



Neutral Citation Number: [2022] EWHC 1429 (Fam)

Case No: FD20P00888

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2022

Before:

MRS JUSTICE THEIS

Between:

B
- and -
N

Applicant

Respondent

Ms Cliona Papazian (instructed by **Makin Dixon Solicitors Ltd**) for the **Applicant**
Ms Maggie Jones (instructed by **Ben Hoare Bell LLP**) for the **Respondent**

Hearing dates: 23rd and 24th March 11th and 13th April 2022
Judgment: 25 May 2022

Approved Judgment

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MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1. The court is concerned with an application by the father under the Child Abduction and Custody Act 1985 for an order pursuant to Article 12 of Hague Convention on the Civil Aspects of International Child Abduction 1980 (“the Hague Convention”) directing the summary return of X, age 5, to Germany. X has been in the care of his mother in this jurisdiction since September 2020.
2. The father’s application is opposed by the mother, who defends the application on three grounds:
 - (1) That Article 3 of the Hague Convention is not engaged, as the child’s habitual residence was not in Germany at the time of the alleged wrongful retention.
 - (2) The father consented or acquiesced to the child being in this jurisdiction.
 - (3) There is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation under Article 13 b
3. As well as considering the trial bundles the court heard the oral evidence of both parties, focussed on the issue of habitual residence and the mother’s defence of consent. The court is grateful to both counsel for their assistance in their detailed and helpful written and oral submissions.
4. Before turning to the background I would like to make some comments about the delay in these proceedings.
5. This matter was first listed for a two day hearing on 17 February 2022. That hearing could not proceed as there was a lack of clarity as to whether the six statements filed by the mother had been signed or needed to be interpreted or read to her. The mother required an interpreter at the hearing. In the end I had to adjourn that hearing and direct that the mother filed an additional statement which addressed the way the statements had been prepared. Part 22 of the Family Procedure Rules 2010, together with Practice Direction 22A, make it clear what the requirements are for statements in such circumstances, with the need for clarity in the declaration at the end of the statement whether it has been read to or interpreted to the maker of the statement. Inevitable delay will happen in hearing these cases if that basic requirement of the rules is not adhered to.
6. During the father’s oral evidence at the adjourned hearing on 23 March 2022 it appeared that the WhatsApp messages attached to his statement had been self-selected by him to be only what he deemed to be relevant and other messages were available that covered the relevant period. Those missing messages not only needed to be produced (amounting to 43 pages) but the mother needed an opportunity to consider them, which resulted in a further adjournment until 13 April 2022.

Relevant background

7. The applicant Father, 58 years, is a German national who had business interests in Uganda, and regularly travelled there from Germany. The respondent Mother, 33 years, is a Ugandan national.
8. The parents met online in 2013 and had a short relationship. The mother became pregnant and gave birth to X in late 2014. The father has 4 children. An adult son, D, who lives with him in Germany. He has another son, A, who lives with his mother and half-sister in Uganda along with A's half-sister, E, whom the father adopted. The mother has 2 other children, both boys, who remain in Uganda.
9. According to the father, there was an agreement between the parties at the time of the birth that X should live in Uganda whilst he was young and then move to Germany when he was a little older, attend school there and spend holidays with his mother in Uganda. The mother denies there was any such agreement. She maintained she was content for X to have dual citizenship with a German passport and identity card and signed documents that enabled the father to claim child benefit for him in Germany, but does not accept the agreement was reached in the way the father describes at the time of X's birth for X to move to live with the father once he was school age.
10. The mother maintains the father did not see X until he was two years old. The father says he first saw X when he was about six months old, thereafter travelling to Uganda 4 – 5 times a year, staying for periods of up to 2 – 3 weeks. X remained living with his mother throughout this time.
11. On 24 August 2017 X obtained a German passport, which is valid until 23 August 2023. The father says that passport has now been lost.
12. On 6 May 2018 the mother signed a letter to the Immigration Office in Germany stating *'I write to introduce to you my son above as his biological mother am a Ugandan citizen. I agree with his biological father [name] a Germany [sic] citizen to travel with him for the month of May and also acquire for him a German identity card. Any assistance given will be highly appreciated.'* The father says this letter was part of the overall plan for X to be able to go and live in Germany.
13. The father and X went to Germany for 17 days between 7 and 24 May 2018.
14. On 17 May 2018 the mother signed a document that was in German, which has been translated in these proceedings. It states with effect from 8 May 2018 the child will reside *'For the most part with the father in his main residence additionally with the mother as a second residence'*. The document was in German. The mother states she was only sent the last page to sign, with an 'x' being marked where she should sign with no real understanding about what it said. The father says he interpreted the document for the mother before she signed it, which the mother denies.
15. The father and X returned from Germany to Uganda on 24 May 2018. According to the father X had further trips to Germany with the father between 11 to 26 June 2018, 30 July to 19 August 2018, the mother did not accept X had been on these trips. By the time of this hearing the father said X's passport was lost. In September 2018 the mother, father and X went to Germany for 10 days, they also visited Paris. It was during that

