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Case No: FD24P00187

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/11/2024

Before :

MS NAOMI DAVEY, SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

K	**Applicant**
- and -	
M	**Respondent**

- -
- -

Lucy Logan Green (instructed by **Makin Dixon Solicitors**) for the **Applicant**
Ann Courtney (instructed by **Otten Penna Solicitors**) for the **Respondent**

Hearing dates: 10th October 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 29th November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS NAOMI DAVEY, SITTING AS A DEPUTY HIGH COURT JUDGE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment 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.

Ms Naomi Davey, sitting as a Deputy High Court Judge :

1. I am concerned with an application by K, the father of AB, an eighteen month old boy, for AB's summary return to the United States of America ("USA") pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 Convention").

2. The Respondent, M, is AB's mother. She opposes the application on three grounds: first that AB was habitually resident in the UK at the date of the removal / retention; secondly that the father consented to, or subsequently acquiesced to, the relocation; and third that AB would be at grave risk of harm or otherwise placed in an intolerable situation were he to be returned.

3. This judgment was circulated in draft electronically on Thursday 10th October and is handed down today 19 November 2024.

4. I read the evidence in the court bundle and viewed the video exhibits at DC2 – DC7. I heard submissions from Ms Logan Green on behalf of the father and Ms Courtney on behalf of the mother. Both the father and the mother attended the hearing, The father attending by video link from the USA.

5. I was invited at the start of the hearing by Ms Courtney to hear live evidence from the father so he could be cross-examined by her as to the support he could provide to the mother in the event that I were to order return. Ms Logan Green opposed this on the basis that the father has voluntarily offered a sum of financial support to the mother were she to return and should not be cross-examined on a voluntary undertaking. I decided that it was not necessary for me to hear the father's evidence in relation to his financial offer; if there were any queries about the undertakings offered by the father, Ms Logan Green would be able to take instructions during the course of the hearing.

6. During the course of her submissions, Ms Courtney also referred me to ZJ's witness statement, noting that she was in court (via video link) should her evidence be required. Neither party sought to call her and I did not consider it necessary to do so.

THE FACTS

7. The key elements of the factual background to this application are as follows.

8. The father and the mother met online in 2020 while the mother was working as a nanny in Virginia. They married on 23 February 2022 in the USA. The mother moved in with the father and his mother (paternal grandmother) in Maryland. The child, AB, was born in America on 25 April 2023. AB is a dual US/UK citizen. He holds both US and UK passports.

9. On 13 November 2023 the mother travelled to the UK, with AB. The father made an application on 18 January 2024 in the Circuit Court for Frederick County, Maryland seeking legal and physical custody of the child. On 22 February 2024, the mother was served with the application. An Order was made on the 22 March 2024 granting the father physical custody of the child. Divorce proceedings, initiated by the father, are pending.

10. The father applied to the Central Authority on 12 April 2024 and subsequently issued this application.

11. The USA and the UK are signatories to the 1980 Convention. The fundamental objectives of that Convention as set out in Article 1 are:

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

12. Article 3 explains that removal or retention is wrongful if:

> "*(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*".

13. Article 12 provides that where a child has been wrongfully removed or retained under Article 3: "*[…] the authority concerned shall order the return of the child forthwith […] unless a defence is established by the person who so acted.*"

14. The cardinal purpose of the 1980 Convention, as set out in Article 1, is to secure the prompt return of children wrongfully removed or retained to the country with which the child has the closest link, so as to ensure it is that jurisdiction which makes the substantive decisions regarding the child's welfare where a welfare dispute arises.

15. As pointed out by Mr Justice Mostyn in *B v B* [2014] EWHC 1804 it is always important to remember that a decision by the court to return a child under the terms of the Convention is, nor more and no less, a decision to return the child for a specific purpose and for a limited period of time pending the court of his or her habitual residence deciding the long-term position.

16. The mother asks me not to make a return order on three bases:

    a) AB was habitually resident in the UK at the date of the alleged retention and thus it was not a wrongful retention for the purposes of Article 3.

    b) The father consented or acquiesced to the retention so falls within the exception in Article 13(a) and I should exercise my discretion not to return AB.

    c) AB is at grave risk of harm if I order his return to the USA or will otherwise be placed in an intolerable position and I should exercise my discretion not to return AB.

