



Neutral Citation Number: [2025] EWCA Civ 1426

Case No: CA-2025-001951

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, FAMILY DIVISION
Sir Andrew McFarlane, The President of the Family Division
FD23P00148

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 November 2025

Before:

THE LADY CARR OF WALTON-ON-THE-HILL,
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON

R (Children: Setting aside Hague return order)

Christopher Hames KC and Susannah Burley (instructed by Freemans Solicitors) for the
Appellant Children, through their Solicitor-Guardian
Teertha Gupta KC and Richard Little (instructed by Creighton & Partners) for the
Respondent Father
Michael Gration KC and Indu Kumar (instructed by Wilson Solicitors LLP) for the
Respondent Mother

Hearing date: 22 October 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

The Lady Carr of Walton-on-the-Hill, CJ handed down the judgment of the Court:

Introduction

1. This appeal arises from an order of the President of the Family Division on 22 July 2025 by which he refused an application to set aside a return order that had been made on 5 November 2024 under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the Hague Convention'). The question for this court is whether he was entitled to conclude that there had not been a fundamental change of circumstances which undermined the basis on which the return order was made.

Background

2. The proceedings concern A (13) and B (11). They and their parents are United States citizens and all members of the family lived in Pennsylvania until 2022. The parents separated when the children were very young and divorce proceedings ensued. An order for joint legal custody was made in 2016, with the mother to have physical custody and the father to have substantial contact. Contact was not without difficulty, but it continued until June 2021, when the mother stopped it, alleging that the children had been sexually abused by the father. They have not seen their father since then.
3. On 6 July 2022, the parents' dispute came before the Court of Common Pleas in Delaware County, Pennsylvania, where it was heard by the Honorable Judge Nusrat J. Love (later Rashid). She concluded that the mother had not proved her allegations against the father and she reinstated the earlier contact arrangements.
4. On 4 August 2022, the mother removed the children from the United States to England. The family had no prior connection with this country, nor any right of residence. The mother claimed asylum for herself and the children.
5. On 19 October 2022, the Court of Common Pleas awarded sole legal and physical custody of the children to the father.
6. The father did not know that the children were in England until January 2023. In March 2023, he brought proceedings for their summary return under the 1980 Hague Convention.
7. In February 2023, the Home Secretary refused the asylum claims. On 25 March 2024, the First-tier Tribunal dismissed the mother's appeal from that decision, having considered and rejected the sexual abuse allegations. The mother's attempts to make further applications to that tribunal or to appeal to the Upper Tribunal have been unsuccessful. She and the children live in precarious circumstances and are liable to deportation at any time.
8. The mother defended the child abduction proceedings on the basis that the children's return to their home state would place them in an intolerable situation under Article 13b of the Hague Convention, and that the children objected to returning.
9. The proceedings were heard in June 2024 by the President of the Family Division, sitting with Upper Tribunal Judge Mandalia, at a hearing lasting three days. In a substantial reserved judgment handed down on 28 June 2024, they rejected the mother's

defences and determined that the children should return to the United States on terms to be agreed between the parents or ordered by the court: [2024] UKHC 1626 (Fam). They found that the children's repatriation and subsequent placement in foster care for a short period following the likely arrest and imprisonment of the mother on arrival would be traumatic, stressful and upsetting, but that it nevertheless fell well short of placing the children in an intolerable situation. In all the circumstances, and despite their very clear objections, the children must be returned to the United States.

10. The mother's application for permission to appeal was refused by Moylan LJ on 22 August 2024.
11. The return order was perfected by the President on 5 November 2024. He refused an application by the older child to be separately represented from his Children's Guardian, and he provided for the children to return forthwith to the United States in accordance with detailed provisions contained in the order. Centrally, the return order was not to be implemented until the American custody order of October 2022 had been modified so that, if the children could not remain with their mother on arrival, they were not to be placed in their father's care pending the first hearing in the Court of Common Pleas. Instead they were to be placed in foster care in the absence of a suitable and available third party.
12. On 11 November 2024, the parents signed an agreement that provided that the father agreed to temporary physical custody going to the mother and to his right to physical custody being temporarily discharged until a first emergency hearing. The father agreed that the children were not to be placed with him in the meantime, and that if the mother was arrested on arrival, they would be placed in foster care or with a third party.
13. The father duly applied to the Court of Common Pleas to modify the order in accordance with the parties' agreement. On 8 May 2025, after hearing submissions from counsel, Judge Rashid denied the father's motion and upheld the October 2022 order, only adding that, pending a first emergency hearing, the father should allow the children to be temporarily cared for by a known family member if he determined that the children were experiencing extreme emotional or mental health issues while in his custody. At that time, no family member had been proposed by either parent.
14. This led to further developments in the English proceedings. On 19 May 2025, in the light of Judge Rashid's refusal to approve the proposed consent order, the father sought an urgent hearing in the High Court. On 10 June 2025, the mother applied to set aside the return order. On 18 June 2025, Ms Nina Hansen applied on behalf of both children for them to be separately represented from their Children's Guardian.
15. At a hearing on 25 June 2025, the President granted the children's application. He discharged the Children's Guardian and appointed Ms Hansen as their Solicitor-Guardian. In respect of the mother's application to set aside the return order, he decided to allow a reconsideration of the return order and gave directions for further evidence. This process followed stages 1 and 2 of the procedure provided for in *Re B (A Child) (Abduction: Article 13(b))* [2020] EWCA Civ 1057; [2021] 1 WLR 517; [2021] 1 All ER 1138; [2021] 1 FLR 721 ('*Re B*') (see [23] below).
16. At a further hearing on 21 and 22 July 2025, the President considered the applications to set aside the return order and also an oral application by the father to vary the return

order so as to permit the children to be placed in the care of their paternal grandmother on return. After hearing submissions, the President ruled that he was not going to set aside the order. He adjourned overnight for the father to consider how he wished the order to be varied. On 22 July 2025, after further submissions, he made the order under appeal. Having confirmed the continuation of the undertakings set out in the order of 5 November 2024, he varied the return order to provide that the children should remain in the temporary physical custody of the mother provided she was not detained on arrival, and otherwise for them to be placed in the care of the grandmother pending the emergency hearing. Having done so, he repeated the declaratory order for the children's summary return and provided that it should occur no later than 12 August 2025, that being the first return date that had been set by the court.