visit the father took the mother to the relevant government offices in Germany to finalise the arrangements for payment of child benefit for X. There was a further trip to Germany with just X and the father between 31 October and 24 November 2018, the mother did not accept X went on this trip. In December 2018 X went to Germany with the father for 21 days and the mother joined them for part of that visit. During 2018 the father spent extended periods staying in Uganda totalling about 108 days, during which time X remained living with his mother and attended nursery school.

16. Apart from the trips outlined above the mother states X remained based in Uganda during 2018 and produced X's nursery report card dated 27 April 2018 and 17 August 2018, as well as pictures from the end of year celebrations in November 2018 from the nursery he attended in Uganda. In oral evidence the father agreed he had visited Uganda for extended periods of time in 2018 and when he was there X stayed with the mother and attended nursery.
17. In 2019 the father travelled to Germany on 11 February 2019 until 31 March 2019, the father says X joined him on that trip, which the mother does not accept. He left again with X on 29 April 2019 to go to Germany, X has not returned to Uganda since then. The mother's case is she understood that to be only another short term visit and relies on a letter she has produced dated 31 May 2019 which states she agrees to X going with the father for a two week holiday. The father questions the authenticity of this letter, stating it makes no sense as it is written after the father and X had left.
18. In messages between the parties on 14 May 2019 there were exchanges about X's understanding of time and when he would come back to Uganda and the mother says '*I swear you will see me on the next flight, I don't even know where I would get the money for an air ticket*'.
19. The messages continue to show the mother repeatedly asking for X to be brought back to Uganda in messages on 6, 16 and 21 June 2019 which the father responds to giving various reasons, none of which refer to X having moved to live in Germany. In July there are similar message exchanges, with the mother expressing her increasing frustration at X not returning to Uganda. In the messages the father refers to business reasons preventing him from returning to Uganda. In his oral evidence he said it was also due to his concerns about the implications for X as the father had understood the mother had commenced a same sex relationship in Uganda. In August the mother accuses the father in one of the messages of taking her son from her, the father responds denying this saying the mother will get him soon.
20. On 5 September 2019 the mother refers in a message to it being X's birthday soon, she asks for a date for X to come to Uganda. The father responds saying he was expecting money at the weekend and if he gets it will book a flight.
21. The messages between the parties in 2020 continue in a similar vein. The mother asks about schooling and on 29 February 2020 states '*You never gave me a chance to choose if he should study in Germany, you put him in school but you lie he is in play class but you know better*', later she messages '*I want [X] back home*', the father replies '*Soon. I know you miss him. But you will see him soon...*'.
22. On 9 March 2020 the mother messages '*You stole my son now your showing off you care for him?!*' A little later she messages '*So because you think you can feed [X] you*

have all rights to steal him without my consent, the father responds *'German law is easy! I take care for him! And I pay your rent for your other kids!'*, a little later the mother messages *'Never underestimate the power of a mother, I have all my full rights, you lied to me into signing custody papers that were in German because you very well know I don't understand Germany [sic], you wanted to take full charge of [X's] government salary, that money is not entirely yours by law and you don't have to solely take care of my son when am alive'*.