Habitual residence

17. A removal will only be wrongful for the purposes of Art 3 of the Convention if, immediately prior to the removal or retention of the child, that child was habitually resident in the State from which the removal or retention took place. It is therefore necessary to start any analysis of habitual residence by determining the date on which the retention or removal took place. In this case, both parties agree that the father consented to the mother taking the child to the UK. What is in dispute is whether the father was consenting to a two-week holiday or a more permanent relocation. Ms Logan Green submits that the unlawful retention occurred on either 25 November – the date the mother confirmed in a message to the paternal grandmother that she was remaining in the UK indefinitely - or 27 November, the expiry of the two-week period. Ms Courtney did not disagree with those dates. I agree that habitual residence falls to be determined on either 25 or 27 November – the precise date makes no difference to the analysis.

18. There is a significant amount of case law on the concept of habitual residence. I repeat here the summary of the law taken from a recent decision of MacDonald J in *NMvSM* [2023] EWHC 2209 (Fam)):

    a) *For habitual residence to be established the residence of the child must reflect some degree of integration in a social and family environment. Whether there is some degree of integration by the child in a social and family environment is a question of fact to be determined by the national court, taking into account all the circumstances specific to the individual case.*

    b) *In the recent case of A (A Child)(Habitual Residence: 1996 Hague Convention) [2023] EWCA Civ 659 Moylan LJ made clear that the concept of some degree of integration is simply a description of the approach to be taken, the question of whether a child is habitually resident in a particular jurisdiction falling to be determined on all of the relevant factors.*

    c) *Habitual residence must be established on the basis of all the circumstances specific to the individual case. The Court of Justice of the European Union has identified the following, non-exhaustive, list of circumstances that might be relevant in a given case:*

        i) *Duration, regularity and conditions for the stay in the country in question.*

        ii) *Reasons for the parent's move to and the stay in the jurisdiction in question.*

        iii) *The child's nationality.*

        iv) *The place and conditions of attendance at school.*

        v) *The child's linguistic knowledge.*

vi) *The family and social relationships the child has.*

vii) *Whether possessions were brought, whether there is a right of abode and whether there are durable ties with the country of residence or intended residence.*

d) *The requisite degree of integration can, in certain circumstances, develop quite quickly. There is no requirement that the child should have been resident in the country in question for a particular period of time. The deeper the child's integration in the older state probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day to day life in the new state, probably the faster his or her achievement of that requisite degree. In circumstances where all of the central members of the child's life in the old state were to have moved with him or her, probably the faster his or her achievement of habitual residence Conversely where any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residents.*

e) *Parental intention is relevant to the assessment but not determinative.*

19. I have also considered the guidance on determining the habitual residence of an infant in the Mercredi v Chaffe case before the CJEU where it was held that:

> "*where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State.*"

20. There is no dispute that AB's place of habitual residence prior to 13 November 2023 was the USA. The burden of proof is therefore on the mother as the person asserting that a change in habitual residence has taken place. The mother's case is that AB acquired habitual residence in the UK within the 11 day / two-week period between arriving in the UK and the mother deciding to stay in the UK / failing to return to the US. Ms Courtney relied on the fact that habitual residence can be obtained instantaneously, and that it is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent. Ms Courtney argued that in this case AB obtained habitual residence on the date he landed from the USA as it was clear that the mother did not intend to return. She relied on the fact that the mother is British and the child is dual British / US national, that at the date of retention, AB had no awareness of his life in America and on arrival in the UK was embedded in his English family and way of life. She also relied

on the mother's wishes that the proceedings remain in this jurisdiction for further assessments given a potential diagnosis of autism in the future and the mother's fears that she will not be able to participate in court proceedings in the US as she has previously been refused permission by the USA court to attend remotely. She further submitted that AB is currently integrated into his British family and has spent over half his life in the UK.

21. Counsel for the father submitted that AB was born in the United States, had lived nowhere but the United States prior to the date of retention, other than the two-week holiday, which could not be sufficient for him to have acquired habitual residence in the UK.

