



Neutral Citation Number: [2024] EWHC 198 (Fam)

Case No: FD23P00358

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 February 2024

Before:

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

Between:

A father

Applicant

- and -

A mother

Respondent

Re. TKJ (Abduction: Hague Convention (Italy))

Ms. Indu Kumar (instructed by Jones Myers, Solicitors) for the Applicant
Dr. Charlotte Proudman (instructed by Wilson Solicitors LLP) for the Respondent

Hearing dates: 29-30 January, 1 February 2024

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30 am on 2 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives **with** **typographical amendments made on 5 February 2024.**

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

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

Introduction

1. This is an application under the Child Abduction and Custody Act 1985 by the father (hereafter ‘F’) for a summary return order under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (‘**Hague Convention**’). The respondent is the mother, (hereafter ‘M’). The application concerns their 5-year-old daughter, TKJ, who was removed by M from Italy to the United Kingdom on 13 December 2023. The parties have been anonymised for reasons of privacy and confidentiality and to allow this judgment to be published.
2. I heard the matter over three days on 29, 30 January and 1 February 2024. I announced the result, and read my findings of fact and reasons for my decision, in open court on 1 February 2024, and explained that I would be handing down the full judgment in writing by email. This is that judgment. I was very grateful to counsel, Dr. Proudman and Ms. Kumar, for their helpful submissions.
3. In this judgment I will identify the issues: set out the facts; explain the relevant legal framework; make relevant findings of fact; then apply the facts and the law to the issues I must decide.

Issues

4. It is not in issue that, at the time M removed TKJ from Italy: TKJ was habitually resident in Italy (Williams J having summarily dismissed an argument to the contrary by order of 21 September 2023); the father was exercising rights of custody within the meaning of the 1980 Hague Convention; the father had not consented or acquiesced in the removal, which was in breach of his rights of custody which were being exercised; TKJ is too young for any objections to return she may have to be considered for the purposes of any exception under Article 13 of the Hague Convention; and the application was made within 12 months of the removal so there is no settlement exception available under Article 12.
5. In those circumstances, the Court is bound to order TKJ’s return to Italy unless M succeeds in establishing the exception under Article 13(b), namely that if I ordered TKJ’s return there is a grave risk that would expose her to physical or psychological harm or otherwise place her in an intolerable situation. If that exception is established, M submits the court is not bound to order EF’s summary return and should not do so in its discretion. M also maintains that to return TKJ to Italy would have the effect of returning M to a situation in which she will be at a real risk of suffering harm amounting to torture or inhuman and degrading treatment, contrary to Article 3 of the European Convention on Human Rights (‘ECHR’), and an order for return is therefore prohibited by s 6 Human Rights Act 1998 (‘HRA’). Those are the substantive issues I must decide.
6. I remind myself that I am not concerned with the issue ‘what is best for the child?’ but ‘who should decide what is best for the child?’. That decision should be taken by the courts in the state of habitual residence (Italy) unless M is able to establish

the exception under Article 13(b) and I do not order return in my discretion: *DT v LBT (Abduction: Domestic Abuse)* [2011] 1 FLR 1215, [23(2)], per Jackson (then) J. Whatever my decision, the courts of either Italy or England and Wales will in due course have to decide the child welfare issues including residence and contact. My decision will determine where TKJ and, by extension, M will live while those issues are determined.

7. Three procedural issues also arose:

- 7.1. M sought permission for her sister to be present in court to provide her with support under FPR r. 27(2)(g). F opposed that application but gave no reason, let alone a good reason. In view of the psychiatric evidence of M's anxiety and low mood I considered that support would assist M to participate effectively in the proceedings and gave permission.
- 7.2. M made a Part 25 application to instruct and rely upon an expert report from a psychologist to supplement the psychiatric report of Dr. Van Velsen. I indicated that I would adjourn consideration of the application and give my ruling once I had heard the substantive application: see paragraph 61, below.
- 7.3. M produced three further witness statements shortly before, during and after the hearing. F did not object to their admission, and I was satisfied that he was able to address the matters raised. I therefore give permission for them to be admitted in evidence.

Facts

8. F was born in Egypt but is an Italian national and is now 34. M is a Moldovan national aged 33. M moved to Italy in 2010 where she met and began a relationship with F in 2016. They are unmarried. They moved to the United Kingdom for work in 2018. TKJ, their only child, was born in London in January 2019 and is now 5. The family moved to Italy when TKJ was six months old where they lived until M removed her to the United Kingdom on 13 December 2022.

The mother's allegations of domestic abuse prior to 13 December 2022

9. M alleges that throughout their relationship F was threatening, controlling and coercive and subjected her to physical, emotional, verbal and sexual abuse (although no details were given of the sexual abuse). While living in Italy, F had opened a restaurant which had failed, leaving F bankrupt. He stopped working and began drinking heavily. While drunk he became very aggressive and violent towards M, making threats to kill her and causing criminal damage in the home by throwing or kicking their possessions. M was constantly in fear for her own and TKJ's safety, particularly when F drove a car with TKJ as a passenger while under the influence of alcohol. M had no support networks in Italy and feared what would happen if she went to the police. F would often threaten that if M left him, he would take TKJ to Egypt and raise her there, with the help of his mother.

10. M relies upon the following specific incidents.

- 10.1. In January 2020, F came home drunk. The pair had an argument. F hit M so hard in the face using the back of his hand that M bled from her mouth and nose. They were in the living room and TKJ witnessed the assault. There was blood all over the floor. F recorded the aftermath of the incident on her mobile phone. The following day, TKJ was playing on M's mobile phone and accidentally sent the video to a friend of M's on Instagram. M has exhibited a screenshot of the Instagram conversation that followed with her friend, which reads (in material part) as follows (emphasis added):

On 31 January 2020:

Friend: 'You sent me blood on the floor. And you said that you won't forgive him. This stays between me and you, ok'

M: 'My daughter sent that'

On 1 February 2020:

M: 'Sorry about those videos. I don't know how I got the idea to make them. I just wanted to give him a scare. I was having a very stressful day and I was very irritated. *He slapped me with the back of his hand to shut me up and hit my nose which then started to bleed.* It's not as bad as it looks like, though. *I wish I hadn't done it, because my daughter was there too.* This hurts the most. She is my greatest treasure, but there are many things that have accumulated over the past few days. We've moved and had to go places to renew the documents and whatnot. Also, my nephew from Moldavia is not doing so well. He is in hospital. I hope he gets well as soon as possible. It's just that there are many things adding up. He's not the cream of the crop, but he's not that bad. I hope it won't happen again.'

Friend: 'I promise no one will know about these videos. Many things happen in each family. Kisses to you sweetheart and do yourself a favour and don't let him do that again to you.'

M: 'Yes, I hope it doesn't happen again. Thank you!'

- 10.2. In August 2022, F threw a big metal air freshener spray (described also as a heavy perfume bottle) with considerable force; M turned her back and it struck her in the back, ripping her tank top and tearing her skin causing bleeding. The injury became bruised and swollen to the extent she was unable to sleep on her back. TKJ witnessed this incident; she was very scared and still remembers the incident. M took a video of the injury, but

no longer has a copy of it. She explains that '[TKJ] accidentally sent it to a Facebook Friend and I deleted it'.

- 10.3. In November 2022 F threatened kill M with a knife. They were at home with TKJ. F had been drinking. M suggested he should cut down drinking and smoking and explained that it was becoming increasingly difficult for her to care for TKJ on her own. F lost his temper and grabbed a kitchen knife from the kitchen, held it to M's chest and threatened to kill her. M was petrified, apologised and asked him to put the knife down. F then punched her in the face and pushed her onto the balcony. TKJ witnessed the assault. M briefly contemplated escaping by climbing down from the balcony (the flat was on the 2nd floor) but was concerned about leaving TKJ alone with F. Shortly afterwards F left the house and M went back inside to care for TKJ.
- 10.4. On 15 November 2022 F repeatedly hit M in the face, threw a lighter at her which struck her nose and caused a nosebleed. He then punched her multiple times in the ribs, causing bruising.
- 10.5. On 26 November 2022 the parties left voicemail messages for each other which were transcribed and translated and read:

F: 'I'll make you pay for everything that you are writing'

M: 'I suffered for many years. I can no longer accept these kind of things. I'm a woman who has a daughter who sometimes needs ... I don't ask for help every day; I ask every now and then. You should be ashamed, you threaten me, I'm leaving, if you want me to pay, I have already paid a lot. I'm telling you I'm at the end of my tether. You made me pay the whole life, you want to destroy me, I won't let you any more, I'm devastated, you hurt me many times, I'm devastated. I don't even want to go home, if I had a place to stay for two-three days, somewhere, two-three days at least, I don't even want to go home, I'm telling you. It often happens that I don't want to go home, but I have no choice, but I often think I don't want to go home.'

