Case No: FD 25 P 00114
Neutral Citation Number: [2025] EWHC 1713 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 July 2025

Before :

MR. NICHOLAS ALLEN KC

(Sitting as a Deputy High Court Judge)

BETWEEN

F

Applicant

- and –

M

Respondent

(Abduction: Settlement: Grave Risk)

- -

Mr. Teertha Gupta KC and **Ms. Olivia Gaunt**
(instructed by **Hanne & Co Solicitors LLP**) for the Applicant

Ms. Anita Guha KC and **Mr. Alex Laing**
(instructed by **Dawson Cornwell LLP**) for the Respondent

Hearing dates: 5th and 6th June 2025

Draft judgment circulated to the parties – 24th June 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 4th July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr. Nicholas Allen KC:

1) I am concerned with an application dated 13th March 2025 brought pursuant to the Child Abduction and Custody Act 1985 (incorporating the Hague Convention 1980) for an order for the summary return to Portugal of a child, B (aged 3).

2) The application is brought by the child's father. It is resisted by the child's mother.

3) In this judgment I shall refer to the applicant as 'F' and the respondent as 'M'. No discourtesy is intended.

4) F was represented by Mr. Teertha Gupta KC and Ms. Olivia Gaunt and M by Ms. Anita Guha KC and Mr. Alex Laing. I am grateful to counsel for the quality of their Position Statements and for their clear and focused oral submissions.

5) In this judgment I have not referred to every argument raised by the parties in their written and oral evidence or in their counsel's submissions. I have however borne all that I read and was said to me in mind.

Background

6) F is aged 44. He is a Portuguese national. M is aged 34. She is a British national. The parties' relationship began when they met in Portugal in July 2018. M moved to Portugal in March or May 2019 (I have seen both dates but nothing turns on this). The parties lived together from this time.

7) B was born in Portugal on 18th December 2021 (aged 3). She is a dual Portuguese-British national.

8) M and B travelled to this country to see M's family on 19th September 2022. It is common ground it was agreed the trip would be for about one month's duration although no date for M and B's return was fixed. On 3rd October 2022 M informed F she would remain in this country with B for a longer period.

9) It is common ground that M's retention of B on 3rd October 2022 was wrongful for the purposes of Article 3 of the Hague Convention as it was in breach of F's rights of custody which were being exercised by him under the law of Portugal, the State in which B was habitually resident immediately prior to the retention.

10) From November 2022 M rented a property next door to friends; from June 2023 she and B moved into a long-term rental property in which they continue to live.

11) The parties entered two periods of mediation – first from December 2022 – March or May 2023 (I have seen both dates but nothing turns on this) and secondly from August 2023 – December 2023 or January 2024 (likewise).

12) On 15th October 2024 M signed an agreement setting out future care arrangements on the basis of B returning to live in Portugal from January 2025. On 13th November 2024 this agreement was lodged with the Portuguese court with a request it be converted into an order. In December 2024 M withdrew from the agreement (with F receiving formal notice of the same from the Portuguese court on 14th February 2025).

13) On 23rd December 2024 M issued CA 1989 proceedings in the Family Court at X [1734-5391-7023-3409] for a child arrangements *"lives with"* order – and proposed that she and B would spend four months per year in Portugal. This was subject to gatekeeping on 21st January 2025 when a FHDRA was listed on 24th March 2025.

14) F's C67 Application for B's summary return to Portugal was issued on 13th March 2025. On 21st March 2025 Mr. Justice Keehan gave directions including ordering the preparation of a report by an officer of the Cafcass High Court team on whether B was settled in this jurisdiction. He also directed the proceedings in the Family Court at X be stayed pending resolution of F's application and vacated the FHDRA listed for 24th March 2025.

15) On 4th April 2025 M applied for the instruction of an immigration expert and psychologist on an SJE basis. These applications were granted by Mr. Richard Todd KC sitting as a Deputy High Court Judge on 15th April 2025.

16) As recorded on the face of the order of 21st March 2025, and as confirmed in her Answer dated 14th April 2025, M originally intended to pursue a defence of acquiescence under Article 13(a) amongst other grounds. However, on 2nd June 2025 it was confirmed she no longer so intended. I consider this to have been appropriate: acquiescence *"is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions"* (*Re H (Abduction: Acquiescence)* [1997] 1 FLR 872 per Lord Browne-Wilkinson at p882). I consider on the evidence it would have been all but impossible for M successfully to pursue this defence.

17) In advance of the final hearing I was provided with (and read) an e-bundle running to 501 pages and detailed Position Statements from the parties' respective counsel.

18) Both parties attended the final hearing in person. F was assisted by a Portuguese interpreter although his conversational English is good.

19) At the outset of the hearing I was informed by Ms. Guha of *"very serious developments earlier this week"*. These were summarised in an email received from the Cafcass Officer (Ms. Veitch). The email recorded she had received a telephone call from a social worker

at City X children's social care. They had received a referral from B's General Practitioner ('GP'). M had reported to the GP that B had told her that *"papa"* had tickled her on her *"front bottom"* and described a *"rusty earring"* that he had *"put in"* her. M was concerned about sexualised play and possibly abuse. The GP did not examine or speak with B but made a referral to social care. A social worker from City X's safeguarding hub thereafter spent a significant period of time speaking with B and completing direct work with her. B did speak about papa's rusty earring but did not say he did anything of concern with it and she did not repeat any of the allegations M had reported to the GP. The social worker told Ms. Veitch she spent a long time and used various creative methods to explore B's experience, for example asking her to point to the places on her body where F tickled her, but she only pointed to safe and expected areas of her body and made no allegations. The social worker also spoke to B about her body parts to ascertain the words she uses for her bottom, vulva and vagina. She did not use the words alleged and made no allegations about those parts of her body during this. B spoke positively about the time she spent with F and the games they played.

20) The social worker spoke to M who reported she felt worried that something like this would happen, because B and F kissed on the mouth which she did not like and felt was inappropriate. M also said that B had been putting things in her bottom and said this was something *"papa"* did. The social worker then spoke to F who was shocked and denied any inappropriate play or behaviour with B. He raised concerns about the timing of the allegations and referral as being just before the final hearing.

21) Ms. Veitch's email then said City X's children's social care intended to complete agency checks with B's nursery and health visitor but at present considered it unlikely they would take any further action, given that B had not repeated her allegations to professionals.

22) Ms. Guha confirmed that M was not seeking an adjournment as children's social care were not taking any further action.

23) Ms. Guha said however that Ms. Veitch's email did not capture the full factual matrix and hence M had prepared a statement which had been served on F's representatives. I was asked to admit the same on the basis F should have the opportunity to respond. Mr. Gupta objected on the basis that Ms. Veitch's email gave me an objective record of allegations (which is all they were) and how social services had investigated the same. However he confirmed it was not being said that F would be prejudiced by the admission of the statement and there would be sufficient time during the hearing for him to prepare a statement in response. On this basis I admitted the same.

