OUTER HOUSE, COURT OF SESSION

[2024] CSOH 24

P756/24

OPINION OF LORD STUART

In the Petition of

JL

Pursuer

against

ORDERS UNDER THE CHILD ABDUCTION AND CUSTODY ACT 1985

Defender

Pursuer: Hayhow KC et Bradbury; Drummond Miller LLP
Defender: Scott KC et Critchley; Balfour + Manson LLP

29 February 2024

Introduction

[1] This opinion concerns an application for the return of two children to Spain under the Child Abduction and Custody Act 1985. The petitioner is the father of the children. The respondent is their mother. It is accepted on behalf of the respondent that there was a wrongful retention of the children in Scotland and that the court will be obliged to order the return of the children unless it is established that there is a grave risk their return would expose the children to physical or psychological harm or other otherwise place them in an intolerable situation.

[2] Before setting out the factual circumstances against which the court's decision is made and the submissions of the parties, I first set out the applicable law.

Applicable law

The Hague Convention on the Civil Aspects of International Child Abduction ("the Convention")

[3] The Child Abduction and Custody Act 1985 gives legal force in the UK to the Convention. Both the UK and Spain are signatories to the Convention. Thus the relevant terms of the Convention govern whether the orders sought by the petitioner should be granted. Insofar as relevant to the submissions made to me, the terms of the Convention are as follows:

> **"Article 3**
> The removal or the retention of a child is to be considered wrongful where—
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. …
>
> **Article 12**
> 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.
>
> 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. …

> **Article 13**
> Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (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.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

[4] As noted above, it is conceded on behalf of the respondent that there was a wrongful retention of the children in Scotland and that the court is obliged under Article 12 to order the return of the children unless it is established, under reference to Article 13, that there is a grave risk their return would expose them to physical or psychological harm or other otherwise place them in an intolerable situation.

[5] As discussed further below, the respondent in this case argues under reference to Article 13 that the court should not order the children's return to Spain as there is a grave risk that the children's return to Spain would expose them to psychological harm or otherwise place them in an intolerable situation.

[6] The proper approach for this court to take in relation to the question of grave risk was authoritatively set out by the Supreme Court in the case *In re E (Children)* [2012] 1

AC 144, as further explained in the case *In re S (A Child)* [2012] 2 AC 257 and as applied in Scotland by the Inner House in the decision in the case *AD* v *SD* 2023 SLT 439.

[7] In *In re E*, Lady Hale and Lord Wilson, delivering the opinion of the Supreme Court, stated at paragraphs 31 to 36:

> "31. … We share the view expressed in the *High Court of Australia in DP* v *Commonwealth Central Authority [2001] HCA 39, (2001) 206 CLR 401* , paras 9, 44, that there is no need for the article to be 'narrowly construed'. By its very terms, it is of restricted application. The words of Article 13 are quite plain and need no further elaboration or 'gloss'.
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> 32. First, it is clear that the burden of proof lies with the 'person, institution or other body' which opposes the child's return. It is for them to produce evidence to substantiate one of the exceptions. There is nothing to indicate that the standard of proof is other than the ordinary balance of probabilities. But in evaluating the evidence the court will of course be mindful of the limitations involved in the summary nature of the Hague Convention process. It will rarely be appropriate to hear oral evidence of the allegations made under Article 13b and so neither those allegations nor their rebuttal are usually tested in cross-examination.
>
> 33. Second, the risk to the child must be 'grave'. It is not enough, as it is in other contexts such as asylum, that the risk be 'real'. It must have reached such a level of seriousness as to be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.
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> 34. Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or *otherwise*' placed 'in an intolerable situation' (emphasis supplied). As was said in *Re D*, at para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: eg, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child.

> 35. Fourth, Article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within Article 13b the court is not only concerned with the child's immediate future, because the need for effective protection may persist.
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> 36. There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues."

[8] In *In re S (A Child)*, in relation to the resolution of disputed allegations concerning domestic abuse and commenting on paragraph 36 of the judgement of the Supreme Court in *In re E*, the Supreme Court stated:

> "29. In his substantive judgment dated 30 August 2011 Charles J sought faithfully to follow the guidance given by this court at para 36 of its judgment in In re E , set out in para 20 above. Thus (a) he began by assuming that the mother's allegations against the father were true; (b) he concluded that, on that assumption , and in the light of the fragility of the mother's psychological health, the protective measures offered by the father would not obviate the grave risk that, if returned to Australia, W would be placed in an intolerable situation; so (c) he proceeded to consider, as best he could in the light of the absence of oral evidence and the summary character of the inquiry, whether the mother's allegations were indeed true; and (d) following a careful appraisal of the documentary evidence, including the mass of emails between the parents, he concluded that, as counsel for the father had been constrained to acknowledge, the mother had "made out a good prima facie case that she was the victim of significant abuse at the hands of the father" (italics supplied). In the light of his conclusion at (d), which on any view was open to him, it seems to us that it was unnecessary for Charles J to have continued to address the mother's subjective perceptions. For the effect of his conclusion was that the mother's anxieties were based on objective reality. So it added nothing for him to refer, as in effect he did in three separate paragraphs of his substantive judgment, to the mother's "genuine

conviction that she has been the victim of domestic abuse", by which he implied that she was convinced about something that might or might not be true."

[9] In *AD* v *SD*, Lady Wise, giving the opinion of the Inner House, stated at paragraphs 26 to 28:

"26. In some 1980 Hague Convention cases where an Article 13 defence such as consent or acquiescence to the removal or retention of children is advanced, the court is required to reconcile, if it can, competing accounts of events given by the respective parties to the proceedings. Normally those accounts will be contained in affidavit rather than oral, tested evidence. In the absence of extraneous evidence supportive of their position, the party upon whom the onus rests may fail to establish the defence (*D v D* 2002 SC 33). In contrast, since the decision of the UK Supreme Court in *In re E* [2012] 1 AC 144, the position where an Article 13(b) 'grave risk' defence founding on domestic abuse is pled, the court's approach is more nuanced. A staged approach is required, with the court first asking itself of the disputed allegations 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 it concludes that there would be such a grave risk,

> 'the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country…'. *(In* r *e E*, paragraph 36).