17. The children's application for permission to appeal was granted by Moylan LJ on 14 August 2025. We heard the appeal on 22 October 2025.

Protective measures under the Hague Convention

18. The United Kingdom and the United States are of course parties to this international treaty. The preamble to the Convention records that the interests of children are of paramount importance in matters relating to their custody, and that the Convention is designed to protect children internationally from the harmful effects of their wrongful removal or retention. In a case where an intolerable situation would exist but for protective measures that could be taken in the home country, the returning court must be satisfied that the proposed protective measures will be sufficiently effective in the requesting state to address the risks.
19. In *Re E (Children) (International Abduction)* [2011] UKSC 27; [2012] 1 AC 144; [2011] 2 W.L.R. 1326; [2011] 2 F.L.R. 758, Baroness Hale and Lord Wilson, delivering the judgment of the Supreme Court, stated:

[35] ... [A]rt 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.

[36] ... 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. ..."

These words resonate in a number of ways in the present case.

20. This well-established approach towards protective measures was fully considered in the judgment of this court in *Re T (Abduction: Protective Measures: Agreement to Return)* [2023] EWCA Civ 1415; [2024] 1 WLR 2896; [2024] 1 FLR 1279. There, Cobb J, with whom Moylan and Lewis LJ agreed, stated at [50]:

“Protective Measures need to be what they say they are, namely, *protective*. To be protective, they need to be *effective*.”

This accords with the Good Practice Guidance issued by the Permanent Bureau of the Hague Conference on Private International Law in October 2020, see paragraphs 43 et seq.

Setting aside Convention return orders

21. In *Re W (Abduction: Setting Aside Return Order)* [2018] EWCA Civ 1904; [2018] 4 W.L.R. 149; [2019] 1 FLR 400 (*‘Re W’*), this court (Moylan LJ, with whom Holroyde and Peter Jackson LJ agreed) held that the High Court had an inherent power to set aside a return order under the Hague Convention where there had been a fundamental change of circumstances which undermined the basis on which the original order was made.
22. Rule 12.52A of the Family Procedure Rules 2010, in effect from 6 April 2020, incorporated this power within the rules of court:

“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 the High Court has to vary, revoke, discharge or set aside other orders, declarations or judgments which are not specified in this rule and where no error of the court is alleged.”

23. In *Re B* this court (Moylan LJ, with whom Peter Jackson and Carr LJ agreed) confirmed the test that must be applied to an application to set aside a return order and identified these procedural stages:

“89. I suggest [this] process... 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.

...

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.”

24. The approach taken in *Re W* and *Re B* is again reflected in Practice Direction 12F, which provides that “the court might set aside its decision where there has been fraud, material non-disclosure or mistake... or where there has been a fundamental change in circumstances which undermines the basis on which the order was made.”

The basis for the return order

25. In their judgment of 28 June 2024, the President and UTJ Mandalia expressed their conclusions about the ‘intolerable situation’ defence:

“49. Turning, therefore, to an evaluation of ‘intolerable situation’ by focusing solely on the children having to return to the USA, it is undoubtedly the case, and is accepted by the father and the children’s guardian, that the experience for the children of going back across the Atlantic with their profoundly reluctant mother will be traumatic to a significant degree. We accept that it is probable that she will be arrested on arrival. We understand that this is likely to involve officers boarding the plane and removing her prior to the other passengers disembarking, and that the children will then be taken into the care of social workers. We do not accept that it is likely that the children will be passed into the care of their father at that stage. Given their response to the guardian when they, erroneously, thought that he might be in the UK, they are likely to display extreme reluctance to see him, let alone be placed in his care. We accept that he intends to suspend the current custody order in his favour, and that he will make it clear to the CYS and other authorities that he does not seek the interim care of the children, but we will require him to do so before any return order takes effect. We join with the guardian in expecting the

children's mother to identify a friend or other trusted member of the community in Pennsylvania who can take on the short-term care of the children on their arrival in the US, but we have decided this issue on the basis that the default position, namely short-term foster care will be provided for them.

50. Moving on, we accept that the mother is likely to be kept in custody for a time. She has no accommodation readily available to her in the US, and no immediate income. We do, however, accept the assertion made on behalf of the guardian that the mother is entitled to apply to the UK Home Office for provision of a resettlement grant to her to provide the wherewithal for her to rent short term accommodation. As a failed asylum seeker, on voluntary return, provision of help with reintegration costs with support from £1500, depending on individual circumstances is in the experience of UTJ Mandalia, available to support an assisted departure by an application to the Voluntary Returns Service. We accept that the criminal process will be likely to run its course in the US and that there is a likelihood that the mother will receive a short term of imprisonment, however this may be mitigated by the father making it clear, as he has committed to do, that he does not want the mother to be imprisoned, nor would he initiate any criminal proceedings against the mother in respect of the abduction.

