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Case No: FD19P00401

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

31 October 2019

B e f o r e :

MR ROBERT PEEL QC

Sitting as a Deputy High Court Judge

Between:

KJC — **Applicant**

- and -

GRC — **Respondent**

Clare Renton for the Applicant
Michael Gration for the Respondent

Hearing dates: 30 and 31 October 2019

JUDGMENT APPROVED

Introduction

1. Article 1 of The Hague Convention states that its objects are:

> "(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

2. Article 3 prescribes that the removal of a child is to be considered wrongful where:

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

3. Article 12 requires a wrongfully removed child, who has been in the country to which he or she has been abducted for less than 1 year, to be returned to his or her home country 'forthwith'. That mandatory requirement applies unless a defence to a return is available under Article 13.

4. Article 13 provides:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-
>
> > (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
> >
> > (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
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> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

5. In **Re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51**, Baroness Hale of Richmond observed at para.48 that:

> "The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their 'home', but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed."

6. Before me is an application under the Child Abduction and Custody Act 1985 and the Hague Convention 1980 for the summary return of 2 children (both girls) aged 3 and nearly 2 to the United States of America. In December 2018 the Mother ("M") removed them from the jurisdiction of the United States, where they were habitually resident and had lived their entire lives.

7. The decision I must make, it should be emphasised, is not a welfare evaluation as to matters such as respective parenting abilities, with whom the children should live, the quantum of contact with the other parent and so on. It is a determination as to whether (i) the Hague Convention is engaged and, if so, (ii) there are one or more statutory exceptions to the principle that the child or children should be returned to the country of habitual residence where such decisions can then be made by the courts of that jurisdiction. As Mostyn J put it in **CA v KA [2019] EWHC 1347**:

> "The role of the 1980 Convention in such a case is procedural. It does not render any substantive relief beyond ordering a return of the child to the land of her habitual residence where the court of her homeland will make the substantive welfare decision. That the role of the court under the 1980 Convention is strictly one of being procedurally ancillary to the relief that will be rendered in the court of the home state is made clear by Article 7.3 of the 1996 Hague Convention, which the Supreme Court in *Re J* [2016] AC 1291] held substantially bolstered the operation of the 1980 Hague Convention. That provides:
>
> > "So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child."

8. The Father ("F") applied through the Central Authorities for return of the children (two girls) to the United States in July 2019. M resists the application. I remind myself that the burden lies on her to oppose the return and that the civil standard of proof applies, namely the balance of probabilities. She raises 2 defences:
   (i) F acquiesced in the retention of the children in this jurisdiction;
   (ii) There is a grave risk that a return would expose the children to physical or psychological harm, or would otherwise place them in an intolerable situation.

The evidence and submissions

9. I heard oral evidence from F, by videolink, strictly limited to the issue of acquiescence. I formed the view that he was sincerely attempting to help the court, did not tailor his evidence and was consistent in his presentation. Above all, he told me, his priority since December 2018 has been to re-establish a continuing relationship with his daughters. He regards M as an excellent mother and does not, in principle, object to the children living with her in England provided that he has regular time with the children, including in the United States.

10. I have had the benefit of reading the bundle in its entirety, together with a small supplemental bundle, and received written and oral submissions from counsel.

Background and facts

11. F was born in the United States and is a citizen of that country. He is 28 years old. He works as a manager in family owned car wash. M was born in England and is a citizen of the United Kingdom. She is 26. She has recently been offered a job as a teaching assistant in the UK.

12. In September 2013 M moved to the United States as a university student where she and F met. In 2014 their relationship started. Their first child was born on 27 February 2016. They married in the United States on 14 October 2017, a matter of weeks before the birth of their second child on 9 December 2017. Both children have United States citizenship. The family lived in California, in a house on the estate of F's parents.

13. There is no dispute that the children were habitually resident in the United States at all relevant times and that F had custody rights pursuant to Californian state law.

14. On M's case the relationship between the parties gradually deteriorated, probably as a result of F's regular (she would say daily) cannabis usage. Domestic violence and F's angry, volatile behaviour ran as an undercurrent through their time together, according to M. There is no suggestion of direct abuse towards the children but M says that they have been exposed to a household in which F has continuously denigrated and abused M. F disputes all the allegations made against him.

15. From September 2018 the parties attended couples' therapy. F started seeing an individual therapist and, in addition, a psychiatrist arranged for by his mother.

