



Neutral Citation Number: [2020] EWCA Civ 1057

Case No: B4/2020/0576

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
Ms Deirdre Fottrell QC
FD19P00342

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/08/2020

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE CARR

Between:

B (A Child) (Abduction: Article 13(b))

Mr Teertha Gupta QC and Mr Michael Hosford-Tanner (instructed by **Duncan Lewis Solicitors**) for the **Appellant Mother**
Mr Mark Jarman and Mr Michael Gration (instructed by **Jones Myers Limited**) for the **Respondent Father**

Hearing date: 12 May 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am 11th August 2020.

Lord Justice Moylan:

Introduction

1. This is an appeal by the mother from the order made on 27 February 2020 by Deirdre Fottrell QC, sitting as a deputy High Court judge (“the judge”). By that order the judge refused to set aside a return order that she had previously made on 25 September 2019 under the 1980 Hague Child Abduction Convention (“the 1980 Convention”) by which she had ordered the mother to return the parties’ child (“B”) to Bosnia Herzegovina (“Bosnia”) by 9 October 2019 (“the September 2019 order”).
2. At the end of the hearing, we announced our decision, namely that the appeal would be allowed and the father’s application under the 1980 Convention would be dismissed. I set out below my reasons for agreeing with that decision.
3. The appeal also provides the opportunity to consider the correct approach on applications to set aside return orders under the 1980 Convention both before and after the introduction of the new Family Procedure Rule 12.52A (inserted by Rule 18 of the Family Procedure (Amendment) Rules 2020 with effect from 6 April 2020).

Background

4. The mother was born in Bosnia and arrived in England in 1995 as a 14 year old asylum seeker with her mother, escaping from the Bosnian conflict. They were granted leave to remain and joined the mother’s sister who had also managed to escape the previous year. The mother’s sister subsequently returned to live in Bosnia. Her father had remained living in Bosnia. The mother is both a British and a Bosnian national.
5. The mother has longstanding mental health problems, as set out more fully below, in part due to her experiences during the Bosnian conflict. The father, also a Bosnian national, has always lived and worked in Bosnia.
6. The mother and father met in 2009 and married in Bosnia in September 2010. They lived together on and off during the marriage. B was born in England in February 2017 and so is now three years old. The father stayed in England for the first six weeks of B’s life and then returned to Bosnia. The mother and B went to Bosnia in May 2017. The mother left B in the care of the father for a four-week period in July/August 2017 when she returned to England. She then went back to Bosnia. She alleged that the father was violent towards her in October 2017 and she reported the incident to the police.
7. In November 2017 the mother and the father returned to England with B. The father returned to Bosnia in December 2017. In February 2018 he again came to England and, after two weeks, the whole family travelled again to Bosnia. The mother alleged that the father took both her and B’s passports and refused to return them. In March 2018 he returned her passport, but not that of B. She travelled back to England for two weeks to attend medical appointments with her mother, leaving B with the father. The mother then went on holiday with her own mother and returned to London before travelling to Bosnia at the end of April 2018.

8. The mother alleged that, in August 2018, the father hit her and snatched B, taking him to his own flat where he kept B for over two weeks before allowing her to take B to her sister's flat. The mother sought assistance from the British Embassy in Sarajevo. In September 2018 the mother, father and B went on holiday to Croatia. The mother then returned to England for some two weeks, again leaving B with the father, before returning to Bosnia.
9. The mother alleged that on 25 January 2019 the father held a knife to her throat and threatened to kill her. She called the police, who attended, but after interviews no action was taken, other than the giving of warnings to both parents.
10. However, on 26 January 2019 another incident occurred which resulted in police action. The father again took B from the mother. She followed them to the father's mother's flat seeking B's return, whereupon the father beat her. The father was arrested, and social services placed the mother and B in a women's shelter. On the following day the Municipal Court in Sarajevo, having made a finding that the father was violent to the mother, placed a restraining order on the father for 12 months preventing him from going within 500 metres of the mother's address and from using or threatening violence against her or from harassing or intimidating her ("the restraining order"). At this point the mother was able to attend the father's flat with police and, amongst other things, obtain B's passport.
11. On 7 February 2019, without informing the father, the mother returned to England with B to live in Islington, London, where she has had a tenancy since 2010. Her mother, B's maternal grandmother to whom she is very close, lives nearby.
12. Following the mother's removal of B from Bosnia the father lodged a criminal complaint against her for child abduction (and, with his mother, for assault). He also sought unsuccessfully to appeal the restraining order.

The commencement of proceedings in England and Bosnia

13. On 4 March 2019 the father lodged applications for divorce and custody in the Bosnian courts. On 14 March 2019 the mother petitioned for divorce in the English courts and on 26 June 2019 applied for wardship. On 5 July 2019 a prohibited steps order was made preventing the removal of B from the mother's care and the jurisdiction.
14. On 19 June 2019 the father issued an application under the 1980 Convention for the summary return of B to Bosnia. On 23 July 2019 the mother's wardship application was stayed pending the outcome of the 1980 Convention application. The mother indicated that she would oppose the application on the basis that B was not habitually resident in Bosnia immediately before his removal from Bosnia (with the result that Article 3 of the 1980 Convention was not engaged), under Article 13(a) of the 1980 Convention (consent) ("Article 13(a)"), and under Article 13(b) of the 1980 Convention (grave risk of harm and intolerability) ("Article 13(b)"). Directions were made for a full hearing in September 2019. Weekly indirect contact between B and the father was allowed. On 2 August 2019 the father identified the undertakings that he would be prepared to give in the event of B's return to Bosnia.

15. On 13 August 2019 the mother's application for the instruction of an expert psychiatrist and an expert in Bosnian law was refused. We do not have a judgment explaining this decision which, I should make clear, was not made by Ms Fottrell. Apart from medical records, this meant that the only medical evidence specifically obtained for the purposes of the proceedings were two short letters, one from the mother's GP and one from another GP at the medical centre where she was registered.

The judgment and order of September 2019

16. At the hearing on 12 September 2019, the judge declined to allow oral evidence and rejected a renewed application on behalf of the mother for the instruction of a psychiatrist. She gave judgment on 25 September 2019. In summary, she concluded:
 - i) That B was habitually resident in Bosnia immediately before his removal in February 2019;
 - ii) There was no "consent" or "acquiescence" to the removal of B from Bosnia for the purpose of Article 13(a);
 - iii) The threshold of grave risk of harm or intolerability was not crossed on the evidence for the purpose of Article 13(b).

For the purposes of this appeal, we are concerned only with the third of these conclusions.