24) I have read both parties' statements. M's statement gives further details of what B is said to have said to her (and hence her to the GP) and F's statement gives further details of his denial.

25) On the basis that (i) these are allegations (and no more); (ii) they are denied by F; and (iii) so far as I remain aware social services have decided to take no further action, I do not take the allegations into account in reaching my decision. It was not suggested on M's behalf I should do otherwise.

26) F's position statement said M had confirmed she sought the attendance of the immigration expert and had also suggested the Cafcass Officer be on standby in case she was required by the court. It was said that F did not require the attendance of any of the professionals, but if the court required it, there should be limited oral evidence from the parties in relation to the defence of settlement. It was said M agreed evidence be given on this issue but she also sought for the parties to give evidence in relation to protective measures. It was said this would be highly unusual and it was difficult to see why that would be necessary, but if the parties were giving oral evidence in any event, no doubt some focussed questions could be asked on this subject.

27) On M's behalf it was said that in addition to the immigration expert, oral evidence had been sought on F's behalf as to whether B was informed she would be returning to Portugal as this was relevant to settlement. Given her age, it was said it was difficult to see how this would take the case anywhere, but if F's counsel wished to ask, M was content to answer. It was also said I may wish to hear some limited oral evidence as to the adequacy of the package of protective measures offered by F.

28) In the end neither party sought that they (or the other party) give oral evidence.

29) The facts of this case are unusual. F has travelled to this country on 33 occasions since December 2022 to spend time with B. M has also travelled back to Portugal with B on six occasions, the longest period of time being for three and a half months from 6th December 2023 until 1st March 2024 with a further extended period in Portugal from 28th September 2024 until 9th November 2024. B has homes with both parties in both countries. On Mr. Gupta and Ms. Gaunt's analysis M has spent approximately 39% of her life in Portugal.

30) It is no doubt as a result of this travel between the two countries that it is common ground that B has a close relationship with both of her parents. I was particularly struck by the following references in the Cafcass Report:

> [24] … I did not observe any tension or vigilance from [B] towards her parents during the handover. This suggests that she is used to calm and civil exchanges and does not feel anxious about being in both parents' presence. This is in sharp contrast to many children of separated parents who are frequently uneasy and fearful about interactions between their parents.
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> [25] … She presents as a child who has her parents' emotional permission to enjoy the time she spends with the other, as well as to share any worries about this. This suggests that [B's] parents each positively promote her relationship with the other.

31) The issues I have to decide are:

a) whether B is now settled in her new environment in accordance with Article 12;
b) whether a return order would expose B to a grave risk of physical or psychological harm or otherwise place her in an intolerable situation contrary to Article 13(b). I am asked to consider a range of possible protective measures; and
c) if either or both of the 'exceptions' or 'defences' are established whether I should exercise my discretion to order a return.

32) The burden of proving there is an exception to an order for return lies with the party asserting it as a defence. The standard of proof is the balance of probabilities.

33) In reaching my decision I have had in addition to the parties' statements the benefit of (i) a Cafcass Report prepared by Ms. Daisy Veitch dated 15th May 2025 (who did not given oral evidence); (ii) the SJE immigration report from Mr. João Perry da Câmara dated 6th May 2025 (who gave oral evidence) and his answers dated 21st May 2025 to the parties' respective written questions; and (iii) the SJE psychological report from Mr. Alexander Marshall dated 16th May 2025 (who did not give oral evidence) and his replies dated 30th May 2025 to M's written questions.

Article 12

34) Article 12 states *inter alia* as follows:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
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> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

35) As F's application was made more than 12 months later than the date of wrongful retention it is the second of these two paragraphs that apply.

36) The date for *"demonstrating"* that the child is *"now settled"* is when "*the proceedings have commenced"*.

37) There remains no binding authority as to whether *"now"* means the date of the issue of proceedings or that of the final hearing.

38) In *Re N (Minors) (Abduction)* [1991] 1 FLR 413 Bracewell J at p417 held that settlement falls to be considered at the date of commencement of proceedings *"as otherwise any*

delay in hearing the case might affect the outcome". However the point was not fully argued and it was academic as it made no difference to outcome.

39) With just two exceptions *Re N* has been consistently followed at first instance (including in *AH v CD and Others* [2018] EWHC 1643 (Fam) per Williams J (see further below)). *Re N* was also followed in *Re O (Abduction: Settlement)* [2011] 2 FLR 1307 by Wilson LJ (as he then was) at [54] in a short concurrent judgment. In *R v P* [2017] EWHC 1804 (Fam) Theis J considered whether *"now"* was when the Hague Convention application was made to the Central Authority in the child's country of habitual residence or the issuing of proceedings in the country where the child has been removed. She considered at [111] the relevant date should be that of the lodging of an application with the court that will decide the application as being an analysis *"supported by academic opinion that relies on authorities from other jurisdictions. It also makes sense for the practical and effective operation of Art. 12 by having such an easily ascertainable date.*" The suggestion that the date could be that of the final hearing was not considered.

40) The two exceptions are (i) *ES v LS (Abduction: Settlement)* [2022] 1 FLR 1285 where Mostyn J considered the issue at [52]-[69] and took the contrary view. He concluded at [69] that *"[h]aving looked at the matter carefully, I am convinced that 'now' means 'as at the date of trial'"*; and (ii) *Re G and B (Children) (Abduction: Settlement: Grave Risk: Ukraine)* [2025] EWHC 795 (Fam) where Harrison J stated at [53] that *"I find Mostyn J's analysis persuasive and agree with it."* At [51] he observed that *"[i]n the majority of cases, whether the issue is considered at the outset of the proceedings or the date of the final hearing is highly unlikely to yield different results."* However, at [54] he further observed as follows:

> The issue may well become significant in cases which are remitted following an appeal or which otherwise have been subject to lengthy delays (perhaps because of a concurrent asylum claim). In my view, it would be absurd and wholly inconsistent with the child's interests, if the court was required to examine an historical position and ignore more recent information. It could also create real forensic difficulties, bearing in mind that in settlement cases the most important evidence relating to the issue is usually a report from Cafcass which examines the child's circumstances as they presently are. So far as I am aware, it has never been suggested that issues such as a child's objections or questions of intolerability must be examined at the date proceedings commence. I can see no logical reason for adopting a different approach to the question of settlement.

41) This remains an issue where as Harrison J observed at [52] *"there remains no (binding) authority in which [the Re N] conclusion has been fully reasoned or one in which it made a difference to the outcome."*

42) The issue was not fully argued before me. With this caveat and conscious that I express any view with considerable diffidence as (either way) I will be disagreeing with judges of the greatest experience and influence, I likewise find Mostyn J's analysis in *ES v LS (Abduction: Settlement)* to be persuasive as I do Harrison J's observations in *Re G and B (Children) (Abduction: Settlement: Grave Risk: Ukraine)* at [54].