51. Looking beyond the first 2 or 3 months, it is likely that the Family court in the US will be seized of the case and will make its own determination as to the children's future arrangements.

52. We have also taken some supportive account of the fact that, in contrast to a case where a grave risk of physical or psychological harm is established on the basis that the children are returning to a situation which will bring them back into contact with an abusive parent, no aspect of what is said to be intolerable in the children's situation arises from any action or risk of harm relating to their father. The difficult situation that the children are currently in has been entirely generated by their mother's actions.

53. On that basis, the children's situation will be traumatic, stressful and upsetting for them on their return to the US. This will be acutely so on the day of return itself and is likely to remain so, to a lesser degree, for some weeks before medium to long term arrangements can be made. To a degree, there will be upset and even trauma involved in the repatriation of any children who have been abducted and kept away from their home country by a parent who resists a return order. The extent of upset and trauma here is greater because of the likelihood that their mother will be arrested and kept in custody on arrival, with the children moving to foster care, but such circumstances are not without precedent.

54. It is a regular aspect of the work of social workers and the decisions made by Family judges, that children are placed in foster care when they do not want to go there. Whilst unwelcome and upsetting, to be placed in foster care for a short period, in our view, falls well short of being placed

in an intolerable situation – namely one that these children should not be expected to tolerate in the circumstances of this case.

55. We therefore rely upon and share the guardian’s analysis that the default plan, including foster care before the medium-term arrangements are settled, is not intolerable for these two children. Thereafter, the US court will be seized of the case and will determine the outcome that best meets the children’s detailed needs. On that basis, we hold that the mother’s case under Art 13(b) based on ‘intolerable situation’ fails.”

26. At [63], the court recorded verbatim the protective measures offered by the father:

“a) ‘CYS to be informed of the mother’s return.

b) Father will tell the prosecutor and Judge that he does not want the mother to be imprisoned, nor would he initiate any criminal proceedings against the mother in respect of the abduction.

c) Father agrees that the children should remain in their mother’s care prior to any custody/contact hearing in the USA, including if she is released on bail.

d) Father will not seek to contact the mother prior to any hearing in the USA.

e) Father will not harass, molest pester, use or threaten violence against the mother.

f) Father would pay for the children’s flights and would not attend the airport on their arrival.

g) Father agrees to pay for therapy for the children.””

27. In relation to the child objections defence, the court found that both boys objected to return to the USA and had reached an age and maturity that justified taking account of their views. The gateway for the court to exercise its discretion to refuse a return was therefore satisfied, but the court declined to do so for these reasons:

“67. In approaching the exercise of our discretion whether or not to order the children’s return to the US, despite their very clear objection to that outcome, we have taken account of all the circumstances and in particular:

i) The children’s views are firmly based upon the narrative that their father has abused them and is an altogether malign individual. The allegations that underly that narrative have been investigated by the CYS on a number of occasions, the US Family Court and the FtT. Each of these bodies has found that the evidence fails to support the allegations and that they are unfounded or unproved (even, in the FtT, on a lower standard of proof). Although we accept that the children’s subjective views are firmly held, the weight to be attached to the children’s objections that are based upon an unfounded narrative, in this case, must be substantially reduced.

ii) Whilst not being in a position to make any findings, and expressly not doing so, the prospect that the children's views of their father may have been generated by alienating behaviour on the part of their mother and that they have thereby suffered harm requires serious and detailed consideration, as does the prospect of the children being reintroduced to their father. In terms of the policy of the Convention these matters are for the court in the children's home state but, more importantly in this case, the involvement of the father can realistically only be achieved if they are back in the US.

iii) The children are American and have no ties or connection with the UK.

iv) In the UK the mother and children will continue to live in very straitened accommodation on a basic subsistence allowance until, at some stage, they may be removed back to the US in any event, because they have no lawful basis to remain in the UK.

v) It is the guardian's professional view that it is in the children's best interests to be returned to the US.

vi) The current situation has been entirely generated by the belief of the children's mother that the children have been abused by their father. There is no credible evidential basis for this belief, yet the children were abducted, in breach of orders of the US court, and have been kept, initially secretly, in the UK because of the mother's belief. There is a strong policy ground based on comity between member states and the father's application.

68. In all the circumstances, and notwithstanding the children's objections, we take the clear view that both A and B must be summarily returned to the USA."

28. So far as concerns this appeal, the resulting order of 28 June 2024 went no further than to recite that the children should return to the USA on terms to be agreed by the parties or determined by the court.
29. The order of 5 November 2024 is a detailed document that endorsed an outcome negotiated by the parties. It provided relevantly:

"IMPLEMENTATION OF THE RETURN ORDER

8. The father has agreed that he will:

(a) Obtain a hearing in the US custody proceedings at which the court can consider the question of temporary custody, such hearing to be listed if possible between 7 and 14 days following the children's return, and

(b) Take appropriate steps as advised by Mr Scanlon [his US legal expert] to seek to procure that the effective current custody order in his favour is modified so as not to require the children to be placed in his care upon their return pending the proposed hearing in the US custody proceedings referred to in (a) above on the basis that the matter can be reconsidered at

that hearing. In the first instance, subject to the mother consenting to the same, the father will file a consent order in the US Court in the terms appended to this order; in the event that the US court is unwilling to approve the consent order, the father will take the alternative step advised by Mr Scanlon.

The steps referred to in (a) and (b) will be taken in advance of the children's return to the USA, subject to paragraph 20 below.