- 10.6. On 1 December 2022 M was on a video call with her sister, MSC, when F came home drunk and started removing his clothes. F began to shout and became threatening, claiming TKJ had made a mess. He then hit M in the face, pushed her into the bathroom and locked her in. While she was in the bathroom he kicked and damaged the door. A photograph of the damaged door was produced in evidence. F also threatened to throw M out of a window. MSC has given a statement describing this incident, including how F appeared in the background without his top on, shouting and swearing at M, his eyes were red and he looked drunk. M looked afraid and kept saying 'it is a disaster with us'. M then ended the call without warning.

- 10.7. On 8 December 2022 F left a voicemail message for M saying ‘Every time you take [TKJ] out and you’re planning to return late you must tell me, where the fuck are you?’ F later assaulted M when she returned home. F became very angry with M and hit her in the head with a lighter he had in his hand, causing pain and bruising which took a few days to subside.
11. This last incident prompted M to leave F a few days later and to take TKJ with her to the UK. She left on 13 December 2022. It is not in dispute that the removal was without F’s consent, who lodged a criminal complaint with the police on the same day.
12. M did not report these incidents of domestic abuse to Italian police or any other authorities as she feared she would not be taken seriously. She says that F has a relationship with local police officers who used to visit his father’s restaurant and would eat there for free.

M’s threats after F’s arrival in the United Kingdom on 13 December 2022

13. M arrived in the UK with TKJ on 13 December 2022 and was collected from the airport by another sister, MSO, and MSO’s husband, MBL, who live England with their children. MBL has provided a witness statement describing how, following M’s arrival, F repeatedly tried to contact him and MSO and left threatening text and audio messages that he will ‘come to London and fuck me and my family’. I have read transcripts of all these messages which contain abusive and graphic threats of violence, including sexual violence, towards M, M’s mother in Moldova, MSO and MBL. There are dozens of these messages on 16 and 17 December 2022. I have set out some examples in Appendix 1.

F’s report to police on 16 and 19 December 2022

14. After receiving the messages from F on 16 December 2022, MBL and MSO helped M contact UK police given their concern that F would come to the UK and harm them. I have seen a record of that report made to Thames Valley Police. MBL spoke to the police call handler on 16 December 2022. Police then attended on 19 December 2022, with an interpreter. At Appendix 2 I have set out the police record of the call on 16 December and their attendance on 19 December 2023, in which M sets out an account of the abuse she suffered at F’s hands.

The non-molestation order on 23 December 2022

15. On 20 December 2022 M brought without notice proceedings in the Milton Keynes Family Court (MK22F00327) seeking a residence order, a prohibited steps order prohibiting F from removing the child from the UK, a specific issue order permitting M to obtain TKJ’s documentation without F’s consent and a non-molestation order. Attached to the application in form C1A were F’s allegations of harm and domestic violence including ‘physical, emotional, psychological, sexual and financial’ harm, which stated that F ‘has threatened her with a knife’ ‘he has threatened to hurt her family’ and ‘he has hit her in the ribcage’. M gives as an example the assault in which F threw a heavy perfume bottle at her (above, paragraph 10.2). M also alleges that F ‘drove drunk with his daughter in the car, endangering the child’. The prohibited steps and non-molestation orders were

made by Recorder Hellens on 23 December 2022. The non-molestation order makes clear on its face that breach of its terms is a criminal offence. Included among its terms was the following prohibition:

The Respondent must not send any threatening or abusive letters, text messages, emails or other communications to the Applicant

...

16. As will be seen, there have been numerous breaches of this prohibition since the order was made. F maintains that he was unaware of the terms of the order before 9 May 2023, the first time that he appeared (remotely) in the proceedings in Milton Keynes and when he was legally represented. However, it is clear that he had received notice of these proceedings by 15 February 2023, at the latest, because on that day F made a supplementary complaint to the police in Italy in which the proceedings in Milton Keynes are referred to. However, I will proceed on the basis that F was not aware of the non-molestation order until 9 May 2023.

F's conduct since the non-molestation order

17. On 25 and 26 December 2022 F left further threatening and abusive messages for M, MBL and MSO. There was then a break until further threatening messages were sent on 3, 5 and 14 February 2023, as detailed in Appendix 1. On 14 February there was also the following text message exchange between M and F (emphasis added):

M: Through your own fault entirely, you've ruined your life and you've ruined mine as well. I don't live with you through your own fault. *You used to drink and beat me.* I want a quiet life and to sleep undisturbed. I couldn't stay with you any more. *You were always hitting me and you threatened me with a knife.* It's not easy for me, and the child was suffering.

F: I am returning to Italy. Bring the child so she can live her life in peace.

M: I have to look after the girl. I must have time to be with her, and I have to work. You've ruined my life.

F: As I've already told you, I'm leaving the flat for you. I'll leave you everything and you can live your life in peace and do what you want. I shall do what I want.

M: Shame on you.

F: You've ruined my life as a human being. Put [TKJ] on. I still love you.

18. It is significant, in my judgment, that in this exchange F does not deny M's allegation that 'you used to drink and beat me' and 'you were always hitting me and you threatened me with a knife'. It is also revealing that F left a threatening and abusive message for F on the same day ('Every day that goes by and [TKJ]

isn't in Italy, I swear on my mum I'll make you pay for it, I swear on my mum I'll make you pay for it') while telling M that he still loved her in this text exchange. This behaviour is characteristic of a controlling and abusive relationship.

19. On 21 February 2023 F left more threatening and abusive messages. There was then a gap before a further abusive message was left on MSO's phone on 27 April 2023. Again, a selection of these is detailed in Appendix 1. The messages then appear to stop until August 2023. When I asked Dr. Proudman whether this was because M, MBL and MSO had blocked F from being able to send messages, she requested permission for M to admit a further statement addressing this point, which was filed on 31 January 2023. In that statement M explains that she changed her WhatsApp number so F could no longer contact her directly in April 2023. F tried to contact her on Facebook and Instagram between March and August 2023, but M no longer has access to those messages as her old phone broke and she does not have the log in details for the accounts, so she made new accounts. MBL blocked F from being able to contact him on his phone in April 2023. MSO contacted F to inform him of the court hearing on 9 May 2023, in one of his messages in response F stated that he 'does not have time for this bullshit', but otherwise she had no further contact with him.
20. Contact between F and M was resumed after a hearing before Knowles J on 10 August 2023 in which M agreed to weekly video calls between F and TKJ, although she made clear her concern that F would misuse those calls or otherwise behave inappropriately. The recitals to the order record that Knowles J made clear to F that such contact was not to be used as a vehicle to contact the mother. The mother alleged (although very late in the day) that in a number of these calls F was abusive. She recalls one occasion in September 2023 when he called M a 'whore' and appeared to be drunk and slurring his words. On 25 October 2023 M received an audio message from F in Arabic, which was played in court. M maintained that this message contained a highly offensive Arabic phrase. F denied that the message was offensive. I gave M permission to obtain a translation of this message which was exhibited to her statement filed on 31 January 2024. The transcription reads:

Fuck your mother, fuck your father's mother, mother fucker, you
whore

21. While this is offensive in any language, I understand it is particularly offensive in Arabic. The father's denial (through his counsel) that this message was offensive was therefore a lie.

The father's case

22. F disputes all of M's allegations which he claims are not true. He also denies he has any problem with alcohol or that he is bankrupt. He points out that there is no independent evidence of any of the injuries M alleges that she suffered or any evidence from social services, police or criminal justice authorities to substantiate her claims. That, he says, is because they are 'made up'. So far as threatening to take TKJ to Egypt to raise her with the help of his mother, he says his mother in

fact lives with him in Italy. F has also offered a number of undertakings by way of protective measures, which I consider at paragraph 56, below.

