Neutral Citation Number: [2022] EWCA Civ 1423

Case No: CA-2022-001452

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mrs Justice Theis
[2022] EWHC 1260 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 November 2022

Before :

LORD JUSTICE BAKER
LORD JUSTICE PHILLIPS
and
LORD JUSTICE NUGEE

- -

X (CHILD ABDUCTION: HABITUAL RESIDENCE)

- -
- -

Teertha Gupta KC and Maggie Jones (instructed by **Ben Hoare Bell**) for the **Appellant**
Michael Gration KC and Cliona Papazian (instructed by **Makin Dixon**) for the **Respondent**

Hearing date : 8 September 2022

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 1 November 2022.

LORD JUSTICE BAKER :

1. This is an appeal against an order in proceedings brought by a father under the Hague Child Abduction Convention 1980 for the summary return to Germany of his son now aged 8, hereafter referred to as "X". The principal issues arising on the appeal are whether the judge was wrong to determine (1) that X was retained in this jurisdiction by his mother without the consent of his father in July 2021 and/or (2) that, if he was retained on that date, he was at that point habitually resident in Germany.

The Law

2. The Convention was incorporated into UK law by the Child Abduction and Custody Act 1985. The Preamble to the Convention states:

> "The States signatory to the present Convention,
>
> Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
>
> Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
>
> Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions."

The following articles of the Convention are relevant to this appeal.

3. Article 1 includes among the objects of the Convention:

> "to secure the prompt return of children wrongfully removed to or retained in any Contracting State …."

4. Article 3 provides, so far as relevant to this appeal:

"The removal or the retention of a child is to be considered wrongful where

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

Article 4 provides inter alia:

> "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights."

5. Under Article 12:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

6. Article 13, so far as relevant, provides:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

7. Article 16 provides:

> "After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

8. We were also referred to Article 20 of the Convention which has not been incorporated into UK law. Article 20 provides:

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental

> principles of the requested State relating to the protection of human rights and fundamental freedoms."

In *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51 (at paragraph 65), and again in *Re M (Children) (Abduction: Rights of Custody)* [2008] UKHL 55 (at paragraph 19) Baroness Hale of Richmond stated that, following the implementation of the Human Rights Act 1998 and the incorporation of ECHR into our law, Article 20 had been "given domestic effect by a different route". The implications of this observation have yet to be fully resolved and, as will become clear, this is not the case to resolve them.

9. The legal principles applicable to the determination of a child's habitual residence originate in the decision of the CJEU in *Mercredi v Chaffe* (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22 and were expounded in a series of decisions of the Supreme Court, starting with *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60; [2014] AC 1 and continuing with *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75; [2014] AC 1017; *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1; [2014] AC 1038; *In re R (Children) (Reunite International Child Abduction Centre intervening)* [2015] UKSC 35; [2016] AC 76, *and In re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4; [2016] AC 606. The principles were succinctly distilled by Hayden J in *Re B (A Child: Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam) into a series of propositions which were substantially approved by this Court in *Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA 1105, [2020] 4 WLR 137.

10. In short, the habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment. The test is essentially a factual one with the inquiry centred throughout on the circumstances of the child's life that are most likely to illuminate his habitual residence. 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. A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her, but it is the child's habitual residence which is in question and, it follows, the child's integration which is under consideration. Parental intention is relevant to the assessment, but not determinative. It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there. There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely. The requisite degree of integration can, in certain circumstances, develop quite quickly.

11. On 13 March 2018, the then President of the Family Division issued Practice Guidance on Case Management and Mediation of International Child Abduction Proceedings. Of relevance to the present appeal, paragraph 2.11 provides:

> "At the first hearing, the parties should attend fully prepared to deal with the case management matters that have not been dealt

> with by way of standard directions upon issue or which have been so dealt with but require variation, together with any additional case management matters that may arise in the circumstances …."

The paragraph continues by identifying specific case management matters "if applicable" including:

> "(h) Directions with respect to ensuring that the child is given the opportunity to be heard during the proceedings, unless this appears inappropriate having regard to his or her age or degree of maturity, including consideration of joinder and separate representation (see paragraph 3.5 below). Any application for joinder and separate representation should be made on notice prior to the first on notice hearing, to be dealt with at that hearing."