17. In reaching her conclusion on Article 13(b), the judge accepted that the mother had "experienced a range of mental health issues" and that she had frequently sought and received treatment for obsessive compulsive disorder ("OCD"), anxiety and depression. It was, she said, less clear that the mother suffered from post-traumatic stress disorder ("PTSD"). The judge recorded that the mother was "currently being treated for anxiety and depression" and that it was "clear that [the mother] requires treatment and medication on an ongoing basis". The judge also accepted that, as the court proceedings had progressed, the mother had been adversely affected. The breakdown of her marriage had also impacted on her mental health.
18. The judge commented that the GP medical evidence, as to the mother's ability to cope with her own mental health if she were to return to Bosnia, appeared to be based on the false premise that B might be removed from her. This was not correct as the court "was not considering a removal" of B from his mother:

"...If the mother returns to Bosnia, as I expect she will, the mother has the support of her sister in that jurisdiction. It is a familiar place to her where she has spent much time and the medical evidence does not meet the threshold of grave risk of intolerable harm to [B] occurring as a result of the impact of any such return on the mother's mental health and consequently on [B]. I accept her evidence that she will find it very distressing and difficult but that in itself is not sufficient to meet the high threshold in Article 13(b) of grave risk to the child."

19. The judge considered it "highly relevant" that the father had offered a range of undertakings which were intended to reduce the risk, including agreement that B

would live with the mother in Bosnia. In terms of the risk of domestic violence, the mother had been provided with “robust protection” from the father in Bosnia, in particular through the restraining order, and had been assisted by the police and social services on 26 January 2019.

20. The judge consequently made the September 2019 order. The order recorded the father’s undertakings as “intended to be enforceable against him” in Bosnia, including an undertaking “not to seek to use or threaten violence against the [mother] or harass, pester or intimidate [the mother] or instruct or encourage any third party to do so”; “not to seek to separate [the mother] and B save for any periods of agreed contact” and “to provide child maintenance to [the mother] of 150 Euros per month” pending an inter partes hearing in Bosnia (not to take place sooner than 21 days after the mother’s return to Bosnia) (“the undertakings”).

Events subsequent to the September 2019 order

21. Immediately following this order the mother self-harmed. On 1 October 2019 an application for permission to appeal was lodged on her behalf. Permission to appeal was refused by me on 9 October 2019.
22. On 18 October 2019 the mother issued an application under Part 18 of the Family Procedure Rules 2010 (“the FPR 2010”) to set aside the September 2019 order and for variation of the undertakings given by the father. She also issued an application under Part 25 of the FPR 2010 for a psychiatric assessment of her. On 23 October 2019 the father applied for the court to fix a date for B’s return to Bosnia.
23. On 25 October 2019 Francis J made directions for a full hearing of the application to set aside including the following:

“9. The court determined on a fine balance that it would adjourn the father’s application and allow the mother’s Part 25 application without prejudice to any findings and on the basis this court has not adjudicated on the merits of the mother’s application or determined any findings in respect of her Part 18 application; save that a prima facie case has been demonstrated ...

11. The matter shall be listed before ... Ms Fottrell QC (if available) on 19 December 2019...to consider whether there is a change in the mother’s circumstances sufficient to vary the order dated 13 September 2019.”

24. On 19 November 2019, unbeknown to the mother, the father obtained a provisional decision from the “Cantonal Centre for Social Work” in Sarajevo which provided that B would live with him and would have contact with the mother, which included staying contact for three nights per week (“the CSS order”). The mother was also directed to pay child maintenance to the father.
25. The background to this decision is that, on 9 April 2019, the Cantonal Centre had initially rejected the father’s application for a parental responsibility order. The father’s appeal from this decision was successful and, on 25 June 2019, a rehearing or reconsideration by the Cantonal Centre was ordered. On 4 November 2019 written submissions were provided on behalf of the father. These were made in support of a request for an “urgent decision” which was based on some of the medical evidence

adduced in the proceedings in England and, as set out in the decision, on it being said that “the mother of [B] was ill and was prevented from caring for the child”.

26. The Cantonal Centre appears to have accepted the case as advanced on behalf of the father and determined that the mother’s “condition requires continuous psychiatric treatment, which prevents her from caring for [B who] has therefore been referred for care to” the local social services. This was an inaccurate understanding of the position and was clearly based on the unfounded suggestion that B had been taken into care because the mother was unable to care for him. Apart from the fact that B had not been taken into care, a psychiatric report by a senior registrar dated 27 September 2019 did not raise any concerns about the mother’s care of B and noted that she clearly cared deeply for him and was aware of his needs. The father appears also not to have informed the Cantonal Centre of his undertakings to the English court.
27. Upon being notified formally of this decision on 6 December 2019, the mother amended her application to set aside, relying additionally on the father’s alleged breaches of his undertakings.
28. Dr Sumi Ratnam, consultant forensic psychiatrist, was duly instructed and provided a report dated 6 December 2019.
29. The matter was initially listed on 19 December 2019 but was adjourned for further evidence, including an addendum report from Dr Ratnam and for a report from a Bosnian legal expert, for which permission was granted.
30. On 20 December 2019 the mother again self-harmed. She was referred to hospital and then stayed as an inpatient at Rivers Crisis House from 21 to 31 December 2019.
31. On 20 January 2020 Dr Ratnam served an addendum report. On 25 January 2020 Mr Emir Kovacevic served his report on Bosnian law and addendum reports on 31 January and 2 February 2020.
32. A full two-day hearing took place on 3 and 5 February 2020, at which Dr Ratnam gave oral evidence by telephone. There was also further written medical evidence from the mother’s treating team. Judgment was reserved. Before turning to the judgment itself, it is convenient to summarise the opinions of the experts.

The expert opinion of Dr Ratnam

33. Dr Ratnam diagnosed the mother as suffering from the following conditions:
 - i) Anxiety with panic disorder;
 - ii) Depression with suicidal thoughts over the previous six months;
 - iii) OCD (mainly skin picking) with significant impact in terms of work and socialisation;
 - iv) PTSD arising from the Bosnian conflict with flashbacks to that time and domestic violence. Her symptoms had diminished in intensity but tended to occur at times of stress;

- v) Maladaptive personality traits of an emotionally unstable type with a history of self-harm to manage her emotions.
34. Dr Ratnam outlined the mother's prescription regimes. However, the mainstay of treatment for anxiety and OCD was cognitive behaviour therapy which would also be appropriate to treat her PTSD. From the literature available, Dr Ratnam stated that it appeared that there were comprehensive mental health services in Bosnia which had undergone a restructuring. Therefore, treatment could occur in Bosnia.
35. In her opinion, the current proceedings, rather than just the September order, had impacted adversely on the mother's health. Her depression had become more severe over the last six months and the stress had exacerbated her PTSD and difficulty in managing her emotions. Dr Ratnam went on as follows:
- “[The mother] is particularly fearful of returning to Bosnia...because she does not accept [the father's] assurances. She has been the victim of domestic violence and would feel unsafe if she returns, which will impact adversely on her mental health.
- As stated there are available treatments in Bosnia ... and the degree of impact on her parenting will depend on if she is able to access available treatment and if [the father's] assurances are enforceable. In addition, if she moves to Bosnia ... she will lose the support of her mother, which [is] of significant benefit to her. It is unlikely that her sister will be able to provide the same degree of support.”
36. Later, in response to a question about whether the father's undertakings were sufficient to protect the mother's mental health, Dr Ratnam stated that they were “sufficient” but repeated that it was important that these were enforceable, something which needed to be clarified.
37. Dr Ratnam explained how the mother's mental health conditions could impact on her care for and/or her emotional availability to her son. Depression would make it difficult for the mother “to consistently respond to B on an emotional basis and in more severe cases of depression, there can be an impact upon the ability to undertake physical day to day activities”. The consequences of PTSD and OCD can also impact on a child. As for prognosis, the mother was willing to engage, which was positive. However, she had not found previous interventions helpful:
- “In order to benefit from intervention for PTSD, it is essential that the individual feels safe from threat ... The perceived threat for [the mother] is [the father] and unless she feels safe from him, she will not be able to engage effectively in intervention.”
38. In her addendum report Dr Ratnam responded to further questions. She confirmed that her “first report was completed on the basis that [B] would live with his mother on their return to Bosnia and that [the father] would abide by the undertakings he gave to the court”:
- “..If [B] were to immediately reside with his father, I am of the view that there would be a significant deterioration in [the mother's] mental state with