23. A little later on 10 April 2020 the father states *'Our fuck was most profitable! For you! And for me: I got [X]...So we have a Win Win Situation: That's Business!'*, the father says he likes teasing the mother, the mother responds *'You are a thief'* the father responds *'But a nice one!?'*.
24. On 30 April 2020 the mother messages *'It's a full year now... I cry everyday. You took my baby away'...I miss my boy'*. A little later she messages *'You don't understand, I remember when you disowned him. You doubted him being your son. I suffered full term pregnancy and 2 years of you pretending to be in prison. I raised my boy alone. You stole him away from me, because you thought you were financially stable.'*, the father responded *'My payment was Paris!'* (which refers to the trip the father took with the mother and X in September 2018).
25. On 4 May 2020 the mother messages *'You took my son away without my approval'* and on 20 May 2020 *'You kidnapped him. And you know it'*, the father responded *You get him back soon as possible'*, the mother responds *'I hope'*. These messages take place in amongst other messages about money payments from the father to the mother.
26. On 17 July 2020 the mother messages to say she has a six month visa to come to England, stating she has to travel by *'next week'*. The father responded *'If your UK I will work on visiting you UK with [X]'*. The messages continue with discussions about money and dates and on 13 August 2020 the father says they will visit the mother in the UK in early September. The father did not know then that the mother had travelled to England in January 2020 and in July 2020 had claimed asylum here.
27. The father, D (the father's older son) and X came to the UK on 30 September 2020. They travelled on return air tickets. It is accepted that as a result of discussions between the parents X stayed with the mother, and the father and D returned to Germany. The issue is on what basis X stayed. According to the mother it was a permanent transfer so X would live with her, according to the father it was a time limited period, in the first instance until Christmas/January 2021.
28. There is reference in the messages on 16 October 2020 to the father asking the mother to *'Finish her procedure XMas!'*...*as we agreed when we left UK!'*. The mother responds *'...this is my son as well it's not your property which you have to take away as though he is not my son! You did not buy him from a shop I gave birth to him the whole thing how he came to Germany had no my consent so seat and discuss like a decent man. We hold shared custody of the son stop dictating my life with my son'*, the father responds *'I only remember you our agreement! He is your son as mine! He needs us both! I know and accept!'*...*My turn starts January again!'*. The father refers to their agreement that X will go to school in Germany.

29. On 19 November 2020 they exchange messages with the mother saying X needs to be in school, the father responds agreeing *'But only up to January!'*, the mother responds saying *'No...up to when I am done with everything'*, a little later the father messages *'We made a deal up to Xmas!'*, a little later the mother responds *'We made no mandatory Christmas deal, I told you I only need him until my process is done'*. The father responds *'Next year'*. The mother says she needs him and the father responds *'We had a Deal'*. The father then asks when her process will be done and after further exchanges the father responds *'I need him January'* in her responses the mother reiterates that there was no agreement that X should live in Germany and it was the father who kept him there for 2 years.
30. On 14 February 2021 the father says in message exchanges *'In October you told you need him for sometime to go through authority'*, a little later on 25 February 2021 the father says *'He can stay with you'*. The messages then make reference to the court, which must be the proceedings in Newcastle which the mother issued in May 2021 seeking a child arrangements and prohibited steps orders.
31. Those proceedings were commenced by the mother in May 2021. There were three hearings within those proceedings, the father participated in person for the first two and did not challenge the jurisdiction of the court until he secured legal representation for the third hearing. Once that court became aware the father had contacted the Central Authority and this application was going to be made those proceedings were stayed.
32. These proceedings commenced on 18 November 2021, directions were made leading to the first hearing listed on 17 February 2022 for two days. That hearing had to be adjourned due to concerns about the mother's statements, at the adjourned hearing on 23 March 2022 there was a further adjournment due to the need for further messages to be disclosed by the father. The court concluded the hearing on 13 April 2022. There have been further delays in counsel for the mother's written closing submissions being filed and served, with a consequent delay on the timing of this judgment.
33. The mother had her asylum interview on 7 April 2022. The court and the parties had been informed a decision would be expected by early May. At the date of this judgment that decision had still not been made.
34. The father has been to visit X for periods of time when X has stayed with him at a hotel, with the agreement of the mother.

Ms Muller

35. Ms Muller is the jointly instructed expert on German Immigration law. In her detailed and clear report she outlines the routes whereby the mother could travel to Germany through an application for a family reunification visa, enabling the mother to remain in Germany for 1 – 3 years. That visa would be available whether X remains in her care or she spends time with him. Ms Muller's report established that the mother can enter Germany and claim asylum there. If the mother's claim here is rejected or not determined she can make an asylum claim in Germany which will be independently determined, irrespective of any determination of the application here. Ms Muller confirmed the German benefits system would provide financial support for the mother in the way she sets out in her report.