9. The father has further agreed that in the event, as is likely, that the mother is arrested at the airport upon her return to the USA and the children are removed from her care, the children should not be placed in his care pending the hearing referred to in paragraph 8(a) above but be placed into foster care in the absence of any other suitable third party being available.

10. Pursuant to the Court's order made on 18 June 2024 the father's solicitors have sent Children Youth Services ('CYS') in Pennsylvania the respectful request directed to them by the Court comprising a series of questions relating to actions which they may take to obtain a placement for the children in the event of their separation from the mother upon their return to the USA.

11. The Court's intention is that the order for the return of the children to the USA should be implemented in accordance with the father's agreements set out at paragraphs 8 and 9 above.

12. The father reaffirms that upon the mother's return to the USA he does not wish for her to be the subject of a prosecution for offences arising from her removal of the children from the USA on 4 August 2022 and that he does not wish for her to be arrested, detained or sentenced to a term of imprisonment. He invites the relevant police and prosecuting authorities in the USA (to whom a copy of this order may be disclosed by any party) to have regard to his wishes in this respect.

13. All parties may contact the DA's office and request the DA's office to provide a document confirming that they have acknowledged the father's position that he does not wish for the mother to be arrested, detained or sentenced to a term of imprisonment.

UNDERTAKINGS

14. The father gives the undertakings set out in Annex A to this order.

15. The mother gives the undertakings set out in Annex B to this order.

16. The undertakings given by the father and the mother constitute binding and enforceable obligations in this jurisdiction and it is intended that the said undertakings should also constitute binding and enforceable obligations in the USA.

17. Nothing in the undertakings given by the father or the mother shall constitute any admission by either of them as to any allegation made by

the other party or shall be intended to bind or otherwise influence the courts of the USA in any future determination of matters of welfare concerning the children once those courts are in a position to deal with such matters at the hearing referred to at paragraph 8(a) above and thereafter.

THE COURT ORDERS THAT:

Return Order

18. The children, [A] and [B] shall return forthwith to the jurisdiction of the United States of America (State of Pennsylvania) pursuant to Article 12 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

19. Subject to paragraph 20 below, the order for the return of the children at paragraph 18 above shall not be implemented until such time as the custody order in the father's favour has been **modified** in accordance with his agreement at paragraph 8 above.

20. In the event that the mother does not provide her signed consent to the proposed consent order in the terms appended to this order by 12 November 2024, the father shall be discharged from his agreement at paragraph 8 above, paragraph 19 of this order shall be discharged and the return order at paragraph 18 shall be immediately enforceable.

21. Upon the return order at paragraph 18 above becoming enforceable pursuant to either paragraph 19 or 20, the order shall be implemented by the mother accompanying the children to the USA on a direct flight to Pennsylvania departing from a London airport on a date no later than 21 days after the date upon which the order shall have become enforceable. The parties shall endeavour to agree the precise mechanics and timing of the children's return to the USA by no later than the date 7 days after the date upon which the order shall have become immediately enforceable, in default of which the application shall be returned to court at short notice for urgent determination of those issues (for the avoidance of doubt such application shall only be listed before the President if he is available and may otherwise be listed before any available High Court Judge).

ANNEX A – FATHER'S UNDERTAKINGS

a. Not to support (save as may be required by law) or institute any proceedings, whether criminal or civil, for the punishment of the mother arising out of the removal of the children from the USA on 4 August 2022 and the subsequent retention of the children in England and Wales since 4 August 2022 to date.

b. To pay the reasonable cost of direct economy flights for the children to return to the USA in accordance with this order and for appropriate therapy for the children following their return.

- c. In the event that the children are accompanied to the USA by the mother, not to attend at the airport upon their return.
- d. Not to remove the children from care of the mother upon the children's return to the USA pending the first on notice hearing before a court of competent jurisdiction to be listed pursuant to paragraph 8(a) of this order.
- e. Not to attend at any property at which the mother and the children are staying pending the hearing referred to in paragraph 8(a) of this order.
- f. Not to use or threaten violence against the mother or the children, or harass, molest or pester the mother of the children pending the hearing referred to in paragraph 8(a) of this order.
- g. Not to contact the mother directly pending the hearing referred to in paragraph 8(a) of this order.
- h. To cause a copy of this order (including its annexes) to be lodged with a Court of Competent jurisdiction and provided to the US Central Authority and the CYS prior to the return of the children to the USA in accordance with this order.

ANNEX B - MOTHER'S UNDERTAKINGS

- a. To accompany the children on their return to the USA in accordance with this order and any subsequent order in which the arrangements for their return are set out.
- b. Within 24 hours of the details being known to her, to provide the CYS with details of the address at which she intends to reside with the children following her return to the USA (subject to her not being detained following her arrival) and, subject to the children not being removed from her care by the CYS, to ensure that the children sleep each night at her disclosed address.
- c. Forthwith upon the children's return to the USA in accordance with this order to cause the children's passports, to be lodged with either CYS, the police or the father pending the hearing referred to in paragraph 8(a) of this order.
- d. Not to apply for any further passports for the children pending the hearing referred to in paragraph 8(a) of this order.
- e. Not to use or threaten violence against the father or the children, or harass, molest or pester the father or the children pending the hearing referred to in paragraph 8(a) of this order.
- f. Not to contact the father directly pending the hearing referred to in paragraph 8(a) of this order."

