B*, at [70], which was relied on by Ms Baker:

> "The authorities make clear that the court is evaluating whether there is a grave risk based on the allegations relied on by the taking parent as a whole, not individually. There may, of course, be distinct strands which have to be analysed separately but the court must not overlook the need to consider the cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk(s) that might potentially be

> established as well as the protective measures available to address such risk(s)."

66. I also, briefly, touch on the issue of undertakings.

67. There is no doubt that the inclusion of undertakings in a proposed order can form part of the court's evaluation of whether Article 13(b) is established. The *Practice Guidance, Case Management and Mediation of International Child Abduction* issued by the President of the Family Division on 1 March 2023 contains a number of provisions dealing with undertakings, which include the following:

> "2.9(b) [The applicant's evidence must contain] a description of any protective measures (including orders that may be subject to a declaration of enforceability or registration under Art 26 of the 1996 Hague Convention or, where appropriate, undertakings) the applicant is prepared, without prejudice to his or her case, to offer for the purpose of securing the child's return, *including the extent to which any undertakings offered and accepted in this jurisdiction are capable of enforcement in the requesting jurisdiction*." (emphasis added)

This is repeated in paragraph 2.11(f). The same applies to the respondent's evidence: paragraphs 2.9(d) and 2.11(e). I have emphasised the obligation on the parties expressly to address in evidence whether, and if so how, undertakings are capable of enforcement in the child's home country. This would include the manner in which an undertaking might be enforceable in that country because it is a party to 1996 Hague Child Protection Convention.

68. The reason for this obligation being imposed can be found in paragraph 3.11, which appears under the heading "Protective Measures" and provides:

> "3.11. In deciding what weight can be placed on undertakings as a protective measure, the court will 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. The issue is the effectiveness of the undertaking in question as a protective measure, which is not confined solely to the enforceability of the undertaking. There is a need for caution when relying on undertakings as a protective measure, and undertakings that are not enforceable in the courts of the requesting State should not be too readily accepted. 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 child. The efficacy of the latter will need to be addressed with care. *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*." (emphasis added)

69. The need for caution as expressed in paragraph 3.1, reflects what was said in the Guide, at [47], and was repeated in the Conclusions & Recommendations adopted by the

Eighth Meeting of the Special Commission on the practical operation of the 1980 and the 1996 Conventions in October 2023, at paragraph 31:

> "It should be noted that voluntary undertakings are not easily enforceable, and therefore may not be effective in many cases. Hence, unless voluntary undertakings can be made enforceable in the State of habitual residence of the child, they should be used with caution, especially in cases where the grave risk involves domestic violence."

70. I would, however, add that there is a broad spectrum of cases and the approach taken by courts to undertakings will depend, as referred to above, significantly on the weight the court intends to place on them as a protective measure *and* their place in the court's overall determination. In the latter context, I repeat what I said in *Re C (Children) (Abduction: Article 13(b))* [2018] EWCA Civ 2834, [2019] 1 FLR 1045, at [43]:

> "First, in respect of Ms Cooper's submissions about the efficacy of undertakings given to the English court, it is clear that, in deciding what weight can be placed on them, the court has to take into account the extent to which they are likely to be effective. This applies both in terms of compliance and in terms of consequences, including remedies, in the absence of compliance. The issue is their effectiveness which is not confined to their enforceability: see, for example, *H v K and Others (Abduction: Undertakings)* [2017] EWHC 1141 (Fam), [2018] 1 FLR 700, at [61]. In saying this, because I acknowledge the concerns that have been expressed about the court's perhaps giving insufficient weight to the point made by Ms Cooper and the need for caution when relying on undertakings, I make clear that I am not saying that enforceability is not an issue, *only that it forms one element of the court's assessment*." (emphasis added)

As an example, in *H v K*, at [61], MacDonald J explained why, in that case, he rejected a submission that "to ensure the efficacy of the foregoing protective measures it is necessary to go beyond accepting undertakings given by the father".