22. I have looked at all the facts pertinent to habitual residence in the round:

a) The mother is a British national; she lived in the US for upwards of 3 years. She married in the US, had a baby in the US. She entered the US on visa waiver scheme and did not regularize her immigration status following her marriage. Her marriage was not a happy one. The mother returned to the UK twice during her pregnancy for scans but chose to have her baby in the US.

b) AB is a dual national. He was 7 months old when he arrived in the UK. Until then there is no question that his habitual residence was the US. He had not been to the UK before.

c) In relation to parental intention for the return to the UK, in the mother's statement she states that the return to the UK was never a two-week holiday, evidencing this by reference to the one-way ticket. However, in the same statement she goes on to talk about the father's mother (AB's grandmother) ensuring that the father would be out of the home whenever the mother wanted to return, suggesting that in her mind a return was not out of the question. In her statement, ZJ describes her understanding as '*there was no suggestion that it would only be for two weeks that the mother would be in the UK, and my understanding was that until there were changes in the father's attitudes that she would remain in the UK*'. This also casts doubt on whether there was a clear intention to permanently relocate. There is no evidence of the mother making clear plans to start a new life in the UK. The father's stated belief was that the trip was for a two-week break although he was aware that the mother did not have a return ticket.

d) AB was no doubt warmly welcomed by his maternal family in the UK on arrival here and as a 7-month-old would have had no real awareness of the change of surroundings. Life would have carried on as normal insofar as he was concerned.

e) AB's father and his paternal family remain in the USA. It is clear from the evidence that the mother was AB's primary carer, not least because the Father was working, but there are photographs in the bundle of the Father with AB on a number of occasions. He was not a totally absent or disinterested father. The mother had a close relationship with the

paternal grandmother and other members of the family, with whom as he grew older AB would undoubtedly have developed a real bond.

23. Doing my best with the available evidence, while AB evidently has strong links with the UK as a dual national and as the place where his maternal family live, I do not accept that this is a case where habitual residence could have changed over as little as two weeks. This is particularly in circumstances where it is AB's first visit to the UK, and where the father and paternal family remain in the US.

24. Having found that AB was habitually resident in the US at the time of the unlawful retention, I now need to consider whether one of the Article 13 exceptions apply such that I have discretion not to order his return. I turn to consent / acquiescence first.

Consent / acquiescence

25. Article 13(a) provides that:

> "*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;*"

26. The issues of consent and acquiescence were addressed in *Re PJ (Children) (Abduction: Consent)* [2009] EWCA Civ 588. Ward LJ set out a number of principles for consent. They are:

i) Consent to the removal of the child must be clear and unequivocal.

ii) Consent can be given to the removal at some future but unspecified time or upon the happening of some future event.

iii) Such advance consent must, however, still be operative and in force at the time of the actual removal.

iv) The happening of the future event must be reasonably capable of ascertainment.

v) 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.

vi) Consequently consent can be withdrawn at any time before actual removal.

vii) The burden of proving the consent rests on him or her who asserts it.

viii) The enquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case.

ix) 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?

27. In the same case Ward LJ noted the difference between consent and acquiescence at paragraph 53 as follows:

> "*we have to construe the words 'had consented to or subsequently acquiesced in the removal or retention' in Art 13(a) of the Convention. The use of the pluperfect tense ('had consented'), contrasted with the qualification of the word 'acquiesced' by the word 'subsequently', seems clearly to show that the concept of 'consent' relates to a stance taken by the left-behind parent prior to the child's removal (or retention) and that the concept of 'acquiescence' relates to his stance afterwards.*"

28. In *Re B (A Child) (Consent; Acquiescence; Intolerability)* [2023] EWHC 2162 (Fam), John McKendrick KC, sitting as a Deputy High Court Judge summarised acquiescence as follows at paragraph 15:

> "*The exception of acquiescence requires the court to look at the subjective mind of the wronged parent and ask: "has he in fact consented to the continued presence of the child in the jurisdiction to which he has been abducted? Has the wronged parent gone along with the abduction?" Acquiescence is of the actual subjective intention of the wrong parent. It is a pure question of fact for the judge on the material before him. The burden of proof is on the abducting parent to establish the acquiescence has occurred. Earlier misstatements of the law drawing distinctions between 'active' and 'passive' acquiescence are incorrect. The fact there has been some active conduct indicating possible acquiescence does not justify ignoring the subjective intentions of the wronged parent (Re H (Minors) (Acquiescence) [1998] AC 72). Parents should not be deterred from agreeing sensible arrangements for the future of their children, the fact such negotiations have taken place should not necessarily lead to the conclusion that there has been acquiescence.*"