43) This issue is however likewise academic in this case as it makes no difference to outcome. It was accepted by both parties' counsel that if B was not *"now settled"* as of 13th March 2025 (the date of F's application) she was not as at the date of the final hearing and if she was *"now settled"* as of that date she was likewise as at the final hearing. In other words, it is accepted by both parties – and in particular M – that M's actions in registering B for nursery and ballet classes since proceedings were issued had no material impact on B's settlement between the two dates.

44) As to the concept of *"settlement"* itself the leading authority is widely considered to be *Cannon v Cannon* [2005] 1 FLR 169. Thorpe LJ stated at [53] that *"[a] broad and purposive construction of what amounts to "settled in its new environment" will properly reflect the facts of each case …".* At [61] he stated that:

> I would unhesitatingly uphold the well-recognised construction of the concept of settlement in Art 12(2): it is not enough to regard only the physical characteristics of settlement. Equal regard must be paid to the emotional and psychological elements.

45) In *Re C (Child Abduction: Settlement)* [2006] 2 FLR 797 Sir Mark Potter P gave the following guidance as to how the concept of settlement should be defined:

> [46] The word 'settled' has two constituents. The first is more than mere adjustment to new surroundings; it involves a physical element of relating to, being established in, a community, and an environment. The second is an emotional and psychological constituent denoting security and stability. It must be shown that the present situation imports stability when looking into the future: see the review of the relevant authorities in *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 WLR 32, [2005] 1 FLR 169, at paras [22]–[25]. The term 'new environment' encompasses place, home, school, people, friends, activities and opportunities but not, *per se*, the relationship with the defendant parent: see *Re N (Minors) (Abduction)* [1991] 1 FLR 413 per Bracewell J, at 417H–41HB.
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> [47] In determining the issue of settlement, as well as the exercise of the court's discretion if settlement is established, the reason for the delay in bringing the proceedings and the parties' conduct, particularly where the abducting parent has concealed the whereabouts of the child, are relevant: see *Re H (Abduction: Child of 16)* [2000] 2 FLR 51 and *Cannon v Cannon*, above …

46) In *F v M and N (Abduction: Acquiescence: Settlement)* [2008] 2 FLR 1270 Black J (as she then was) at [66] cautioned against *"the development of an unduly technical approach to the question of settlement"*.

47) In *AH v CD and Others* Williams J summarised the applicable principles as follows:

> [41] The courts have considered the principles of settlement in a number of cases, the principal amongst which are (a) *Re N (Minors) (Abduction)* [1991] 1 FLR 413, (b) *Cannon v Cannon* [2005] 1 FLR 169; (c) *C v C* [2006] 2 FLR 797; (d) *Re M (Zimbabwe)* [2008] 1 FLR 251. A

recent example of the application of the principles is *Re T (A Child - Hague Convention proceedings)* [2016] EWHC 3554 (Fam). The principles which can be derived from those cases are these:

(i) The proceedings must be commenced within one year of the abduction. The making of a complaint to police or an application to a Central Authority does not suffice.

(ii) The focus must be on the child. Settlement must be considered from the child's perspective, not the adult's. The date for the assessment is that date of the commencement of proceedings not the date of the hearing. This is aimed at preventing settlement being achieved by delay in the process.

(iii) Settlement involves both physical and emotional or psychological components. Physically, it involves being established or integrated into an environment compromising a home and school, a social and family network, activities, opportunities. Emotional or psychological settlement connotes security and stability within that environment. It is more than mere adjustment to present surroundings.

(iv) Concealment and delay may be relevant to establishing settlement. Concealment is likely to undermine settlement. Living openly is likely to permit greater settlement. The absence of a relationship with a left behind parent will be an important consideration in determining whether a child is settled.

(v) A broad and purposive construction will properly reflect the facts of each case – it does not require a 2 stage approach but must, to use a probably over-used expression involve a holistic assessment of whether the child is settled in its new environment. It has to be kept in mind that the settlement exception is intended to reflect welfare. The Article 12 settlement exception of all the exceptions is most welfare focused. The underlying purpose of the exception is to enable the court in furtherance of the welfare of the child to decline a summary return because imposing a summary return (i.e. without a more detailed consideration of welfare) might compound the harm caused by the original abduction by uprooting a child summarily from his by now familiar environment.

[42] … Settlement does not require a complete settlement, any more than habitual residence requires full integration. Settlement is plainly an evaluation which is, to some degree, subjective. There will be a spectrum ranging from the obviously and completely settled to the very unsettled. In between there are many possibilities.

48) The authorities were recently reviewed in *Re G and B (Children) (Abduction: Settlement: Grave Risk: Ukraine)* per Harrison J at paragraph [39] onwards. At [50] he stated that the question of settlement should be considered *"holistically"* and that *"[t]the court's primary focus is on the question of whether settlement has been achieved 'in a new environment' as opposed to with the abducting parent."*

49) As Thorpe LJ stated in *Cannon v Cannon* at [57] *"[a] very young child must take its emotional and psychological state in large measure from that of the sole carer"*. It was common ground between the parties that B will have taken her cues from her parents.

50) On M's behalf it was submitted that B is settled having regard to the following factors:

a) B has been living in this country since 19th September 2022;
b) B has been living in her current home for two years;
c) F has visited B in this country on a monthly or bi-weekly basis and has been able to stay for seven - ten day periods whilst he worked remotely;
d) F visited the property in this country prior to M securing a rental contract and confirmed his approval of this home for B;
e) B has maintained a close and loving relationship with F throughout the period she has lived in this country via regular direct and videocall contact;
f) B frequently spends time with her maternal family who live 15 minutes away from their home and are able to support M with consistent childcare and at times that M suffers a debilitating episode from a chronic back hernia;
g) B has maintained her relationship with her paternal family when she has visited Portugal with M on six occasions;
h) B is fluent in English and speaks limited Portuguese;
i) M has secured employment and financial stability in this country and is able comfortably to meet B needs;
j) B has attended a playgroup, forest school and two nurseries in this country, enjoys many extra-curricular activities, and has a wide network of close friends in her social and family environment;
k) B has enjoyed two birthday parties in this country and has celebrated Christmas in two out of three years in this country with her family;
l) all of B and M's main belongings are in their home in this country. M refutes the assertion by F that she moved their possessions to Portugal last year save for a few items of clothing and books;
m) B was registered at a medical centre in early 2023 and with her current GP since 2024. She has had routine appointments with an optician and dentist in this country; and
n) B's lived experience for the majority of her childhood living in this country has allowed her to achieve a sense of safety, security and permanency.

51) On F's behalf it was submitted that the mere fact of how long B has been in this jurisdiction is not enough. She will derive her sense of emotional and psychological settlement from her relationship with her parents, particularly given her young age. Her sense of security will come from living with M, wherever they are living, rather than from her geographical, jurisdictional location, and will be supported by the fact that she has been able to enjoy significant time with F since she has been staying in City X. For the purposes of Article 12, the focus is on whether settlement has been reached *"in a new environment"* rather than with the abducting parent. That B feels secure living with M and spending significant time F does not make her settled in City X.