27. Within the first stage of the assessment, unless there is no *prima facie* case made out at all, it is necessary to evaluate the available material and analyse the nature and severity of the risk to the children. The allegations are assumed to be truthful for the purpose of that exercise. It is that analysis that puts the court in a position then to make a proper assessment of whether the proposed protective measures will be sufficient to address or ameliorate that risk (*In re C (A Child) [2021] 4 WLR 118, paragraphs 55-59)*. The importance of that analysis lies in the relationship between the level of risk and the need for protection; a particularly high risk of the most severe harm will require to be balanced by more effective protection than a lower risk of either that or of less severe harm *(In re E*, paragraph 52). So the exercise involves a delicate slide rule type balance to be struck between the assessed risk and the protective measures offered.

28. It is also important to note that, in principle, where a party's subjective perception of events leads to a risk to her mental health, this can found an Article 13(b) defence. If there is a grave risk that the children would be placed in an intolerable situation as a result of the mother's suffering that may be sufficient (*In re E*, paragraph 34). The crucial question is not whether the parent's anxieties are reasonable, but what will happen if the children are returned with her. If she will suffer such anxieties that the effect on her mental health will create an intolerable situation for the children they should not be returned (*In re S (A Child) (Abduction: Rights of Custody)* [2012] *2 AC 257*). Finally, and of some significance in the present

> case, Article 13(b) requires the court to look prospectively. The protective measures may require to cover more than the immediate future because the need for effective protection may persist (*In re E*, paragraph 35)."

[10] In *L* v *H* 2021 SCLR 467, Lady Wise, sitting in the Outer House, stated:

> "15. While the case of *In re E* might have impacted on what things might create a grave risk for a child, the strength of the test that must be satisfied to succeed under article 13b remains as exacting as ever. Clear and compelling evidence of a grave risk of substantial harm is required, something much more than the risk inherent in any unwelcome return to the country of habitual residence. It has also long been established that in the absence of compelling evidence to establish that the courts in the requesting country do not have the power to protect the child, the courts of the requested county should assume that they will be able to do so – C v C [1989] 1 WLR 654."

Evidence

[11] No joint minute of admissions was entered into between the parties. Various affidavits and productions were lodged. Some productions were identified and referred to in affidavits. Some productions were referred to at submission. Some productions were neither identified nor referred to in affidavit nor in submission. In the absence of any indication by either party of the relevance or otherwise of those productions not referred to, I have left them out of my considerations. I have considered the information provided by the Ministerio De Justicia, lodged at 6/3 of process.

[12] The petitioner lodged three affidavits, dated 4 September 2023, 5 October 2023 and 14 November 2023. I have considered all carefully. The parties were in a relationship from August 2014 until their separation in August 2021. Thereafter the respondent and children moved into alternative accommodation. The petitioner paid 1,000 euros per month for rent and bills for the respondent and children. The petitioner works offshore; previously three weeks on, three weeks off and, from around a year ago, two weeks on, two weeks off. The parties had a rota for childcare. When the petitioner was onshore, the children would ordinarily spend nine or ten nights with the petitioner at his accommodation. In April 2023

the respondent left her accommodation and the children moved permanently into the petitioner's accommodation. When offshore at work the petitioner's mother travelled from Scotland to Spain to care from the children. On 2 August 2023, during the children's school holidays, the petitioner and children travelled to Scotland to visit the petitioner's mother. They were due to return to Spain on 31 August 2023. Whilst in Scotland the children had some supervised contact with the respondent. When the petitioner returned to work during August the petitioner was advised that the children had been retained by the respondent. The respondent would drink to excess, spending significant periods in pubs, and take illicit drugs. On 9 April 2023 the respondent left Spain and informed the petitioner that she was never coming back. The respondent returned to Spain intermittently, staying with friends. On one occasion the petitioner was sufficiently concerned about the respondent's health that he made an appointment for the respondent to see a doctor. Reference is made to 6/21 of process. When in the UK, the respondent spent five days in hospital following an attempted suicide by taking all of her prescribed medication.

[13] In relation to the messages lodged with the court by the respondent, the petitioner accepts that there is no excuse for them, explaining that they coincided with two difficult periods in his life when he was overcome with the shock and emotion of the situations. The first relating to the period when his relationship with the respondent came to an end. The second when the respondent abandoned the children in April 2023. The petitioner denies the respondent's allegation that the petitioner grabbed the respondent by the throat; he held the respondent back to stop her hitting him. The petitioner refers to various messages from the respondent but these are not identified within the affidavit. The messages demonstrate that the respondent will, as she has done previously, threaten suicide to coerce the petitioner to do what the respondent wants. The petitioner has never harmed nor been coercive or

controlling of the respondent. He would never harass or threaten or intimidate the respondent.

[14] If the children were returned to Spain the petitioner would raise an urgent court action in respect of the children (by which I understand to mean to address any underlying welfare questions, including residence, relocation and contact). The petitioner would offer the respondent financial assistance for ensuring contact whilst long term arrangements were finalised. He is financially able to do so as he had done before. The petitioner would cover all costs regarding flights, transport, food and accommodation on a regular basis. The petitioner would allow the respondent to reside in his accommodation with the children on her visits to Spain. The petitioner would go and stay with one of his friends during this period. The petitioner would allow daily video contact between the children and respondent when she does not have direct contact.

[15] The petitioner's mother prepared three affidavits, 4 September 2023, 5 October 2023 and 14 November 2023. Beyond some broad confirmation of the parties' separation and respective travel arrangements, there is little of relevance to the issues before me.

[16] An affidavit is lodged on behalf of the petitioner from a Linda Pietraszko. The affidavit is dated 25 September 2023. Ms Pietraszko states that she has known the parties for around two and a half or three years. Ms Pietraszko is critical of the respondent's child care, stating that the respondent would take cocaine, smoke weed and consume alcohol to excess. Again, whilst the matters raised by Ms Pietraszko might have some relevance to underlying welfare issues between the parties, there is very little in the affidavit that bears upon the issues raised by this petition.