The application to the American court

30. The father duly applied to the Court of Common Pleas to modify the October 2022 sole custody order to reflect the parties' November 2024 agreement. The matter came before Judge Rashid on 8 May 2025. We have seen the bundle of documents that were available to her, and a transcript of the hearing. The documents included the substantial English judgment of June 2024, and the parties' agreement of 11 November 2024, but not, it appears, copies of the English court's orders of 28 June or 5 November 2024. If that is so, it may not have been apparent to that court that the parties were acting in accordance with a considered court order, and not merely a personal agreement. The transcript contains much reference to the agreement, but none to the judgment or orders of the English court.
31. In addition to the father's motion, Judge Rashid was faced with a procedural application by the mother that is of no direct relevance to this appeal, but was designed to cause delay. The father was present in court. In the course of submissions by his counsel, Judge Rashid made it clear that she doubted her power to place the children in foster care and that, even if she had such a power, she would not exercise it. She saw no reason why the children should not go to their father pending a hearing. She asked whether there were family members or other adults who could look after the children temporarily, but no one was suggested. She noted that she was not obliged to endorse the agreement reached by the parties in the UK. At that point, counsel for the mother stated that the mother was no longer in agreement with the father's motion.
32. Judge Rashid's thinking appears from these passages:
- “I think that I can put an order in place that says, if and when she lands, the children go into his immediate sole physical custody.
- Now, if [father] wants to waive his right to exercise his sole physical custody under the current temporary order and say, no, I want them to go with [mother]'s family member or with my family member, then he can do that. But there is absolutely no reason why I'm going to order that the children go to CYS.”
- And later:
- “If there is no third party, and by third party I don't mean CYS, I mean a family member, that the parties can agree to, then I'm going to order that if the children are returned to the United States, father shall take immediate temporary sole physical custody of the children, which is what he has right now.”
- Addressing mother's counsel:
- “Now what is that going to do to your client? Probably not make her very happy and probably, unfortunately, [father], not make her want to come back here. But there is nothing else that I believe under Pennsylvania state law this Court can do.”
33. Judge Rashid then made it trenchantly clear that she was not going to approve any arrangement whereby the children stayed with their mother, even if she was not

arrested, due to the harm that she had caused to the children, and to the risk of further flight. It was for the father, as she put it, to “call the shots”:

“So, when they’re returned, father will take immediate, temporary, sole physical custody of the children. Now, if father at that point, after coming into contact with these children, sees that there’s an immediate danger issue, there’s nothing stopping him from calling up grandmom and saying, can you watch the kids? ...

There's nothing stopping him from making a parental custodial decision. Okay? Then it gets immediately scheduled, as immediate as I can possibly be, which is usually within two to three days, immediate.

And then we come in and we talk more about the psychological trauma. We pick a reunification counsellor, and we see where the children are literally going to be laying their head moving forward.”

Father’s counsel said that he was trying to incentivise the mother to return, but Judge Rashid said that she did not think that anything of that kind could be done.

34. She accordingly made an order in these terms (‘the US Order’):

“ORDER

AND NOW, to wit, this 8th day of May, 2025 upon consideration of Father’s Emergency Petition for Special Relief filed on February 28, 2025 and Mother’s Answer and Motion to Quash filed on April 8, 2025 argument of counsel on May 6, 2025, and recorded conference with counsel on May 8, 2025 it is hereby **ORDERED** and **DECREED** as follows:

1. Father’s Emergency Petition for Special Relief is **DENIED**.
2. Mother’s Motion to Quash is **GRANTED** without relief.
3. It is further **ORDERED** as follows:
 - a. Mother shall provide Father with itinerary of the flight on which the children ([names and dates of birth]) are booked to return to the United States. ...
 - b. Father shall assume temporary sole legal and physical custody of all children upon their arrival in the United States pursuant to Court Order dated October 25, 2022.
 - c. Father shall provide a certified copy of this Order and the October 25, 2022 to any federal or state agency upon request.
 - d. Father shall allow the children to be temporarily cared for a known family member if he determines that the children are experiencing extreme emotional or mental health issues while in his custody.

e. Children may contact Mother by phone or video call at any time without restriction using their own cell phones. ...

4. Mother shall surrender the passports for both child to Father upon arrival in the United States. ...

5. Once children are in Father's physical custody, [father's counsel] shall notify Chambers and an emergency hearing will be scheduled at which children should be present and/or available for interview.

BY THE COURT: [Judge's signature]"

Subsequent developments

35. The father's position in the English proceedings has remained that he will not seek to have physical custody of the children on their arrival in the United States. Shortly after the US order was made, he proposed in the English proceedings that the children should be placed with his mother on arrival, she being willing to come from California to assume that role, and he filed a statement from her. That proposal had not been made to Judge Rashid, whose reference to a 'grandmom' was notional. The mother, for her part, has never proposed a third party, despite repeated urging from the courts in both jurisdictions.

The decision under appeal

36. In an extempore judgment given on 21 July 2025, the President summarised the factual and procedural background, the applicable law and the parties' submissions.
37. He summarised the recent US proceedings in this way:

"12. Following the making of [the 5 November] order and the signing of that agreement, the father promptly issued a motion from the American court on 14 November 2024 seeking the court's order modifying its previous order. There then was a substantial delay before any substantive hearing which took place on 6 May 2025. It is not necessary for me to go into the whys and wherefores of that delay but at that hearing, the same judge who had presided in relation to these children on earlier occasions, declined to approve the consent order. She made an order giving temporary sole legal and physical custody to the father on the children's arrival back in the USA but provided that the father was permitted to allow the temporary care of the children by another family member if he determined that there was a need to do so. The order provided for contact between the children and their mother over the telephone or in other remote ways. By that time it had become known to the parties through investigation that it simply was not going to be possible, in terms of the way that social services operate in America, for the children to be placed by the father or the mother in temporary local authority pre-arranged foster care.