deterioration of mood, an increase in anxiety, increase in OCD symptoms and also an increase in symptoms of PTSD. The risk with depression is of suicidal ideation and possible suicidal acts. It is also likely that there will be increased difficulty regulating her emotions, which will be associated with an increased risk of self-harm. [The mother] identified that stress was a significant trigger for her and she will lack social support in Bosnia. In addition, given [the father's] actions, she will feel threatened regarding the contact that she has with her son, which will be a stress."

39. When asked about the impact of the father's actions in obtaining the CSS order Dr Ratnam stated:

"[The father's] actions raise concerns as to if he will abide by the undertakings ... and this is imperative if [the mother] is to return to Bosnia. By not notifying the mother of the steps being undertaken in Bosnia or informing the Cantonal Centre for Social Work in Sarajevo of his undertakings to the court, [the mother] will continue to feel under threat from [the father] regarding [B] remaining in her care and this will impact adversely on her health."

40. As for the threat of criminal proceedings against the mother, Dr Ratnam indicated there would have to be an absolute reassurance with written documentation that the mother would not be prosecuted either through criminal or civil courts in order to avoid deterioration of her mental state on her return to Bosnia.

41. In her oral evidence, Dr Ratnam described the mother as "stable" but stated that there had been points when the mother had been "overwhelmed" by the situation, and that her PTSD was exacerbated at times of stress. At such times she would be "emotionally dysregulated". Her stability was undermined by her self-harming. Dr Ratnam stated that:

"in order for mother's health not to deteriorate, it is really important that she does not feel threatened and that she feels safe. So she should not be threatened in any way from father. Those would be detrimental to her wellbeing."

She stated that, whilst the mother's depression had worsened about six months ago, it had not worsened since then, saying that "she might be stable but she remains symptomatic". She observed that the mother was resilient and had been able to access support when needed. As expressed by the judge, Dr Ratnam "had taken the view that the undertakings needed to be 'rock solid' and that B would be with the mother, and that was the basis upon which she had reached the view that the mother could engage with mental health services in Bosnia".

The expert opinion of Mr Emir Kovacevic

42. Mr Kovacevic explained that the Cantonal Centre has specific responsibility for cases involving children following relationship breakdown and will always direct a social worker to prepare a report on child custody and contact. He explained the legal processes surrounding the CSS order. There was a right of appeal from the order, but any appeal would not postpone enforcement of the order, although it was "theoretically possible" that the court might revoke the decision if the mother

appealed, returned to Bosnia and participated in the divorce proceedings there. There was a time limit of 15 days in which to appeal, though that limit can be extended for good reason. The father had the right to initiate enforcement proceedings on the CSS order. The CSS order was provisional with a final decision to be taken in the future.

43. Mr Kovacevic stated that the protective measures provided for in the undertakings were not enforceable in Bosnia until recognised by the courts there. The mother had no available remedies for any breach of the undertakings until then. As for the threat of criminal proceedings against the mother, the father could withdraw his complaint, which might influence the prosecutor's decision. However, the prosecutor could nevertheless continue the criminal proceedings, which were conducted "ex officio". In Bosnia, the offence of child abduction out of the jurisdiction carried a sentence of imprisonment for a term of between three months and five years. An offender who voluntarily surrendered a child may be released from punishment.
44. Mr Kovacevic also identified two organisations which could provide the mother with free legal assistance and stated that legal aid would be available to her if her income is less than 40% of the average Bosnian salary.

The judgment of 27 February 2020

45. The judge handed down her reserved judgment on 27 February 2020. She dismissed the mother's application to set aside the order of September 2019. Given the nature of the arguments raised on this appeal, it is necessary to set out the judgment in a little detail.
46. Having rehearsed the background by way of introduction, the judge identified that this was an application under Part 18 of the FPR 2010 to set aside the September order by the mother who asserted that there had been "a change of circumstances which merited reconsideration" of that order. The application was "primarily based on a deterioration in her mental health and her assertion that as a result she simply could not cope if she was required to return to Bosnia with B". Article 13(b) was said to be engaged because the impact on her mental health would expose B to a grave risk of harm and place him in an intolerable situation. The mother also asserted two further changes in circumstances, namely breach of the undertaking not to (seek to) separate B from his mother and the fact that she could no longer stay in her sister's home in Bosnia.
47. The father invited the court to refuse the application. The mother was simply refusing to accept the September order. The court had been aware of the mother's mental health difficulties in September 2019; there were the necessary medical facilities available for the mother in Bosnia.
48. The judge moved on, under the heading "Proceedings", to rehearse the procedural background. She referred to the CSS order and stated (at paragraph 12) that it was "a change of circumstances but whether it is fundamental so that it merits setting aside the order" was something to which she would return to later.
49. She went on to rehearse the evidence. She referred to the mother's mental health difficulties and to her findings in September 2019 in that regard. The judge next, under the heading "Change in Circumstances", considered the mother's evidence

relating to her mental health, commenting that it appeared to her that the mother was “keen to provide more information about her mental health rather than evidence about a change of circumstances”. She found (at paragraph 34) the mother’s statement to be “both revealing and puzzling”: revealing in that it evidenced a deep resistance to the September order and puzzling in that by 18 October 2019 the mother had taken the firm stance that she would not go back to Bosnia “because she took the view that she was unable to cope.” This was puzzling because at “that time she asserted that it was owing to the mental health crisis she was experiencing” but she maintained this position even as her mental health had stabilised.