[17] The respondent lodged three affidavits, dated 28 September 2023, 15 November 2023 and 16 November 2023. I have considered all carefully. Again, a significant degree of their

contents might be more properly considered as relevant to underlying arguments about the welfare of the children and, to that extent, might have limited relevance to these proceedings. That said, they might have some relevance to the respondent's subjective state of mind and, to that extent, have potential relevance to a question of grave risk of harm to the children arising indirectly out of the respondent's mental health.

[18] The affidavits state, in summary, that the parties began a relationship in 2014. They lived in Spain. The petitioner worked offshore, three weeks on, three weeks off. In August 2021 they separated. After separation the petitioner arranged and paid for accommodation for the respondent and the children. The respondent was the children's primary carer. The petitioner was and is unable to care for the children full time. When the petitioner was not working and had the children residing with him, the petitioner's mother would visit Spain to care for the children. When the petitioner was onshore, the children would stay with the petitioner at his accommodation for around 10 days or less. When the parties first separated the petitioner was very angry. He went to the respondent's house one night "for a chat", which "ended with his hands around [the respondent's] throat". The petitioner had been verbally abusive towards the respondent for years. He would put her down, pick faults and criticise her. He would dictate when the respondent had free time. He usually refused to fit in with the respondent's social activities. He had a financial hold over the respondent. The respondent felt powerless, trapped, controlled and worthless. The petitioner made threats to kill the respondent. The petitioner admitted to smacking one of the children, reference was made to 7/1 of process. The petitioner sent various messages to the respondent, some were critical of the respondent. The respondent reported the petitioner to the police in Spain but did not attend for interview through fear of repercussion. In Spain the respondent had very limited opportunities. She had no car, no money and no pension. She did not speak

Spanish. Nor did the children. She told the petitioner she wanted to return to the UK with the children where she could "stand on [her] own two feet". She told the petitioner that she was struggling mentally in Spain. The respondent used drinking alcohol as a coping mechanism. The petitioner would also drink and take drugs, including cocaine. Reference was made to 7/10 of process in support. On 25 March 2023 the respondent left Spain. She asked the petitioner for the children's passports but he would not give them to her. The respondent felt like she had no choice and left Spain without the children. By this time the respondent was in a new relationship. On 29 April 2023 the respondent returned to Spain as she was missing the children. She contacted the petitioner, who advised her that her previous accommodation was no longer available. The respondent resided with friends once back in Spain. The respondent asked to stay in the petitioner's accommodation when he was offshore, rather than the petitioner's mother travelling from Scotland to be in the petitioner's house, but the petitioner refused. The respondent only saw the children a few times as the petitioner limited her contact with the children. When the respondent had the children overnight they had to share a single room in the respondent's friend's flat. The petitioner would make arrangements for the respondent and the children through the respondent's friend. The respondent felt powerless. The petitioner had no compassion for the respondent. Between 29 April and 15 July 2023 the respondent travelled back the UK on a number of occasions. In early July 2023, the petitioner took the respondent to the doctor. The respondent was prescribed anti-depressant medication. On 15 July 2023 the respondent returned to the UK for the final time. The petitioner has sent the respondent abusive messages. Reference was made to 7/2 to 7/9 of process. The petitioner sent abusive message to the respondent's mother. Reference was made to 7/12 of process.

[19] In July 2023 the respondent and her new partner separated. The respondent took an overdose of her anti-depressant medication and thereafter spent five days at Medway Hospital recovering. The respondent had told her ex-partner of her intention to do so and he had called an ambulance. The respondent then travelled to Derby. Whilst in Derby the respondent found out that the petitioner and children were in Scotland. The respondent travelled to Scotland where she obtained temporary accommodation suitable for her and the children and had contact over two days with the children whilst supervised by the petitioner. The petitioner returned to Spain leaving the children with his mother. Following advice received from Citizen's Advice and solicitors the respondent went to the petitioner's mother's house and collected the children. She took the children to her temporary accommodation. The respondent cannot return to Spain. She cannot afford to travel back and forth to Spain. In her absence, when the petitioner is working off shore it is unclear who will care for the children in Spain. As the children's primary carer the respondent is worried about what would happen to the children in her absence.

[20] On 31 October 2023 the respondent saw her GP, when she was prescribed medication for depression and anxiety. The respondent has been feeling better and more positive since being prescribed medication. The children reside with the petitioner's mother, which is around 10 minutes from the respondent's accommodation. The children are settled and happy residing with their paternal grandmother and at their respective school and nursery. These factors also assists the respondent's mental state. The respondent no longer takes illicit drugs. She has minimised drinking alcohol. The respondent receives Universal Credit and Housing benefit. The respondent has been advised she is not eligible for legal aid in Spain. The respondent is unable to afford legal fees as estimated for litigation in Spain. The respondent could not represent herself. The respondent does not speak Spanish.

[21] An affidavit dated 4 October 2023 by an Elaine Nunn was lodged on behalf of the respondent. Ms Nunn first got to know the respondent in around 2020. They had children of similar ages. They would spend time together, both with and without their children. The respondent was a great mum. She always put the children first. The respondent began to become increasingly stressed. The respondent was noticeably more stressed when the petitioner was onshore. Despite a rota for childcare being put in place, the petitioner would change his mind at short notice, meaning that arrangements for childcare were not consistent. This increased the respondent's stress. The petitioner did drink. This, on occasions, interfered with his childcare. The respondent also drank, although this did not cause Ms Nunn alarm. The respondent did go out and drink when the petitioner was looking after the children. The petitioner was controlling when it came to the children. The petitioner was looking after the respondent financially and he felt he was able to tell the respondent when she was having the children. From recent discussion with the respondent, the respondent appeared to be happier. The children appeared a lot more settled now.

[22] The following productions were identified and referred to in affidavit or referred to in submission.

[23] 6/17 of process appears to be a message from the respondent to Mrs Lawless dated 15 May 2023. It appears to explain the respondent's feeling that she has nothing for her in Spain, that she feels suicidal daily and that she seeks Mrs Lawless's help in persuading the petitioner allow the respondent to relocate to Scotland.