16. In early November, the couples' therapist contacted M's father in England suggesting that M should leave the United States immediately, basing her view on concerns about M's safety. F told me in evidence that the parties had on previous occasions discussed M and the children travelling to England for short periods of time (perhaps 2 months), to enable the girls to experience the world.

17. On 19 November 2018 the two therapists and the psychiatrist, according to the notes, "discussed [M's] plan to leave. We have agreed that it is best that [F] is made aware of this plan as opposed to [M] just leaving." In my judgment it is tolerably clear that F was in the dark at that stage about any imminent move to England and plainly therefore had not agreed to such a move.

18. According to the therapist notes of 26 November 2018 M and F "discussed her plans to leave with the girls to England. They agreed that this was temporary for now". I regard this discussion as (i) forming part of the general discussions about the future of the family, (ii) being held within a candid forum where each party was invited to

participate fully in therapy in order to attempt to salvage the relationship and (iii) amounted to consideration of a temporary arrangement rather than a permanent move. To my mind, there was no settled agreement to a move to England.

19. According to M, the session to which I have referred "riled" F which to my mind suggests he was far from endorsing a plan to leave for the United Kingdom.

20. On 2 December 2018 there was, according to M, an incident of violence to which the police were called. The very next day M booked tickets to the UK. The purchase of tickets by M was not as a result of an arranged, pre-planned move with F, on a date agreed between them and with plenty of advance notice. Rather, it was, in my judgment, a precipitous decision by M as a result of an unpleasant incident which led her to decide, definitively, that her future with the children lay elsewhere.

21. On 4 December 2018 M and the children flew to the United Kingdom. F was aware of her departure but it cannot be said (nor, in fairness, does M so contend) that he "consented" to the children's departure in clear and unequivocal terms; there is simply no evidence to that effect. Indeed, the tickets she bought were on a return basis, the date of return being 28 February 2019. M says that the return flights were cheaper; that may be so, but it was reasonable for F to assume that she and the children would return on 28 February 2019.

22. For the avoidance of doubt, I am clear that F did not consent to any permanent removal of the children to this jurisdiction on 4 December 2018. M did not seek to argue otherwise.

23. Although the dates are not entirely clear, it appears that after arriving in the United Kingdom M told F that she and the children would not return. Once in the UK, M told F she would not return. In early February they had an exchange of text messages which record discussions about the children's future. M wrote "They will live with me in England, you can visit whenever you like and have them summer holidays". F replied that they should spend 6 months with each party until starting school, and then with F all holidays and summers.

24. On 18 February 2019 English solicitors instructed by M wrote to F. The letter records that "There then followed a meeting between you, [M] and the three medical professionals involved with your family. During the meeting concerns were raised about your behaviour and the impact it was having on [M] and the children. It was agreed that [M] would return to the UK with the children in order to give her the rest that she needed and you the opportunity to work on yourself and your own issues. It was agreed that you would continue to speak with the girls and that the arrangements for them would be assessed in due course". Further on, it is said that "[M] therefore proposes to remain in the UK with the children for the time being to give you the opportunity to continue working on yourself so that you can return to full health". The balance of the letter made various proposals for contact. It seems to me that the

suggestion in the letter is of a temporary arrangement, consistent with the temporary move envisaged in the therapist notes of November 2018.

25. On 24 February 2019 (4 days before the assumed return date) F texted M to say "Why are you doing this?" "Please call me back I'm answering" and "Go ahead and keep the girls as long as you need. I can't keep this up anymore. Sorry it ended like this". I am struck by the emotion, worry and note of despair in those messages which were sent immediately after receipt of solicitors' correspondence. F told me, and I accept, that his principal concern was to be able to contact the children. At that time, he had not contacted lawyers and was not aware of the Hague Convention and his rights thereunder.

26. On 13 March 2019 F's newly instructed lawyers in California wrote to M's lawyers:
    (i) Asserting F's custody rights;
    (ii) Asserting wrongful retention by M under the Hague Convention;
    (iii) Proposing that California should have jurisdiction over child welfare issues;
    (iv) Suggesting a parenting plan under which the children would live with M and have contact with F;
    (v) Stating that "If no agreement as to a parenting plan can be reached, F is demanding the children return to live in California no later than April 15, 2019".