52) It is further said that the facts on the ground are that B only commenced at nursery on 28th April 2025, after proceedings were issued by F, and by the time of the Cafcass report had only attended four sessions (it being observed that by the time of M's

description of B's attendance at nursery in her Statement of 12th April 2025, she had only attended once for an initial taster session).

Analysis

53) Settlement is a matter of fact for me to determine. I have to consider holistically whether B has achieved a level of physical, emotional and psychological settlement in this jurisdiction.

54) I agree with Mr. Gupta and Ms. Gaunt when they say in their Position Statement at paragraph 19 that Ms. Veitch's Cafcass Report is balanced and leaves the question open for the court. I further agree that the report does not lean towards a conclusion that B is settled, only going as far as to say at paragraph 41 that there are factors which support that B (emphasis added) *"is **becoming** physically settled"* in this country – living in the same house for 23 months and regarding it as her home, knowing her neighbours and having become part of the local community, being familiar with the local area, having developed a close friendship with a particular local child and living near her maternal family - and at paragraph 53 that *"some"* factors *"point towards [B] being **somewhat settled** in [this country]"*.

55) In my judgment B is not settled in this jurisdiction. In reaching this conclusion I agree with Ms. Veitch at paragraph 53 of her report that *"what [B] has been told by her parents about what to expect from her future is contested, but to my mind is instrumental in establishing the extent to which she is emotionally and psychologically settled in [this country]. If [B] has been led to believe that she would be returning to Portugal, it is difficult to imagine that she has been able to consider her current home a permanent one until very recently"*.

56) There is no doubt that M had not communicated to F an unequivocal intention permanently to reside in this jurisdiction with B until recently. This is clear from:

a) the two lengthy periods of mediation between the parties between December 2022 and March/May 2023 and between August 2023 and December 2023/January 2024. Mediation would not have taken place if M had informed F of an intention permanently to reside in the jurisdiction as otherwise F would have issued proceedings earlier. In reaching this conclusion I do not trespass on the confidentiality of the mediation process which I might be at risk of doing if I were required to express a view as to whether (as is asserted on F's behalf) the mediation concerned when (not if) M would return to Portugal;

b) the many WhatsApp messages and emails sent by M to F between October 2022 and October 2024 many of which are quoted at paragraph 20 a of Mr. Gupta and Ms Gaunt's Position Statement. These record M repeatedly informing F she had no intention of staying in this country long-term and/or that she and B would be moving back to Portugal; and

c) the written agreement signed by both parties on 15th October 2024, reached after several months of discussion and negotiation, and which stated B would return to live in Portugal from January 2025.

57) On F's behalf it is said what M said to F is also likely to be what was understood by B to be the case. I consider the position is more nuanced than this. To the extent that he has discussed it with her, B has been told by F that she will be returning to Portugal and the only question is when. I accept - as it is consistent with the above - that (as he states) F has been told by M that she has told B that B may (if not will) be returning to Portugal. It is disputed whether B has been led to believe the same by M with M stating she was not so told.

58) This is not an issue I need to resolve. I agree with Mr. Gupta and Ms. Gaunt that as is said at paragraph 22 of their Position Statement the above means B has either (i) received a consistent message from both parents that she may (if not will) be returning to Portugal in which case she will understand her current situation is or may be a temporary one; or (ii) she has received different messages from each of her parents, in which case she is likely to feel a sense of confusion. Either way, B has not received a clear and consistent message that this country is and will be her permanent home. I agree that B will therefore feel 'in limbo' and in my view cannot as a consequence have a sense of physical, psychological and emotional settlement here (as distinct from her feeling settled with M). My analysis in this regard is similar to that of Ms. Veitch as expressed at paragraphs 50 and 51 of her report.

59) In this context I accept F's evidence at paragraph 5 of his Statement of 2nd May 2025 that B has said to him *"when am I going to Portugal?"*. I accept this evidence because although it is disputed by M, she does accept (as she is recorded as having said to Ms. Veitch at paragraph 51 of the Cafcass report) that B at times has said she wants to go to Portugal (albeit M says this is said by her to please F).

60) B's young age is also a relevant factor in this analysis: she is not in full-time education and is not of an age to have established close ties with anyone but her parents. As set out above it is common ground that her young age means that she will derive her sense of emotional and psychological settlement from her relationship with her parents more than from any particular location. Further, as Ms. Veitch stated at paragraph 15 of her report, B *"has yet to establish friendships at nursery."*

61) I also conclude a lack of settlement in this country will have been compounded by B's six visits to Portugal (one of which was three and a half months long) and visiting F's home in Portugal. M inaccurately describes all six visits as *"short"* at paragraph 59 of her Statement. I do not consider that B is of an age when she will be able to distinguish one country to be her home and one where she travels for holiday. Further, she has (at the very least) some ability to speak and understand Portuguese and she has a large extended family in City Y.

62) As was submitted on F's behalf, the factors which would in theory point towards B being settled in this jurisdiction are that she has resided in the same property for 23 months, has developed some connections within the community and is living close to members of her maternal family. This does not constitute the requisite physical integration and stability for the purposes of Article 12, particularly when there are also properties in Portugal which B considers to be home, and has many friendships and family there with whom she has a close connection and has maintained a relationship with physically when in Portugal and remotely when in this country.

63) I also conclude from M's WhatsApp messages and her emails to F that she herself had not considered remaining in this jurisdiction to be a long-term stable arrangement until relatively recently. I acknowledge in reaching this conclusion it is possible that M said this to F in order not to 'rock the boat', to play for time and/or to put off a final difficult conversation with F for as long as possible whilst in her own mind she had reached a clear decision. I note that in paragraph 33 of her Statement M refers to reaching out to Women's Aid X on 15th March 2024 as she felt *"exhausted and under constant pressure from [F]"*, that a feature of this pressure was (she said) the flipping by F between apparent contentedness with B remaining in this country and his demands she return to Portugal, pressure that (as M states at paragraph 36) was "*overwhelming"* at a time she was the primary carer of a toddler. It is therefore said that at times she told F that she would return as a means of coping with that pressure. However, on balance I am satisfied that given the length of time over which these messages were sent they were genuine. I accept it is likely that B will have picked up on M's lack of settlement. In any event it cannot be that B has become settled when M is not.

64) Ms. Guha submitted orally that from the time M arrived in this country she *"knew in her heart she wanted to stay"*. F does not believe this and I conclude it was not the case. However, as Mr. Gupta submitted if M <u>was</u> being deliberately clandestine and/or deceitful she should not be able to benefit from the same.