[24] 6/20 of process bears to be an email dated 14 September 2023 from the petitioner's employer confirming the petitioner has always passed his offshore medical, his drug screen and alcohol breathalyser tests.

[25] 6/21 appears to be an email from Albir Medical Centre dated 28 September 2023. The email confirms an appointment for the respondent on 13 July (I presume 2023). The email also confirms that the respondent did not attend a follow up appointment but notes that following a discussion with the respondent the medical practice was satisfied with the reason given by the respondent for her non-attendance. Standing the medical practice's satisfaction with the reason given for non-attendance and the absence of any further evidence on the point, it is difficult for me to draw a negative inference from the non-attendance.

[26] 6/22 of process is lodged as confirmation that the petitioner paid for the respondent's hotel accommodation in Falkirk between 2 and 5 August 2023.

[27] 6/25 and 6/27 of process appear to be messages from the respondent to the petitioner lodged by the petitioner in support of the submission that the respondent would use the threat of suicide to manipulate.

[28] 6/30 of process bears to be an email dated 6 October 2023 from Joaquin Bayo Delgado, a Spanish Barrister, offering advice on a number of matters. Mrs Scott, on behalf of the respondent, drew the court's attention to an apparent conflict between the opinions expressed by Joaquin Bayo Delgado and Amparo Arbaizar (per 7/21 of process, discussed below) on the question of the respondent's eligibility for legal aid in Spain in relation to the future of the children. The email also referred to (i) measures that might be taken to ensure the Respondent and the children a "soft landing" on their return to Spain and (ii) orders that could be sought from the Spanish court by the Respondent in connection with the children.

[29] 6/34 of process appear to be messages from the respondent to the petitioner lodged by the petitioner in support of the submission that the respondent would use the threat of suicide to manipulate.

[30] 6/36 and 6/37 bear to be, respectively, an application, in Spanish, for residency in Spain on behalf of the respondent and an email from an Eve Esteve dated 22/12/2021, again in connection with an applications for residency in Spain on behalf of the parties and the children. The application appears to be in Spanish. It appears dated 28 June 2021. I was not addressed on this matter. If that is correct, the application appears to pre-date the parties' separation. The email post-dates the parties' separation. It appears that the Respondent's application has been separated from those of the Petitioner and the children. The productions offer little, if any, assistance on the question of residency for the Respondent in her current circumstances.

[31] 6/38 of process appears to be messages from the respondent to the petitioner lodged by the petitioner in support of the submission that the respondent would use the threat of suicide to manipulate.

[32] 6/39 and 6/40 of process bear to be, respectively, messages and a still shot both sent by the respondent to her ex-partner, again lodged by the petitioner in support of the submission that the respondent would use the threat of suicide to manipulate. The former is said to be dated 18 July 2023, the day the respondent took the overdose, the latter 20 July 2023, when the respondent was in hospital.

[33] 7/1 of process appears to be messages from the petitioner to the respondent. They do not appear to me to be relevant to the question before the court. They might be relevant to any underlying welfare discussion.

[34] 7/2, 7/3, 7/5, 7/7 and 7/8 of process bear to be messages between the petitioner and the respondent from around March 2022 and March, June, July and August 2023 in support of the respondent's submission that the petitioner was abusive towards the respondent.

[35] 7/13 of process appears to be a letter dated 5 October 2023 from a Spanish lawyer, D. Jose Luis Rodriguez Candela. The letter addresses the issues of (1) a right of residency in Spain for the respondent and (2) the respondent's right to receive legal assistance from the Spanish state. It appears from this letter that the respondent (i) would be able to stay in Spain for a maximum period of 90 days out of every 180 days, (ii) would be unable to meet the financial requirements of non-labour residency, (iii) is not in a position to meet the requirements for a labour residency, at least currently, (iv) if in an "irregular situation" (which is not explained in the letter), would require three year's residence before she would be able to apply for residency and during that period would be at a risk of expulsion, (v) may have a right to receive social support but only once she has obtained residency, (vi) would have the right to free legal assistance even if in an irregular situation (again, "irregular situation" is not defined in the letter), and (vii) would be unable to obtain residence on the basis of "Brexit" (again no further specification is given).

[36] 7/15 of process bears to be an updated letter from the Spanish lawyer, D. Jose Luis Rodriguez Candela also dated 5 October 2023. It appears to add little, if anything, of substance to 7/13 of process.

[37] 7/17 of process appears to be an undated "support letter" written by the respondent's GP and at the respondent's request to "confirm how much her children mean to her" and "how detrimental losing her kids would be to her mental health." The letter narrates that the respondent's mood is extremely low, she is depressed, anxious and has panic attacks. On reading the letter it seems to me that the factors narrated in support of the matters sought to be supported are narrated at the specific request of the respondent rather than being conclusions reached by the GP following the GP's own medical assessment.

[38] 7/18 bears to be medical records from the Medway Foundation NHS Trust relating to the respondent. Both parties made reference to extracts from these records. The petitioner made reference to pages 22 and 23, both from an IP AHP/CNS Review Note-Liaison Psyche dated 18 July 2023. It records that the respondent was brought into the hospital after taking an intentional overdose of an unknown quantity of citalopram with cocaine and alcohol. The trigger for the respondent's overdose is recorded as the ending of her relationship with her then partner. It records that the respondent told her ex-partner that she intended to commit suicide and the ex-partner informed the hotel manager where the respondent was staying who, in turn, called an ambulance. Various investigations, including a mental state examination, were undertaken. The Summary records "she reported ongoing suicidal thoughts which appear to be related to her current social situation – having nowhere permanent to live, her boyfriend ending the relationship and ongoing issues with her ex-partner who lives in Spain with their children." The petitioner also made reference to page 124, which is part of the ambulance notes and confirms the respondent's use of alcohol and cocaine and taking citalopram "in attempt to end her life".