    F was plainly stating that he opposed the children staying in England unless all welfare issues were resolved. I do not read this letter as in any way indicating consent or acquiescence to M retaining the children in England. On the contrary it expressly reserved F's rights unless and until a parenting plan was agreed. The letter was part of an ongoing, fluid situation in which the parties were endeavouring to reach overall agreement.

27. On 2 April 2019 M's solicitors replied. Compromise on residence and contact issues was not reached. It is of some note that no mention is made in this letter of any suggestion that F had acquiesced to retention or, to put it another way, any suggestion of a clear agreement on F's behalf to M and the children living permanently in this jurisdiction.

28. It seems that limited correspondence between lawyers to attempt to resolve all issues continued, without success. Similarly, and unsuccessfully, the parties communicated with each other to discuss parenting matters. On 2 June 2019 text messages between M and F discussed possible contact arrangements. I am struck by the cordial, friendly and cooperative nature of the messages. In particular, they appear to have agreed in principle that M and the children would return to the United States for a period of time to facilitate contact between F and the children. In his evidence, F said that he envisaged the children returning to the United States whereas the last text message says "Yes they will go to school there [i.e. in the UK] I agree". It was suggested by M's counsel that F, far from requiring a return of the children to his homeland, was envisaging the children living permanently in England. I disagree. His evidence to

me about the children being returned to the United States was, in my view, a reference to the anticipated trip by the children to see him there rather than a condition precedent to ongoing negotiations. The reference to the school was part of a continuing theme whereby the parties were having sensible discussions about what should happen on the ground; in this case the need for schooling arrangements to be made.

29. On 5 June 2019 M issued divorce proceedings in this jurisdiction.

30. On 28 June 2019 F instituted divorce and custody proceedings in California.

31. In September 2019 there were further text exchanges between the parents about possible contact dates for the children and F. By that time, of course, Hague Convention proceedings had been instituted. They formed part of a continuing pattern of seeking to make sensible arrangements.

32. In my judgment, the discussions after December 2018 between the parties focussed, sensibly, on trying to reach agreement on all matters. F told me that he considers M to be an excellent mother. He does not see to displace her as primary carer. Nor does he object, in principle, to a Californian court giving her permission to relocate to England with the children provided that a contact arrangement is in place. Sadly, overall agreement was not reached.

The Mother's United States immigration status

33. On 14 December 2018, just after leaving for England, M received a conditional Green Card based on her marriage to F, entitling her to remain in the United States for 2 years pending determination of her application for a permanent Green Card.

34. In her statement, M asserts that by living in the United Kingdom for an appreciable period of time, she may have broken a condition of the Green Card, namely continuous residence in the United States. Her card may no longer be valid. She may be restricted to the ESTA visa waiver scheme entitling her to stay in the country as a tourist for a maximum of 90 days. F in his statement disputed this.

35. In M's counsel's written submissions (but not, I observe, in her written evidence) it is said that:

    (i) Upon advice from the United States embassy M is required to relinquish her conditional Green Card and she accordingly sent it to Boston on Monday (2 days before this hearing) to be processed.
    (ii) Until this is processed, she would not be eligible for the ESTA programme entitling her to visit the United States for 90 days. The process could take up to 2 months.

    F's legal team were not informed of this until the hearing.

36. When the matter came before me, I gave M permission to place before me website print-offs from US departments. During the course of the first day I raised queries about the immigration position. Overnight, F obtained some informal advice from a Californian lawyer which suggested that provided she returns within 1 year of her departure from the United States, M may be able to ensure continuity of the conditional visa, albeit the lawyer was not made aware that M had apparently set in train the process of relinquishing her Green Card.

37. From the website material, it appears that the US authorities (i) presume that an absence of more than 6 months breaks the condition of continuous residence but (ii) the applicant (M) may be able to overcome the presumption depending on individual facts and (iii) absence for more than 1 year automatically breaks continuous residence. Here, the 1-year period ends on 3rd December, a matter of about 1 month away (12 months after departure) or, possibly, 13 December (12 months from the date of grant of the conditional green card). Of course, if M's Green Card has been relinquished, none of this matters.

38. It is unfortunate that neither party addressed this at case management hearings. It is an issue upon which M relies as part of her Article 13(b) defence. No expert evidence was adduced. M's own evidence is limited. The absence of solid evidence is unsatisfactory. I must do the best I can on the evidence available.