12. Paragraph 3.4 of the Practice Guidance provides:

> "Key to ensuring that the final hearing is dealt with in a manner commensurate with the summary nature of most international child abduction hearings is the identification at the case management stage of what matters are truly in issue between the parties. It is particularly important that the directions hearing(s) preceding the final hearing be used to identify the real issues in the case, so that the judge can give firm and focused case management directions, including as to the form that the hearing will take. Parties can expect the court to be rigorous and robust at the case management stage in requiring parties to consider and identify the issues that the court is required to determine and to make concessions in respect of issues that are capable of agreement."

13. Paragraph 3.5 provides, so far as relevant to this appeal:

> " …. Where it is clear on the face of the application and supporting evidence that it will be appropriate for the child to be heard during the proceedings the court may give directions to facilitate this at a without notice hearing or by way of standard directions on issue. Where directions have not already been given, the question of whether the child is to be given an opportunity to be heard in proceedings having regard to his or her age and degree of maturity, and if so how, must be considered and determined at the first on notice hearing. The methods by which a child may be heard during the proceedings comprise a report from an Officer of the Cafcass High Court Team or party status with legal representation. In most cases where it is appropriate for the child to be given an opportunity to be heard in proceedings an interview of the child by an officer of the Cafcass High Court Team will be sufficient to ensure that the child's wishes and feelings are placed before the court. In only a

> very few cases will party status be necessary. Where the exception relied on is that of settlement pursuant to Art 12 of the 1980 Hague Convention, the separate point of view of the child will be particularly important. The court should record on the face of any final order the manner in which the child has been heard in the proceedings."

The background

14. The following summary of the relevant background is taken substantially from the judgment at first instance.

15. The father, now aged 68, is a German citizen with four older children who had business interests in Uganda and was a frequent visitor to that country. The mother, now aged 34 is a Ugandan national with two older children. The parties met online in 2013 and had a short relationship as a result of which the mother became pregnant and gave birth to X the following year.

16. It was the father's case that when X was born, the parties agreed that he should live in Uganda while he was young and then move to Germany where he would attend school, spending holidays with his mother in Uganda. The mother denied that there was any such agreement. She accepted that she agreed that X would have dual citizenship and a German identity card so that the father could claim child benefit for him in Germany, but denied that she ever agreed that the boy would move there to go to school.

17. There was a conflict of evidence between the parties about the number of visits the father made to Uganda and also about the number of times X visited Germany. In the early years, X remained living with his mother in Uganda. It was asserted by the father, but denied by the mother, that he visited X on several occasions in the first two years. In 2017, X was granted a German passport. The following year, the mother signed a letter addressed to the German immigration authorities stating that she agreed that X could travel to Germany with the father for the month of May 2018 and that he could be granted a German identity card, following which the father took X to Germany for 17 days. In the same month, the mother signed a document in German stating that with effect from that time the child would reside "for the most part with his father [as] his main residence additionally with the mother as a second residence". The father's case before the judge was that he interpreted the document for the mother before she signed it. It was the mother's case that she was only sent the final page of the document to sign and had no real understanding of what was said. On 24 May 2018, the father returned X to Uganda.

18. Thereafter, according to the father, but substantially denied by the mother, X had several further trips to Germany with his father in the course of the next year. The mother accepted that X went to Germany with his father in December 2018, where they were joined by the mother for part of the time. It was the father's evidence, but again denied by the mother, that X travelled to Germany with him for nearly seven weeks between 11 February 2019 and 31 March 2019. For the rest of the period between May 2018 to April 2019, X remained in Uganda with his mother where he attended nursery. During that period, the father spent extended periods in Uganda.

19. On 29 April 2019, the father took X to Germany. The child has not returned to Uganda since that date. It was the mother's case this was intended to be only another short-term visit and messages passing between the parties and adduced in evidence showed the mother repeatedly asking the father to return the child. The father gave a variety of reasons for not returning him, but it was recorded in the judgment that none of them referred to X having moved to live in Germany. This pattern of messages continued in the first part of 2020. The mother accused the father of "stealing" and "kidnapping" her son. The father responded that she would get him back soon.