13. Following the outcome of the hearing before the American court on 6 May, the mother brought proceedings back to this court asserting that the

father had failed to comply with the terms of the consent agreement. It is certainly the case that he failed to succeed in obtaining the variation of the order in the terms that were to have been sought.”

(In fact, it was the father who first applied to restore the matter.)

38. The President’s discussion and conclusions are at [28-32]:

“28. I have already referred to the law, the test is plain, the bar is high. There will be few successful cases and the court will only grant a reopening of the proceedings if there has been a fundamental change to the basis upon which the decision and the order were made and so it is not enough for there to have been a change in the basis of the order, that is plain in this case. What has to happen is that the fundamental understanding of what would happen in the case has to have changed.

29. What is the basis upon which the decision was made? Well that is set out in our judgment in paragraphs 49 to 55 to which I have already made reference. The basis as I read those paragraphs, is that the children are not to go into their father's care but into the care of some other individual or organisation. That that is so is also evidenced some months later by the terms of the November consent order. Again I have already read out paragraph 8(a) and 8(b). Both of those are satisfied in the present circumstances despite the change of detail and I say that because paragraph 8(a) is for there to be a hearing before the American court as a matter of urgency as soon as the children are brought back to the jurisdiction, and that remains part of the plan. Paragraph 8(b) is to take steps, “so as not to require the children to be placed in his care upon their return.” The default is therefore for the children to be with someone else.

30. The consent agreement is also in my view, of significance. Again, I have read that out. The focus of the consent agreement is to stress that the children are not to be placed in the father's care. It is not a requirement that they be placed in foster care or anywhere else. The point is that they are not to go to the father but that they are to go to a third party. The agreement is also on the basis that there would be an earlier review before the American court and again that that remains in place. Indeed the matter has already been to the American court and the court is seized of it and has made some orders to which I have already referred. So whilst foster carers are no longer a possibility, it remains open to the mother to put forward anyone that she chooses and in default of that, the paternal grandmother is in readiness to take on the care of the children.

31. So the basis of the decision made in June reinforced by the orders in November, was that it was not intolerable for the two children to be in some form of temporary care with another person pending an emergency review hearing in America. That basis has not fundamentally changed in my view. The change has been to the detail of the arrangement but the basic structure remains the same. In any event, these arrangements were only ever a holding mechanism pending a return to the American court as a matter of urgency. So far as the primary grounds for setting aside the

decision are concerned, I reject the case put forward by the mother and the children and conclude that there has been no fundamental change to the basis upon which the decision about an intolerable situation was made.

32. Separately, the question of delay in my view comes nowhere near establishing a fundamental change. By the time the court heard this case in June of last year, the children had already been here two years. It is highly regrettable that that is the case. They were already established in school here, they were already firmly of the view that they did not want to go back. Further time has consolidated that but not to a degree that fundamentally changes the landscape as it was before the court in June of last year. Therefore looking at delay either on its own or cumulatively with the other points that are made, I am not persuaded that there are grounds here for allowing the mother and the children's applications to set aside the order."

39. The President then made the order now under appeal, which includes these provisions:

"3. The Court approved the amended plan for the return of the children to the USA pursuant to the return order, dated 5 November 2024, as set out below.

Undertakings

4. The father continues to be bound by the undertakings set out in Annex A to the order of 5 November 2024.

5. The mother continues to be bound by the undertakings set out in Annex B to the order of 5 November 2024.

6. The undertakings given by the father and the mother constitute binding and enforceable obligations in this jurisdiction and it is intended that the said undertakings should also constitute binding and enforceable obligations in the USA.

7. Nothing in the undertakings given by the father or the mother shall constitute any admission by either of them as to any allegation made by the other party or shall be intended to bind or otherwise influence the courts of the USA in any future determination of matters of welfare concerning the children once those courts are in a position to deal with such matters at the first hearing listed in the USA and thereafter.

The terms and implementation of the return order

8. The varied terms as approved by the Court for the children's return to the USA, pursuant to paragraph 15 below, are as follows:

(a) The children shall remain in the temporary physical custody of the mother, provided she is not detained upon her arrival in the USA.

(b) In the event that the mother is detained upon her arrival in the USA, the children shall be placed in the temporary physical custody of the

paternal grandmother, [name], pending the emergency hearing to be obtained as below.

(c) The father will obtain an emergency hearing before Judge Rashid sitting in the Court of Common Pleas of Delaware County, Pennsylvania.

(d) The father will not seek to have any form of contact with the children pending the emergency hearing.

(e) The father reaffirms that upon the mother's return to the USA he does not wish for her to be the subject of a prosecution for offences arising from her removal of the children from the USA on 4 August 2022 and that he does not wish for her to be arrested, detained or sentenced to a term of imprisonment. He invites the relevant police and prosecuting authorities in the USA (to whom a copy of this order may be disclosed by any party) to have regard to his wishes in this respect.

(f) All parties may contact the District Attorney's office and request the District Attorney's office to provide a document confirming that they have acknowledged the father's position that he does not wish for the mother to be arrested, detained or sentenced to a term of imprisonment.

(g) The father will notify the FBI to assist with the planning of the children being placed in the temporary physical custody of the paternal grandmother, [name] including whether the children can be accompanied on their flight from London to Philadelphia by their servants or agents.

(h) The father agrees to use best endeavours to seek assistance for the travel of the mother from London to Philadelphia in accordance with the return order.

IT IS ORDERED THAT:

...