Psychiatric evidence of Dr. Van Velsen

23. On 7 November 2023, Russell J gave M leave under FPR Part 25 to instruct a psychiatrist to provide an assessment of F for the purposes of assisting the court in the determination of the Article 13(b) exception. Dr. Cleo Van Velsen, a consultant psychiatrist, produced two reports dated 5 and 25 January 2024 and gave oral evidence, answering questions from both Dr. Proudman and Ms. Kumar. She was asked for her opinion as to: whether M was suffering from any mental disorder; what treatment might alleviate that condition; what impact a return to Italy would have on her mental health and her ability to parent TKJ; and what protective measures could be put in place to mitigate any adverse impact on her mental health.
24. In terms of M's psychiatric history, Dr. Van Velsen noted that M had attended A&E in Italy in 2021 because she had been experiencing panic attacks due to physical and emotional abuse and was prescribed Xanax and advised to visit her GP. In 2023 M attended her GP in the UK reporting low mood and anxiety at the prospect of a return to Italy and was prescribed Propranolol medication to treat anxiety. Dr. Van Velsen did not have access to M's Italian medical records, but she did review her UK GP records. These record a visit on 26 September 2023 in which M reported 'anxiety and stress as a result of domestic abuse' that 'these symptoms date from January 2023 ... still having this problem and is getting worse ... [M is] worried about the court hearing and that I will probably have to return to Italy with my daughter'. She was seen the following day and was said to report she was 'not sleeping well and anxious'.
25. In interview with Dr. Van Velsen, M described how her heart rate increases and sometimes her hands and feet go numb, her 'sleep is not very good, because I am worried if I have to return to Italy ... I came to England because the father did not behave very well and drank a lot'. She reported insomnia, waking early, bad dreams (for example when she needs to go to court) and the dreams sometimes involve her ex-partner. She denied any active suicidal thoughts although 'I sometimes feel that I might lose control'. In the past she had suicidal thoughts but not now. She has no history of deliberate self-harm or suicide attempts but repeated 'I feel fearful for my life'. In her addendum report Dr. Van Velsen repeated that M 'did not describe suicidal thoughts at the time of the interview' and 'there is no history of suicidal plans or actions, and I cannot predict that these will develop. They might'. Under questioning from Dr. Proudman the doctor denied that she had misunderstood M and stood by her assessment that there was no active suicidal ideation, but could not rule that out if she returned to Italy. There was no family history of mental disorder.
26. Dr. Van Velsen's provisional diagnosis was that M is suffering from an 'adjustment disorder' in response to the stressor of F's domestic abuse. However, that diagnosis was conditional on the court finding the allegations of domestic abuse to be true: the doctor had, quite properly, made no such findings or assumptions herself. When I asked her to assume those allegations to be true, she was very clear of the diagnosis of an adjustment disorder, with mixed anxiety and

depressed mood (DSM-V, 309.28). She was adamant, however, that the symptoms were not so severe as to warrant a diagnosis of post-traumatic stress disorder (PTSD), even under Dr. Proudman's searching questions on this issue. M's presentation lacked the necessary features for a PTSD diagnosis of recurrent, involuntary and intrusive memories, flashbacks and nightmares. However, she opined, if the causative stressor of her condition, the domestic abuse, was to continue then M's condition will become worse and might develop into a depressive order, more severe anxiety, or PTSD. It is relatively common for an adjustment disorder to develop into PTSD. In those circumstances M might become actively suicidal. Measures could be put in place that would reduce the impact of a return to Italy such as a non-molestation order or a referral to psychiatrist in Italy. If she lacked that help and support, it could trigger more severe feelings of anxiety and perhaps depression. In particular, if F did not respect the boundaries placed upon him and continued to pester or harass her that would make her adjustment disorder worse and she would not be safe. She accepted that M's symptoms 'could get a lot worse on her return' in those circumstances. This would be exacerbated if she felt helpless, stuck, unable to escape, and isolated from the support of her family that she enjoys in the United Kingdom. Dr. Van Velsen had not seen the abusive messages from F and therefore did not discuss these with the mother, but agreed that if similar messages were sent in future they would have a negative impact on M's mental health, notwithstanding her evident resilience.

Legal framework

27. In this section I set out the relevant legal principles. These closely follow those I identified in *Re. EF (Abduction: Hague Convention (Slovakia))* [2023] EWHC 505 (Fam), [20-25, 30-39] and which both Dr. Proudman and Ms. Kumar accepted was an accurate summary of the relevant law, although each emphasised aspects (in some cases supported by additional authority) that tended to support their case.

Overview

28. The underlying purpose of the 1980 Hague Convention, which is given effect domestically by the Child Abduction and Custody Act 1985, is to enable the 'prompt return of children wrongfully removed to or retained in any Contracting state' (Article 1). It is intended to provide a swift, summary procedure for a left-behind parent to secure the return of a child wrongfully removed to or retained in another country by the removing parent. Where the procedure is triggered the courts of the requested state are required to 'act expeditiously' (Article 11), if possible, within six weeks of the request being made.¹ Once a request is made, the courts of the requested state 'shall not decide on the merits of rights of custody until a determination has been made that the child is not to be returned' (Article 16).

¹ Under the terms of EU Council Regulation 2201/2003 (the 'Brussels IIa Convention') the process was expected to be completed within six weeks of the application being made. Although, since the UK's departure from the EU on 31 January 2020, Brussels IIa no longer applies so there is no longer a legal deadline, Hague Convention proceedings are still expected to be completed within a six week window; para 1.2 of the Practice Guidance 'Case Management and Mediation of International Child Abduction Proceedings' (2018) (the Practice Guidance).

29. The Courts of the requested state must be satisfied that: the request falls within the scope of the Convention, namely that the child is under 16 and was ‘habitually resident’ in the requesting state at the date of their removal or retention (Article 4); and that the removal or retention was ‘wrongful’, namely that it was in breach of the custody rights of the left-behind parent and that those rights were actually exercised or would have been exercised but for the removal or retention (Article 3). Where these criteria are satisfied, there is a *prima facie* duty to return the child if less than a year has elapsed since the wrongful removal or retention or more than a year has passed and it is not demonstrated that the child has now settled in their new environment (Article 12).
30. The Courts of the requested state are not obliged to return the child if one of the exceptions in Article 12 or 13 are made out. Return under the Hague Convention may otherwise be a breach of Article 3(1)² of the UN Convention on the Rights of the Child (UNCRC) and Article 8 ECHR in circumstances such as those considered by the Grand Chamber of the European Court of Human Rights (ECtHR) in *Neulinger v Switzerland* (2012) 54 E.H.R.R. 31. Following *Neulinger*, the Supreme Court clarified the interrelationship of the Hague Convention with the UNCRC and Article 8 ECHR in *E (Children), Re (Abduction - Custody Appeal)* [2012] 1 A.C. 144 and, later, in *S (A Child), Re* [2012] 2 AC 257.³ At [13-17] of their speech on behalf of the Court in *E*, Baroness Hale and Lord Wilson observed that ‘the fact that the Hague Convention does not expressly make the best interests of the child a primary consideration does not mean that they are not at the forefront of the whole exercise’. The Hague Convention is premised on the assumption that ‘if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute’. It is also based on a second assumption, namely that ‘the best interests of the child will be served by a prompt return to the country where he is habitually resident’. This latter assumption may, however, be rebutted, ‘albeit in a limited range of circumstances, but all of them inspired by the best interests of the child’, namely if one of the exceptions in Articles 12, 13 or 20 are made out:
 - 30.1. if proceedings were begun more than a year after the child’s removal and they are now settled in their new environment (Article 12);
 - 30.2. if the person left-behind has consented to or acquiesced in the removal or retention or was not exercising their rights at the time (article 13(a));
 - 30.3. if the child objects to being returned and has attained an age and maturity at which it is appropriate to take account of their views (article 13);
 - 30.4. if ‘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’: article 13(b);

² 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

³ The Supreme Court’s understanding of the interrelationship between the ECHR and the Hague Convention has since been affirmed by the Grand Chamber of the ECHR in *X v Latvia* [GC] (2014) 59 EHRR 3, [93-108].