50. The judge then set out the evidence of Dr Ratnam, some of which she said was “not new”. She commented that Dr Ratnam may not have appreciated that undertakings in a 1980 Convention case are only temporary but she understood her evidence to be that the more uncertainty there was as to the effectiveness of the undertakings, the greater the risk of deterioration in the mother’s mental health. The judge summarised other aspects of Dr Ratnam’s evidence including that if B were living with the father on the mother’s and his return to Bosnia “this would lead to a significant deterioration of the mother’s mental health”; and that it was “likely that there would be increased difficulty regulating her emotions”.
51. The judge set out the contents of documents dated 13 December 2019 and 14 January 2020 from the mother’s treating psychiatrist, Dr Bountouni. At paragraph 52, the judge said:

“Dr Ratnam’s opinion and report has been of assistance. She confirmed the information already before the court in September as to the range and nature of the mother’s mental health difficulties. She explained how the deterioration in the mother’s mental health, of which the court was aware in September, has impacted in the immediate and longer term. There are in my view two key elements which emerge from her report. Firstly although the mother’s mental health has deteriorated and that she is symptomatic, it has stabilized and Dr Ratnam considers the mother could obtain the assistance she needs in Bosnia and that she could engage with professional support there. Secondly, her mental health will be adversely affected by her perception that the undertakings are not solid, by the absence of her own mother and by her fear of the father. It is the interplay between these two elements which is central to the question of whether there is a fundamental change in circumstances which merits setting aside the order.”

52. The judge then referred to the undertakings and the evidence of Mr Kovacevic. She did not consider that the father had breached the undertaking that he would not seek to prosecute the mother in either the criminal or civil courts for her removal of B from Bosnia. She said that the question of whether the father had breached the undertaking not to seek to separate B from the mother’s care was not a simple issue when seen in the context of the Bosnian proceedings as a whole, in which the mother had chosen not to participate. She had “robbed herself” of the opportunity to explain in Bosnia what arrangements she thought were best for B. The judge accepted that the father had “gone behind” the undertaking by continuing actively to invite the Bosnian court to determine his application for custody. She also noted that, although the father appeared to have understood that B was at risk of being placed in local authority care, “that was erroneous”. The father could have sought clarification of this but had not

done so. However, although the father had breached the undertaking, the judge took the view that, having regard to the delays which had occurred in the proceedings in England and the September order, this did not evidence disregard of the undertaking or “bad faith on his part”. He had not seen his son, whom he had been co-parenting, since his removal in February 2019 and it was “difficult to be overly critical of him for the enthusiasm with which he has pursued his case” in Bosnia.

53. At paragraph 76 the judge said that the question was whether “on its own or in conjunction with other matters this constituted a fundamental change of circumstances”. Whilst she was critical of the father for breaching the undertaking, the progression of his case in Bosnia had to be viewed in the context of the developments in the case in England at the time. The judge concluded that, objectively, it was “reasonable” for the father to “seek to progress” the case in Bosnia and he could not be criticised for having “set in motion the steps which led to” the CSS order. However, the consequence was that “the mother now perceives the undertaking as not being rock solid”.
54. The judge rejected the mother’s submission that the father had breached the undertaking not to harass, pester or intimidate the mother by reference to various text messages. The exchanges provided more evidence of the distrust, hostility and animosity between the parents but no more.
55. The judge then set out the law, including the substantive law in relation to Article 13(b). At paragraph 93 she said:

“In considering whether the Article 13(b) defence is now made out I must be wary of accepting that the child will suffer a grave risk of harm simply because the mother refuses to return with the child to Bosnia.”

56. The judge then proceeded to a section headed “Discussion”. She found that the mother’s mental health position had stabilised by the time that she saw Dr Ratnam and Dr Bountouni in November and December 2019. This led the judge to say, at paragraph 100, that, “if by the time of this hearing the mother’s mental health was stable, ... her case as to a fundamental change of circumstances is not made out” and that she could not, on the medical evidence, find that there was a fundamental change of circumstances. She accepted that the mother’s mental health could deteriorate but considered that the risk of it doing so could be managed by the mother and mental health professionals:

“102. As I have noted elsewhere it is Dr Ratnam’s view that the risk of deterioration of the mother’s mental health in the future if she were to return with [B] to Bosnia is ameliorated and therefore can be managed if the mother engages with mental health support services which are available in that jurisdiction. She has repeatedly done so in this jurisdiction going back over the past 15 years ... All of the mental health professionals are unanimous in their view that she engaged well with support that was provided and it assisted her to recover and to stabilise her mental health.

103. I have no reason to think that she could not or would not do so in Bosnia were she to return there. Despite her expressed resistance to returning there it is her country of origin and it is a familiar country to her. Because many of

her family have always lived there and indeed still do, she has always been a regular visitor there. She lived there most recently for a year in 2018, and she travelled easily between there and England during the course of the year. I accept also Dr Ratnam's view that mother would access support and I note Dr [Bountoni's] observation that notwithstanding her health difficulties the mother is resilient. The mother has always been motivated to seek support and treatment and that is evidenced in her medical notes and her reaction to the September incident."

57. At paragraph 104 the judge stated that the second element was to consider "whether the risk of deterioration is exacerbated by the perceived lack of solidity in the father's undertakings or father's assurances". In this assessment, she considered that she could not "place too much emphasis on Dr Ratnam's expectation that the undertakings should be absolute or 'rock solid', because they are by their nature temporary". She considered it more important that they had been given "in good faith" by the father. But she recognised that, if the mother perceived them to be inadequate or that "they had been breached by the father", Dr Ratnam had said she would feel "unsafe" and "in such circumstances her mental health is at risk of deterioration".
58. The judge repeated (at paragraph 106) her conclusion that the deterioration in the mother's mental health alone did not constitute a fundamental change in circumstances justifying setting aside the September order. The evidence in September had established the serious and chronic nature of her mental health problems. The self-harming incident in September was new information and had led to a period of intensive treatment but the mother's condition had stabilised.
59. The judge then considered the "impact of the undertakings and the breach by the father". This was a change of circumstances "but not of such a fundamental nature as to require the court to set aside" the September order. Although the father had breached the undertaking, it was important that this, and the CSS order, were considered in the "context in which the father acted" and "in the context of my conclusion as to the father's motivation" and the mother's decision that she could not return to Bosnia. In her view, the undertaking could be restored "to provide a holding position" and the father "could chose not to action" that order.
60. The judge went on to consider the mother's position that she would not return to Bosnia due to the deterioration in her mental health, her fear of the father, anxiety over the removal of B from her care and concern over a possible prosecution, the judge stated:

"110. ... I accept that subjectively the mother perceives these fears to be insurmountable ... I bear in mind ... that it does not matter whether the mother's subjective fear as to the risk to her mental health is reasonable or unreasonable. However, the court's assessment does not end with the subjective view of the mother.

111. I must also have regard to the objective evidence and the evidence of Dr Ratnam. Objectively the risk which the mother perceives does not accord

with the evidence of Dr Ratnam or the pattern of the mother's past behaviour ...

113. I am unable to accept Mr Hosford-Tanner's submission that the mother is unable to return to Bosnia owing to the deterioration in her mental health combined with the perception of the risk from the father. If the mother maintains that position I can only conclude that she is making a choice to do so."