29. In *Re H* [1998] AC 72, Lord Browne-Wilkinson held that:

> "*in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions. Once it is established that the question of acquiescence depends upon the subjective intentions of the wronged parent, it is clear that the*

> *question is a pure question of fact to be determined by the trial judge on the, perhaps limited, material before him.*"

30. The burden of proof rests with the mother to show that the father consented to, or subsequently acquiesced in, the removal or retention. The mother asserts four bases for this:

    a) first, the father signed the passport in the full knowledge that the tickets to the UK were one way;

    b) second, the father would have known that the mother had twice overstayed her visas, did not have a green card, and would have difficulty in being allowed entry back into the country;

    c) third, the text messages between the mother and father attached to the mother's first statement to the effect that the father was happy for her to leave. There was some confusion at the hearing as to which of the text messages (undated in the bundle) related to the mother's trips to the UK in 2022/early 2023 during her pregnancy and those subsequent to AB's birth and prior to her departure in November 2023. It was subsequently agreed that of the text messages exhibited to the mother's statement, those at pages 84, 88, 89, 90, 100 & 101 are from after AB's birth. The mother and father disagree about the text messages at 91 / 94 (same screens shot) 95, 96, and 107, which the mother says are from after the birth and the father says are from before the birth.

    d) Fourth, the mother relies on the long message of 16 December 2023 from the father to the mother which includes *"I may never get a chance to say this again so I'm take my chance now. I love you and I love* [child's name]. *Whatever you decide just please give him the best life you can and please take care of yourself* [M]". Ms Courtney asserts that he sent this because he knew the marriage was dead in the water and that matters were not retrievable between them and he was essentially acquiescing to AB remaining in the UK.

31. Counsel for the father asserted that of the text messages exhibited to the mother's statement, those sent in 2022 are irrelevant to the issue of whether the father consented to the removal of AB in November 2023. I agree with this. In so far as the text message sent on 13 November 2023 (i.e. the day of removal) at page 106 of the bundle is concerned ("*I been trynna be a nice guy for a long time. But when you come back i will be a different person and i refuse to change That's the litteral only last thing i have to say to you. ...Goodbye* [M] *take care.*" Ms Logan Green argued that this did not amount to consent but was simply the father saying goodbye ahead of a two-week holiday and wishing the mother a safe journey. Counsel further referred me to various text message exchanges subsequent to the mother's arrival in the UK which in her submission support the fact that the father was unaware that the mother intended to stay in the UK beyond the two weeks, let alone consented to it. These exchanges comprise:

    i) The series of messages starting at page 139 of the bundle from Saturday 25 November 2023 to February 2024 between the father and the mother. I was informed that the messages which look blank are because the father was blocked

at that time. Ms Logan Green highlighted the message of Saturday 16 December which refers expressly to a '2 week break'.

ii) The text message exchange with B at page 151 which Ms Logan Green asserts shows that contrary to the father acquiescing in his son remaining in UK he was desperately trying to find out what's going on.

iii) The text messages to the maternal grandfather on 27 December at page 153 in which the father is trying to establish what is going on and says *'As far as I knew* [M] *was supposed to come back in two weeks'.*

32. Ms Logan Green further relies on the steps the father took to make contact with his lawyers in the US, the FBI and various family members. She says that the fact that he didn't immediately seek a Hague application cannot be held against him. He was doing what he could to ensure AB returned.

33. In response to the mother's reliance on the 16 December 2023 message as acquiescence, Ms Logan Green submits that the authorities are clear that just because a party is trying to sort things out amicably, this does not amount to acquiescence.

34. I find that there was no clear and unambiguous consent by the father prior to the mother's departure from the US for taking AB for anything more than a two week break. I am asked to infer consent from the father's knowledge of the one-way ticket and the issues around the mother's immigration status. Set against that are the references (prior to the mother's departure) to the two-week period in the text message exchange between the mother and father at pages 171-175 of the bundle. I also consider that the text message exchange at pages 178 to 179 supports the father's case that he was not consenting to a more permanent removal as the mother refers to the father having been invited on the trip.