Acquiescence: The Law

39. The nature and meaning of acquiescence is authoritatively explained in **In re H [1998] 1 AC 72**. Per Lord Browne at 90E-G:

> To bring these strands together, in my view the applicable principles are as follows:
>
> 1. For the purposes of Article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in *In re S. (Minors)* "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact".
> 2. The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.
> 3. The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.
> 4. There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.

40. In **P v P [1998] 1 FLR 630** Hale J (as she then was) said, at 635:

> "This case has all the hallmarks of what no doubt frequently occurs in these cases, of parents seeking to compromise a situation, allowing the abducting parent to remain in

> the country to which he or she has gone provided the wronged parent is satisfied as to the other matters which are in issue between them. Only if there were such a concluded agreement could it be said that there was clear and unequivocal conduct such as to fall within the exception….it would be most unfortunate if parents in this situation were deterred from seeking to make sensible arrangements, in consequence of what is usually an acknowledged breakdown in the relationship between them, for fear that the mere fact that they are able to contemplate that the child should remain where he has been taken will count against them in these proceedings. Such negotiations are, if anything, to be encouraged. They should not therefore necessarily fall within the exception or necessarily lead to the conclusion as a matter of fact that there was a subjective state of mind that was wholly content for the child to remain here."

41. In **P v P [1998] 2 FLR 835** the Court of Appeal held that without prejudice discussions about the child remaining in England did not amount to the father forsaking the right to seek return of the child.

Article 13(b): The Law

42. The leading authority is **Re E (Children) (Abduction: Custody Appeal) [2011] 2 FLR 758, SC**. I gratefully adopt the distillation by Macdonald J at para 67 of **Uhd v McKay [2019] EWHC 1239** of the applicable principles therein, namely:

> "(i) There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
>
> (ii) The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.
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> (iii) The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.
>
> (iv) The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.
>
> (v) Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.
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> (vi) Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a

return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b)."

43. In **Re D [2007] 1 FLR 961** at paragraph 54, Baroness Hale characterised "intolerability" thus:

> "'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'. It is, as Art 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus, the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there."4

44. As Macdonald J pointed out in Uhd v McKay, the evidence cannot be viewed entirely in the abstract, or with no critical appraisal. The court is entitled to weigh all the evidence and make an assessment about the credibility and substance of the allegations. He referred to dicta from Moylan LJ in **Re C (Children) (Abduction: Article 13(b) [2018] EWCA Civ 2834** and said this at paras 70-72:

> "70.In the circumstances, the methodology articulated in *Re E* forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see *Re S (A Child)(Abduction: Rights of Custody)* [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.
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> 71.That the analytical process described in *Re E* includes consideration of any relevant objective evidence with respect to risk is further made clear in the approach articulated by Lord Wilson in *Re S* to cases in which it is alleged, as it is in this case, that the subjective anxieties of a respondent regarding a return with the child are, whatever the objective level of risk, nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable. As noted above, in *Re E* the Supreme Court made clear that such subjective anxieties are, in principle, capable of founding the exception under Art 13 (b). However, it is also clear from the decisions of the Supreme Court in *Re E* and in *Re S* that there are three important caveats with respect to this principle.
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> 72. First, the court will look very critically at an assertion of intense anxieties not based upon objective risk (see *Re S (A Child) (Abduction: Rights of Custody)* at [27]). Second, the court will need to consider any evidence demonstrating the extent to which there will, objectively, be good cause for the respondent to be anxious on return, which evidence will remain relevant to the court's assessment of the respondent's mental state if the child is returned (see *Re S (A Child)(Abduction: Rights of Custody)* at [34] and see also *Re G (Child Abduction: Psychological Harm* [1995] 1 FLR 64 and *Re F (Abduction: Art 13(b): Psychiatric Assessment)* [2014] 2 FLR 1115). Third, where the court considers that the anxieties of a respondent about

a return with the child are not based upon objective risk to the respondent but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise the respondent's parenting of the child to a point where the child's situation would become intolerable, the court will still ask if those anxieties can be dispelled, i.e. whether protective measures sufficient to mitigate harm can be identified (see *Re E (Children)(Abduction: Custody Appeal* at [49]). Within this context, in *Re S* Lord Wilson observed at [34] as follows:

> "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 courts mental state if the child is returned".