71. Finally, I would note that one way in which undertakings might be considered to be enforceable for current purposes is if there are equivalent measures available in the child's home state. This was, it seems to me, probably the approach taken by Cobb J (as he then was) in *Re A and R (1980 Hague Convention: Return to Australia)* [2024] EWHC 2190 (Fam), [2025] 1 FLR 707 ("*Re A and R*") when he decided, at [69], that the undertakings offered by the father "will be capable of ready enforcement in Australia". He had earlier referred, at [60], to "the Australian Court having jurisdiction under its own Family Law Act 1975 to make orders which can constitute protective measures" and to the fact that "the mother could apply for an Apprehended Domestic Violence Order". Cobb J also referred to the Fact Sheet which has been produced by the Australian International Hague Network Judges on protective measures and to which he had referred in *Re T*, at [53(iii)].

Determination

72. I first deal with ground 1.

73. As referred to above, it would have been better if the Judge had permitted Dr McDermott to give evidence. Her report had only been provided on the last working day before the hearing and the parties should have been permitted to ask questions which they would have been entitled to do under r. 25.10 if it had been provided earlier (which I would expect to be the position in nearly all cases). This would also have avoided either party considering, subsequently, that they had been disadvantaged by not being able to ask questions. However, I do not consider that the fact that Dr McDermott did not give oral evidence caused any procedural unfairness or that it undermines the Judge's decision. Apart from a slight question about one aspect of her evidence (as referred to in paragraph 13 above and which I deal with further below) her evidence is clear and there is nothing to suggest that, if she had been asked questions, the effect of her evidence would have been materially different.

74. I next deal with the challenge to the Judge's approach to, and decision in respect of, domestic abuse.

75. It is right, as submitted by Ms Baker, that a judge must consider "the cumulative effect" of the allegations relied on by the taking parent, *Re B*, at [70]. However, as I also said in that case, there "may be … distinct strands which have to be analysed separately". In the present case the mother's allegations of domestic abuse were distinct from her case in respect of the effect on her mental health of returning to Australia. As Ms Baker rightly acknowledged during the course of her submissions, the mother's domestic abuse allegations were referred to in the report but they did not feature as part of Dr McDermott's analysis.

76. Further, the Judge was required to consider the nature and extent of the mother's domestic abuse allegations and "first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation", *Re E*, at [36]. He properly asked that question and was clearly entitled to decide that the answer was that they did not cross that threshold.

77. I would accept Ms Baker's challenge to the Judge's bare statement that the proposed non-molestation undertaking "will be enforceable". However, because the allegations themselves did not cross the Article 13(b) threshold, there was, in fact, no need to consider the issue of protective measures in respect of this part of the case. Further, as was referred to in *Re A and R*, at [60], the courts in Australia (federal and state) have the power to make orders to protect a parent from domestic abuse. The Judge referred to this in paragraph 48 (quoted above) when considering the mother's case overall.

78. Accordingly, I do not accept that the Judge's approach to the mother's allegations of domestic abuse was flawed.

79. I next consider the mother's case that the Judge's decision, in respect of the mother's mental health and the risks on return, was based on a series of conclusions about the risks which were not open to him on the evidence and that he failed to undertake the three stage test referred to in *Re B* [2024], namely assessing the nature of the risk, the

likelihood of the risk materialising and the consequences of the risk materialising for the child. As set out in that case at [51], I repeat:

> "In a case such as the present, for the purposes of determining whether the circumstances set out in Article 13(b) have been established, this will involve consideration of the nature or extent of any potential deterioration or relapse in the mother's mental health and the nature or extent of any potential impact on [the child]."

The ultimate or critical question, as referred to above, is whether the effect on the mother's mental health "will create a situation that is intolerable for the child": *Re S*, at [34]

80. I propose, therefore, first to analyse the nature and extent of the risk to the mother's mental health and then to consider the nature and extent of any impact on B.

81. The nature of the risk to the mother's mental health in this case is clear. As set out in Dr McDermott's report, it is that the mother would be at "risk of developing a clinical depression of significant degree". As to the "degree of [the mother's] depression", Dr McDermott considered that this could become "moderate to severe".

82. As to the likelihood of the risk materialising, Dr McDermott said that the mother would be "at serious risk" of developing clinical depression and that "the prognosis in terms of a significant deterioration in her mental health would be high".