20. In January 2020, the mother travelled to England, initially, it seems, without telling the father. In July 2020, she claimed asylum in this country. On 17 July 2020, the mother sent a message to the father saying that she had a six month visa to come to England. The father responded that he would "work on visiting you in UK with [X]". In further messages, the parties finalised arrangements for the father to bring X to visit the mother in England.

21. On 30 September 2020, the father flew to the UK with X, accompanied by the father's oldest son. They travelled on return air tickets. It was accepted before the judge that following discussions X stayed with his mother in England while the father and his oldest son returned to Germany, but the basis on which he stayed was hotly disputed at the hearing. It was the father's case that the parties agreed that X would stay until Christmas or shortly afterwards. It was the mother's case that it was agreed that he would live permanently with her. According to messages cited in the judgment, during the autumn of 2020, the father asserted that X would only be staying with the mother until January. The mother did not accept this. At one point she said: "we made no mandatory Christmas deal. I told you I only need him until my process is done".

22. At the start of 2021, the UK was in lockdown as a result of the Covid pandemic. According to the judgment, the father did not thereafter press for the return of the child, and X remained living with his mother and attending school here. In May 2021, the mother started proceedings for a child arrangements order in the Family Court at Newcastle. At the first two hearings, the father attended in person without challenging the court's jurisdiction. At the third hearing in July 2021, the father was legally represented and the court was informed that he intended to make an application under the Hague Child Abduction Convention for the summary return of the child to Germany, whereupon the proceedings under the Children Act were stayed.

23. On 31 October 2021, the father submitted an application under the Convention to the German Central Authority. They in turn transmitted the application to the UK Central Authority who appointed solicitors to bring proceedings. On 18 November, an application was issued in the Family Division of the High Court for the summary return of the child. On the same date, standard directions on issue were made in accordance with the established procedure. On 1 December 2021, a directions hearing took place before a deputy judge. Two further interim hearings took place, one for directions in which the final hearing was listed in February 2022. In the event, the final hearing in February was adjourned to March and then adjourned part-heard to a date in April. Oral evidence was given by the parties on the issues of habitual residence and the mother's defence of consent. At the end of the hearing, the proceedings were adjourned again for written submissions.

24. On 25 May 2022, the judge handed down a judgment granting the application for the summary return of X to Germany no later than 27 July 2022. The relevant parts of the judgment are summarised below. On 21 July, the mother filed notice of appeal whereupon the return order was stayed pending determination of the application for permission to appeal and of the appeal if permission granted. On 8 August, permission to appeal was granted and the hearing of the appeal listed on 8 September.

25. With the mother's agreement, the father had contact with X in England for four days at the end of August. On 28 August, however, he removed the child from the jurisdiction to Germany. On 31 August, Russell J made an order for the immediate return of the child. At the date of the hearing of the appeal, the father had not complied with the order and remained in Germany from where he observed the appeal hearing via the live stream. At a further hearing on 6 September, Judd J ordered that Russell J's order for the return of the child remains in force. An application to this Court shortly before the hearing of the appeal for an order that the father attend the hearing was refused. The reasons for our decision are set out later in this judgment.

The parties' positions before the judge

26. Before turning to the judgment, it is instructive to see how the case and issues were formulated by the parties in documents filed during the proceedings, in particular on the identification of the date on which it was alleged that X had been retained in this jurisdiction and the issue of habitual residence. The terms in which the parties' respective cases were formulated shed some light on how the judge came to her decision.

27. In the "Request for Return" dated 31 October 2021, submitted by the father to the German Central Authority and then forwarded to the UK Central Authority, it was recorded under the heading "Time, date, place and circumstances of the wrongful removal or retention":

> "January 2021 and July 2021[sic]. Mother refused to get him to first year German school …. He was only on holiday with mother – in asylum procedure in UK."

28. In a statement dated 15 November 2021, filed with the application to the High Court, the solicitor allocated by the UK Central Authority to represent the father did not expressly identify the date on which it was said that the child had been wrongfully retained. She stated that in May 2019 X had moved to Germany with the mother's consent, that in September 2020 he had come to England initially for a one week visit, and that the parties had then agreed that he could stay until Christmas. She continued:

> "In mid-December 2020 Germany placed a restriction on any travel to the UK and Kindergartens were closed. The Respondent told the Applicant that schools were open in the UK, and the parties agreed the child would benefit from starting school. It was unknown how long the restrictions in Germany would be in place for, and the parties agreed the child would stay in the UK until the end of the school term in July 2021."