- 30.5. if the return of the child ‘would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms’: article 20.
31. Where one of these exceptions is established, the assumption that it is in the best interests of the child to be returned to the requesting state ‘may not be valid’: *Re. E*, [16]. Accordingly, the Courts of the requested state will then have a discretion whether to accede to or refuse the request to return the child, to be exercised in accordance with the principles at paragraph 37, below.
32. However, ‘these limitations on the duty to return must be restrictively applied if the object of the Convention is not to be defeated’ and ‘there is a particular risk that an expansive application of Article 13(b), which focuses on the situation of the child, could lead to this result’: *Re. E*, [30], citing the explanatory report to the Hague Convention, para 34. This has implications for the procedure that the Court is to undertake when determining Hague Convention proceedings, including the following.
- 32.1. The burden of proof lies on the person opposing the child’s return (usually the removing parent) to adduce evidence to substantiate one of the Article 13 exceptions to the civil standard: *Re. E*, [32].
- 32.2. The Courts of the requested state are not expected to carry out a ‘full-blown examination of the child’s future ... which it was the very object of the Hague Convention to avoid’: *E*, [22].
- 32.3. There is, moreover, no right to call oral evidence which should only be allowed ‘sparingly’, with the threshold for the court giving permission a ‘high one’: *Re. B* (CA) [2022] 3 WLR, [57-65]. While that threshold is more likely to be crossed where binary issues of fact are involved, such as whether consent has been given for the purposes of Article 13(a), the judge must decide whether it is necessary to hear oral evidence in order to be able fairly to determine central issues of fact in the context of what is a summary process and in the context of the available documentary and written evidence: *Re. B*, *ibid*, [64].
- 32.4. There are particular restrictions that apply when the Court is concerned with the exception under Article 13(b), to which I now come.

Article 13(b): grave risk of harm or an intolerable situation

33. The parent opposing return may establish an exception under Article 13(b) if they prove 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’. The Supreme Court in *E* held at [31-34] that Article 13(b), by its very terms, is of restricted application. In addition to the burden being on the parent opposing return there are the following limitations on its application:
- 33.1. The risk of harm to the child must be ‘grave’. It is not enough that the risk be ‘real’. The risk must reach a certain level of seriousness as to be characterized as ‘grave’. Although ‘grave’ characterizes 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: *Re. E*, [33].

- 33.2. The child must be put at risk of ‘physical or psychological harm’ or otherwise placed in an ‘intolerable situation’. ‘Intolerable’ gives colour to the term ‘physical or psychological harm’. It 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’. Every child must put up with a certain level of ‘rough and tumble, discomfort and distress’, but there are ‘some things it is not reasonable for a child to tolerate’. Among these are physical or psychological abuse or neglect of the child, as well as ‘exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent’, including where ‘the mother’s subjective perception of events lead to a mental illness which could have intolerable consequences for the child’: *Re. E*, [34-35] and *Re. S*, [27], [34]; see also *G v G* [2022] AC 544, [155], below paragraph 43. It is important to recognise that the mother’s ‘subjective perception’ of continuing domestic abuse need not be a reasonable one for the exception to be available. As Lord Wilson explained in *Re. S*:

34 In the light of these passages we must make clear the effect of what this court said in *Re E* [2012] 1 AC 144. 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.

- 33.3. I return to this, below, under the heading ‘controlling or coercive behaviour’.
- 33.4. Article 13(b) looks to the future: the situation as it would be if the child were to be returned forthwith to her home country, having regard to any protective measures that may be put in place to safeguard the child from such harm: *Re. E*, *ibid*, [35]. There may, objectively, be a ‘grave risk’ that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation if they are returned (whether with or without the removing parent) to live with the left-behind parent without any protective measures. But if, for example, the child can be returned to a different setting, with effective restrictions on the left-behind parent having any contact with them and the removing parent, then the threshold required for Article 13(b) purposes will not be crossed. The gravity of the

risk of harm, including both its likelihood and the potential seriousness of the harm, needs to be evaluated in the light of the availability and efficacy of any protective measures. ‘The clearer the need for protection, the more effective the protective measures must be’: *Re. E*, [52], cited in *Re. S (Abduction: Article 13(b)) (Mental Health)* [2023] EWCA Civ 208, [92].

- 33.5. Relevant protective measures may include anything which might reduce the risk, including general features of the home State such as access to the courts and other state services: *Re. C* [2019] 1 FLR 1045, [41]. The measures may also include orders made by the court in the requested state or undertakings given by the left-behind parent requiring them, for example, not to contact the removing parent pending the resolution of children’s proceedings in the requesting state. In assessing the efficacy of any such orders or undertakings, the fact that they are enforceable in the requesting state under the terms of the 1996 Hague Convention⁴ is a relevant consideration: *Re. Y (Abduction: Undertakings)* [2013] 2 FLR 649. If there is any doubt as to the availability or efficacy of protective measures, enquiries may be made through the international liaison judges and a short adjournment may be necessary for that purpose: *E v D* [2022] EWHC 1216 Fam, [32].
34. In determining the Article 13(b) issue the court should adopt the following approach.
- 34.1. The burden of establishing the Article 13(b) exception remains throughout on the party opposing return. However, given the nature of allegations of domestic abuse upon which the risk of harm is likely to be founded and the limited evidence available given the summary nature of the proceedings, the court may be unable to determine the truth of the allegations. The courts have therefore adopted a pragmatic solution. Unless the available evidence enables them ‘confidently to discount the possibility that the allegations give rise to an article 13(b) risk’, the judge ‘should assume the risk of harm at its highest and then, if that risk meets the threshold in Article 13(b), go on to consider whether protective measures sufficient to mitigate the harm can be identified’: *Uhd v Mckay* [2019] 2 FLR 1159, per MacDonald J, [68-70], applying *Re. E*, [36] (as endorsed by the Supreme Court in *Re. S (A Child)* [2012] 2 AC 257, [22]) and the Court of Appeal decisions in *Re. C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045, [39], and *Re. K (1980 Hague Convention: Lithuania)* [2015] EWCA Civ 720, [52-53].
- 34.2. Although the case-law does not expressly say so, in my judgment it follows from the reasoning in *Re. E*, *Re. S*, *Uhd*, *Re. C* and *Re. K* that if the judge is able to find, on the limited evidence available, that the allegations made by the removing parent are made out then they may make such a finding, rather than assume the allegations to be true. Positive findings of fact, as opposed to assumptions made in the context of

⁴ Full name the ‘Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children Protection of Children 1996’

disputed allegations, can provide a surer foundation for a court's conclusion that there is a grave risk of harm or intolerability. There is no reason why such findings cannot be made in the absence of oral evidence (*Re. S*, [35]), although that might be a reason why a court in subsequent proceedings would not be bound by such findings. That said, while Ms. Kumar accepted that a Court could make such findings, she rightly emphasised that the Court must proceed with care before doing so.

34.3. Although it is not necessary, it is preferable for the judge to adopt a two stage process under Article 13(b): *Re. B*, [2022] 3 WLR 1315, [70-71].

(1) At stage one, the judge should evaluate the nature and level of the risk *in future* on the basis of their finding (if made) or assumption that the allegations made by the removing parent of the left-behind parent's *past* behaviour are true: *ibid*, see also *Re. C*, [2019] 1 FLR 1045, [48-50]. If a number of different allegations are made, the judge should consider the cumulative effect of those allegations as a whole before evaluating the nature and level of risk: *Re. B*, [70]. If the court assesses the necessary threshold has been reached then they will proceed to stage two; if not, the exception fails.

(2) At stage two, the judge should evaluate the adequacy and efficacy of any protective measures in reducing or removing that risk to a level below the threshold of 'grave risk' provided for by Article 13(b).

34.4. Although there is no burden of proof on the left-behind parent to establish the adequacy and efficacy of protective measures in the event of a return, the court does need to be satisfied that such measures are available. I note that Article 11(4)⁵ of the Brussels IIa Convention appears to impose a legal burden on the left-behind party, but this is no longer law following the UK's exit from the EU. In *Re. C* [2019] 1 FLR 1045, [69], Lewison LJ observed that to impose such a burden reverses the burden of proof imposed by Article 13(b) on the party opposing return. In *X v Latvia* [GC], [108] the Grand Chamber made clear that the courts must 'satisfy themselves' that adequate and effective safeguards are 'convincingly provided':

108. Furthermore, as the Preamble to the Hague Convention provides for children's return "to the State of their habitual residence", the courts *must satisfy themselves* that adequate safeguards are *convincingly provided* in that country, and, in the event of a known risk, that *tangible protection measures are put in place*.