45. In considering the Article 13(b) defence, the court is duty bound to consider what protective measures can be put in place. Article 11(4) of Council Regulation 2201/2003 is as follows:

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

46. Williams J summarised the use of protective measures thus in **A (A Child) (Hague Abduction: Art 13(b) Protective Measures [2019] EWHC 649**:

> "23. Article 11(4) of BIIA rules out a non-return where it is established that adequate protective measures are available. The Practice Guide makes clear that this is intended to address the situation where authorities have made or are prepared to make such arrangements. The Court of Appeal has recently confirmed that protective measures include all steps that can be taken, including housing, financial support, as well as more traditional measures such as non-molestation injunctions (see *Re C* [2018] EWCA Civ 2834).
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> 24. Protective measures may include undertakings, and undertakings accepted by this court or orders made by this court pursuant to Article 11 of the 1996 Hague Child Protection Convention are automatically recognised by operation of Article 23 in another Convention state (see *Re Y (A Child) (Abduction: Undertakings Given for Return of Child*). To be enforceable they must be declared enforceable pursuant to Article 26. The 1996 Hague Convention Practical Operation handbook provides examples of measures which might be covered by Article 11. European Regulation 606/2013 on the Mutual Recognition of Protection Measures in Civil Matters sets up a mechanism allowing for direct recognition of protection orders issued as a civil law measure between member states, thus a civil law protection order such as a non-molestation order or undertaking issued in one member state, can be invoked directly in another member state without the need for a declaration of enforceability but simply by producing a copy of the protection measure, an Article 5 certificate and where necessary a transliteration or translation.

25.A protection measure within that is defined as any decision, whatever it is called, ordered by an issuing authority of the member state of origin. It includes an obligation imposed to protect another person from physical or psychological harm. Our domestic law provides this court can accept an undertaking where the court has the power to make a non-molestation order. Thus, it seems that a non-molestation undertaking given to this court could qualify as a protection measure within the European Regulation on protection measures. "

47. In some cases, the abducting parent is unable to return to the country of habitual residence with the children for reasons beyond his or her control (to be contrasted with those cases where the parent elects not to return with his or her children). In **Re W [2018] EWCA Civ 664** the issue facing the court was an unexpected permanent bar to the mother's return to the United States because of her inability to obtain a visa. The first instance judge ordered a return. Allowing the appeal Moylan LJ said:

> 57. Putting it simply but, in my view, starkly, if the children were to be returned to the USA without the mother, the court would be enforcing their separation from their primary carer for an indeterminate period of time. It would be indeterminate because the court has no information as to when or how the mother and the children would be together again. These children, aged 5 and 3, would be leaving their lifelong main carer without anyone being able to tell them when they will see her again. In my view it is not difficult to describe that situation, in the circumstances of *this* case, as one which they should not be expected to tolerate. I acknowledge that the current situation has been caused by the mother's actions, and that she was herself responsible for severing the children from their father but, as referred to above, the court's focus must be on the children's situation and not the source of the risk.
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> 58. It is therefore clear to me that if the judge had analysed all the circumstances from the children's perspective she would have come to the conclusion that to return the children to the USA when the mother had been refused a visa would be to place them in an intolerable situation.
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> 59. Accordingly, I propose that the appeal should be allowed and that the provision in the order that provides for the return of the children without the mother in the event of her visa application being refused, be discharged. This does not mean that the children will not be returned to Texas. On the contrary, provided a visa is granted to the mother by the authorities in the requesting state, the children will return. Moreover, the judge's order contained a provision (paragraph 17) granting the parties liberty to apply as to the timing and implementation of the order. If there is any indication that the mother is not pursuing her visa application, the matter can be restored to the judge for further directions.

It is of significance that on the unusual facts of that case the mother had no right of re-entry at all. Here, M can re-enter; the question is whether she will be entitled to remain beyond 90 days.

48. In general, immigration difficulties, which are relatively common in these cases, do not by themselves establish the Article 13(b) defence. It is a question of assessment of risk as part of the overall Hague Convention evaluation. In **Re R [2005] 1 FLR 33**, for example, the mother's ability to re-enter Germany for only a short period of time did not prevent a return order. A similar outcome cane be found in **Re K [1995] 2 FLR 550.** I note also **Re GP [2017] EWCA 1677** which mandates the court to "examine in concrete terms" the position to be faced by a parent upon return; if the judge has insufficient information, consideration should be given to an adjournment to obtain appropriate evidence.

49. Miss Renton, on behalf of F, has referred me to an extract from "The Hague Child Abduction Convention" by the well known academic Rhona Schuz in which it is said, as part of an overview of the approach to the Hague Convention throughout the signatory countries, that "In some of these cases the courts have indicated that they would be willing to accept the claim of intolerable situation if all efforts to obtain permission to enter the following country fail".