35. The evidence supports the case that the father had suspicions that the mother may not return; indeed he expresses these concerns in the text message exchange at page 179. But this does not reach the threshold of clear and unambiguous consent. I further accept the submissions made by Ms Logan Green and outlined above as to acquiescence. I find that the mother cannot have been under any illusion as from the end of November 2023 that the father consented to or acquiesced with AB remaining in the UK. I therefore do not find that the exception in Article 13(a) is made out by the mother on the balance of probabilities.

36. I now turn to the exception in Article 13(b) which provides that a state is not bound to order the return of a child if *(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***.

37. The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in *Re E (Children)(Abduction: Custody Appeal)* [2012] 1 AC 144. The applicable principles may be summarised as follows:

i) There is no need for Article 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Article 13 are quite plain and need no further elaboration or gloss.

ii) The burden lies on the person 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.

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) Article 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country.

38. Within the context of this tension between, on the one hand, the need to evaluate the evidence against the civil standard of proof and, on the other hand, the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands that the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate the harm can be identified.

39. The mother bases her assertion that returning her son would put him at grave risk of harm or otherwise in an intolerable situation on three bases.

a) First, the domestic abuse she says she suffered, along with the lack of support and lack of interest shown by the father in the baby, while living with the father, as outlined in the mother's two statements.

b) The challenges and uncertainty she and AB would face if they returned to the US, including the risk of mother's arrest on arrival given that the FBI have been alerted to the abduction; the lack of anywhere for the mother and AB to live so they would effectively be homeless, and the lack of sufficient financial support. During the hearing Ms Courtney clarified that living with other members of the father's family is not an option. She submitted that it would be intolerable for AB to move in with the father, who he does not know.

c) Third, the fact that the mother may not be allowed back into the US. I was referred to the report of an immigration expert instructed as a single joint expert who concluded (albeit he uses different language in different places in his report) that "*The mother may not be able to travel to the United States insofar as she might be inadmissible or otherwise unsuccessful in obtaining a visa to the United States. Nevertheless she is reasonably likely to be permitted to enter the United States pursuant to*

> *an exercise of the Secretary of Homeland Security's discretionary parole power*."

40. Counsel for the father submitted that this was clearly a case where there were regular marital arguments and unpleasantness. But even taken at its highest does not reach the threshold for article 13(c) defence. Counsel referred me to the protective measures proposed by the father, which include:

    a) That he will pay for the costs of the child's direct return flights to America and will either come and collect the child or pay for the mother's direct flight should she wish to travel with him

    b) Not to attend the airport if the mother objects

    c) Not to institute or voluntarily support any proceedings whether criminal or civil for the punishment of the mother arising out of the unlawful retention of the child in England

    d) Not to seek to separate the mother and the child, should she return with him, pending the first inter parties hearing in any proceedings issued in America relating to the child. Counsel subsequently forwarded an email exchange with the father's US lawyer, confirming that this provision could be given effect by way of a consent order filed in the Maryland court.

    e) Not to attend the address where the mother may reside at in America, pending the first inter parties hearing in any proceedings issued in America regarding the child

    f) Financially contributing towards the mother's accommodation. In the course of the hearing it was clarified that the father can contribute $800 a month to this.

41. I am going to deal with the mother's visa situation first. The expert report states variously that "The mother <u>should be able to</u> travel to the United States with AB", that "it is <u>highly likely</u> that the US government will facilitate The mother's travel to the United States even though she may be inadmissible to the United States" and that "she is <u>reasonably likely</u> to be permitted to enter the United States pursuant to an exercise of the Secretary of Homeland Security's discretionary parole power". It is clear that there is no certainty in respect of the mother's ability to travel to the USA now or in the future. Ms Logan Green submits that the mother should have been making enquiries with the US consulate in anticipation that the result of this hearing could be a return order. I agree. But the fact is that I am faced with a situation where there is uncertainty as to whether the mother will be able to return to the USA.