34.5. Such an approach does not require me to treat F as being under a legal or evidential burden of proof in relation to the existence of protective measures. The exercise under Article 13(b) requires consideration of the

⁵ 'A court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if *it is established that* adequate arrangements have been made to secure the protection of the child after his or her return.'

anticipated risk to the child upon return. This involves a process of evaluation, assessment or judgment in relation to which the concept of a burden and standard of proof is ‘not particularly helpful’: *R (N) v Mental Health Review Tribunal* [2006] QB 468, [99]. The court should approach the task at each stage by considering all the available evidence and by determining, first, the relevant facts concerning what is alleged to have happened in the past, which the parent making the allegation must either prove (applying the civil standard) or which the court may assume; second, to conduct an evaluative judgment as to the nature and level of risk in future if the child is returned by reference to what has happened in the past and the adequacy and efficacy of any protective measures that the court satisfies itself will be available; third, to ask whether the removing parent has discharged the burden on her under Article 13(b).

Domestic abuse, controlling or coercive behaviour and Article 13(b)

35. Baroness Hale in *E* acknowledged that a child may suffer ‘harm’ or be placed in an ‘intolerable situation’ for the purposes of Article 13(b) when a parent or caregiver is subjected to domestic abuse to which the child is witness or which causes or may cause a deterioration in their caregiver’s mental health: [34], *Re. S*, [34] above, paragraph 33.2. In recent years there has been an increasing awareness, as a matter of domestic law, that ‘domestic abuse’ may occur when a person subjects another to a pattern of behaviour amounting to ‘controlling or coercive behaviour’. This awareness should also inform the exercise under Article 13(b). In *Re. A-M (A Child: 1980 Hague Convention)* [2021] EWCA Civ 998, [49, 56], the Court of Appeal held that when considering Article 13(b) ‘the court must be astute to recognise’ conduct which forms part of a pattern of controlling or coercive behaviour’, referring to the judgment of the Court of Appeal in *Re. H-N (Allegations of domestic abuse)* [2022] 1 W.L.R. 2681, [29-32]. I refer to and adopt what I said on this issue in *EF*, [32-37].
36. Dr. Proudman drew my attention to a further important matter that the Court should bear in mind when assessing allegations of domestic abuse. The court cannot infer that allegations are not true simply because a victim has not reported allegations of domestic abuse or because she has remained in an allegedly abusive relationship. She referred to observations to that effect by Judd J in *M (A Child)* [2021] EWHC 3225 (Fam), [81-82], by Cobb J in *Re B-B (Domestic Abuse: Fact-Finding)* [2022] EWHC 108 (Fam), [98] and by Knowles J in *A v B* [2022] EWHC 3089 (Fam), [63-64]. A victim of abuse may remain in a relationship because they have ‘lost any objective sense of what is acceptable and unacceptable in a relationship’ (per Cobb J in *B-B*, [98]) or because their ability to resist their abuser has been compromised. As Hayden J noted in *F v M*, [83, 113], there may be no need for an abuser to lock a victim of abuse in their home; eventually, the victim may effectively ‘lock themselves in’. And a victim of abuse may not report abuse for the same reasons or because of ‘shame, fear of being disbelieved or fear that the process of reporting an assault will itself be traumatic’: per Knowles J in *A v B*, [64].

Discretion

37. Where the court is satisfied one of the exceptions in Article 13 is made out it is no longer under a duty to order the return of the child to the requesting state under Article 12. However, the court retains a discretion to return the child. This discretion is ‘at large’, that is to say it is not exercised within limits set down by the Hague Convention: per Baroness Hale in *Re. M (Abduction: Zimbabwe)* [2008] 1 FLR 251, giving a speech with which the rest of the House of Lords agreed: [43]. The underlying purposes of the Hague Convention are relevant to the exercise of the discretion, but should not always be given more weight than other considerations, which may include wider considerations of the child’s rights and welfare: [43]. The exercise of discretion will be determined by the court’s findings as to why there is no obligation to return the child. For example, where the decision has been taken under Article 13(b) that there is a ‘grave risk’ of harm to the child if they are returned it will be ‘inconceivable’ that the court will nevertheless in its discretion order their return: [45] (a point she had also made in *Re. D* [2007] 1 A.C. 619, [55]). Different considerations may apply in consent cases, although as a general principle ‘the further one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be’: [44].

Domestic abuse, the Hague Convention and Articles 2 and 3 ECHR

38. Following the close of submissions on 30 January 2024, and while drafting the judgment, I invited Counsel to address me on a further issue of law, namely the interrelationship between Articles 2 and 3 ECHR and the Hague Convention. I heard further submissions on this issue on 1 February 2024, in the light of which M now submits that I should refuse to order TKJ’s return as this would lead to a real risk of breach of M’s rights under Article 3 ECHR and is prohibited by s 6 HRA.
39. It is important to recognise that the impact of an order for return which has the effect of returning a victim of domestic abuse to the territory of their abuser has human rights implications beyond those under Article 8, which I have considered at paragraphs 30-32, above. A return under the Hague Convention may also have implications under Articles 2 (the right to life) and 3 (the right not to be subjected to torture or inhuman and degrading treatment) ECHR. States are prohibited from removing or returning an individual to another state where there are substantial grounds for believing they would be at a real risk of a breach of Article 2 or 3 if returned: *Soering v United Kingdom* (1989) 11 EHRR 439, *Re. AAA (Syria) (‘Rwanda judgment’)* [2023] UKSC 42, [23] (the *Soering* test).
40. Articles 2 and 3 ECHR impose a number of positive duties on contracting states, including an operational duty to take preventive measures to protect an individual who is at a real and immediate risk of death, torture or inhuman and degrading treatment at the hands of a private person of which the state is or ought to be aware: *Osman v UK* (2000) 29 EHRR 245, [115]; *Tunikova v Russia* (2022) 75 EHRR 1, [103]. The ECtHR has recognised that victims of domestic abuse are in particular need of state protection under these Articles (*Opuz v Turkey* (2010) 50 EHRR 28, [159]; *Tunikova*, [95]). Domestic abuse can take various forms, ranging from physical assault to sexual, economic, emotional or verbal abuse,

with women making up the overwhelming majority of victims: *Kurt v Austria* (2022) 74 EHRR 6, [161]. Physical or sexual abuse is not required for domestic abuse to fall within the definition of ‘inhuman and degrading treatment’: *Tunikova*, [73, 75] (emphasis added):

73. ... Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, *even in the absence of these aspects*, treatment which humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or which arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, may also fall within the prohibition set forth in Article 3. ...

75. ... Article 3 does not refer exclusively to the infliction of physical pain but also to that of mental suffering which is caused by creating a state of anguish and stress by means other than bodily assault *Fear of further assaults can be sufficiently serious to cause victims of domestic violence to experience suffering and anxiety capable of attaining the minimum threshold of application of Article 3.*

41. Where domestic abuse is suspected, Article 3 requires state authorities to respond immediately by undertaking an autonomous, proactive and comprehensive risk assessment and to take operational preventive and protective measures that are adequate and proportionate to the assessed risk: *Tunikova*, [104]. Similar duties arise under Article 2: *Kurt*, [159, 168-169, 190]. It is important to recognise the link between domestic abuse and a heightened risk of the victim’s death, either at the hands of the abuser or by suicide. There is a helpful article by Sophie Naftalin and Prof. Vanessa Munro in ‘Legal Action’, October 2023, which explores the growing body of research which establishes this link.⁶
42. M submits that, where the court is considering an application under the Hague Convention to return a child removed by a victim of domestic abuse, an investigation into the Article 2 and 3 implications of ordering return is called for. If the court were to find that there were substantial grounds for believing that an order for return would expose the victim to a real risk of inhuman and degrading treatment – or worse – as a result of domestic abuse by the left-behind parent, this would have implications under Articles 2 and 3 unless (a) the child could safely be returned on her own, or (b) there are sufficient protective measures in the receiving state to avoid the risk of harm. A return would otherwise be prohibited by s 6 Human Rights Act 1998 and Article 20 of the Hague Convention, which is set out in material part at paragraph 30.5, above. M submits, following this logic, that I must assess the Article 3 compatibility of the proposed return and refuse it because there is a real risk that M will suffer torture or inhuman and degrading treatment at the hands of F if TKJ is returned as M will have no option but to accompany her.