65) I also conclude the agreement signed in October 2024 reflected M's genuine intentions at that time. I note at paragraph 37 of her Statement M states she signed the agreement *"after six months of repetitive demands, persistent threats, and lengthy emails outlining [F's] needs. He used alleged legal pressure to force me into signing, claiming things like, 'My lawyer says it needs to be signed today – this week – tomorrow'"*, but that (at paragraph 39) shortly thereafter *"[t]he thought of moving to a house without heating or electricity in the winter with a 3-year-old felt impossible"*. It is further said on M's behalf that the agreement was in Portuguese (in which M is not fluent), was drafted by F's lawyer, and M received no legal advice thereon. It is further said M does not even know if she got to see the final version having received further last-minute amendments from F, she was never provided with an English translation (as F refused to obtain one) and she had never seen the translations of the agreement exhibited to F's Statement.

66) I am satisfied that even though M may not be fluent in Portuguese she understood the material provisions of the agreement (and M does not suggest she did not). It is not said

that the signed and lodged version was materially different to earlier versions. It was also negotiated over several months which reduces (although I accept does not necessarily eliminate) the possibility of F exerting undue pressure on M.

67) I am fortified in my conclusion that M's intentions were genuine by the fact that she rented a property in Portugal in October 2024 and what she thereafter said to F about it. In my view securing this property was M giving effect to the parties' negotiated agreement. On M's behalf it is now said she took on what she understands to be (in legal terms) an illegal dwelling which she describes at paragraph 36 of her Statement as *"a small, isolated, one-room cabin with no electricity or heating, and no neighbours nearby"*. However M messaged F on 12th October 2024 *"The place is lovely and we are settling in"* and on 14th October 2024 *"Everything of mine needs to come"*. I prefer the contemporaneous WhatsApp messages as reflecting the truth.

68) It is relevant when considering the property that M has rented in Portugal and her now apparent criticisms of it that, as described by the Cafcass Officer at paragraph 28 of her report, M's present home in this country is a "*wooden constructed cabin"* with an outdoor composting toilet and the house is open plan and has mains water but no other mains power. There is solar power from panels on the roof and radiators which run on bottled gas. There are therefore at least some similarities between the two properties.

69) Having reached this conclusion I do not need to resolve the factual dispute as to whether M has now moved most of her and B's belongings to her Portuguese property. F states she has relying *inter alia* on a photograph dated (I believe) 31st October 2024 which he states shows M having towed a caravan to Portugal containing her belongings. M states the caravan contained only what she needed for that trip and she left no belongings she had brought from this country there and all that is now in the property is what M left behind when she left Portugal in 2022 and what was then put into storage.

70) For completeness I should record that in reaching my conclusion on settlement I accept (as was said on M's behalf) that when she acknowledged to Ms. Veitch (as recorded at paragraph 49 of her report) that she *"'didn't intend for this to become our home,' and that relocating to [this country] was never meant to be permanent"* this was not (as F said) a *"concession"* by M but was a reference to her initial intentions only.

71) If, contrary to my conclusion, B was settled in this jurisdiction at the material time, my discretion will be *"at large"* (*Re M (Zimbabwe)* [2008] 1 FLR 251 per Baroness Hale of Richmond at [43]). She continued:

> … The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word *"overriding"* if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.

> [44] That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.
>
> [47] In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer 'hot pursuit' cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors, which may well, as here, include the child's objections as well as her integration in her new community.

72) In *F v M and N (Abduction: Acquiescence: Settlement)* Black J (as she then was) observed at [72] that it is *"unusual"* for a summary return to be appropriate if the settlement defence is established. She said she had been told that if she did order a return (which in fact she did suspended to allow the mother time to issue an application in Poland) *"this would the first time it had happened in this country"*. However she acknowledged it was clear that a settled child *can* be returned to their country of habitual residence referring to *Re M* where Baroness Hale commented in para [31] that she had reached the conclusion (albeit not without considerable hesitation) that Article 12 *"does envisage that a settled child might nevertheless be returned within the Convention procedures. The words 'shall … unless' leave the matter open. It would be consistent with all the other exceptions to the rule of return."*

73) In *ES v LS (Abduction: Settlement)* Mostyn J stated:

> [71] It is a fact, and not a particularly surprising fact, that there has been no reported decision in England and Wales or, apparently, elsewhere where settlement has been proved but nonetheless a return order has been made … This is because the discretion is formal and invariably exercised against a return. It is driven by the primary threshold finding in the same way that the discretion in a risk of harm case is always driven by the primary finding. It is the same where the defence is consent or acquiescence. It would be a vanishingly rare case where the discretion would be exercised in favour of a return where consent or acquiescence is proved.

74) In *AX v CY (Article 12: Settlement)* [2020] 2 FLR 1257 Robert Peel QC (sitting as a Deputy High Court Judge) did not consider that the settlement defence had been established but if it had been made out he would have exercised his discretion in favour of ordering the child's return to Spain.

75) Mr. Gupta and Ms. Gaunt set out several reasons why I should find it is in B's best interests to return to Portugal and hence why I should exercise my discretion to order the same:

a) it is common ground that B benefits greatly from her relationship with F which is key to furthering her welfare and to her sense of stability. It will not be feasible for F to continue to travel to this jurisdiction as frequently as he has done so far for an indefinite period. The inevitability of the court refusing to return B to Portugal will be that her relationship with F suffers significantly, which cannot be in her best interests. On the contrary, if B is returned to Portugal, M will return with her, and she will be able to enjoy a full and meaningful relationship with both parents;

b) B will be well able to adapt to life back in Portugal. She speaks and understands Portuguese, has many friends and family in Portugal and two homes there which she has visited and where she has her own room and belongings. The Cafcass Officer is confident that B will adapt to a return to Portugal with the support of her parents. Further, if F is right about what B has been led to believe by both her parents, she will be anticipating a return to Portugal and is looking forward to it, and a refusal to return will be confusing and upsetting for her; and

c) although it is accepted that Convention policy arguments usually carry less weight in cases where a child or children are settled, in the circumstances of this case, Convention policy should militate in favour of a return to Portugal. This is not a case of a parent who has simply waited and has only sought B's return after two and a half years of her being here. Quite the opposite; F sought B's return immediately, as soon as she was wrongfully retained. F has continued to seek B's return since then, but has tried to do so amicably and via non-court means. Crucially, he was also continuously reassured until very recently that M would return to Portugal, and believed that until M reneged on the parties' agreement. The steps taken by F are entirely understandable and reasonable, and that is the only reason why proceedings were not issued sooner. There is (or should be) a policy interest in acknowledging parents who seek to resolve matters without resorting to the court immediately. This is an entirely different situation to a parent who has only just raised an issue after two and a half years, and therefore this case is distinguishable to the reported cases where the court has refused a return where settlement has been established.