[39] The respondent referred to the following pages of 7/18 of process. Pages 22 and 23, as above. Page 113, which records under the heading "Suicidal" that "[the respondent] wants to end her life due to an argument with her ex-boyfriend." Page 67, from an IP AHP/CNS Review Note-Liaison Psyche dated 17 July 2023, which records "ongoing fleeting suicidal thoughts". Page 32, part of an IP Ward Round Document dated 18 July 2023, which records that the overdose was the first time the respondent had taken an overdose and that the respondent does not know if she is still suicidal but that the respondent has "active suicidal ideation". Page 104, which records a past medical history of "Depressive disorder". Page 39, an IP Nursing Note Hando & Svg Lives, dated 21 July 2023, which states that the

respondent is waiting for a doctor to review her so that she can be discharged and "Independent with ADLs, nil concerns per now."

[40] 7/19 of process appears to be a medical report by Professor Macpherson, FBPsS, dated 11 October 2023. Prof. Macpherson records that he had access to a letter of instruction, an affidavit of the petitioner, an inventory of productions, copies of various text and WhatsApp messages between the petitioner and respondent and a copy of the petition and answers. Prof. Macpherson interviewed the respondent. One limitation noted by Prof. Macpherson was not having access to the respondent's clinical records.

Prof. Macpherson was asked to consider a number of identified questions. The respondent presented with a number of mental health disorders, namely (i) an Adjustment Disorder, with low mood and anxiety, (ii) traits of Borderline Personality Disorder, relevantly characterised by, amongst other things, unstable and intense personal relationships and recurrent suicidal behaviour and (iii) a several year history of substance abuse and a long history of Alcohol Use Disorder. The cause of the respondent's Adjustment Disorder is likely to be related to her ongoing situation before the court and will persist as long as proceedings are ongoing. The problematic traits in her personality emanate from adverse experiences during childhood. Although Prof. Macpherson does not make a formal diagnosis of Borderline Personality Disorder, he states that he is disinclined to offer the diagnosis with certainty based on only two remote assessment sessions. Prof. Macpherson appeared unable to provide an opinion regarding the likely impact on the respondent's mental health of returning to Spain. This appeared to be a result of the respondent not wishing to consider or willing to discuss the possibility. In terms of protective measures that would be necessary to safeguard the respondent's mental health if she did return to Spain, Prof. Macpherson opined that the respondent should seek a referral to a clinical

psychologist for Cognitive Behavioural Therapy. The respondent would benefit from around eight sessions of CBT. Prof. Macpherson recommended that the sessions should commence once the respondent's legal situation was resolved. The respondent's location in Spain would not be an obstacle to engaging in therapy with a UK based practitioner. In terms of the likely impact on the respondent's mental health from the children returning to Spain without her, Prof. Macpherson recorded that the respondent was unwilling to discuss the implications of the children returning to Spain. Prof. Macpherson noted that "One may reasonably assume that her mental health would deteriorate as a consequence of the children returning to Spain." Finally, Prof. Macpherson noted that the respondent had previously travelled between Spain and the UK and would be able to do so again.

[41] 7/21 bears to be a letter dated 8 November 2023 from an Amparo Arbaizar Rodriguez, a Spanish Lawyer addressing the question of the availability of legal aid for the respondent in seeking orders in Spain for relocation of the children to Scotland. Legal aid would not, following the UK's withdrawal from the EU, be available to the respondent so long as she is resident in Scotland. Should the respondent obtain legal residency in Spain, she would then become eligible for legal aid. The letter also states that the total cost of legal proceedings in Spain would be a minimum of 3,800 to 4,500 euros, although costs could exceed that depending on circumstances.

[42] On the basis of answers originally lodged, a report was instructed by the court from a Child Welfare Reporter on the question of the older child's objection to return to Spain. The Reporter confirmed that the older child did not object to returning to Spain and, consequently, the defence was not further advanced.

Submissions

[43] On behalf of the respondent, Mrs Scott acknowledged the onus of establishing grave risk lay with the respondent and adopted what was said in *In re E* at paragraphs 33 and 34 regarding the terms "grave risk", "physical or psychological harm" and "intolerable situation". Mrs Scott submitted that the court had moved away from the approach in *D* v *D*. The court should ask itself whether disputed allegations, if true, would expose the child to the relevant risk.

[44] The issue in this case, Mrs Scott submitted, is whether a return to Spain would expose the children to the relevant risk of harm because their mother may commit suicide. In connection with a risk of maternal suicide, Mrs Scott drew the court's attention to the case of *Director-General, Department of Families* v *RSP* (2003) 177 FLR 169, a decision by the Full Court of the Family Court of Australia.

[45] Turning to the evidence, Mrs Scott submitted that it was clear from the curator *ad litem's* report that the children were attached to both parents and that severance of their relationship with their mother would have a detrimental effect on the psychological welfare of the children. The issue was whether there was a grave risk of such detriment. Mrs Scott submitted that the threat of suicide could not be dismissed as empty given the respondent's fragility, the evidence of mental illness and the respondent's actual attempt on her own life. Mrs Scott relied upon the report by Professor Macpherson (7/19), various entries in the respondent's medical records (7/18) and a letter from the respondent's GP (7/17).

[46] On the assumption that the relevant risk of harm existed, the court would have to consider whether that risk could be ameliorated should the children be returned to Spain. That could not happen in this case. The respondent has no right of residency in Spain (7/13).

She is not eligible for health care in Spain. She is of limited means. She is not eligible for legal aid in Spain to litigate in relation to future care of the children (7/21).

[47] On behalf of the petitioner, Mr Hayhow made reference to and relied upon much of the case law set out above, emphasising three points. Firstly, the goal of the Convention is the expeditious return of the child to the jurisdiction of habitual residence, where any underlying disputes regarding the welfare of the child should be resolved. Secondly, in relation to an assessment of "grave risk" Mr Hayhow submitted (i) clear and compelling evidence of grave risk of substantial harm is required, (ii) whilst the situation a child could face on return depended, in part, on the protective measures that could be put in place to ameliorate any relevant harm and that, in the absence of compelling evidence that the court of the requesting country do not have the power to protect a child, the court of the requested country should assume that the requesting country's courts will be able to do so, (iii) although protective measures might be of great importance in cases where grave risk is said to arise from domestic abuse of the returning parent, they are less likely to be relevant where any grave risk is said to arise from the possibility a respondent might deliberately harm themselves, where it would be more appropriate to assess the extent of the risk by looking at the returning parent's mental health and the treatments available to them, and (iv) the court should be slow to reward a party who, through their own making, creates a grave risk of harm to the child, by refusing to order a return to the child's home country (especially *C* v *C* 1989 1 WLR 654 at 661C-E). Thirdly, in relation to evidential disputes arising between affidavits, where there was no evidence to support a conclusion one way of another, no conclusion could be drawn (*D* v *D*).