⁶ <https://www.lag.org.uk/article/214523/investigations-into-suicides-in-the-context-of-domestic-abuse>

43. Neither I nor Counsel could find any authority where this issue has been directly addressed by the courts. However, Ms. Kumar drew to my attention to *G v G* [2022] AC 544 in which the issue was addressed indirectly by the Supreme Court. In that case the courts had to resolve competing claims for asylum by removing a mother and child and for the child's return under the Hague Convention by the left-behind father. The claim for asylum was based on the mother's fear of persecution from her family in South Africa on the grounds of her sexuality. She resisted the Hague Convention application under Article 13(b) (citing the father's domestic abuse) and 13(2) (child's objections). The mother claimed that the Hague Convention application could not be determined, or any order implemented until the asylum application had been resolved, which might take years. The High Court (Lieven J) stayed the Hague Convention application and the father appealed. The Court of Appeal allowed the father's appeal and lifted the stay. The mother appealed to the Supreme Court, where her appeal was partially successful. Of relevance to this case, one of the grounds of appeal was that the making of an asylum application to the Home Secretary operated as a bar to the High Court determining a Hague Convention case. That was because the asylum application involved an assessment of whether there was a real risk of a breach of the mother's human rights on return. If there was such a risk, return would be prevented by the Hague Convention by Article 20. That Article 20 issue could not be determined while the asylum claim was outstanding because any question of asylum protection was exclusively for the Home Secretary. The relevant part of the Supreme Court's judgment is at [155] where Lord Stephens, giving the judgment with which Lords Lloyd-Jones, Hamble, Leggatt and Burrows JJSC agreed, ruled out the use of Article 20 in this way because the issues raised are to be determined under Article 13(b) (emphasis added):

155 The ground of appeal was in essence based on article 20 of the 1980 Hague Convention ... Although this article is not expressly incorporated by the 1985 Act, it has been given domestic effect by section 6 of the Human Rights Act 1998 which makes it unlawful for any public authority to act in a way that is incompatible with the ECHR, so that a court (as a public authority) is bound to give effect to ECHR rights wherever they appear, including the rights in article 20 (*In re D* [2007] 1 AC 619, para 65). *If a taking parent has been subjected to, for instance, abuse by the left-behind parent ... then the issues which could be raised under article 20 are, as the Court of Appeal stated at para 41, amply reflected in the operation of article 13(b).* I need only refer to what Lord Wilson JSC said at para 34 of *In re S* [2012] 2 AC 257: "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." *The application of article 13(b) ensures that the court is not acting in a way which is incompatible with the ECHR. The 1980 Hague Convention proceedings are focused upon the child, but that focus itself involves consideration of the position of the*

taking parent. Article 20 is not to be used as a way around the rigours of the other exceptions to return of the child.

44. In the light of that dictum Dr Proudman conceded, in my view rightly, that an argument that a return order will expose a victim of domestic abuse to a risk of a breach of Article 2 or 3 is to be determined indirectly through the operation of Article 13(b) and not directly through Article 20. Both parties accepted that the distinctions between the two are likely to be more theoretical than real. Both approaches require an assessment of the risk to the victim of domestic abuse on return and whether the available protective measures are adequate to address that risk. The only dispute between the parties was whether I should conduct a separate Article 3 analysis as part of the Article 13(b) exercise: Dr. Proudman submitted that I should, Ms. Kumar that I should not. In my judgment, such an analysis will not be necessary in most cases. As the cited passage demonstrates, ‘the issues that could be raised under Article 20 are amply reflected in the operation of article 13(b)’ which ‘ensures that the court is not acting in a way which is incompatible with the ECHR’. A proper analysis under Article 13(b), applying the *Re. S* approach, should ensure compliance with Articles 2 and 3. However, there may be cases where an Article 2 or 3 analysis illuminates the Article 13(b) analysis. If the Court considers the risk on return is sufficient to meet the threshold of ‘inhuman and degrading treatment’ – or worse - then the effectiveness of the protective measures to address that risk will need to be commensurate with the gravity of that risk. ‘The clearer the need for protection, the more effective the protective measures must be’: above, paragraph 33.4. In my judgment, there will be cases where it is appropriate for the Court to consider the Article 2 or 3 case-law when conducting the Article 13(b) analysis.

Relevant principles in making findings on the evidence

45. In making findings on the evidence, I will apply the principles set out in *EF*, [39].

Resolution of disputed factual issues

46. I will first resolve the disputed factual issues (or Article 13(b) assumptions) necessary for the determination of the issues in the case, namely:
- 46.1. Whether M has been the victim of domestic abuse by F;
- 46.2. Whether M is suffering from a mental disorder as a result and whether it is likely to deteriorate if M returns to Italy;
- 46.3. Whether F has acted in breach of the non-molestation order made on 23 December 2022.

Whether M has been the victim of domestic abuse by F

47. Applying the *Re. E* approach (above, paragraph 34.1) I do not need to make findings of fact; unless the available evidence allows me ‘confidently to discount the possibility that the allegations give rise to an article 13(b) risk’ I must assume them to be true. In her written submissions Ms. Kumar invited me to discount M’s allegations as untrue, but in oral submissions – when pressed - she accepted

that the evidence did not allow me to dismiss the allegations. She acknowledged, for example, that the allegation of assault in January 2020 was corroborated by the Instagram messages between M and the friend to whom the video of the bloody floor had been sent. Ms. Kumar did argue that I should not make positive findings of domestic abuse, however. She noted that there was no contemporaneous medical evidence or police reports to corroborate M's allegations. I reject that submission and find, on the balance of probabilities, that M was the victim of domestic abuse, including coercive and controlling behaviour, by F since at least January 2020 and that her removal of TKJ and flight to the United Kingdom was effected in order to escape that abuse. My reasons are these:

- 47.1. I do not draw any adverse inference from the fact M did not report these allegations to the police or any other agency in Italy for the reasons given in the cases mentioned at paragraph 36, above.
- 47.2. The incident of January 2020 is corroborated by the Instagram conversation between M and her friend. This is a contemporaneous record of M explaining, very reluctantly, that F had '*slapped me with the back of his hand to shut me up and hit my nose which then started to bleed*'. It is highly unlikely that this was fabricated.
- 47.3. The incident of 1 December 2022 is corroborated by the evidence of M's other sister, MSC, at least to the extent that she saw F shouting and swearing at M, that he appeared drunk and was not wearing a top and M was visibly afraid.
- 47.4. M has given a number of accounts of the abuse which are consistent with her account to this court. These predate these proceedings and, in some cases, her abduction of TKJ which makes it unlikely that they are recent fabrications for the purposes of these proceedings. For example:
 - (1) On 26 November 2022 M texted F to say he had 'threatened her', had 'hurt her many times'. This predates the abduction. During the course of the exchange F did not deny either that he had threatened or hurt M.
 - (2) The allegation that F had threatened M with a knife in November 2022 appears in the reports to the police made on 16 December 2022 by MBL and by M on 19 December 2022; in the application for a non-molestation order on 20 December 2022; and is referred to in M's text to F on 14 February 2023, and not denied by F. The consistency of the accounts, the fact they predate these proceedings and the fact the allegation is not denied by F, lead me to conclude it is likely to be true.
- 47.5. A number of the messages that F sent to M, MSO and MBL which I have set out in the Annex involve threats of serious harm, including sexual harm, to each of M, her mother, MSO and MBL. To pick one example, F left messages on MSO's phone on 17 December 2022: 'me have friends, Albanese people, Nigerian people, Egyptian people, after I fuck [MBL], I

fuck you, understand'; 'Which you like is fuck you, [MSO], Albanese people or Egyptian people, which you like?'. F accepts that he sent these messages but submits they should be seen in context, namely that they were sent at a time when he was deeply upset by M's unlawful removal of TKJ and he also sent other messages which were not abusive. I reject that. The fact that F was understandably upset about the abduction of his daughter does not justify the use of such vile and threatening language to M and her family members. These messages are shocking and unacceptable and lend support to M's allegations of domestic abuse.