76) On M's behalf it was submitted by Ms. Guha and Mr. Laing that:

a) in circumstances where B has spent almost the entirety of her life living in this country and F delayed in bringing his remedy pursuant to the Hague Convention for two and a half years facilitating B's settlement, it is axiomatic that the court should exercise its discretion to refuse an order for summary return in circumstances where M and B will face a myriad of obstacles and hardship in seeking to reintegrate into a stable and secure

lifestyle in Portugal;

b) if allowed to remain living in this country, M will be able to recover from the stress and low mood and symptoms of depression that she has suffered as a result of these proceedings. B and M have established firm roots and a thriving and fulfilling life in this country; and

c) in exceptional circumstances in a Hague case, B has benefited from regular and highly frequent visits from F. She has also been able to regularly visit him and the extended paternal family in Portugal since moving to this country. F's suggestion that he will not be able to maintain the same frequency of travel appears self-serving and should not be accepted at face value. He has faced no impediment in his work or financial position in travelling between the two countries over this extensive period. Flights between Faro and City Z can be purchased for less than £50. There is no reason why F could not maintain the same level of commitment to his relationship with his daughter going forward.

77) At this point it is convenient to deal with two issues that it is said would also militate against the exercise of the discretion namely M's immigration status and the impact of a return on her mental health.

78) I have had the benefit of the SJE immigration report from Mr. João Perry da Câmara dated 6th May 2025 on which he was questioned by both counsel.

79) M presently has a temporary residence permit which lapses on 30th June 2025. I accept that Portuguese immigration law is, to adopt the phrase used by Ms. Guha and Mr. Laing at page 17 of their Position Statement, *"fiddly and discretionary"* and much will depend on the evaluation and discretion of a particular officer. Mr. Perry da Câmara's English was also not always completely easy to comprehend. Notwithstanding this it was clear to me that the tenor of his oral evidence was positive overall. This is of note as he acknowledged he was a pessimist by nature. He stated that if M was assisted by an immigration professional so her application contained the necessary paperwork, detail and was well-explained, there was no reason why M's application would not be *"appreciated"* particularly as under Portuguse legislation the interests of a minor were *"very relevant"*. He further said that if a Portuguese father offered financial support and with B being a Portuguese national, that if the English court had ordered a return then this *"will be the way to cross the river and the bridge and get the right to accompany the child"*. What was essential was that M progressed her application (whether seeking to extend her current permit or by applying for a new one) by the end of June 2025.

80) In light of this evidence although I acknowledge the grant of a permit is discretionary I am satisfied that on balance M will be able to formalise her right of residence in Portugal. I therefore do not consider that this issue weighs with any great significance in the balance.

81) As to M's mental health, Mr. Alexander Marshall's report of 16th May 2025 records that M has described suffering periods of anxiety and her current symptoms (triggered by uncertainty and the prospect of a return to Portugal) are indicative of depression and require monitoring. He sets out the significant impact on M of a return to Portugal in those circumstances. He highlights that there is no evidence from M's history of similar circumstances to draw a comparison regarding how she may be able to cope as her coping mechanisms in the past have included the freedom to return home to this country.

82) The report emphasises the following stressors as operating cumulatively "*in addition to the general and expected stresses of such circumstances"* (i) isolation; (ii) an inability to return or avail herself of her support network in this country; (iii) coercive and controlling behaviours; (iv) constraints on M's ability to draw upon support or engage in her typical responses to distress; and (v) restrictions on securing employment. It is said on M's behalf that these stressors all arise within the context of presently demonstrating symptoms of depression, whilst M would not have access to her typical means of coping, and experiences a sense of threat, and would be reliant upon F financially, placing further constraints on her independence and freedom.

83) I am of course very mindful of all the above. However I agree with Mr. Gupta and Ms. Gaunt that the conclusion from the report is that while a return may have a cumulative impact on M's wellbeing, there is no clear evidence that it would have such a detrimental impact on B and in particular M's ability to parent her, especially when compared to the very significant impact on B of not being able to enjoy such regular time with F. I therefore do not consider that this evidence weighs significantly in the balance.

84) There is also a separate policy point that arises on the facts of this case. The parties were engaged in mediation as to if (if not simply when) B should return to Portugal. Ms. Guha submitted that *"the passage of time before concrete measures were taken take this case away from the norm"* and particularly as F had the benefit of legal advice in Portugal, two and a half years prior to issuing proceedings *"is an exceptional time to wait"*. However, a party should be allowed to enter mediation and/or use other forms of non-court dispute resolution without fear that the time taken in seeking to resolve matters outside of court may be used against them (whether as part of the defence of settlement or otherwise) should resolution in a non-court forum not ultimately be achieved and court proceedings thereafter issued. It would be contrary to the court's *"duty"* pursuant to FPR 2010 Part 3 to consider non-court dispute resolution and likewise contrary to the overriding objective pursuant to FPR Part 1 to deal with cases *"justly"* if a court acceded to a submission made by a respondent to an application for summary return that the merits of a settlement defence and/or the arguments in relation to the non-exercise of the discretion were strengthened because court proceedings were not issued earlier when this was because the parties were engaged in non-court dispute resolution.

85) In addition I agree with Ms. Veitch when she states at paragraph 43 of her report that "*the fact that [B] has not yet attended nursery for any significant period suggests she is*

better placed to adapt to a further change of her circumstances, provided it takes place before she is due to start school."

86) I likewise agree with Ms. Veitch's view as expressed at paragraph 45 of her report that B *"will, to a great extent, settle and adapt to a change in circumstances, provided that she is in [M's] care. She presents a bright and resilient child who is bilingual and has positive relationships with both her parents; she is likely to adapt to a return to Portugal, if directed, with their shared support."* I agree with this view because in her email of 19th January 2025 (to which I refer further below) M states similarly describing B as "*an adventurous and engaging child who has shown only joy and easy adaptation on the many travels we have taken together as mother and child, She is secure in her attachment and finds it exciting to meet new people and be in new places, she already is familiar with both home bases and environments and adjusts to each with ease."*

87) I accept that as stated in *Re M (Zimbabwe)* the further away one gets from a speedy return envisaged by the Convention, the less weighty its objectives are.

88) However, taking all the foregoing into account, and my view that it is inherently unlikely to be feasible for F to be able to continue to travel to this jurisdiction as frequently as he has done so far for an indefinite period, if I had reached the conclusion that B was settled in this country, then on the (very) unusual facts of this case – and which include that (i) it is common ground that B benefits greatly from her relationship with F; and (ii) she already has a home in Portugal with both of her parents - I would have exercised my discretion to order her return to Portugal (subject of course to my separate consideration of the Article 13(b) exception/defence to which I shall now turn).

Article 13(b)

89) Article 13(b) states:

> 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.

90) The Supreme Court examined the law in respect of the harm exception in *Re E (Children) (Abduction: Custody Appeal)* [2011] 2 FLR 758 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 FLR 442. More recently in *MB v TB (Article 13: Alleged Risk of Oppressive Litigation)* [2019] 2 FLR 866 at [31] and in *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159 MacDonald J at [67] summarised the applicable principles derived from the authorities as follows:

i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.

iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.

v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.

vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).

91) At [32] of *MB v TB (Article 13: Alleged Risk of Oppressive Litigation)* MacDonald J further stated:

> The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures.

He said similarly at paragraph [68] of *Uhd v McKay (Abduction: Publicity)*.