61. The judge was unclear as to how much of a factor any accommodation difficulties for the mother in Bosnia were in reality. If the mother were to return to Bosnia, the judge invited the father to consider providing accommodation for her.
62. Finally, the judge considered whether the mother's refusal to return, which the judge had concluded was "a choice that she had made because she feels that she cannot cope" (although, the judge repeated, she did "not objectively accept that to be the case"), would place B "at grave risk of harm owing to his being in an intolerable situation". She saw no reason to take the view that the father could not provide an adequate standard of care. She did not consider that the return of B to Bosnia into his father's care would be an intolerable situation for him. The Bosnian courts would ultimately have to decide where B lives and with whom.
63. Directions were made for the parties to clarify their positions in the light of the judgment. The judge invited the father to consider what steps he might take to meet some of the mother's concerns and to give undertakings in relation to any criminal prosecution of the mother and enforcement of the CSS order.
64. At a final hearing on 2 March 2020 to address outstanding issues, the judge delivered a further short judgment. She declined to suspend the return order on the basis of a request dated 10 February 2020 by the Bosnian Municipal Court to Islington Social Services for an assessment of the mother's ability to care for B in the context of determining with whom B should live and what parental contact he should have. She noted that the father confirmed that he would make no complaint against the mother and not seek to execute the CSS order; he had withdrawn his criminal complaint. He also offered to provide funding for two months' accommodation for the mother. She ordered the father to confirm these matters in a short sworn statement and the mother to confirm in writing that she has not made a criminal complaint against the father. The judge declined to delay enforcement of the return order pending further enquiries of the Bosnian judge seised of the case, and made directions for the handover of B to the father on the earliest possible date after 19 March but not later than 1 April 2020.
65. On 3 April 2020 I granted permission to appeal.

The parties' submissions in overview

66. For the mother, Mr Gupta QC submits that the judge correctly treated the application as a set-aside application but applied the wrong legal approach. She should have focused on whether there had been a fundamental change in the circumstances that led to the September 2019 order and, if satisfied that there had been, should then have proceeded to conduct a review or rehearing. Instead, she conflated the two processes and conducted a review of the mother's Article 13(b) defence on too narrow a basis,

by reference only to whether or not there had been a fundamental change. She should have found that there had been a fundamental change of circumstance and then have re-considered the Article 13(b) defence afresh on the basis of all the material then available. The process instead became confused.

67. It was submitted that the situation presented to the court in February 2020 was fundamentally different to that in September 2019, by reference to the following matters in particular:
- i) The significant deterioration in *and* a fuller understanding of the mother's mental health problems, as set out in Dr Ratnam's reports, including the fact that the mother had self-harmed following the judgment in September 2019 and the hearing in December 2019, following by a period of inpatient care. She was at risk of suicidal actions. All that was before the court in September 2019 were two GP reports, a 2016 pre-natal psychological report and a list of medical appointments.
 - ii) The fact that the judgment in September 2019 was predicated on the mother returning to Bosnia (see paragraphs 71 and 72). It was now clear that the mother would (quite reasonably) not return to Bosnia. Her fears about the father were justified and rooted in reality. There was still the possibility of criminal proceedings against her in Bosnia.
 - iii) The fact that it was now known that the undertakings given by the father were unenforceable as a matter of Bosnian law. The father could not be trusted. For example, he denied in his statement of August 2019 that he had any criminal convictions, when in fact he has two convictions for violence in 2012. Moreover and in any event, the father had breached at least one of the undertakings in seeking and obtaining the CSS order. Whilst a stay of the CSS order could be sought, that would take many months and the mother has no legal representation in Bosnia.
68. Had the judge correctly concluded that there had been a fundamental change in circumstance and gone on to re-consider the Article 13(b) defence on an open basis, she would have concluded that the defence was made out. Amongst other things, she failed to give any weight to the fact that a move by the mother to Bosnia would mean the loss of her mother's important support. Given that the entire application was before the judge and that she appears to have made a decision on the substance of the defence (see for example paragraph 93 of the judgment), Mr Gupta submitted that it was open to this court also to address both stages of the process.
69. For the father, Mr Jarman submitted in essence that the judge correctly approached the "gateway stage" and asked herself the first question of whether there had been a fundamental change in circumstances. She was entitled to make the findings that she did and come to the conclusion that there had been no such fundamental change for the reasons that she gave, save for what Mr Jarman suggested was her implicit finding that the mother's decision not to return to Bosnia was a fundamental change. The judge fairly reconsidered that aspect: for the mother simply to decide not to return could not be a valid ground for setting aside the September order.

70. Finally, in the event that the mother were to succeed in passing the “gateway stage”, Mr Jarman submitted that there should be a remitted re-hearing. Whilst it has been some 15 months since B’s removal from Bosnia, the evidence of Dr Ratnam only emerged in December 2019. It would be “critical” to have updating evidence on the mother’s mental health in circumstances where Dr Ratnam’s opinion was that the mother’s condition had stabilised. It would also be helpful to explore the possibility of enforceable undertakings in Bosnia.

The Law

71. The law in respect of Article 13(b) is well-established and I set out only a brief summary. I would also point to the recent *Guide to Good Practice on Article 13(1)(b)* published by the Hague Conference on Private International Law.
72. The only authorities to which I propose to refer are *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 and *In re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257.
73. In *In re E*, the Supreme Court addressed the scope of Article 13(b) and the correct approach to its application. The essence of its conclusion, as set out below, is that the wording of Article 13(b) itself restricts its scope. I would add that, sometimes, as in the *Guide to Good Practice*, at [25], it is suggested that this Article, as an exception to the obligation to order a child’s return, is to be “applied restrictively”. Sometimes, as in *In re E*, it is suggested that the Article is “of restricted application”. These are nuanced not substantive differences because the underlying principle is the same, namely the Article has a high threshold for its application and, as a result, the scope for its application is limited.
74. The approach set out in *In re E*, was explained as follows, at [31], in the judgment of the court delivered by Lady Hale and Lord Wilson. There is “no need” for Article 13(b) to be “narrowly construed” because, “By its very terms, it is of restricted application. The words of article 13 are quite plain and need no further elaboration or ‘gloss’”.
75. After dealing with the burden of proof, this is further explained as follows:

“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.

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 *In re D* [2007] 1 AC 619, 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: e g, where a mother’s subjective perception of events leads to a mental illness which could have intolerable consequences for the child.”

76. The judgment then makes a further observation which is of particular relevance to the present case:

“35 Fourth, article 13(b) 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 13(b) the court is not only concerned with the child’s immediate future, because the need for effective protection may persist.”