42. A case in which the mother was in a very similar visa situation was considered by the Court of Appeal in Re W [2018] EWCA Civ 664. Lord Justice Moylan said the following:

> "*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. In my view it is not a situation the child should have 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.*
>
> *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.*"

43. While the children in Re W were slightly older than AB, the youngest was only three years old. Ms Logan Green suggested that the separation of an 18 month old child from his mother, while distressing for the child, does not amount to an intolerable situation in the way that may be argued for an older child who has known the mother as prime carer for a substantial period of time. I disagree. An 18 month old child will have developed a strong attachment to his primary carer, and in my view it would be intolerable to return AB without his mother and separate them for an indeterminate period of time. I will not therefore be making a return order for AB in the absence of a means for his mother to enter the USA with him.

44. Looking at the grave risk of harm / intolerability test on the basis that AB would be returning with his mother, I consider the mother's first basis for relying on 13(b), namely her assertions of domestic abuse while she was living with the father. The mother's statement specifies one instance of violence towards her where she alleges he hit her with a vape. In addition some of the text messages from the mother to the father exhibited to the mother's statement appear to be her showing marks on her body and suggesting that the father caused them, although the mother has not provided any explanation in her statement of this. The mother also alleges that the father exercised financial control over her, not providing her with sufficient or appropriate food or buying necessary items for the baby, including nappies, and that the father exercised control over the mother's socialising and clothing. The mother describes an episode where the father became angry with her for socialising with friends at a pumpkin patch party and describes the father being so angry about her wearing a vest top that he closed the boot so aggressively it smashed. She alleges the father showed no interest in the baby, not being present during most of the birth or subsequently caring for the baby. The mother's second statement (but not her first) makes reference to the father shaking AB on two occasions.

45. The father disputes all of these allegations and gives a cogent alternative version of events in his statement. Without conducting a fact-finding exercise to determine the veracity of the mother's allegations, there are some points that can be made on the basis of the evidence as presented in the bundle. The statement from ZJ supports the mother's

allegations in relation to the father not providing sufficient food for the mother and AB and the father's lack of interest in caring for AB. However, ZJ' knowledge is limited to what the mother told her contemporaneously and the fact of the father's absence at the times ZJ was with the mother and AB (which may be explainable by the father having been at work). I also note the photographic evidence of the father spending time with his son exhibited to the father's statement, albeit these are only snapshots in time. The text messages between the parents reveal an unhappy relationship including instances of the father being verbally abusive to the mother. The videos – while also only snapshots in time - also indicate high levels of anger and discord between the parents (on both sides) and an element of oppressive and controlling behavior by the father in seeking to film the mother. On the face of it the allegation that the father shook the child is an extremely concerning allegation, however it is not one in respect of which the mother has provided any detail at all (when or where the incidents took place, how it occurred, or what the impact was on the child) or supporting medical evidence.

46. My assessment of the risk of harm needs to look forward to the future, to the situation as it would be if I were to return AB. The intention is not for the mother and AB to live with the father. The proposal is for the mother and AB to live in separate accommodation to which the father is willing to contribute $800 a month; that the father not attend at the mother's address nor seek to separate her from AB pending the first inter partes hearing.

47. Ms Courtney submitted that the considerable uncertainty as to where the mother and AB would be living, the lack of any guarantee that the father will pay her the $800 a month towards her rent, the lack of any income beyond the $800 which would all go on rent, and the potential for arrest and prosecution, equates to a situation in which it would be intolerable to place AB.

48. Turning first to the risk of arrest. The case law is clear that the abducting parent being arrested and prosecuted for child abduction is not sufficient by itself to satisfy Article 13(b). In *Re L (Abduction: Pending Criminal Proceedings)* [1999] 1 FLR 433 the possibility of criminal proceedings being brought and even the possibility of the mother being arrested at the airport on her return was not enough to establish a grave risk of harm to the children. In *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145 the possibility that the father would change his mind and bring criminal proceedings against the mother if she returned to the United States was likewise not sufficient to establish the exception under Article 13(b). As I understand it, Ms Courtney's submission is that in the event of the mother being arrested AB would either be taken into the care of the state authorities, or looked after by his father who was never his primary carer, and whom AB has not seen for several months and will have no memory of and that this would amount to an intolerable situation for AB.