- 47.6. There is independent evidence of abusive and controlling behaviour including F's text message of 26 November 2022 ('I'll make you pay for everything that you are writing'), 8 December 2022 ('Every time you take [TKJ] out and you're planning to return late you must tell me, where the fuck are you'), 16 December 2022 ('I want to talk to my daughter, slut'), 14 February 2023 (above, paragraph 17-18), 21 February 2023 ('Bitch and bitch's daughter ... let me talk to my daughter'), 27 April 2023 ('Tell that slut of [M] to write to me in Italian') and 25 October 2023 ('Fuck your mother, fuck your father's mother, mother fucker, you whore'). F accepts these messages were sent.
- 47.7. I find F to be an unreliable and untruthful witness. He dismisses all of the allegations by M as 'made up' when I have found them to be likely to be true. Of more concern, he instructed his counsel to deny that the audio message of 25 October 2023 contained nothing abusive when, in fact, it was blatantly offensive and abusive. He sought to take advantage of the fact the court did not have the benefit of an Arabic translator. This lie undermines his credibility in relation to his denials of domestic abuse more generally as I find he had no innocent reason for the lie such as shame, misplaced loyalty, panic, fear or distress. The lie also demonstrates a contempt for truth and for the court process that is relevant to a further question I must determine, namely the efficacy of protective measures in the event of a return.
48. I make no positive finding that F has alcohol problems as there is no evidence of this beyond M's testimony, which is denied by F. However, I cannot confidently dismiss that allegation and I therefore assume it to be true for the purposes of Article 13(b). Similarly, I make no positive finding that F subjected M to sexual abuse given that M has given no detailed evidence of such abuse. M explains that she gave no details because it is too painful for her to talk about and because she fears retribution from F if she does so. In view of that explanation, which is plausible, and my other findings I am not able confidently to dismiss the allegations of sexual abuse, which I therefore assume to be true.

Whether M is suffering from a mental disorder as a result of the domestic abuse that she has suffered

49. In the light of Dr. Van Velsen's psychiatric evidence I find that M is suffering from a mental disorder, namely an adjustment disorder, which is the consequence of the domestic abuse from which she has suffered. That mental disorder is likely to deteriorate if M is returned to Italy, particularly if protective measures are not

adequate to protect her from continuing abuse by F or the fear of such abuse. That deterioration may take the form of depression, anxiety and symptoms consistent with a diagnosis of PTSD and active suicidal ideation. I return to this in the context of my conclusions under Article 13(b).

Whether F has acted in breach of the non-molestation order made on 23 December 2022

50. I have given F the benefit of the doubt that he was unaware of the terms of the non-molestation order before 9 May 2023. Accordingly, I do not find the abusive and threatening messages sent between 16 December 2022 and 27 April 2023 to have been a breach of that order. However, I do find that F has breached that order since contact was resumed with TKJ following the hearing before Knowles J on 10 August 2023. The abusive message sent to M on 25 October 2023 is the clearest example of such a breach, although I also find that F probably made abusive remarks ('whore') to M during one of the contact sessions with TKJ in September 2023.

Decision

51. Against that background I now turn to the determination of the substantive issues.

Article 13(b): grave risk of harm to TKJ

52. I find that, on the balance of probabilities, there is a grave risk that TKJ's return to Italy would expose her to physical or psychological harm or otherwise place her in an intolerable situation for the purposes of Article 13(b). My reasons are these (and applying the two stage approach in *Re. B* [2022] 3 WLR 1315, [70-71], above paragraph 34.3).
53. Stage one: is there a grave risk of harm? I have found that M was the victim of domestic abuse comprising violent, coercive and controlling behaviour by F since, at the latest, January 2020 and that her removal of TKJ and flight to the United Kingdom was effected in order to escape that abuse. I have also made assumptions for the purposes of Article 13(b), namely that F has problems with alcohol and he also subjected M to sexual abuse: above, paragraphs 47-48. The domestic abuse has resulted in M suffering from an adjustment disorder which is likely to deteriorate if M is returned to Italy, in particular if adequate protective measures are not in place: above, paragraph 49. In that event, there is a grave risk M's ability to parent TKJ will be compromised, placing TKJ in an intolerable situation. Furthermore, TKJ has herself witnessed M being subjected to violent and abusive behaviour, including the incident in January 2020 when she accidentally sent the video of blood on the floor to M's friend. I find that TKJ is likely to have been psychologically harmed by that abuse and there is a grave risk she will suffer further harm if such abuse was to continue. TKJ will also be at risk from F due to his alcohol problem, for example if he drives with her as a passenger while intoxicated.
54. I also find that, in the absence of any protective measures, there is a grave risk that F will resume his abusive behaviour. The risks are threefold.

- 54.1. F will influence M into resuming their relationship. F and M were together for over six years before the separation; they have a child together; the abuse went on for many years; the protective factors of living with her family in another country will no longer be in place; F will be living only 1.5 km away from M; M will be living in their old flat which F controls; as contact between F and TKJ resumes there is likely to be increased contact between F and M; and M is likely to perceive that her escape from F was to no avail and to feel hopeless, isolated, lonely, anxious and in low mood. In those circumstances, and given what is now known about the aetiology of abusive relationships, M will be highly vulnerable to F's attempts to resume the relationship. It is likely that F will make such attempts, as witness his text message to M on 14 February 2023, 'I still love you'. As I observed in *Re. EF*, 'the insidious nature of coercive and controlling relationships is such that the victim remains vulnerable to the abuser's influence and will often return to the abusive relationship': [65]. If the relationship resumes, it will only be a matter of time before the abuse does too.
- 54.2. In any event, F will continue to harass and abuse M, particularly during and around contact sessions with TKJ, as he has done since August 2023. His opportunity to do so will increase exponentially once M and TKJ have returned to Italy. They will be living a short distance away in a flat paid for by F and largely dependent on maintenance payments from F. The risk is exacerbated by F's alcohol problems which will reduce his ability to regulate his behaviour and make it more likely he will behave in an abusive manner.
- 54.3. Furthermore, M has a genuine subjective fear that F will harm her or TKJ if she returns to Italy. As a result, she will *feel* unsafe, which is likely to have a deleterious impact on her mental state even if the abuse does not eventuate. As the Supreme Court made clear in *Re. E* and *Re. S*, a genuine fear of continuing domestic abuse may be sufficient to found the exception in Article 13(b) even if that fear does not have reasonable foundations: above, paragraph 33.2.
55. I also consider that, in each case, there are substantial grounds for believing M is at a real risk of being exposed to treatment that – in light of the length and severity of the abuse that F has inflicted to date – crosses the threshold of 'inhuman and degrading treatment'. This includes her subjective fear of such abuse: *Tunikova*, [73-74], above, paragraph 40. I make no finding that she is also at a real risk of exposure to 'torture' (as Dr. Proudman submitted) or that there is a real risk of homicide or suicide, although there is clearly *a* risk of both. That is not to say they are not relevant, I simply heard limited submissions and evidence on these issues and they are not necessary for the resolution of the Article 13(b) question in this case.
56. Stage 2: are there adequate and effective protective measures that will avoid that risk? On behalf of F, Ms. Kumar submitted that there are protective measures available which will avoid any identified risk of harm. She pointed out that M has lived in Italy for many years, from 2010 to 2018 and again from 2019 to 2022, and speaks Italian. She and TKJ are settled and integrated in Italy, which is

TKJ's habitual residence. On F's behalf she advanced the following by way of protective measures:

- 56.1. F would issue child welfare proceedings in Italy once TKJ is returned. Those proceedings will resolve the issues of residence and contact. According to F's Italian lawyer, these will take a minimum of 10 months to resolve. The Italian court will be able to make appropriate interim orders regulating residence and contact.
- 56.2. F undertakes not to bring any prosecution against M for abducting TKJ. This is a standard undertaking, necessary to guard against the risk that a removing parent may otherwise refuse to travel or that the child will be harmed if the removing parent is prosecuted and imprisoned: see the Guide to Good Practice on the Hague Convention, paragraph 67. F has already initiated criminal proceedings against M, however, and is unable to confirm whether the prosecution will be continued even if he does withdraw his complaint. Prosecution may – as in England and Wales – be a matter for the Italian authorities, not the complainant. This is a matter that would need to be clarified before any return could be implemented, but I will proceed on the assumption that the criminal proceedings are withdrawn.
- 56.3. F has undertaken to pay for M and TKJ's travel costs to Italy; to pay maintenance of 350 euros per month; and to provide M and TKJ with accommodation, namely the flat in which the family were living and on which he has continued and will continue to pay rent of 450 euros per month. He will live at his mother's address 1.5 kilometres away. Mother says the property is inappropriate. F says he cannot afford to rent another property in addition. F also points out that M will be entitled to welfare benefits in Italy. TKJ will return to nursery school, so presumably M would also be able to work part-time as a cleaner, as she does in England. I take into account M's evidence that F is bankrupt and has not paid any maintenance since she removed TKJ in December 2022. However, I accept F's evidence, for the purposes of this exercise, that M and TKJ would have a home and adequate means for subsistence if returned.
- 56.4. F also undertakes not to separate TKJ and M other than during periods of agreed contact or to use or threaten violence, harass or pester M or instruct any third party to do so, or to approach within 100 metres of the property. Ms. Kumar proposed that these undertakings could be made by way of order which will be reflected in due course by a mirror order in Italy, but which are enforceable in any event by virtue of the 1996 Hague Convention. Again, I will assume that orders to that effect would be made in the Italian courts.
- 56.5. I also take note of the fact that the Italian courts, police and social services will have similar powers to those of the authorities in the United Kingdom to protect and support M as a victim of domestic abuse: see above, paragraph 33.5.

57. Discussion. Would the grave risks that I have identified at paragraphs 53-54 above be adequately and effectively mitigated by these protective measures? In my judgment, they would not.

57.1. First, no protective measures can prevent M from resuming her relationship with F.

57.2. Second, F has shown he is willing to continue his abusive behaviour even when a court order is in force, as demonstrated by his behaviour following the resumption of contact with TKJ in August 2023, particularly the abusive phone message of 25 October 2023. He has left threatening messages in which he professes to be unconcerned by what the police will do (on 26 December 2022, 'I'm not care the police, not care everyone, I'm coming after is fuck everyone'). He has also shown that he is prepared to lie to a court when it suits him. The risk is heightened by F's alcohol problems and the dysregulating effects of alcohol intoxication. In those circumstances, I am not satisfied, from an objective standpoint, that the protective measures would adequately or effectively protect F and TKJ from harm.

57.3. Third, M's subjective fear that F will harm her or TKJ if she returns to Italy will persist *even if* there are, objectively, adequate protective measures in place.

58. I also consider, for the same reasons, that those protective measures are inadequate to address the real risk that M will be exposed to treatment crossing the Article 3 threshold.

59. For these reasons, I find that M has established the exception under Article 13(b).

Discretion

60. Given my conclusions in relation to Article 13(b) it is 'inconceivable' that I would go on to order TKJ's return as a matter of discretion: above, paragraph 37.

M's Part 25 application

61. In those circumstances it is not necessary to resolve M's application for a psychologists report.

Conclusion

62. For the above reasons, in my judgment:

62.1. I am satisfied that there is a grave risk that TKJ's return would expose her to physical or psychological harm or otherwise place her in an intolerable situation for the purposes of Article 13(b).

62.2. It is not appropriate to return TKJ to Italy as a matter of discretion.

62.3. It is not necessary also to decide whether an order for TKJ's return would breach M's Article 3 rights, although I have found it helpful in my

determination of the Article 13(b) question to consider the relevant Article 3 case-law and principles.

63. F's application is accordingly dismissed.

64. That is my judgment.

Appendix 1: selection of audio messages left by F on M, MSO and MBL's telephones

16 December 2022

F: Remember that I'll treat you the same way you treat me.

F: I want to talk to my daughter, slut.

F: Tell [MBL] he's a faggot and I'll make him pay for everything that he said, I mean it, I swear on my mother that I'll make [MBL] pay for everything. [MSO] not so much, but [MBL] is going to pay for everything.

F: [MBL] is a thief, he steals everything. He has no dignity, his wife should be fucked, tell him, I'm going to make him pay, seriously, I'm going to make him pay.

F: Really, I'm coming in London, I call for my kids, I call for my kids, no [F], I believe in me, I'm coming in London, me everyone I fuck.

F: Your wife, [MSO], is go working in London, everyone is fuck, Italian people, Egyptian people, Roman people, English people, is fuck, you're like a donkey, working like a donkey, every morning like a donkey, after you're sleeping like a donkey.

17 December 2022

F: [MSO] sorry, I'm text you too much, [MBL] is block me. I text you, show [MBL], understand? [MBL] is [indiscernible] understand, after I'm coming in London, I'm coming me every country, me have friends, Albanese people, Nigerian people, Egyptian people, after I fuck [MBL], I fuck you, understand, sorry [MSO] you show the message [MBL], [MBL] is [unintelligible], understand?

F: Which you like is fuck you, [MSO], Albanese people or Egyptian people, which you like?

25 December 2022:

F: I call [M], no for [M], I call [M] speak with my kids, I'm no answer, I believe in me, I going Moldavia, see your mother after I'm coming in London I believe me, you no understand me, I believe me, I'm going Moldavia, I'm coming in London after see you, [F], [MBL], I no like too much speak, after three four day I'm coming.

F: After me, I'm fuck everyone, I believe in me.

F: Me I'm not like with [M], no more [M], me I call for my kids, me I dad [TKJ], understand? You speak with [M], you answer, me I speak with [TKJ], after I'm coming, I believe in me, I believe in me, I fuck everyone.

26 December 2022:

F: I'm not care the police, not care everyone, I'm coming after is fuck everyone.

3 February 2023:

F: If you don't let me talk to [TKJ] I swear on my mom, I'll make you pay, I swear on my mom, I'll make you pay, you ruin everything.

5 February 2023:

F: Will you let me talk to my daughter, you bitch? Bitch and bitch's daughter.

14 February 2023:

F: Every day that goes by and [TKJ] isn't in Italy, I swear on my mum I'll make you pay for it, I swear on my mum I'll make you pay for it.

21 February 2023:

F: Bitch and bitch's daughter, bitch and bitch's daughter, let me talk to my daughter

27 April 2023 (messages left on MSO's telephone):

F: Tell that slut of [M] to write to me in Italian, since I don't understand.

F: And to let me talk to my daughter, bitch!

Appendix 2 – Record of M’s complaint to police 16 and 19 December 2022

MBL spoke to the police call handler on 16 December 2022 and is recorded as saying the following:

‘In Italy the suspect drank often and beat her and ‘hurt her’. He took a knife and said he would kill her with the knife, in front of their children. He said that he had friend [sic] in police and that he could hurt her, throw her from a balcony or anything. He told her that his connections to police would protect him. The suspect is in Italy at the moment. He has messaged caller to say that he will kill caller and his family. Caller thinks that suspect knows that [M] is at his house. ... Suspect has said that he will go to [REDACTED] and kill [M]’s mother.’

Police then attended on 19 December 2022, with an interpreter. The note of attendance records:

‘[M] has come to UK as she has been in a relationship for six years with, [F] who in the last four months has become abusive to her. [M], has stated the abuse became worse in the last two weeks to come to the UK and stated that in her home town in ITALY that [F] has threatened to kill her and then picked up a knife had it in his hand when threatening her. They share a child together [TKJ] who [M] has brought with her to the UK from ITALY in order to protect them both from [F]. [M] has not reported any of the abuse to the police in ITALY due to her believing they will not listen to her due to them being friends with [F]. [M] has stated that she is scared that he will come to the UK in order to get their child. [M] has also stated that [F] has informed the police of them both leaving Italy and states and she has been receiving abusive messages from him in audio and message. These kind of messages have also been sent to [MBL] as well. [F] has stated, he is going to fuck them and come to the UK for his child. The whole family is saying that they are all concerned with him coming to the UK however he does not know the address they are staying at but they believe that he will be able to find it. [M] is going to contact the council to be able to get housing and gain custody of her child is her main concern. [M] has also stated that she has no evidence of the offences that occurred in Italy.’