[48] Turning to the evidence, Mr Hayhow made submissions on the evidence under four broad heads. Firstly, an analysis of the disputed evidence generally, namely (i) the

respondent's allegations regarding the petitioner's use of alcohol and drugs were not made out (reference was made to 6/20), (ii) the respondent's allegations of financial control by the petitioner were not made out (7/19, page 8), (iii) the absence of any formal complaint by the respondent regarding her allegation of a single episode of assault by the petitioner on her undermined the allegation such that it was not made out, (iv) whilst the petitioner accepts he sent unpleasant texts to the respondent in about August 2021 and April 2023 and does not seeks to justify these, they do not make out the respondent's allegation of verbal abuse over years and (v) the respondent's evidence more generally should be seen as self-serving and less than candid (reference was made to 7/19, at page 6).

[49] Secondly, in relation to the extent of grave risk of harm, it was accepted by the petitioner that the children would suffer sufficient psychological harm should their mother commit suicide. The issue thus became the extent of the risk of suicide; and in this case, specifically, as asserted by the respondent whether that risk arose from the return of the children to Spain since she would be parted from them.

[50] Thirdly, Mr Hayhow submitted that the premise that the respondent would be separated from the children on their return to Spain was not correct. The respondent's mental health was not a barrier (see 7/19, page 14). The petitioner was prepared to meet the costs of flights, accommodation, food and entertainment. Whilst the respondent did not have residency rights in Spain, she was entitled to travel to Spain for up to 90 days in any 180 day period (see 7/2/13, point 1). In any event, the respondent could apply for rights of residency (see 7/3/15(5)). Whilst in Spain the respondent would be able to apply for legal aid to raise proceedings in respect of the welfare of the children (7/15(4) and 7/21, page 2). The respondent would be able to access medical facilities in Spain by use of her European Health Insurance Card. In addition, she would be able to access (remotely) the NHS therapy

considered appropriate for her (see 7/19, pages 13 and 14). In any event, historically the petitioner has shown willingness to pay for medical treatment for the respondent in Spain.

[51] Fourthly, in relation to the extent of the risk of the respondent's suicide. The respondent had a history of threatening suicide in order to manipulate others. The incident involving her former boyfriend was an example. The letter from the respondent's GP was a further example. The respondent now sought to employ the tactic against the court. The respondent's overdose in July 2023 was not a serious attempt to take her own life; it followed a split from her former boyfriend during which the respondent appeared to have told her former boyfriend that she intended to take the overdose and where she was. The former boyfriend then called an ambulance. Further, the account of the event in the respondent's affidavit did not accord with the contemporaneous account she gave to doctors. The respondent's psychological condition has been assessed for the purposes of these proceedings (see 7/19). Importantly, the respondent is no longer abusing alcohol or drugs, thereby removing causative factors in her overdose (7/19, page 9). Whilst the respondent is experiencing symptoms of an Adjustment Disorder, that is likely to persist for as long as these proceeding remain (7/19, page 11). Prof. Macpherson, aware of the respondent's overdose in July 2023 raised no concerns of a risk of suicide and concludes that there is no medical reason preventing the respondent from returning to Spain (7/17, page 14). Finally, the respondent's own supplementary affidavit dated 15 November 2023 expressly records that having sought medical assistance and being prescribed anti-depressant medication she is feeling much better and a lot more positive. Drawing the above together, Mr Hayhow submitted that there was no real risk of suicide.

Decision and Reasons

Decision on submissions on the relevant law

[52] The parties were largely in agreement in relation to the proper application of the law as set out above. I understood Mrs Scott to submit that, what the Inner House referred to in *AD* v *SD* as the "more nuanced" approach, applied generally, the court asking itself whether disputed allegations, if true, would expose the children to the relevant harm. I do not agree that the "more nuanced" approach is as widely expressed as that. On a proper reading of *AD* v *SD* the "more nuanced" approach is limited to allegations of domestic abuse (see paragraph 26 of *AD* v *SD*, drawing on *In Re E*). There are, of course, allegations of domestic abuse made in this case and in considering these the "more nuanced" approach will be appropriate. Outwith allegation of domestic abuse, the approach set out in *D* v *D* applies. Beyond this I seek to apply the law as set out above.

Assessment of the evidence

[53] I consider it appropriate to assess the evidence under reference to three areas. Firstly, the evidence led in support of allegations of domestic abuse. Here I follow the "more nuanced" approach. I will also consider within this area whether and to what extent any proposed protective measures would be sufficient to ameliorate any relevant risks arising. Secondly, the evidence relevant to the respondent's mental health. Thirdly, the evidence relevant to the practicalities of the respondent's return or visits to Spain, including her ability to engage, effectively, in any legal proceedings in Spain. I then intend to bring these three evidential strands together to consider whether, as Mrs Scott submits on behalf of the respondent, they establish that there is a grave risk that the children's return to Spain

would expose them to physical or psychological harm or otherwise place them in an intolerable situation.

[54] The respondent alleges that the petitioner had been verbally abusive towards her for years. The petitioner would put her down, pick faults and criticise her. The petitioner made threats to kill the respondent. The petitioner sent various messages to the respondent. I accept that the alleged abuse could be classified as less serious than the nature of abuse often seen in the Supreme Courts, however, the messages lodged in process and referred to above are, in my assessment, calculated to be hurtful, critical, undermining and cruel. They are abusive in nature and were clearly received in that way. The respondent's subjective perceptions are relevant. The petitioner's abusive messages were not limited to the respondent, messages are lodged that the petitioner sent to the respondent's mother.