49. The father's Counsel describes the issue of arrest as a 'red herring' given that there is no indication the FBI has pursued the case following the one conversation the father had with them. She also refers to the voluntary undertaking the father has given not to institute or voluntarily support any proceedings whether criminal or civil for the punishment of the mother. Nevertheless, I do not consider the risk of prosecution can be entirely discounted given the view of the expert that the mother could face criminal prosecution for parental child abduction, which is a crime at both the federal and state level. The question is whether that risk amounts to a 'grave risk of harm' or 'otherwise

intolerable situation'. While the authorities are clear that the risk of arrest and prosecution of itself is insufficient, I still need to consider whether the risk of the mother being separated from AB (albeit it within the same jurisdiction, with access to the US judicial system, and with some level of direct contact) would put AB at grave risk of harm or otherwise intolerable situation. This is a situation in which the father has expressed himself willing to look after AB, no doubt with the support of the paternal grandmother with whom the father lives. I take the allegations made by the mother about AB's parenting of, and interest in AB, as discussed above into account, but on the balance of probabilities do not consider that the risk of arrest (which given the voluntary undertaking by the father not to initiate or otherwise voluntarily support any proceedings is relatively low) and consequence that AB may end up living with the father for a period of time to reach the Article 13(b) threshold.

50. Beyond the risk of arrest I turn to look at whether returning the mother to the USA on the basis proposed would lead to a grave risk of harm to AB or putting AB into an intolerable situation. In addition to paying for the mother and AB's flights back to the USA, the father has offered to: pay $800 per month towards separate accommodation for the mother, until the first inter-partes hearing in court proceedings, which I am told is the most he can afford; not to attend the airport on the mother's arrival if she objects; not to attend the mother's home; and not to seek to separate AB from his mother until the first inter-partes hearing in any court proceedings.

51. The undertakings not to attend the airport or the mother's home speak for themselves. I raised during the hearing with Ms Logan Green my concern as to how the undertaking not to seek to separate AB from his mother until the first inter-partes hearing in any court proceedings could be squared with the order that is currently in place giving the father custody. I subsequently received confirmation – by way of an email exchange between Counsel for the father and the father's attorney in the US - that the issue of custody can be dealt with in the current proceedings in the US by the parties filing a consent order.

52. On the father's evidence $800 per month would cover a one-bedroom rental property in a town 30 minutes from the Frederick area. Ms Courtney submits that this would leave very little for utilities or food for AB and the mother and, in the absence of any means of enforcing the payment, the mother could become homeless at any point. It seems to me that it will be essential for the father to have secured accommodation for the mother prior to her returning to the USA in order to ensure the mother's return with AB is, in practice, on the basis proposed.

53. I accept that returning AB to the USA even with accommodation to go to would be extremely difficult for the mother. I do not underestimate that. Unless her family are able to assist or she is able to find work, she will be living with very little means, and she will be away from the love and care of her immediate family She does, however, have the support of the father's family with whom she remains close and who have supported her and AB in the past. On the balance of probabilities, I do not find the threshold for Article 13(b) is made out for a return on the basis proposed.

54. I therefore find that AB was unlawfully retained in the UK; that the father did not consent to, or subsequently acquiesce in, the unlawful retention. I find that the 13(b) exception is made out to the extent that returning AB without his mother would put him

in an intolerable situation. I find that the 13(b) exception is, on balance, not made out were AB to be returning with his mother on the basis proposed.

55. I will therefore order that AB is to be returned to the USA, his country of habitual residence, provided his mother is granted entry into the USA and provided:

i) that the father gives the requisite undertakings to this court to:

a) pay $800 per month to the mother pending the first inter-partes hearing in any custody proceedings and to have secured accommodation, prior to the mother and AB's departure from the UK, in which the mother and AB can live on their arrival;

b) not to institute or voluntarily support any proceedings, whether criminal or civil, for the punishment of the mother arising out of the unlawful retention of the child in the UK;

c) not to attend the airport on the mother's arrival if she objects;

d) not to attend the mother's home pending the first inter-partes hearing in any custody proceedings;

e) not to seek to separate AB from his mother pending the first inter-partes hearing in any custody proceedings

ii) that there is a consent order in place within the US custody proceedings, reciting these undertakings and providing for the mother to have custody of AB pending the first inter-partes hearing of those proceedings.

56. I should make clear that I expect the mother to make best endeavors to obtain a visa or humanitarian parole. I authorise disclosure of this judgment and subsequent order into her immigration application and invite Counsel to include in the draft order a clear timetable by which the mother should take the necessary steps in respect of her immigration status.