Discretion: The Law

50. Should one of the exceptions be established, that is not the end of the matter. The court is required to go on to consider whether, notwithstanding the availability of the defence, the child should nevertheless be returned. This is an exercise of discretion. Macdonald J put it thus in **TY v HY (Return Order) (Rev 1) [2019] EWHC 1310** at paras 48-49:

> "48. Establishing one of the exceptions under the 1980 Convention merely 'opens the door' to the exercise of a discretion whether or not to order the child's immediate return. Were this court to be satisfied that either or both of the exceptions under Art 13 are made out in this case, the court retains a discretion to order the summary return of the NY to the jurisdiction of her habitual residence notwithstanding that conclusion (see *Re M (Abduction: Rights of Custody)* [2008] 1 AC 1288).
>
> 49. The discretion is at large and it is wrong to import any notion of exceptionality with respect to the discretion. The court is entitled to have regard to the policy aims of the Hague Convention, namely that questions regarding the child's welfare should be determined in the country of their habitual residence. Other factors relevant to determining the question of whether the court should exercise its discretion to order a return will include (but will not be limited to) the child's degree of connection to each country (in the sense of with which country does the child have the closer connection in terms of his life, his first language, his race or ethnicity, his religion, his culture, and his education so far), the length of time the child has spent in the country and the effect of the decision on the child's primary carer. In the context of non-Hague cases, the Supreme Court has held that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there (***Re J (A Child)(Custody Rights: Jurisdiction)*** **[2006] 1 AC 80** at [32]). "
>
> 50.It is the case that the authorities suggest that it will be rare to exercise the discretion to order return of the child where the court is satisfied that the consent exception is made out, as was made clear in *Re K (Abduction: Consent)* [1997] 2 FLR 212 at 220. However, it is important to consider the facts of that case. In *Re K (Abduction: Consent)* the father consented to an English mother returning home to England, her home country where her own parents lived, the mother having moved to the father's home country only after their marriage. There are also examples of the discretion to return being exercised notwithstanding the exception of consent being established. In *Re D (Abduction: Discretionary Return)* [2000] 1 FLR 24 Wilson J as he then was ordered the return of the children to France notwithstanding the mother's consent. Again, it is important to examine the facts of that case. Unlike *Re K (Abduction: Consent), Re D (Abduction: Discretionary Return)* was not a case of one parent consenting to the children being removed to the country of the other parent's birth, where that parent had grown up and had family. Rather, in *Re D (Abduction: Discretionary Return)* the consent had been given by the mother to the children being removed to a country in which neither parent had any connections or family. Within this context, Wilson J exercised his discretion to return the children notwithstanding the mother's consent having been established in circumstances where:
>
> > "These children lived in France throughout their lives until December 1998. Their first language is French. Their father is, of course, a French speaker. The mother

> speaks French much better than she speaks English. The family had no connection with England until, in about 1997, the father came from Scotland to live here. And, in the light of the interview with A, there is no difficulty about the children accepting an order that they should go back to France."

51. I note also that the precarious US immigration status of the mother in **re L-S [2017] EWCA 2177** was also held to be a relevant feature of the case, albeit, unlike in **Re W,** sounding in the discretionary exercise rather than at the Article 13(b) stage.

Inherent jurisdiction

52. F's counsel flagged up in her written submission an alternative formulation for a return order under the inherent jurisdiction. In the light of the Supreme Court decision in **Re NY [2019] UKSC 49** handed down this morning, that submission is withdrawn and I need say no more about it.

Discussion: consent and acquiescence

53. M's case is that after she left the United States F acquiesced in her retention of the children in this jurisdiction. She asserts that:
    (i) F's state of mind had clearly settled on an agreement to M and the children remaining in the United Kingdom;
    (ii) Alternatively, even if he had not settled that view in his own mind, his conduct clearly and unequivocally led M to so believe and it would be wrong to require a return.

    M asserts that the date of acquiescence was either 24 February or 2 June; on each of those dates. She says, messages were sent which demonstrate acquiescence under either limb.