36. The court had given permission for an expert to report on the mother's immigration position here, particularly in the light of the fact that X had been granted EU settled status. Securing such a report in the timeframe was not possible, despite the extensive efforts made by the mother's solicitors to do so. Ms Jones did not seek a further adjournment and the court had the benefit of two informal notes prepared by a colleague of Ms Jones from her chambers, Ms Cronin. In the light of Ms Muller's report the need for such an expert reduced.

Legal framework

37. The relevant legal principles regarding habitual residence are well established, most conveniently set out by Hayden J in *Re B (A Child)(Custody Rights: Habitual Residence)* [2016] 4 WLR 156 at paragraph 17. This analysis was approved (with one qualification) by the Court of Appeal in *Re M (Children)(Habitual Residence:1980 Hague Child Abduction Convention)* [2020] 4 WLR 137. It is a question of fact bearing in mind the matters listed in *Re B* including such matters as the degree of integration by the child in the social and family environment, the factual inquiry should be centred on the factual circumstances of the child's life, the parent's intention and the stability of the child's residence. No one factor is determinative.
38. Turning to the issue of consent, this defence is only established if the consent relied upon is clear and unequivocal (*Re P-J (Children) (Abduction: Consent)* [2019] EWCA Civ 588). The burden of proof rests on the person who asserts it.
39. The leading authority is *Re P-J (Children) (Abduction: Consent)* [2009] EWCA Civ 588, [2010] 1 WLR 1237 at para 48, nine principles were set out:
- (1) *Consent to the removal of the child must be clear and unequivocal.*
 - (2) *Consent can be given to the removal at some future but unspecified time or upon the happening of some future event.*
 - (3) *Such advance consent must, however, still be operative and in force at the time of the actual removal.*
 - (4) *The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party, for example, "Whatever you may think, I have concluded that the marriage has broken down and so I am free to leave with the child." The event must be objectively verifiable.*
 - (5) *Consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract.*
 - (6) *Consequently consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.*
 - (7) *The burden of proving the consent rests on him or her who asserts it.*
 - (8) *The enquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case.*

(9) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?

40. Consent, although needing to be clear, does not need to be express: as Holman J put it in *Re C (Abduction: Consent)* [1996] 1 FLR 414, p 419:

“If it is clear, viewing a parent’s words and actions as a whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgment that is sufficient to satisfy the requirements of Art 13. It is not necessary that there is an express statement that ‘I consent’.”

41. As Ward LJ set out in *Re P-J* (above, at [48(5)]), consent is to be viewed against the realities of family life “*or more precisely, in the context of the disintegration of family life*”; it is not to be seen as if it were an arms-length contractual agreement. There is certainly no requirement that the agreement be given in, or even evidenced in, writing, though of course contemporaneous written documents will be of high evidential value.
42. Consent must remain operative at the time of the removal, though it may be given significantly in advance so long as it remains ‘valid’ at the pertinent time.
43. These same principles apply to the question of acquiescence, any acts relied upon must be clear and unequivocal. It is a question of fact.
44. The proper approach to the determination of an Article 13(b) ‘defence’ is set out in the decisions of the Supreme Court in *In re E (Children: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442. The Supreme Court set out the test to be applied in *Re E* (ibid) at paragraphs 31 to 35.
45. The Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part IV, Article 13(1)(b) has also assisted in the proper understanding of the Article 13(b) defence. That Practice Guide and existing authority of the courts in this jurisdiction provides the framework, helpfully summarised by Ms Papazian as follows:

i. Article 13(b) contains three different types of risk:

- a. A grave risk that the return would expose the child to physical harm;*
- b. A grave risk that the return would expose the child to psychological harm; or*
- c. A grave risk that the return would otherwise place the child in an intolerable situation.*

ii. The three different types of risk set out above can be raised independently, or employed together;

iii. Article 13(b) does not require that the child be the direct or primary victim of harm if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child;

iv. *The term ‘grave’ qualifies the risk and not the harm to the child. The risk must be real and reach such a level of seriousness to be characterised as grave;*

v. *The level of harm must be such as to amount to an “intolerable situation”, which is a situation that an individual child should not be expected to tolerate. In Re D (Abduction: Rights of Custody) [2006] UKHL 51, Baroness Hale held that the word, ‘intolerable’ used in this context, must mean “a situation which this particular child in these particular circumstances should not be expected to tolerate”;*