77. In *In re S (A Child)*, the judgment of the court was given by Lord Wilson. The case dealt with the question of whether, in the context of the effect on a parent’s mental health for the purpose of Article 13(b), there needed to be an objectively reasonable or realistic risk or whether the parent’s subjective perception of the risk could be sufficient. Lord Wilson said:

“27 In *In re E* [2012] 1 AC 144 this court considered the situation in which the anxieties of a respondent mother about a return with the child to the state of habitual residence were not based upon objective risk to her but nevertheless were of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to the point at which the child's situation would become intolerable. No doubt a court will look very critically at an assertion of intense anxieties not based upon objective risk; and will, among other things, ask itself whether they can be dispelled. But in *In re E* it was this court's clear view that such anxieties could in principle found the defence. Thus, at para 34, it recorded, with approval, a concession by Mr Turner QC, who was counsel for the father in that case, that, if there was a grave

risk that the child would be placed in an intolerable situation, “the source of it is irrelevant: eg, where a mother's subjective perception of events lead to a mental illness which could have intolerable consequences for the child”. Furthermore, when, at para 49, the court turned its attention to the facts of that case, it said that it found

“no reason to doubt that the risk to the mother's mental health, whether it be the result of objective reality or of the mother's subjective perception of reality, or a combination of the two, is very real”.

78. Later, in response to Thorpe LJ’s suggestion that the “crucial question” had been whether “these asserted risk, insecurities and anxieties [were] realistically and reasonably held” by the mother and his dismissal of the mother’s case founded on her “clearly subjective perception of risk”, Lord Wilson said:

“34 In the light of these passages we must make clear the effect of what this court said in *In re E* [2012] 1 AC 144. The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned.”

79. Next, I must deal with the law relating to an application to set aside an order under the 1980 Convention. I propose, first, to deal with the authorities and the rules. After this, I deal with the process which I suggest should be adopted *including*, I emphasise, the approach which the court should take at each stage of the process, from the making of the set aside application to the rehearing of the substantive application under the 1980 Convention.
80. Although there is some jurisprudential history on the question of whether/when the court can set aside an order under the 1980 Convention, I do not think it is necessary to go back further than *Re W (Abduction: Setting Aside Return Order)* [2019] 1 FLR 400 in which I gave the lead judgment. This is not to elevate this decision above the other, earlier, cases to which we were referred but because the insertion of r.12.52A into the FPR 2010 has resolved the question of whether there is jurisdiction to set aside such an order.
81. In *Re W*, I made the following observations: the first, in the context of whether the court has a set aside power:

“[37] However, before considering those issues, it seems to me that there would be considerable advantages to the judge who made the final order being asked to determine whether the asserted change of circumstances justifies any reconsideration of

the order and, if it does, whether it is of sufficient impact to justify a rehearing. I would express the test as being whether there has been a fundamental change of circumstances which sufficiently undermines the basis of the court's decision and order to require the application to be reheard.”

My conclusions were as follows:

“[66] In conclusion, my provisional view is that the High Court has power under the inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention. This power can be exercised when there has been a fundamental change of circumstances which undermines the basis on which the original order was made. I set the bar this high because, otherwise, as Mr Devereux QC observed, there would clearly be a risk of a party seeking to take advantage of any change of circumstances such as a simple change of mind.

[67] I would add that the re-opening of a final Hague order (whether for return or non-return) is likely to be a rare event indeed and that, as the process is a summary one, any application for such an order will necessarily have had to be filed without delay. Further, where an application for rehearing has been issued, the court will case-manage it tightly so that only those applications that have a sufficient prospect of success are allowed to proceed and then only within parameters determined by the court.”

82. I was there dealing, and only dealing, with the set aside application. I was not dealing with the approach the court should take at any consequent rehearing. In that case, the judge below had set aside the return and directed a rehearing of the substantive application. The judge’s decision to set aside the original order was upheld.
83. In *Re W* I proposed, what I described as, a “high” bar when the court is determining an application to set aside an order under the 1980 Convention, namely (I repeat) “a fundamental change of circumstances which undermines the basis on which the original order was made”. This approach has been adopted, as part of the changes to the FPR 2010, in PD12F paragraph 4.1A, as set out below. That this approach has been adopted by the Family Procedure Rules Committee, fortifies my view that this is the right test when the court is deciding whether to set aside an order.
84. Rule 12.52A provides as follows:

“Application to set aside a return order under the 1980 Hague Convention

12.52A(1) In this rule-

“return order” means an order for the return or non-return of a child made under the 1980 Hague Convention and includes a consent order;

“set aside” means to set aside a return order pursuant to section 17(2) of the Senior Courts Act 1981 and this rule.

(2) A party may apply under this rule to set aside a return order where no error of the court is alleged.

(3) An application under this rule must be made within the proceedings in which the return order was made.

(4) An application under this rule must be made in accordance with the Part 18 procedure, subject to the modifications contained in this rule.

(5) Where the court decides to set aside a return order, it shall give directions for a rehearing or make such other orders as may be appropriate to dispose of the application.

(6) This rule is without prejudice to any power of the High Court has to vary, revoke, discharge or set aside other orders, declarations of judgments which are not specified in this rule and where no error of the court is alleged.”

85. The relevant Practice Direction which deals with International Child Abduction, PD12F, was also amended and now includes the following:

“Challenging a return order or non-return order

4.1A

If you are a party to a return case and you believe that the court has made an error, it is possible to apply for permission to appeal (see Part 30 of the Rules and Practice Direction 30A).

In rare circumstances, the court might also ‘set aside’ its own order where it has not made an error but where new information comes to light which fundamentally changes the basis on which the order was made. The threshold for the court to set aside its decision is high, and evidence will be required – not just assertions or allegations.

If the return order or non-return order was made under the 1980 Hague Convention, the court might set aside its decision where there has been fraud, material non-disclosure or mistake (which all essentially mean that there was information that the court needed to know in order to make its decision, but was not told), or where there has been a fundamental change in circumstances which undermines the basis on which the order was made. If you have evidence of such circumstances and wish to apply to the court to set aside its decision, you should use the procedure in Part 18 of the Rules.

If the return order or non-return order was made under the inherent jurisdiction (see Part 3 of this Practice Direction), the court might set aside its decision for similar reasons as with

return-non-return orders under the 1980 Hague Convention, but it also might set aside its decision because the welfare of the child or children requires it. If you have evidence of such circumstances and wish to apply to the court to set aside its decision, you should use the procedure in Part 18 of the Rules.

Any such application should be made promptly and the court will also aim to deal with the application as expeditiously as possible.”

86. I now turn to the approach which the court should take when a set aside application has been made. There clearly needs to be a structured approach and, in my view, a helpful comparison is the staged approach taken when an application is made to reopen findings of fact in children proceedings. There are significant differences between that type of case and an application to set aside an order under the 1980 Convention and I do not suggest that the law which has developed to guide courts when dealing with the former is applicable to the latter. It is simply the structure of the process which I consider helpful.
87. This process can be gleaned from *In re Z (Children) (Care Proceedings: Review of Findings)*; *Practice Note* [2015] 1 WLR 95 and *Re E (Children: Reopening Findings of Fact)* [2020] 1 FLR 162.
88. In the latter case, Peter Jackson LJ summarised the process as follows:

“[49] ... there are three stages. First, the court considers whether it will permit any reconsideration of the earlier finding. If it is willing to do so, the second stage determines the extent of the investigations and evidence that will be considered, while the third stage is the hearing of the review itself.”