54. I reject this argument:

    (i) The context of the removal was an expectation on F's part that it would be temporary.
    (ii) For much of 2019 the parties had regular discussions, including through lawyers, to try and resolve all welfare matters. F did not at any stage formally relinquish his right to apply under the Hague Convention, for example by solicitors' letter.
    (iii) The text message of 24 February was, as indicated above, an emotive message sent just after he had received a letter from M's solicitors and shortly before the children were due back in the United States on the return tickets. It is not a clear, considered and measured acquiescence to retention (or, perhaps, anticipatory consent to retention as may be a better categorisation given the expected anticipated return date was a few days later). Further, on the evidence he had not consulted solicitors and could not give informed consent to rights of which he was not aware.

(iv) The messages on 2 June 2019 were exchanged after F's Californian lawyers had clearly set out F's position, including specifically reserving his right to apply under the Hague Convention. I regard these messages as being primarily about contact in the United States, and not agreement to permanent retention in England.

(v) Having heard F's evidence, I am quite satisfied that he had not formed, in his own mind, a clear agreement to retention by M in the United Kingdom.

(vi) Further, the text messages do not present as clear and unequivocal evidence justifying M to believe that F had acquiesced. Essentially, M's case boils down to the content of a handful of text messages (arguably only 2) on 2 dates during some 9 months or so. That is not a bar to establishing the defence but, in this case, it is thin indeed.

(vii) The fact that the parties had sensible, constructive discussions, through lawyers and in person, about the children's arrangements is a considerable distance away from the sort of clear, concluded agreement envisaged by Hale J in **P v P [supra].**

Discussion: Article 13(b)

55. M relies on 2 submissions:

(i) The pattern of domestic violence and abuse is such that the threshold is crossed; and/or

(ii) Assuming M is unable to return to the United States for longer than 90 days, the potential consequences for the threshold in being separated from M are such that the threshold is crossed.

56. As to the first submission, M's case is that she was subject to extensive personal abuse by F, occasioned by his regular cannabis usage. She lists numerous incidents in her statement and the notes of the therapist record similar references, although I remark that there is no mention of cannabis use therein. M sets out a pattern of anger, shouting, volatile behaviour and unreliability. In 2016 she says that F threw her down the stairs in a fit of temper. He has tried to choke her and has thrown her to the floor. In 2018 he smashed her laptop and dragged her across the garden. Again in 2018 he was out of control, flooded the bathroom, spat at and hit M. In late 2018 he killed a chicken in front of M. On 2 December 2018, the incident which provoked M's departure, he smashed a cupboard door in M's face. Other, similar incidents, are relied upon. F denies any such behaviour on his part, but it seems to me that I should take the allegations at face value for these purposes, without in any way making findings of fact.

57. M does not allege that the children have been directly abused but she says that they have witnessed the abuse in the family home and have been exposed to coercive, volatile and violent behaviour.

58. I do not underestimate how terrifying these incidents must have been assuming, as I do, that something along these lines took place. But I must consider whether these matters cross the Article 13(b) threshold. In my judgment, they do not:

(i) Provided that F and M do not live with each other, and come into contact with each other to a minimal degree and only for the purposes of contact, the risk to the children is heavily circumscribed.

(ii) There is no evidence that the children will be directly placed in harm's way if returned to the United States. The risk to them is being present during episodes of anger, violence and other abuse as between their parents, and as a consequence exposed to a risk of emotional harm.

(iii) M has consistently stated, during discussions between the parties and their solicitors, that the children can have extended periods of contact with F, including during holidays. She does not place centre stage any direct risk posed to the children by F. The text messages between the parties, particularly those of 2 June 2019, do not evidence any fear or apprehension on M's part. On the contrary, she was envisaging returning to the United States with the children for a period of time to facilitate contact. This to my mind is powerful evidence contrary to M's case that she and the children would be exposed to a risk of harm. If she was prepared to return with them for contact measured in weeks, why would she be at any greater risk if she and they return until the Californian court determines all welfare matters?

(iv) There is no medical or other expert evidence to the effect that the impact upon M's state of mind of a return order would be so severe as to impair her ability to care for the children and thereby place them in an intolerable position.

(v) Protective measures can be put in place to ensure that M (and therefore the children) are properly protected upon return to the United States. F has offered a number of undertakings which seem to me to be appropriate:

  (a) He will pay for the return flights
  (b) He will not meet M or the children at the airport
  (c) A non-molestation undertaking
  (d) He will not use drugs near the children
  (e) He will not support any proceedings in the United States relating to any allegation of child abduction.
  (f) He will ensure that M has exclusive use of the car.
  (g) He will pay for any application by M for a fresh visa or continuation of existing visa.
  (h) He will provide M with $3,070 per month from the time of return to cover rental and living costs.