[55] In relation to any evidence regarding "financial control" exercised by the petitioner over the respondent, I note what the respondent says at paragraph 24 of her affidavit dated 28 September 2023, and acknowledge that there was a significant degree of financial dependency by the respondent on the petitioner but do not consider that the very limited allegations are sufficient for me to make a finding of domestic abuse in connection with that financial support. The extent to which that financial dependency might directly and/or indirectly undermine and cause a deterioration of the respondent's mental health is a different question and I address this below. Overall, I find that the petitioner has engaged in abusive behaviour towards the respondent. For completeness, I note that the petitioner says this behaviour is limited to two periods, namely when the parties' separated in August 2021 and when the respondent left Spain in April 2023. Irrespective of the implications of the "more nuanced approach", I do not accept that the limitation asserted is borne out. The

messages lodged by the respondent bear to be messages that are inconsistent with the dates asserted by the petitioner.

[56] That then raises the question of whether there are or would be appropriate protective measures available to the respondent in Spain sufficient to ameliorate any risks arising from the abuse. I agree, to some extent at least, with counsel for the petitioner that protective measures to ensure domestic abuse does not occur might be of less relevance where any possible "grave risk" arises from a respondent's own self harm, and where, in those circumstances, the focus might more appropriately be on a respondent's mental health and health care treatments that might be available to assist such a respondent. However, where, as in this case, a petitioner's actions, i.e. the asserted continued criticisms and sending of abusive messages, causes or materially contributes to an overall set of circumstances that, collectively, give rise to possible "grave risk", the availability of appropriate protective measures might well be relevant. In this case, given the practical arrangements for shared care in respect for the children proposed by the petitioner in his affidavits and on his behalf in submission, I am concerned that there would be little that could practically be done to prevent the petitioner, should he chose to, engaging in the types of abusive behaviour outlined above. Again, it is not just an objective assessment of the relevant behaviour that is relevant but also the respondent's subjective perceptions. Again, a proper assessment of "grave risk" in this case must be made against a consideration of the whole circumstances of the case. Thus, my findings in relation to the petitioner's abusive behaviour towards the respondent is only one factor that must be weighed in the assessment of any relevant risk of possible harm or placing the children in an intolerable situation.

[57] Turning to an assessment of the respondent's mental health, Prof. Macpherson's report makes clear his assessment of the respondent's psychological functioning, which I

have set out above. Although Prof. Macpherson commented that the respondent's engagement at interview was, for the reasons he sets out, less than optimal, Prof. Macpherson found no compelling evidence of any serious attempts by the respondent to misrepresent herself or her functioning. In this regard, I do not accept the petitioner's characterisation of the respondent's actions as allowing a party to defeat the goal of the Convention by founding on a risk to the child of her own making. There might be some force in such a submission where a party engages in a deliberate, calculated behaviour with the intention of defeating the goal of the Convention – to colloquially "deliberately burn one's bridges" – but I do not accept such a description is apt to describe the respondent's actions, which, on my assessment of the evidence, are a genuine reaction to and consequence of her mental health disorders. Parties focused their submissions on whether returning the children to Spain would expose the children to a grave risk of psychological harm or otherwise place them in an intolerable situation because their mother may commit suicide. However, on my assessment of the evidence, it ought to be recognised that the relevant risk might also arise because the respondent suffers such a deterioration in her mental health, falling short of suicide, but sufficient to undermine her ability to interact with the children appropriately as their mother. That conclusion, it can be reasonably be inferred, is supported by Prof. Macpherson's answer to question 5 on page 14 of his report. Prof. Macpherson also states that the respondent's symptoms of anxiety and depression amounting to the Adjustment Disorder are related to her ongoing situation before the court and will persist as long as proceedings are ongoing. Irrespective of the proceedings before me, it seems likely that further litigation will ensue between the parties, whether in Spain or Scotland, in relation to underlying welfare issues regarding the children, including possible relocation of the children to the UK, which is likely to cause the respondent's symptoms to

persist. Further, it appears clear from messages from the petitioner to the respondent dated March 2022 (lodged at 7/2 of process), that the petitioner thought the respondent's ability to interact with the children was significantly undermined long before the respondent's attempted suicide in July 2023.

[58] In relation to the extent of the risk of suicide, Mr Hayhow submitted that the respondent uses the threat of suicide to manipulate others and that the respondent's actions in July 2023 were not a serious attempt to take her own life. I do not accept that submission. Prof. Macpherson expressly references recurrent suicidal behaviour as a characteristic of Borderline Personality Disorder and, as noted above, found no compelling evidence of any serious attempts by the respondent to misrepresent her functioning. Further, although the respondent might have told her ex-partner of her intention to take an overdose – if that is what one should infer from 6/40 of process – the respondent appears to have taken the overdose in the absence of any knowledge on her part that her ex-partner would actually intervene. Mr Hayhow further submits that Prof. Macpherson's assessment as at October 2023, supported by the terms of the respondent's latest affidavit, demonstrate that the respondent's mental health has improved "very significantly" and that "the extent of the risk of the respondent committing suicide is now low". To the extent that the word "now" is used to describe a "current" risk, I accept that there is some force in that submission. However, as the respondent explains in her affidavits, the improvements in her mental health are derived from her feeling more settled and positive as a consequence of a number of factors, including the children being close to her and settled, her own positive interactions with the children, having her own accommodation, having a degree of financially independence to the extent that she has her own income by way of state benefit, being drug free and consuming significantly less alcohol. It is clear from the evidence before me that,

objectively, but also from the respondent's subjective perception, these stabilising factors were not present in Spain and were, in fact, significant contributors to the respondent's mental destabilising. The proposals outlined at paragraph 15 of the petitioner's affidavit of 14 November 2023 and reiterated in submission would likely return the respondent, to the position she was in when residing in Spain after the parties' separation and would undermine a number of the currently present stabilising factors, with the attendant risk of significantly undermining the respondent's mental health.