In the former case, Sir James Munby P said of the third stage:

“[35] ... There is an *evidential* burden on those who seek to displace an earlier finding - in that sense they have to “make the running” - but the *legal* burden of proof remains throughout where it was at the outset. The judge has to consider the fresh evidence alongside the earlier material before coming to a conclusion in the light of the totality of the material before the court.”

It is the last sentence which I consider relevant, namely that the court has to consider *all* the relevant material when redetermining the substantive application.

89. I suggest the process, referred to above and adapted as follows, should be applied when the court is dealing with an application to set aside 1980 Convention orders:
 - (a) the court will first decide whether to permit any reconsideration;
 - (b) if it does, it will decide the extent of any further evidence;
 - (c) the court will next decide whether to set aside the existing order;

(d) if the order is set aside, the court will redetermine the substantive application.

90. Having regard to the need for applications under the 1980 Convention to be determined expeditiously, it is clearly important that the fact that there are a number of distinct issues which the court must resolve does not unduly prolong the process. Indeed, it may be possible, when the developments or changes relied upon are clear and already evidenced, for all four stages to be addressed at one hearing. More typically, I would expect there to be a preliminary hearing when the court decides the issues under (a) and (b), followed by a hearing at which it determines the issues under (c) and (d). These will, inevitably, be case management decisions tailored to the circumstances of the specific case.
91. I would further emphasise that, because of the high threshold, the number of cases which merit any application to set aside are likely to be few in number. The court will clearly be astute to prevent what, in essence, are attempts to re-argue a case which has already been determined or attempts to frustrate the court's previous determination by taking steps designed to support or create an alleged change of circumstances.

Determination

92. I can express my conclusions relatively shortly because, by the end of the hearing, it was clear to me that the appeal must be allowed and the father's application under the 1980 Convention be dismissed because Article 13(b) was clearly established.
93. I start by acknowledging that this was not a straightforward case. I also consider that, with the benefit of hindsight, this was a case in which permission should have been given for further medical evidence to be obtained when the mother first applied for this in August 2019. However, having said that, I consider that the judge's determination cannot stand for a number of reasons.
94. First, in my view it is clear that, as submitted by Mr Gupta, the judge in this case conflated what I have referred to above as stages (c) and (d). The judge did not first consider whether there had been a sufficient change or changes to justify setting the September order aside and then go on to redetermine the father's application. Instead, her consideration of both elements overlapped and were, as a result, interspersed in her judgment. As a result, at both stages she appears to have applied the test of whether there had been a fundamental change of circumstances.
95. Secondly, when determining whether there had been a fundamental change of circumstances, although the judge (at paragraph 76), asked the right question, namely whether any of the alleged changes "on their own *or* in conjunction with other matters" (my emphasis) amounted to a fundamental change of circumstances, she did not then consider the matters relied on by the mother in conjunction. I deal further, below, with the judge's assessment of the changes relied on by the mother.
96. Thirdly, at stage (d), the judge did not conduct an assessment based on all the material for the purpose of deciding whether the exception under Article 13(b) was established but only conducted a limited reconsideration. In respect of this last point, I would accept Mr Jarman's submission that the judge did determine that the fact that B would be returning to Bosnia without the mother was a fundamental change of circumstances. But, as will be clear, I do not accept his further submission that the

judge, thereafter, carried out a sufficient review or reconsideration of the mother's case under Article 13(b).

97. The key matters relied on by the mother, in support both of her case that there had been a fundamental change and that Article 13(b) was established such that a summary return order should not be made, were the father's breach of his undertaking, the effect on her mental health of a return to Bosnia and her consequential decision that she could not return to Bosnia. I will take these in turn.
98. The judge found that the father had breached his undertaking that he would not seek to separate B and the mother on their return to Bosnia. As set out above, he breached the undertaking by obtaining an order from the tribunal in Bosnia (by seeking an "urgent decision" supported by submissions made on 4 November 2019) and did so, as the judge found, on an "erroneous" basis, namely by causing the tribunal wrongly to understand that the mother was prevented from caring for B and that he had, therefore, been taken into care.
99. I take a different view to the judge as to whether the father can be criticised for acting as he did. In contrast to her conclusion, I can see no basis on which his conduct can either be justified or diminished. He had given an undertaking to this court and he acted directly contrary to it. He can, therefore, be criticised for taking the "steps" which he did and seeking to "progress" his case as set out in the previous paragraph. I do not see how any "delays" in the resolution of the case in England, nor do I consider that any misplaced "enthusiasm" to progress his case in Bosnia, mitigate the father's breach of the undertaking.
100. The father's breach also highlights the fact that, as clarified by the evidence of Mr Kovacevic, undertakings to this court are not enforceable in Bosnia until recognised by the courts there and the mother, therefore, has no available remedies in Bosnia for any breach of the undertakings until then. As a result, their efficacy depended on the father voluntarily complying with them. This is relevant because of the importance attached to the robustness of the undertakings by Dr Ratnam for the purposes of safeguarding the mother's mental health. As set out above, in her opinion they needed to be "rock solid".
101. In my view, the judge was, therefore, wrong to discount the effect of the father's breach of his undertaking based on her conclusions as to the father's "motivation" and her assessment that he could not be criticised for the breach. Even though I disagree with the judge's conclusions in that respect, in any event, the relevance of the breach was the consequential impact on the mother's mental health as analysed by Dr Ratnam and not whether objectively the father's conduct could be explained or excused.
102. In this respect, the judge also discounted Dr Ratnam's evidence as to the need for the undertakings to be "rock solid" because, as the judge put it, undertakings are "not meant to provide a long-term solution" and are "by their nature temporary". I do not propose to address the role of undertakings when the court is determining an application under the 1980 Convention (and would simply refer to what is said, at [47], in the *Guide to Good Practice* about the need for caution). However, I consider that the judge was wrong to conclude that she "cannot place too much emphasis on Dr Ratnam's expectation" about the relevance of the undertakings to the mother's mental health. She was wrong because, as she went on to say, "if the mother perceives

the undertakings or assurances to be unenforceable or that they had been breached then, as Dr Ratnam observed, she feels ‘unsafe’ and in such circumstances her mental health is at risk of deterioration”. The relevance of the father’s breach was the consequential impact on the mother which did not depend on whether, from a legal perspective, the undertakings were temporary. This was a mental health issue, not a legal issue.