  There may be further protective measures as agreed between the parties.

(vi) I am entitled to assume that the State of California has a variety of measures available to the court and appropriate authorities to protect both M and the children, and that M will proactively take such steps as she considers appropriate to avail herself of such safeguarding measures.

59. As to M's additional submission, namely her uncertain immigration position, in my judgment I have sufficient information to reach a considered decision, notwithstanding the unsatisfactory way in which this issue has developed before me.

60. On the face of M's case, she may be unable to return to the USA until her conditional Green Card is relinquished (which will take up to 2 months). Thereafter, she would be entitled to enter and remaining in the United States for up to 90 days under the ESTA scheme. Although I have described the state of evidence as unsatisfactory, it does now seem clear that as a minimum she will be entitled to entry under the ESTA scheme; the only uncertainty is whether she will be prevented from so doing for up to 2 months.

61. If I were to order a return in circumstances where M cannot accompany the children because she would be refused entry to the United States, the consequences for these young children would be, to my mind, very serious indeed. She has always been their primary carer, particularly in the 10 months or so since coming to England. All the discussions have been on the basis of the children living with M. F regards her as an excellent mother. Separation of the children from their mother in such circumstances would carry grave consequences indeed. However, on the information before me, there is a maximum period of 2 months until the conditional green card is relinquished and during which M may be prevented from entering the United States. Thereafter, M can accompany the children under the ESTA scheme.

62. Having given the matter considerable thought, I am persuaded that the question marks about M's immigration status in the United States do not establish an Article 13(b) defence for the following reasons:

    (i) I remind myself that it is M who relies on the defence and must establish it. She has not produced expert evidence, the material she relies upon consists of website printouts and she did not seek case management directions to address the issue.
    (ii) M is the cause of the immigration difficulties. She left the country just before she was granted the conditional green card and did not return, even for short periods of time, to ensure its continuity. She has submitted the card to be relinquished without either notifying F's legal team or, so it appears, taking specialist US immigration law advice.
    (iii) M is able to enter the United States for at least 3 months (unlike the situation in **Re W** where the mother was permanently barred from entry). That is, in my judgment, sufficient time for the United States court to seize the relevant welfare issues. I bear in mind also that the ESTA permits multiple 90 days visits within its 2 year validity.
    (iv) The purpose of the Hague Convention depends upon mutual cooperation between signatory states. I am entitled to assume that the United States courts and authorities will deal appropriately and justly with issues such as this arising out of abduction cases. I note the passage in Clarke Hall and Morrison at 5-127 where it is said that "…US rules have since been eased through the use of significant public benefit parole to facilitate the return of an abductor who might otherwise have no right of entry".

63. However, I am satisfied that if M were unable to accompany the children back to the United States, that would constitute an intolerable situation for the children and expose them to a grave risk of harm. Although the evidence on this is thin, M's case at its highest is that it will take up to 2 months before she will be able to enter under the ESTA scheme. I am willing to accept this at face value. It seems to me, therefore that the options are (i) to order a forthwith return, placing the onus on M to apply back to court for an extension of time if she is able to satisfy the court that she is unable at present to enter the United States for reasons beyond her control or (ii) to make an order for return by no later than 2 months from today. I prefer the latter course. That allows M time to regularise her immigration position and should avoid the need for further applications to court.

64. I propose to make an order for return on the basis of the protective measures outlined above, such return to take place by no later than 2 January 2020.

65. I encourage the parties to reach agreement about contact in the meantime.

Other

66. F confirmed to me in evidence that:
    (a) His overwhelming priority is to have contact with the children.
    (b) He regards M as "a great Mom".
    (c) He does not seek to displace her position as primary carer of the children.
    (d) He agreed that, in principle, if M is, after return, required subsequently to leave the United States because of immigration problems, the children should go with her and not be separated from her.
    (e) He does not object, in principle, to M and the children relocating from the United States to England provided that he has regular contact with the children.

67. I invite the Californian court to bear such matters in mind when deciding welfare issues. That said, welfare decisions will be made in California and will be entirely a matter for the Californian court.

Conclusion

68. I shall make a return order in the terms above, and on the basis of the protective measures outlined. There shall be liberty to apply as to implementation. This judgment shall be made available to the Californian court.