[59] In relation to the practicalities of the respondent's return or visits to Spain, as discussed above, the petitioner submits that he would meet the costs of the respondent's flights, transport, accommodation and food. He offers that the respondent could reside at his house with the children. In addition, the petitioner submits that the respondent would be entitled to remain in Spain for 90 out of every 180 days. The respondent would be able to apply for legal aid in order to raise such proceedings as she thinks fit relative to the welfare of the children. Taking these points individually in the first instance, the financial and accommodation proposals advanced by the petitioner are unrealistic in that they return the respondent to the position of dependency on the petitioner that previously, materially contributed to the deterioration of the respondent's mental health. Insofar as the respondent's ability to obtain legal aid, there is a conflict between the evidence relied on by the parties – see 6/30 of process lodged on behalf of the petitioner and 7/21 of process lodged on behalf of the respondent. In 6/30 the author explains that the respondent would be entitled to apply for means tested legal aid regardless of her residency as long as her children were resident in Spain and a web-link is provided in support of the assertion. No further documents were drawn to my attention. In 7/21 of process, following consultation with Mrs Scott, the author provides further advice on the question of the availability of legal

aid. The author confirms after a review of the relevant law and from discussions with the legal aid office of the Andalusian Government, that legal aid is not available to the respondent, so long as she is resident in Scotland. The respondent's eligibility changed on the UK's exit from the EU. Reference to Spanish Law nr.1/1996, 10th of January, on legal aid, confirms, in so far as relevant that "the following have the right to free legal assistance … foreigners who reside legally in Spain". It is not in dispute that the respondent does not have residency rights in Spain. Further, on the evidence before me, residency in Spain is not a viable option for the Respondent given her circumstances. On the evidence before me, I accept that the respondent would not be entitled to legal aid in Spain. In addition, it is, in my opinion, wholly unrealistic to expect the respondent to litigate in the Spanish court in connection with the welfare of the children, which would presumably involve the respondent seeking to relocate with the children to the UK, whilst at the same time remaining financially and practically dependent on the petitioner to see her children. That concern is reinforced by the petitioner's apparent volatility as evidenced by the various messages sent by him lodged in process. In relation to the respondent accessing medical facilities in Spain, I do not consider this to be material to my decision when considered against the other factors discussed. In any event, the limited "understanding" of Prof. Macpherson would be insufficient for me to make a reliable finding that sufficient health care would be available for the respondent in Spain. Finally under this area of evidence, the likely consequence of the respondent spending 90 out of every 180 days in Spain, or indeed any lesser but regular, extended period of time would operate as a barrier to the respondent building and maintaining stability in her life, particularly over any longer period, a factor that appears to have been material to the respondent's mental health improvements.

[60] In drawing the above strands together, I note that whilst the parties' respective submissions and my discussion of the evidence have addressed separately and distinctly, the various factors that bear upon the respondent's circumstances, and thereby her ability to interact meaningfully with the children as their mother, from the respondent's perspective, these factors bear upon her simultaneously and interact with each other and cannot, in practice, be separated.

[61] On the evidence before me, including that relating to the background of the causes and consequences of the respondent's mental health disorders, the history and consequences of the respondent's financial dependency on the petitioner and the past behaviour of the petitioner towards the respondent, especially where the degree of dependency existed, I find that following the parties' separation the respondent's mental health deteriorated significantly and to such an extent that the respondent felt compelled to leave Spain. The respondent returned intermittently to see the children residing with friends and then, following the ending of her relationship with her now ex-partner, the respondent attempted to take her own life. It is not disputed that to succeed in taking her own life the respondent would cause the children psychological harm or place them in an intolerable situation. As I have already noted, I also find that where the respondent suffers such a deterioration in her mental health, falling short of suicide but sufficient to undermine her ability to interact appropriately with the children as their mother, it is likely to likewise cause the children psychological harm or place them in an intolerable situation. I note that although the factor of the respondent's separation from her ex-partner was an additional factor present at the time the respondent sought to take her own life, the remaining factors were sufficient in their own right to cause the respondent to leave Spain and her children.

[62] On the evidence before me, I find that, currently, the respondent is settled in her own accommodation and financially independent of the petitioner, she has the benefit of medical and other support structures around her and her mental health concerns are under control. Consequently, she feels positive in herself and about her future. She is no longer expressing suicidal ideation. Likewise the children appear settled and there is regular, healthy interaction between them and the respondent as their mother. In these circumstances, I find no current material risk of the children suffering psychological harm or being placed in an intolerable situation.

[63] On evidence before me, including the proposal's made by the petitioner regarding the respondent spending 90 of every 180 days in Spain and the payment or provision by the petitioner of the respondent's flights, transport, food and accommodation, together with the consequences of the respondent's mental health disorders and the past behaviour of the petitioner towards the respondent, I find it highly likely that should the children be returned to Spain in the above circumstances the respondent will suffer a significant reversal in her mental health. In addition, the improvement in the respondent's mental health, on my assessment of the evidence, appears to be significantly influenced by the increased stability and improved prospects in her own life – to be able to stand on her own two feet as the respondent put it. The proposal of the petitioner, which includes the respondent spending significant periods out of Scotland would undermine the respondent's ability to secure and maintain stability in Scotland, for example via possible regular employment in due course. Further, the prospect of which appears to be anticipated by the petitioner, should there be litigation between the parties relative to the children, it seems to me inevitable that there is likely to be increased tension between the parties, which is likely to result in further undermining of the respondent's mental health, as occurred previously. In these

circumstances, I find that, should the children return to Spain in the above circumstances, there is a material risk of a significant deterioration in the respondent's mental health and a consequent return of her suicidal ideation or, in any event, a deterioration in her mental health such as to significantly undermine the respondent's ability to interact meaningfully and healthily with the children as their mother, which, in turn, will give rise to a grave risk that the children will suffer psychological harm or otherwise be placed in an intolerable situation, as these expressions are defined in *In re E* and subsequent cases referred to above.

[64] In light of these findings, I am not prepared to order the return of the children to Spain. On the evidence before me, I find it established on sufficiently clear and compelling evidence that to make such an order would give rise to a grave risk that the children would be exposed to psychological harm or otherwise placed in an intolerable situation.