29. At the case management hearing on 1 December 2021, the recitals to the directions order included:

> "D. AND UPON the mother through counsel formally indicating in lieu of an Answer to these proceedings that she seeks to defend them on the following bases:
>
> (i) Article 13a: Consent/Acquiescence
>
> (ii) Article 13b : Grave Risk/Intolerability
>
> E. AND UPON the mother expressly not seeking to rely on Child's Objections as a defence."

30. Following the abortive final hearing in February 2022, an order for further directions was made which included the following recitals:

> "It is recorded that the Mother's case is:
>
> 1. The child was wrongfully retained in Germany in May 2019 and therefore he remained habitually resident in Uganda until September 2020 when the Father brought him to the UK and on the Mother's case the Father agreed to him remaining in the United Kingdom.
>
> 2. The Mother accepts that both parents have rights of custody and did so at the date of the alleged retention in May 2019."

31. In accordance with directions given at that hearing, the mother then filed a statement dated 25 February 2022 in which she said that she did not accept that X acquired habitual residence in Germany, adding:

> "If the court finds that X acquired habitual residence in Germany, the two defences under the Hague Convention which I would seek to rely on are Article 13(a) consent / acquiescence and Article 13(b) Grave Risk of Harm/intolerability…. In terms of Article 13(a) the Applicant willingly brought X to me in the UK and when I told him I would seek legal support to ensure X remained in my care, the Applicant consented for X to remain living with me in the UK."

32. In her skeleton argument filed for the hearing in March 2022, the mother's counsel Ms Jones stated:

> "It is asserted by the Mother that in the circumstances it cannot be said that she has wrongfully retained X in the UK, and she would assert that he has habitual residence here. He now has settled status, and is a dependent on her application for asylum."

Later in the skeleton argument, Ms Jones said:

> "It is accepted that it is difficult, if not impossible, to assert that X remains habitually resident in Uganda. He has not lived there since May 2019, and M has not lived there since January 2020. The question has to be whether, bearing in mind the factors that have been set out by the Supreme Court and the circumstances of this case, X had acquired habitual residence in Germany by September 2020. There is scant information about X's circumstances in Germany.
>
> M asserts that X is habitually resident in England. He has lived with her since September 2020, with the consent of F. He is settled here, living with M and attending school. He is integrated here."

33. In the skeleton argument filed on behalf of the father for the hearing in March, his counsel Ms Papazian asserted that it had been the mother's case at the previous hearing in February that X's habitual residence had remained in Uganda up to September 2020. Ms Papazian summarised the issues for determination as follows:

> "(i) where was X habitually resident as at the date of retention (July 2021)
>
> (ii) whether the Father consented to the permanent removal of X to his Mother's care in September 2020 or on his case to a temporary stay initially until Christmas 2020 and then extended to July 2021
>
> (iii) whether a return to Germany would expose X to a grave risk of harm or other intolerability
>
> (iv) in the event of the establishment of any defence, the exercise of the Court's discretion."

The father's case was that the evidence showed that X was fully integrated in Germany, that when X came to England in September 2020 the father only consented to X remaining for a limited time, initially until October 2020 but extended to January 2021, that his stay was then extended because of travel restrictions imposed because of the pandemic, that as a result he started school here, and that it was agreed between the parties that he would return to Germany in July 2020.

34. In a further note dated 12 April 2022 filed on behalf of the father, following the disclosure of certain documents including WhatsApp messages passing between the parties, it was asserted that the issues before the court remained:

> "(i) where was X habitually resident at the date of retention;
>
> (ii) whether the Father consented to the permanent removal of X to his Mother's care in September 2020 or on his case to a temporary stay initially until Christmas 2020 and then extended

> to July 2021 (TB 102 §15105 §36) If the Father did not consent whether he thereafter acquiesced to X remaining in England."