vi. *The Article 13(b) defence focuses upon the circumstances of the child upon return. It should not, therefore, be confined to an analysis of the circumstances that existed prior to or at the time of the removal or retention, but instead requires consideration of the circumstances as they would be if the child were to be returned forthwith;*

vii. *The forward looking nature of the exception does not, however, mean that past behaviour and incidents cannot be irrelevant to the assessment of a grave risk upon return – for example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists ;*

viii. *All assertions of risk are to be evaluated on the same standard or threshold and step-by-step analysis:*

a. As a first step, the court should consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk;

b. If it proceeds to the second step, the court determines whether it is satisfied that the grave risk exception to the child’s return has been established by examining and evaluating the evidence presented by the person opposing the child’s return. An evaluation means that the court must consider all of the relevant evidence before it - Re C (Children) (Abduction: Article 13 (b)) [2018] EWCA Civ 2834, [2019] 1 FLR 1045 and by taking into account the evidence / information pertaining to protective measures available in the State of habitual residence ;

ix. *Any consideration of protective measures must be undertaken in the light of the decisions of the Court of Appeal in Re S (A Child) (Hague Convention 1980: Return to Third State) [2019] EWCA Civ 352, [2019] 2 FLR 194, [2019] Fam Law 1006 at §§54 – 56, Re C (Children) (Abduction: Article 13 (b)) [2018] EWCA Civ 2834, [2019] 1 FLR 1045 at §§40 – 45 and In Re P [2017] EWCA Civ 1677, [2018] 1 FLR 892 at §§59 – 61. Particularly:*

a. The efficacy of any proposed protective measures must be addressed with care, with “the more weight placed by the court on the protective nature of the measures when determining the application, the greater the scrutiny required in respect of their efficacy” (Re S);

b. Protective measures may “include general features of the home state such as access to courts and other state services” (Re C at §40);

c. When considering the efficacy of undertakings, the court must, when deciding what weight can be placed on them, “take into account the extent to which they are likely to be effective” which “applies both in terms of compliance and in terms of consequences, including remedies, in the absence of compliance” (Re C at §43);

d. The judge must “examine in concrete terms” the situation that would actually face a returning parent upon their return to the home state. To apply the questions asked in Re P to a more general situation: What would happen when the parent and child stepped off the plane? Would the abducting parent be arrested? Where would they go, and what would they live on? (Re P at §61)

46. The way the courts should approach this defence has most recently been considered by Moylan LJ in *Re A (Children) (Abduction: Article 13(b))* [2021] EWCA Civ 939, at paragraphs 94 – 96 he stated:

*94. In the Guide to Good Practice, at [40], it is suggested that the court should first “consider whether the assertions are of such a nature and of sufficient detail and substance, that they could constitute a grave risk” before then determining, if they could, whether the grave risk exception is established by reference to all circumstances of the case. In analysing whether the allegations are of sufficient detail and substance, the judge will have to consider whether, to adopt what Black LJ said in Re K, “the evidence before the court enables him or her confidently to discount the possibility that the allegations give rise to an Article 13(b) risk”. In making this determination, and to explain what I meant in Re C, I would endorse what MacDonald J said in *Uhd v McKay (Abduction: Publicity)* [2019] 2 FLR 1159, at [7], namely that “the assumptions made by the court with respect to the maximum level of risk must be reasoned and reasonable assumptions” (my emphasis). If they are not “reasoned and reasonable”, I would suggest that the court can confidently discount the possibility that they give rise to an Article 13(b) risk.*

95. But, I repeat, a judge must be careful when undertaking this exercise because of the limitations created by it being invariably based only on an assessment of the written material. A judge should not, for example, discount allegations of physical or emotional abuse merely because he or she has doubts as to their validity or cogency. As explained below, in my view this would lead the court to depart from the Re E process of reasoning while, equally, not being in the position set out in Re K

96. If the judge concludes that the allegations would potentially establish the existence of a grave risk within the scope of Article 13(b), then, as set out in Re E, at [36], the court must “ask how the child can be protected against the risk”. This is a broad analysis because, for example, the situation faced by the child on returning to their home state might be different because the parents will be living apart. But, the court must carefully consider whether and how the risk can be addressed or sufficiently ameliorated so that the child will not be exposed to a grave risk within the scope of Article 13(b). And, to repeat what was said in Re E, at [52]: “The clearer the need for protection, the more effective the measures will have to be”.