Application to set aside

11. The applications to set aside the return order dated 5 November 2024, made on behalf of the mother on 12 June 2025 and on behalf of the children on 26 June 2025, are dismissed. ...

Variation of the return order

14. Paragraph 19 of the order dated 5 November 2024 is discharged subject to the terms and implementation of the return of the children to the USA as set out in this order and the return order is to take immediate effect.

Return order

15. The mother shall return or cause the return of the children, [A, date of birth] and [B, date of birth] forthwith to the jurisdiction of the United States

of America (State of Pennsylvania) pursuant to Article 12 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

16. The return order of 5 November 2024, shall be implemented by the mother accompanying the children to the USA on a direct flight to Philadelphia, Pennsylvania departing from a London Heathrow airport forthwith and in any event on a date no later than 12 August 2025, after the date upon which the order is immediately enforceable. ...

Disclosure of papers

21. There shall be permission to the parties to disclose the papers in these proceedings including the Court's judgment and orders to any lawyers that they may instruct in the USA in respect of any current or future proceedings in relation to the parties and/or children and to any Court in the USA seised of such proceedings. ...

Listing

24. This matter is listed for a remote hearing at 12 noon on 28 July 2025 for consideration of the practicalities of the return of the children to the USA. ...

Dated: 22nd July 2025"

40. A hearing on 28 July did not resolve remaining issues about the costs of the mother and children's travel.

The submissions on appeal

41. The sole ground of appeal, advanced by the children and predictably supported by the mother, is that the President was wrong to find that there had not been a fundamental change in circumstances which undermined the basis for the original return order. It is said that the President and UTJ Mandalia plainly considered it to be intolerable for the children to be placed into the custody and care of the father on return. However, as a result of the domestic order, it is now entirely in the gift of their father as to where and with whom they should be placed on their return. The children barely know their paternal grandmother. The President did not grapple with the effect of the US Order and the refusal to put in place a regime that reflected the basis on which the return order was made. There is no finding that the father can be relied upon to honour his agreement to the English court, even if the US Order in fact permitted him to do so. The children accordingly cannot be assured as a matter of law or fact that on a return they will not be placed in the care or control of their father before the matter comes to court. The protective steps required by the English court are now ineffective, and that was clearly a fundamental change of circumstances.
42. The father reminds us that welfare responsibility for children rests with the home state, that the Hague Convention is a limited jurisdiction, and that the power to set aside a return order is still more limited. He accepts that the children are experiencing extreme emotional and mental health issues due to their mother's behaviour. He further accepts that the foundation of the original return order was that the children are not to go into

his care upon their return to the USA. However, it was not regarded as intolerable for the children to remain temporarily in the care of another person (foster care or third party) pending an urgent hearing, and that underlying position has not fundamentally changed. While the details of the implementation arrangements have altered, the essential structure is principled and unchanged. Placement with a third party meets the criteria for both courts. The grandmother (with whom the children used to get on well, as the mother accepted in the tribunal proceedings) cannot be criticised as a short term carer. Her availability is the key reason why there has not been a fundamental change of circumstances. It was open to the mother to put forward someone of her own choosing, but she has not done so.

43. The father further argues that the President was entitled to be satisfied that the children would not be placed in his care and control, given that:
- 1) The US Order provides detailed protective measures for the children's return, including an immediate urgent custody hearing upon arrival, the father's discretion to allow temporary care by a known family member in response to emotional distress, daily unrestricted contact with the mother, and conditions restricting the father's contact with the mother;
 - 2) The father's position is that, pending an urgent hearing, he will not seek the children being placed in his immediate care or have any contact with them, and that, if the mother is detained on arrival in the USA, the children are to go into the paternal grandmother's temporary custody.
 - 3) The father has shown good faith, has complied with orders, and can be trusted to comply with his undertakings.
44. In any event, the original return order had contemplated and approved the return of the children to the USA without the desired arrangements in place, as it provided that the father would be released from his agreement to obtain an urgent hearing should the mother not agree to the consent order.
45. The parties made submissions about the position that would arise if this court held that the return order should have been reconsidered. In this respect, the father's fallback position was that the appeal should be adjourned to give the US court the opportunity to consider the up to date position.

Our decision

46. We can state our decision and reasons quite shortly. We remind ourselves that the proceedings from which this appeal arises concern the proper operation of the Hague Convention in the interests of children, and not the interests of parents. We share the concern expressed by the judges in both jurisdictions about the extreme delays since the children were abducted.
47. The starting point is that there is no issue about the correctness of the original return order that was decided upon in July 2024 and finalised in November 2024. These children should be returned to their native country as soon as possible for their futures to be decided in accordance with its laws and processes. We agree with the President

that neither the unavailability of foster care nor the passage of time comes close to establishing a fundamental change of circumstances.