92) In *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 Moylan LJ made clear that it is not the case that the court has to accept allegations made without conducting an assessment of the credibility or substance of the allegations:

[39] In my view, in adopting this proposed solution, it was not being suggested that no evaluative assessment of the allegations could or should be undertaken by the court. Of course a judge has to be careful when conducting a paper evaluation but this does not mean that there should be no assessment at all about the credibility or substance of the allegations …

93) In *Re C (A Child) (Abduction: Article 13(b))* [2021] EWCA Civ 1354 Moylan LJ emphasised at [48] and [49] that the risk to the child must be a future risk. At [50] he cited from the *Guide to Good Practice: Part VI, Article 13(1)(b),* published in 2020 by the Hague Conference on Private International Law as follows:

> [35] The wording of Article 13(1)(b) also indicates that the exception is "forward- looking" in that it focuses on the circumstances of the child upon return and on whether those circumstances would expose the child to a grave risk.
>
> [36] Therefore, whilst the examination of the grave risk exception will usually require an analysis of the information/evidence relied upon by the person, institution or other body which opposes the child's return (in most cases, the taking parent), it should not be confined to an analysis of the circumstances that existed prior to or at the time of the wrongful removal or retention. It instead requires a look to the future, i.e., at the circumstances as they would be if the child were to be returned forthwith. The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence.
>
> [37] However, forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That said, past behaviours and incidents are not per se determinative of the fact that effective protective measures are not available to protect the child from the grave risk.

94) Article 13(b) was also considered in *Re IG* (*A Child) (Child Abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123 per Baker LJ in which he summarised at [47] the applicable principles to be as follows:

1. The terms of Article 13(b) are by their very nature restricted in their scope. The defence has a high threshold, demonstrated by the use of the words "grave" and "intolerable".

2. The focus is on the child. The issue is the risk to the child in the event of his or her return.

3. The separation of the child from the abducting parent can establish the required grave risk.

4. When the allegations on which the abducting parent relies to establish grave risk are disputed, the court should first establish whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise

placed in an intolerable situation. If so, the court must then establish how the child can be protected from the risk.

5. In assessing these matters, the court must be mindful of the limitations involved in the summary nature of the Hague process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13(b) and so neither the allegations nor their rebuttal are usually tested in cross-examination.

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

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

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

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

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

95) With regards to protective measures, in *E v D (Return Order)* [2022] EWHC 1216 (Fam) MacDonald J at [32] drew the following principles from *Re GP (A Child: Abduction)* [2018] 1 FLR 892, *Re C (Children) (Abduction: Article 13(b))* [2019] 1 FLR 1045 and *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] 2 FLR 194:

i) The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.

ii) In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.

iii) The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.
iv) There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.
v) There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.
vi) The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.

96) Further at [33] MacDonald J stated:

> With respect to undertakings, what is therefore required is not simply an indication of what undertakings are offered by the left behind parent as protective measures, but sufficient evidence as to extent to which those undertakings will be effective in providing the protection they are offered up to provide.

97) In *H v O; and others (Secretary of State for the Home Department Intervening)* [2025] EWHC 114 (Fam), MacDonald J at [45] repeated what he had said in *E v D (Return Order)* as to what are the key principles in determining the efficacy of protective measures.

98) I am also entitled to have regard to the purpose and policy aims of the Hague Convention. In *Re W (Abduction: Intolerable Situation)* [2018] 2 FLR 748 Moylan LJ stated:

> [46] Child abduction is well-recognised as being harmful to children. As was noted in *Re E (Children) (Abduction: Custody Appeal)* [2011] 2 FLR 758, the *'first object of the Convention is to deter either parent … from taking the law into their own hands and pre-empting the results of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any disputes can be determined there'*.

99) I shall take M's allegations against F (and the consequent risk of harm) at their highest and thereafter if satisfied that the risk threshold is crossed go on to consider whether protective measures sufficient to mitigate the harm can be identified. Although it was made clear in *Re B (Children) (Abduction: Consent: Oral Evidence) (Art 13(b))* [2023] 1 FLR 911 per Moylan LJ at [71] that it is not *necessary* (original emphasis) for a judge to undertake the *Re E* approach as a two-stage process (because the question of whether Article 13(b) has been established requires a consideration of all the relevant matters including protective measures), absent the court being able confidently to discount the possibility that the allegations give rise to an Article 13(b) risk, conflating the *Re E* process 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. In other words the judge may fall *"between two stools"*.

100) I also remind myself that as stated in *Re B* per Moylan LJ at [70] 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).

101) If I find Article 13(b) satisfied, I retain a residual discretion to return.

Analysis

102) M raises concerns in respect of (i) domestic abuse; (ii) housing issues; (iii) her immigration position; and (iv) the effect on her mental health.

103) I shall consider these in turn (albeit conscious that I also need to evaluate their cumulative effect).

Domestic abuse

104) M makes a number of serious allegations against F. She alleges that her relationship with F was and is an abusive one, with her frequently feeling sexually disrespected and used. She alleges there were frequent occasions when F would push her to have sex, during which she would disassociate. M states she was coerced by F into accepting his terms as to how he chose to behave during their 'open' relationship, that F had multiple sexual partners and had sexual intercourse without using condoms in the face of M's objections placing M at an unacceptable level of risk. It is said M is suffering the enduring effects of the traumatic experiences of her relationship with F in which she feels that her boundaries were violated and her self-esteem was eroded. From March 2024, it is said that M started receiving support from the domestic abuse charity, Women's Aid X, and that M continues to attend support groups and one-on-one sessions focussed on helping women cope with coercive control.

105) I readily acknowledge the seriousness of these allegations of domestic abuse. However I do not consider that, even taken at their highest, they constitute a grave risk that B would be exposed to harm or placed in an intolerable situation if she were to be returned.

106) I agree with Mr. Gupta and Ms. Gaunt that the allegations are mostly situational to the parties' relationship. I also consider that M's case is undermined by her own proposals: as recently as 19th January 2025 (which is after she withdrew from the parties' written agreement) she set out in an email to F some questions and suggestions that she had sent to her lawyer which included the possibility of committing to spend six months with B each year in Portugal; I agree she cannot then say B would be exposed to harm or placed in an intolerable situation by returning to Portugal. M's case is further undermined by (i) M answering 'no' in response to the questions *"Are there allegations of harm?"* (which

expressly includes domestic abuse) in her application for a child arrangements order issued on 23rd December 2024; (ii) although M claimed exception from a MIAM on grounds of domestic abuse she said in a WhatsApp to F dated 8th February 2025 she *"acknowledged"* domestic abuse with her lawyer after returning from Portugal last year *"when you threatened to stop us coming home"*, that legal aid is granted when this has been acknowledged and that domestic abuse *"is in the papers for that reason alone"* and that M had *"no need or intention"* to ask anyone to *"punish"* F with a criminal order; and (iii) the parties' frequent communications, interactions and handovers without issue.