Submissions

47. Ms Papazian contends it is agreed, as a matter of fact, that X was living in Germany with the father from May 2019 until he came to this country in September 2020. In those circumstances he lived with the father for an extended period of time, was well integrated into life in Germany, as evidenced by the photos relied upon by the father, in an environment that was already familiar to him due to his many previous visits. Ms Papazian submits it is simply unrealistic to suggest X's habitual residence was otherwise than in Germany, the focus of the factual analysis should be on the child's life which for eighteen months was based entirely in Germany until September 2020. She submits X's habitual residence remained there, as on the father's case the time in this jurisdiction was only time limited from September 2020. The WhatsApp communications in 2019 between the parents give mixed messages, but when read as a whole are equally consistent with the mother wanting the father to bring X to visit her in Uganda. The reality for X is his life was based in Germany during this time and that is where his habitual residence is. That habitual residence was not disturbed by what the father states was a time limited stay with the mother in September 2020, initially to Christmas 2020 then extended to July 2021 to ensure X was back in Germany to start school.
48. On behalf of the mother Ms Jones submits the father's evidence cannot be relied upon about what he says was the agreement between the parties as to where X should live, which he says was reached at the time X was born. This is supported by the inconsistent accounts the father has given about the situation in 2018, initially saying that was when X moved to Germany. She submits the letter written in May 2018 by the mother, consenting to a one month trip, and the messages in 2019 do not support the father's case about the agreement between the parties. There are repeated messages from the mother asking for X to be returned. In those circumstances, where the mother continued making repeated requests for X's return to Uganda, the court should be cautious about concluding X's habitual residence was in Germany at the time these proceedings started. Ms Jones recognises that the mother did not communicate to the father when she came to England, and when she did it was not a truthful account as to when she came and the circumstances. Ms Jones submits X's habitual residence is in England based on what she says is the agreement reached between the parties in September 2020 for X to move here to live with her. That is tied up with the defence of consent.
49. In the event the court determines H's habitual residence is in Germany, the burden falls on the mother to establish the defences she relies upon.
50. Ms Jones submits the combination of the messages and what the mother says are the oral discussions between the parties the father consented to H staying with the mother in the UK in September 2020. In the messages in late 2020 the mother referred to the fact that X had been kept in Germany by the father for two years and the agreement for X to stay with her was not time limited, as suggested by the father. The father engaged with the proceedings in Newcastle in May 2021 and the contemporaneous messages demonstrate continuing discussions between the parties about timing in late 2020 and into 2021. Ms Jones submits it is of note there is a lack of clarity about when it is said the mother unlawfully retained X.
51. As regards Article 13 b the mother's case is that in her circumstances, where she has made a claim for asylum here, there remains some uncertainty about how she could

enter Germany, whether she would be supported there, limits to her access to the courts in a language she doesn't speak and where she has no wider support network puts X at grave risk of harm and places him in an intolerable position.

52. If the court determines X's habitual residence is in Germany Ms Papazian submits the defences should be rejected. The evidence demonstrates the trip by X to England to see his mother was only intended to be a short term visit. Return tickets were purchased. Any agreement after they arrived was only ever time limited. The messages refer to this; the initial period was until Christmas and was extended to the summer 2021, the father making it clear throughout that the plan was for X to return to Germany in time to start school there.
53. Ms Papazian submits the evidence from the German immigration expert Ms Muller could not be clearer. Ms Muller sets out the routes for the mother to enter Germany and the support she would be entitled to. Whilst the impact of her leaving this jurisdiction is that her asylum application here may not be determined, she could make an asylum application in Germany. As a consequence, Ms Papazian submits, this route having been outlined, there is no evidence that the threshold is met of the child being at grave risk of harm or being placed in an intolerable position.