83. It is also necessary to consider what steps might be available to mitigate a deterioration in the mother's mental health, as referred to above, if it was to occur. The focus in respect of this part of the analysis was on paragraph 2.8(e) in Dr McDermott's report. To repeat, in response to the question of whether there were any supports or treatment plans which might ameliorate any risk to the mother's mental health, Dr McDermott said there would not be "any realistic supports, or treatment, which would ameliorate the virtually inevitable risk" to the mother's mental health.

84. I can understand why Ms Baker relied heavily on this part of Dr McDermott's evidence and I had, initially, thought that this was dealing with treatment subsequent to the mother's mental health deteriorating on a return to Australia. However, on reflection, and having heard the parties' respective submissions, it is clear to me both from the way in which the question was phrased and from the structure of the answer that this is dealing with the question of whether there are any, what might be called, preventative supports or treatment available which could reduce the likelihood of her developing clinical depression if a return order is made. It is not dealing with the question of treatment if the mother's mental health does deteriorate after she has returned. If it was, it would be inconsistent with Dr McDermott's reference in paragraph 2.10(g) to the situation that would arise *if* the mother's depression after a return to Australia was "persistent or unresponsive to psychological/psychiatric treatment(s)". This clearly does not rule out treatment being available which would mean that it was not persistent and/or was responsive to treatment.

85. On the issue of treatment *after* the mother's return to Australia, Dr McDermott said that it "would be crucial to have an intensification of [therapeutic] sessions". The evidence

clearly established that this would be available and no doubt the mother's current psychologist would "have a high index of suspicion for the development of a clinical depression" as recommended by Dr McDermott.

86. In addition, Dr McDermott recommended that the mother "would need ready access to a psychiatrist". The Judge addressed this issue in paragraph 40 when he said that "it has not been seriously suggested that Australia lacks appropriate services to treat depression that mother will be able to access, even if she has to self-fund". He also referred in paragraph 48 to his "confidence that mother will be able to access appropriate medical … services". In my view, although criticised by Ms Baker, these specific conclusions were clearly open to the Judge.

87. I next turn to the key question of whether the consequences of the risk of a deterioration in the mother's mental health are such as to establish a grave risk of harm to B or of his being placed in an intolerable situation.

88. The height of the mother's case is found in paragraphs 2.6 (c) and 2.10(g) of Dr McDermott's evidence. In the former she said that if the degree of the mother's depression was moderate or severe, which it *could* become, "more likely than not there *could* be negative consequences to her [emotional] availability to, and responsiveness towards, B" (emphasis added). In the latter, she said that *if* the mother's clinical depression was persistent and unresponsive to treatment this "*could* result in a negative impact on her ability to parent" B (emphasis in original). It is relevant to note that Dr McDermott did not suggest that the mother would not respond to treatment and she also referred to the fact that the mother had been "resilient in the face of seriously challenging clinical work".

89. Despite the powerful case advanced by Ms Baker, I have concluded that the Judge was entitled to decide that the evidence did not establish the high threshold required by Article 13(b), namely a *grave* risk of harm to B or of his otherwise being placed in an *intolerable* situation. Apart from the fact that the risk to B depended on the mother's condition being unresponsive (and there being no evidence that it would be), as Mr Gupta submitted, the fact that there *could* be *a* negative impact on the mother's ability to parent B is not sufficient. The nature and extent of this potential impact on B are not such as to bring this case within Article 13(b).

90. I have not separately dealt with all the other matters advanced by Ms Baker but I do not consider that any of them add significantly to her appeal. I would add, for the avoidance of doubt, that the Judge did sufficiently consider, in concrete terms, B's situation on a return to Australia.

91. Accordingly, I have concluded that the Judge was entitled to decide that Article 13(b) was not established. It would, undoubtedly, have been better if he had addressed the question of the impact of a return order on the mother's mental health more closely in the analysis part of his judgment. However, his judgment has to be read as a whole and he addressed Dr McDermott's evidence in some detail at an earlier stage. Also, having myself carefully considered the evidence, in particular the medical evidence, I am satisfied that it does not establish that there was a grave risk that returning to Australia would expose B to psychological harm or would otherwise place him in an intolerable situation.

Conclusion

92. In conclusion, for the reasons set out above, in my view this appeal must be dismissed.

Lord Justice Peter Jackson

93. I agree.

Lord Justice Zacaroli

94. I also agree.