48. At the same time there is an obligation on a court exercising Hague Convention powers to ensure that children are not placed in an intolerable situation on return. In the present case, the situation created by the mother led the President and UTJ Mandalia to conclude that a return into the immediate care of the father would be intolerable for them. As a result, the court took pains to devise protective measures to ensure that this could not happen until an urgent hearing before the Court of Common Pleas, which would then have the opportunity to assess the position as it actually stood. The intention behind the return order was that the children should remain with their mother in the unlikely event that she remained at liberty, and that they should otherwise be placed with a suitable third party or in foster care. Placement with the father in this period was not to be countenanced. That conclusion was based on a strong body of independent evidence about the children's actual situation. The central protective measure on which the return order was based was therefore that the custody order in the father's favour would be suspended or modified, allowing for the children to remain with their mother or, if she was unavailable, receive alternative care: see [49] of the original judgment and paragraph 19 of the order of 5 November 2024.
49. The Court of Common Pleas, for reasons that we respectfully appreciate, was unable and/or unwilling to endorse a foster placement. However, in contrast to the English court, it was also unwilling to allow the children to stay with their mother on return even if she was available to them. It further saw no reason why the children should not be placed immediately with their father, and provided for this in paragraph 3b of its order. The children can only be placed with a known family member under paragraph 3d thereafter, and only if the father then determines that they are experiencing extreme emotional or mental health issues while in his custody.
50. From the point of view of the English court and the parties, the US Order was unexpected. It undoubtedly represented a change in circumstances. The question is whether the change was of a fundamental kind that undermined the basis on which the original return order was made. The President reasoned that it was not because, referring to the original return order at paragraph 8(b) and the November parental agreement, the children would not go to the father but would be in some form of temporary care with another person. Accordingly, he found that the change had been to the detail of the return arrangement but that the basic structure remained the same. In any event, it was only to be a holding mechanism pending the emergency hearing.
51. It has not been suggested to us that the protective arrangements that the English court put in place were unimportant when it came to order that the children should be returned in the face of their strong objections. It need hardly be said that they are not responsible for their situation, and however much they may have been influenced by their mother, these children, now aged 11 and 13, have extremely strong feelings about their father. Those feelings do not have to be soundly based to be authentic. The return itself will be extremely difficult for them, particularly if their mother is arrested. The core protection that was promised to them by the original return order was the assurance that they would not be placed with their father on arrival, whatever happened and for however short a period. On any view of the US Order, it does not provide them with that assurance. They will go first to their father and he will, as Judge Rashid put it, "call the shots". That is not a legal nicety, but a matter of substance.

52. Seen in this way, we consider that the President fell into error by focusing on the arrangements that had been made within the English proceedings, when it is the regime provided by the US Order that will govern the arrangements after the children's arrival in America.
53. Close attention to the US Order shows that the programmes intended by the two courts do not differ in detail alone. The original return order provided that the children should optimally remain with the mother and should in no circumstances go to their father. Conversely, the US Order directs that the children shall go to the father and shall in no circumstances remain with their mother, even if she is free to remain with them upon return. We cannot envisage the original return order having been made if this outcome had been foreseeable to the English court. At a minimum, it would in our view have been bound to ask for further clarification of the effectiveness of its intended protective measures. As matters stand, the asymmetry between the US Order and the revised return order amounts to a conflict that leaves the children unprotected. The father's promise to the English court that he will leave the children in their mother's care (if she is available) is unacceptable to the court under whose jurisdiction the children will be placed immediately upon their return. Equally, his promise to surrender them to their grandmother so that they do not come into his care is at odds with the regime endorsed by that court. It is difficult to see how these matters could be overcome by the father under the US Order as it stands, regardless of whether he could be relied upon to act in good faith.
54. There is of course an outcome that may well be acceptable to both courts and that would resolve the difficulty that now arises. That is for the children to be placed with their paternal grandmother in America, if their mother is arrested on arrival and unavailable. Despite its inquiry, the US court was not offered this option, which has the approval of the English court. We regard the recent reservations expressed about the grandmother by the mother and children as counting for little in a situation of this gravity.
55. However, the fact that a regime might have been put in place by the Court of Common Pleas for the children to be placed with their grandmother does not mean that such a regime has in fact been put in place. On our analysis it has not. It also remains to consider the position if the mother is not arrested on arrival and is available to care for the children.
56. We have well in mind the high bar for reopening a return order, but we nonetheless conclude that the discrepancies in the legal and practical regimes that have emerged since the original return order was made can only be seen as a fundamental and undermining change in circumstances. We allow the children's appeal from the refusal of the applications to set aside the return order.
57. How, then, should this court dispose of the appeal? We have concluded that we should adjourn it for a fixed period to give a further opportunity for the Court of Common Pleas to consider the position in the light of the information that was not before it in May 2025, namely that a suitable family member other than the father is now available as a short term carer. It may be possible for the protective measures identified as necessary by the English court to be effected in Pennsylvania. A further hearing would also allow the Court of Common Pleas to consider the position of the children if their mother is not arrested but has had their travel documents removed from her.

58. It will of course be entirely a matter for the Court of Common Pleas as to whether it chooses to make any further order in the light of the new information, but we consider it to be in the interests of the children that such an opportunity should be afforded before we make final orders disposing of all aspects of this appeal.
59. This unusual course is justified because the courts in England and America have both reached the firm conclusion that these children should return to America, yet the children have now been in England for over three years. Having had the opportunity to study the proceedings in both jurisdictions, it is our respectful and considered view that the present difficulties might yet be overcome if each court has a fuller understanding of the other's perspective. It is in the children's interests that the decision-makers in each of the national jurisdictions should be fully aware of the up-to-date position in the other jurisdiction.
60. We shall therefore:
- 1) Set aside paragraph 11 of the order of 22 July 2025, whereby the applications made by the mother and the children for the return order to be set aside were dismissed.
 - 2) Adjourn the appeal on the basis that it is to be restored in no more than 90 days, so by 10 February 2026.
 - 3) Stay the return order contained at paragraphs 15 and 16 of the order of 22 July 2025, pending further order of this court.
 - 4) Cause a copy of our judgment and order, and the two judgments given by the President in this matter, to the International Family Justice Office (for the attention of the UK Hague Network Judge, Lord Justice Moylan), for onward transmission to the Hague Network Judge in the United States.
 - 5) Invite the parties to agree further interim directions to give effect to our decision.
-