Discussion and decision

54. The complicated factual background in this case has been difficult to unravel in order to establish the relevant facts. The position has not been helped by the late disclosure of documents, in particular the messages from the father's phone. The fact that there were further relevant messages only became apparent during his oral evidence at the adjourned hearing.
55. The delay in determining these proceedings has been very unfortunate, as has the delay in the determination of the mother's asylum application. A decision was due on that application at the end of April/early May, it has yet to be determined. Whilst that decision may have brought further clarity, in the light of Ms Muller's evidence I am satisfied Ms Muller has set out a route for the mother to go to Germany, in the event the court orders X to return.
56. Dealing with the question of habitual residence first. Having considered the written and oral evidence of the parties I have reached the conclusion there was no settled agreement between the parties for X to come and live in Germany with the father in either 2018 or 2019. It is very likely that was what the father wanted and in his own mind considered that was the right thing for X. The messages during the relevant period and the documents signed by the mother in connection with securing child benefit in Germany are not determinative of the position, as the father seeks to suggest. They are equally consistent with the mother's position that she agreed to X having dual citizenship. Whilst there is no issue that X was likely to spend some time in Germany, the father thought it would be on a far more settled basis than the mother. The dynamics between the parties in the messages and oral evidence are important to bear in mind. In my judgment they make it clear the father was the more dominant and forceful character, both financially and otherwise. He expressed himself in forceful and resolute terms, often referring to X as his child and had very fixed views about the need to comply with what he saw was the agreement they reached at the time of X's birth. This somewhat fixed view was illustrated in his oral evidence about what the arrangements

would be if the court did order X's return, there was no question in his mind that X would need to live with him and could see his mother. There seemed little room for reflection about X's position and the impact on him of such a change having spent such a long period of time in the care of the mother. The father could only view the position through an adult lens. The mother, in my judgment, was more compliant and effectively did what the father asked her to do, which included signing the relevant forms sent to her by the father in German. Economically she was the weaker partner and during the relevant period appeared reliant on requesting and receiving payments from the father. The messages during the relevant period in 2019 make it clear the mother was making repeated requests for X to be returned to Uganda to her care, which is inconsistent with the account given by the father that X living with him in Germany was an agreed plan from birth. It may have been what the father wanted but it was not, in my judgment, one agreed to by the mother. The father ignored those repeated pleas by the mother for X to be returned to Uganda, he did not produce those messages when he prepared his first statements thereby giving an unbalanced picture as to what the actual position was.

57. The intention of the parents is but one factor to take into account regarding habitual residence. I need to consider the position from X's perspective. By the time these proceedings had been commenced he had lived in Germany since May 2019. There is no issue that he remained living with the father, was living in an environment that was familiar to him, he was not in school but there is some evidence from the father in his statements of their day to day life, the activities and visits they undertook. The father's older child, D, appeared to be part of the network for X as he accompanied the father and X when they came to England in September 2020. There was clearly some integration in a social and family environment. It also has to be recognised that, unbeknown to the father, the mother had left Uganda in early 2020, come to England and had sought asylum here on the basis that it is not safe for her to return to Uganda. She misled the father in her messages in July 2020 when she told the father she had a visa to come to the UK, implying she was still in Uganda which she now accepts was not the case. The mother does not actively assert that H's habitual residence is retained in Uganda, a jurisdiction she no longer lives in and does not seek to return to.
58. The courts have made clear it is highly unusual for a child to have no habitual residence. The mother's case is that X's habitual residence is not in Germany is focussed on the fact that she did not agree to X going to Germany for longer than a holiday in May 2019 and then the father agreed to X living with her in September 2020. In my judgment, whilst a relevant consideration, such a narrow view fails to take into account the wider canvas the court is required to consider, one that is more focussed on the situation of the child.
59. Reliance by the mother on the father not challenging the court's jurisdiction when he engaged in the proceedings in Newcastle can be considered but the father did not have legal representation at the relevant time. In those proceedings the issue of jurisdiction was raised in the safeguarding letter. The order dated 2 July 2021 raises the issue of jurisdiction and records the father '*submits to the jurisdiction of the Court and the Court ordering the father to confirm this in writing, after taking legal advice if he so wishes*'. The order dated 2 August 2021 records the father stating that he '*submits to the jurisdiction of the UK Courts and confirmed this in writing to the Court which unfortunately did not reach the Judge or the Mother's solicitors*'. The issues in those proceedings were recorded as being the mother's wish for X to live with her here and

the father seeking for X to reside with him in Germany. Directions were made for statements to be filed by the parties the completion of a report from Cafcass and the matter was listed for further directions on 5 November 2021. At a hearing on 19 October 2021 the father was legally represented, the order recorded the father informing the court he misunderstood the position regarding jurisdiction when he had not been legally represented and that jurisdiction should be considered in the context of proceedings under the Hague Convention. The court determined the issue of jurisdiction needed to be considered and listed the matter for a hearing on 5 November 2021 to determine jurisdiction. At the hearing on 5 November 2021 the court was informed of the application by the father to the Central Authority in Germany and that solicitors had been instructed here to issue proceedings under Article 12 seeking the return of X to Germany under the Hague Convention. Those proceedings were then stayed.