Housing issues

107) M already has rental accommodation in Portugal, which she chose and where M and B have stayed. M's assertion at paragraph 96 of her Statement that *"I do not have anywhere to live in Portugal"* is not correct. In her email of 19th January 2025 to which I have referred above she refers to having a *"home base"* in Portugal. I understand that M's property is approximately an hour and a half away from F.

Immigration

108) I have considered this in detail above.

Effect on M's mental health

109) I have likewise considered this above. M asserts that she will feel isolated and will be impacted by a return to Portugal. However the SJE report does not support her Article 13(b) defence. At most, the evidence suggests that a return to Portugal would have a negative effect on M's wellbeing. As Mr. Gupta and Ms. Gaunt observe, this is understandable given M currently does not want to return. There may be aggravating factors which would increase her experience of distress, and there may be constraints on her freedoms and ability to draw upon adaptive means of coping. However the evidence does not support a conclusion that there is a risk of a significant deterioration in M's mental health on a return, or of M becoming so psychologically disabled so as to mean that she would not be emotionally and physically available to B. M does not say that she will not or cannot return.

110) The threshold for Article 13(b) is high. In *Re B (A Child) (Abduction: Article 13(b): Mental Health)* [2024] EWCA Civ 1595 Moylan LJ at [54] reiterated that the *"key question"* is:

> … what is likely to happen if the mother and A were to return … Is the likely effect on the mother's mental health sufficient to establish a grave risk that A would be exposed to physical or psychological harm or otherwise placed in an intolerable situation? As referred to above, this requires consideration of the nature of the risk; the likelihood of the risk materialising; and the consequences of the risk materialising for A. These are for the purposes of answering the ultimate question, namely whether there is a grave risk that returning A … would expose her to psychological harm or otherwise place her in an intolerable situation.

111) The assessed potential impact on M's mental health in this case does not satisfy this threshold.

112) Standing back and considering the allegations relied on by M as a whole, rather than individually, I am also of the view that their cumulative effect does not constitute a grave risk of harm to B or otherwise place her in an intolerable situation.

113) If, however, I am wrong in this conclusion and M's allegations, at their highest, would constitute a grave risk of harm to B or otherwise place her in an intolerable situation, I would be satisfied that the protective measures that are offered are sufficient to mitigate the harm. At paragraph 104 of his Statement F offered the following undertakings:

a) to apply for a hearing as soon as possible after B's return;
b) to pay for M and B's economy flights from the UK to Portugal to include one piece of hold luggage each;
c) not to attend at the airport upon M and B's arrival in Portugal;
d) not to support or instigate any civil or criminal proceedings arising from M's removal of B from Portugal to England or her retention of B in England;
e) not to use or threaten abuse against M nor encourage anyone else to use or threaten abuse against M;
f) not to separate B from M save for agreed periods;
g) not to attend M's place of residence without prior agreement;
h) to lodge the return order and undertakings with the Portuguese court prior to B's return and provide evidence of this;
i) to pay M child maintenance of €800 pm until the first on notice hearing in Portugal;
j) to provide M with a car for the first six months;
k) to contribute towards any nursery fees in relation to any nursery that M and he agree on; and
l) to contribute towards any medical costs of M and B.

114) Although it is of course a matter for me I note Ms. Veitch considered at paragraph 56 of her report the protective measures to be appropriate and not place B at risk of harm.

115) In light of the SJE immigration expert's opinion that M's property in Portugal may not be a sufficient permanent address for the purpose of M renewing her existing visa or obtaining a new one, F thereafter offered M the use of a family property. However, his mother lives upstairs. Unsurprisingly this was not attractive to M. At my encouragement F put forward an alternative option which was that he would pay the rent on a property owned by his cousin for a year and which is currently vacant and available for immediate occupation. At my suggestion F also offered to pay the costs of M's immigration application being prepared and supported by a lawyer capped at €3,000 in the first instance (which was the cost estimated by the SJE of this work being carried out by one of his colleagues). F also agreed to write off any sums he considered M owed him (in the sum of c. €3,500). Further *"if pressed"* he offered to cover health insurance for M and B for one year with the premium of €900 for year to be paid direct to the provider.

116) I will accept these undertakings in their final form as offered with amendments that (i) as to the write-off of the alleged debt this is to include F not seeking to offset any or all of the same against the sums owed for maintenance /accommodation; (ii) F is not to seek to remove B from M's care save for the purposes of contact as agreed by the parties or ordered by the Portuguese court; (iii) F is to make payment of the deposit and initial month's rent prior to M's return to Portugal so that the property is available for her; (iv) the first payment of €800 pm is to be made before M's return; (v) F is to make such payment (if any) to the immigration lawyer as is necessary for M begin the process of the renewal of her immigration visa prior to 30th June 2025; and (vi) the provision of the €800 pm, the accommodation, and the car is to be for a minimum of a year or until the positive determination of M's immigration application (if earlier). I consider that not only is this the appropriative duration for the purposes of protective measures but this longer period of support is also likely to be of assistance in satisfying the Portuguese immigration authorities of proof of (permanent) residence and income.

117) My return order is conditional upon all the foregoing being put in place.

118) The maintenance and similar obligations will be subject to any order varying the same that may be made by the Portuguese courts.

119) Given the recent allegations M has now said that rather than F having staying contact with B in Portugal she now offers only visiting contact to be supervised by F's sister. F in turn states that he will not permit M to take B out of Portugal for the first 12 months because of his concern that she would simply retain B in this country. Therefore proceedings in Portugal in the short-term dealing with these and other matters concerning B's welfare will be needed.

120) On M's behalf it is said it is significant there is no evidence as to the extent to which the Portuguese court would enforce undertakings given to the English court or mirror those undertakings with orders of its own.

121) I am conscious of the importance of this issue as discussed in *Re T (Abduction: Protective Measures: Agreement to Return)* [2024] 1 FLR 1279 per Cobb J and with whom the other two members of the Court of Appeal agreed. However in the somewhat unusual factual circumstances of this case (see for example paragraphs 29-30 above) I am satisfied that this is a case where F can be trusted as he is mindful of the need for B to have the benefit of a safe and secure environment and of the importance of M having the same in order to be able to meet B's needs.

122) My acceptance of F's undertakings (which constitute 'measures' for the purpose of Article 23 of the Hague Convention 1996 and are therefore recognisable by operation of law in Portugal) will therefore be sufficient protection. I am satisfied on the facts of this case that this satisfies the need for the protective measures to be effective (which is not confined solely to the issue of enforceability).

123) For the same reasons I do not consider that the undertakings need to be reflected in an order of the Portuguese courts prior to return under Article 11 of the Hague Convention 1996.

124) Having found Article 13(b) defence is not satisfied, the residual discretion to order a return does not arise.

Conclusion

125) For the foregoing reasons I dismiss both of the defences raised by M and order a summary return of B to Portugal.

Addendum

126) On 3rd July 2025 I received an agreed note of proposed corrections and anonymisations to my draft judgment. I am grateful for its preparation and have adopted all of the same.

127) That is my judgment.