103. Next, the mother’s case in respect of her mental health was based on the effect of her returning to Bosnia. This was, in part, connected with the father’s breach of his undertaking and was founded on Dr Ratnam’s evidence. With respect to the judge, it appears to me that, in considering this issue, she fell into the error addressed by Lord Wilson, at [27] and [34], in *In re S*. As Lord Wilson said, the “critical question is what will happen if, with the mother, the child is returned”. Although the reasonableness or unreasonableness of the “mother’s anxieties” and/or the fact that they are not based on an objective risk may lead “a court [to] look very critically” at the case advanced by the mother, neither of these elements prevent the court from determining that “the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child”. It is clear that “subjective perception” can be sufficient.
104. In her judgment, at paragraph 110, the judge accepted “that subjectively the mother perceives [her] fears to be insurmountable”. However, although she then referred to Lord Wilson’s observations (as summarised above), she went on to consider the “objective evidence and the evidence of Dr Ratnam” and considered that, “Objectively the risk which the mother perceives does not accord with the evidence of Dr Ratnam or the pattern of the mother’s past behaviour”. With respect to the judge, I would suggest that this was the wrong order. Dr Ratnam’s evidence and the mother’s past behaviour needed to be included in any assessment of the mother’s subjective perception; not after concluding that “the mother perceives these fears to be insurmountable”.
105. In addition, I consider that the judge’s approach to the issue of the mother’s mental health was flawed in a number of other respects. As the Supreme Court made clear in *In re E*, Article 13(b) is “looking to the future” so that the critical issue in the present case was the potential effect on the mother’s mental health of a return to Bosnia. Applying this approach, I do not consider that, the fact that “by the time of this hearing the mother’s mental health was stable”, supports the judge’s conclusion, at paragraph 100, that “her case as to a fundamental change of circumstances is [not] made out”. The question was, not whether the mother was stable at that time, but what would happen if she went with B to Bosnia.
106. Accordingly, the judge’s reference to the fact that the mother was “stable” did not address the critical, forward-looking, issue of the effect on the mother’s mental health of a return to Bosnia. If the judge had looked at the mother’s mental health from this perspective she would, inevitably, have concluded that returning to Bosnia would be likely to lead to the mother feeling threatened, not feeling safe and, as a result, not being able to access treatment. This would result in the emotional dysregulation described by Dr Ratnam and the consequent effect on her ability to care for B.
107. I also consider that the judge, at paragraph 103, misdescribed Dr Ratnam’s evidence when she said that she accepted “Dr Ratnam’s view that the mother would access

support” in Bosnia. This was not the effect of Dr Ratnam’s evidence. Similarly, I am not sure what led the judge to conclude, also at paragraph 103, that she had “no reason to think that [the mother] could not or would not” engage with mental health professionals if she returned to Bosnia.

108. Dr Ratnam considered that there were available treatments in Bosnia *but* their ability to be effective critically depended on the mother’s ability to engage with them. She “had been the victim of domestic violence” and was fearful of the father. As Dr Ratnam explained, the “degree of impact on her parenting will depend on if she is able to access available treatment” which, in turn, depended on the father’s assurances being enforceable. Dr Ratnam’s clear evidence was that “unless [the mother] feels safe from [the father], she will not be able to engage effectively in intervention”. This was why the efficacy of the father’s undertakings needed to be clear; this was “imperative”.
109. In addition, following receipt of the CSS order, Dr Ratnam said that if, following the mother’s return, B were immediately to reside with the father “there would be a significant deterioration in [the mother’s] mental state” in a number of respects. This included it being “likely that there will be increased difficulty regulation her emotions, which will be associated with an increased risk of self-harm”.
110. Dr Ratnam referred to a number of other matters which would impact on the mother’s mental health in Bosnia. She would lose the support of her own mother, which had been “of significant benefit to her”. In addition, unless there was “absolute reassurance that [the mother] will not be prosecuted”, this would be another cause of her mental health deteriorating on her return to Bosnia.
111. In my view, the clear effect of Dr Ratnam’s evidence was that there was, at least, a significant risk that the mother’s mental health would significantly deteriorate if she were to return with B to Bosnia. In fact, I consider that her evidence established that the mother’s mental health would be likely significantly to deteriorate. Based on the fact that the undertakings had been clearly demonstrated to be far from “rock solid”, this meant that the mother would continue to feel under threat from the father which, as described by Dr Ratnam, “will impact adversely on her mental health”. Because she would not feel safe, the mother would not be able to engage effectively with mental health services in Bosnia. As the mother would not be able to access treatment, this would clearly have a significant impact on her parenting, for the reasons given by Dr Ratnam. Put another way, it was not enough for there to be services in Bosnia that would be available to the mother when the mother’s mental health would not allow her to be psychologically available to benefit from such services.
112. Finally, and contrary to the judge’s conclusion, in my view it was, therefore, understandable why the mother had concluded that she could not cope if she were to return to Bosnia. The judge had rejected this because “I do not objectively accept that to be the case”. Even though I consider the judge was wrong to reach this conclusion, because of the effect of Dr Ratnam’s evidence, in reaching this conclusion the judge, as required by *In re E*, also failed properly to apply her assessment that “subjectively the mother perceives these fears to be insurmountable”. These fears meant that the mother’s decision was not her “choice” as described by the judge.

113. In conclusion, therefore, in my view there had clearly been a fundamental changes or developments justifying setting aside the September order. These comprised the breach by the father of his undertaking, the evidence given by Dr Ratnam as to the effect on the mother's mental health if she returned to Bosnia and the mother's consequent decision that she could not return to Bosnia. The judge should therefore have found that the mother had satisfied stage (c) of the process set out above.
114. Turning to stage (d), in my view it is equally clear that there would be a grave risk of B being placed in an intolerable situation based on the prospective significant deterioration in the mother's mental health if she were to return to Bosnia and their prospective separation. To adopt what Lord Wilson said in *In re S*, the "effect on [the mother's] mental health will create a situation that is intolerable for" B. Dr Ratnam was clear that it was "essential" that the mother "feels safe from threat" and that "the undertakings needed to be 'rock solid' and that B would be with the mother". This was "the basis upon which she had reached the view that the mother could engage with mental health services in Bosnia". There was no reason for the mother to view the undertakings as being rock solid nor for her not to fear B being separated her. As referred to above, the likely detrimental effect on the mother's mental health was clearly established by Dr Ratnam's evidence. Nor should it be forgotten that, regardless of whether or not the father had acted with good faith with regard to his undertaking, there would be every prospect of heavily contested custody proceedings in Bosnia, which on Dr Ratnam's evidence would be likely to destabilise the mother's mental health.
115. Finally, I can also see no basis on which it could be suggested that, because the mother's mental health would suffer in this way, B should be returned to Bosnia without her. To be fair to Mr Jarman, he did not suggest this, but based his argument on the judge's assessment that the mother's decision not to return was her "choice". As set out above, I disagree with the characterisation of the mother's decision in this way. In any event, the father's case and the judge's decision were based on the mother being unwilling rather than unable to return to Bosnia. It has never been suggested nor, in my view, could it be suggested that a return order should be made notwithstanding Article 13(b) having been established. That would not be a proper use of the 1980 Convention in this case.
116. I would therefore allow the appeal, set aside the order for B's return to Bosnia and dismiss the father's application under the 1980 Convention.

Lord Justice Peter Jackson:

117. I agree.

Lady Justice Carr:

118. I also agree.