60. I have reached the conclusion that despite my findings about the lack of an agreement between the parents that X should move and live in Germany as the father suggests, the fact is X did go to Germany in May 2019 and remained living there until September 2020. The father's action was unilateral in taking and keeping him there, despite the regular requests for him to be returned by the mother. However, from X's perspective his day to day life was in Germany, living with his father and undertaking the events the father has described. Although there is limited evidence of significant integration in the wider community I am satisfied there was some integration. X's habitual residence was in Germany and remained so, subject to any defences being established by the mother.
61. Turning to the circumstances of X coming to this jurisdiction in September 2020. In the lead up to that trip the messages exchanged between the parties refer to it in the context of being a visit. That is supported by X coming here on a return ticket. Discussions followed once they arrived which led to X staying for a longer period. The father's account is that the agreement was until Christmas/January 2021 and that is largely supported by the messages exchanged in the autumn of 2020. The mother suggested a longer period until what she described in some messages as her '*process*' is done, indicating that she understood the arrangement was for a longer period of time but does not suggest it was a permanent move as her statements suggest. It seems clear that the original agreement was for it to be time limited, probably until Christmas 2020/January 2021.
62. In my judgment the period was extended by a combination of the Covid restrictions and the opportunity for X to attend school here. The messages refer to X starting school here in early 2021, with the father maintaining his position that X should attend school in Germany starting in September 2021. The father continued to take steps towards enrolment at school in Germany for X.
63. For consent to be established the agreement needs to be clear, unequivocal and communicated between the parties. That was not the position here. The initial period was time limited to Christmas/January 2021 and whilst it was extended, it was always in the context that X would return to attend school in Germany. Whilst I accept that was not what the mother wanted, consent can't operate in a unilateral way.
64. Ms Jones does not press the defence that the father acquiesced to X remaining here. She is right to do so in the light of the messages the court has seen and the proceedings issued in Newcastle with the recordings about the father's position on jurisdiction. The

proceedings issued by the mother are inconsistent with her case on consent and acquiescence and more consistent with taking a pre-emptive step as she knew it was a time limited period. The father was unrepresented in the Newcastle proceedings and there is little information that he was made aware of his remedies under the 1980 Hague Convention (see *R v R (Residence Order: Child Abduction)* [1995] 1 FLR 625). The messages exchanged between the parties are consistent and make clear the father's position was maintained that the end date would be when X should return to Germany in order to enable him to attend school there.

65. Turning to the question of Art 13 b, I am satisfied that defence is not made out. Ms Muller's evidence has mapped out a way the mother can accompany and remain with X in Germany, which is what she said in her evidence she would do if the court ordered X's return. She could make an asylum application in Germany that would not be adversely impacted by her claim here not being determined. Ms Cronin's note stated that if the mother travels to Germany whilst her asylum application here is outstanding, that application will be treated as withdrawn and will be discontinued. The evidence establishes that there would be state financial support for the mother, supplemented by the undertakings the father is prepared to give (as set out in paragraph 39 of his statement dated 27 January 2022) to ensure that she has accommodation and financial support on their arrival. X should remain in the mother's care in Germany (as proposed in the father's undertaking), with agreed time being spent with the father until the relevant court in Germany makes any order to the contrary.
66. The father's application under the Hague Convention for X to return to Germany is granted. The parties should discuss the final terms of any order, including the timing when X should go. The Court will determine any issues regarding the terms of any order that are not agreed.
67. From X's perspective he has now spent significant periods of time in the care of each parent. This court having reached its conclusion within these proceedings I urge the parents to re-focus on X and to actively consider engaging in mediation to try and reach agreement or narrow issues between them. If they can't reach agreement, court proceedings will need to be commenced in Germany to determine what future arrangements meet X's welfare needs to bring about some stability in the future care arrangements for him. This will ensure he can benefit from maintaining his important relationship with both of his parents in a way that prevents unilateral action being taken by either parent again.