35. In closing submissions filed on 4 May 2022 after the hearing, Ms Jones for the mother stated:

> "It is submitted that X was wrongfully retained by F in Germany in May 2019, M having consented to a 2 week holiday, and that he never became habitually resident in Germany as M continued to demand his return and make it clear that she did not consent to his retention in Germany. It is accepted that this is only one factor when considering the issue of habitual residence, but that it should weigh heavily in the circumstances of this case.
>
> It is also the case that F has provided scant evidence of X's integration in Germany.
>
> If it is found that despite the wrongful retention of X in Germany, he had become habitually resident there by September 2020, it is M's case that F brought X over for a holiday in the UK, but then agreed to X remaining with M in the UK.
>
> …
>
> It is unclear when F is saying that X was wrongfully retained in the UK …. If the court find that M has wrongfully retained X in the UK then she would seek to defend the application for X to be returned to Germany on the basis of Art 13(b)."

36. In closing submissions on behalf of the father, Ms Papazian asserted:

> "The Father's case is that [X] was habitually resident in Germany at the date of his departure on 30 September 2020."

Having identified evidence in support of that submission, she continued:

> "In any event it is submitted that X had acquired habitual residence in Germany by the date of his departure on 30 September 2020. It follows that the Court must therefore order the summary return of X to Germany pursuant to Article 12 of the 1980 Hague Convention unless a defence is established and the court exercises its discretion not to order a return. The burden of proof is on the Mother to establish her defences of consent or acquiescence and intolerability / harm."

She then continued with submissions on the defences, starting as follows:

> "It follows that it is for M to establish her defence of consent to a permanent return to her care following X's arrival into this jurisdiction on 30 September 2020 for what was clearly only intended to be a trip evidenced by the booking of return flight tickets …. If the Mother fails to establish consent then the Court

> must then consider her alternative case that the Father acquiesced to X remaining in this jurisdiction. It is submitted (and especially after cross examination on behalf of the Father) that the Mother does not establish consent and on these facts cannot establish acquiescence."

37. Finally, in supplemental submissions filed in response to the mother's submissions, Ms Papazian for the father asserted:

> "X was clearly habitually resident in Germany when he arrived in England on 30 September 2020 after spending 17 months living in Germany with his Father. He was retained beyond the period the parties agreed. The Mother has failed to establish consent to his permanent stay in England and has failed to establish her Article 13(b) defence."

The judgment

38. In paragraph 2 of her judgment, the judge recorded the mother's case in these terms:

> "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."

39. The judge then set out the background history, including passages from text messages passing between the parties, followed by a summary of the opinion given by a jointly instructed German lawyer. In respect of this opinion, the judge later recorded that she was satisfied that the lawyer had "set out a route for the mother to go to Germany, in the event the court orders X to return." She then recited the legal principles relating to habitual residence and the defences of consent, acquiescence and under Article 13(b). It is perhaps indicative of the focus of the hearing before the judge that the greater part of this summary was on the defences, with only a short paragraph on habitual residence.

40. Next the judge summarised counsel's submissions. On the issue of habitual residence, she did so in these terms:

> "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 up 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 X's habitual residence is in Germany, the burden falls on the mother to establish the defences she relies upon."

41. The judge proceeded to summarise the respective submissions on the mother's defences. On the issue of consent, she said:

> "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 X 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."

42. Under the heading "Discussion", the judge then set out her analysis of the issues. She began by observing that it had been difficult to unravel the complicated factual background and that the difficulties had been compounded by the late disclosure of documents, in particular messages from the father's phone. Dealing first with habitual residence, she recorded that she had concluded that "there was no settled agreement between the parties for X to come and live in Germany with the father in either 2018 or 2019", and gave her reasons for that conclusion by reference to the parties' evidence and the contemporaneous messages that had passed between them. She then continued:

> "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 X'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 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."

43. She considered but rejected the mother's reliance on the father's initial failure, at a time when he was not legally represented, to challenge the jurisdiction of the court in Newcastle. She expressed her conclusion on habitual residence in these terms:

> "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."

44. In line with the way in which the mother's case had been presented, the judge then considered the events of the period from September 2020 to July 2021 in the context of the defence of consent.

> "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."

45. The judge then dealt with the defences of acquiescence and grave risk under Article 13(b), finding that neither had been made out. She therefore concluded by granting the father's application for summary return, whilst expressing the hope that, as X had "spent significant periods of time in the care of each parent", they would "refocus on X", either by engaging in mediation or commencing proceedings in Germany 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."

46. One notable omission from the judgment is that it does not expressly identify the date on which the child was wrongfully removed or retained. This omission was, however, corrected in the order approved by the judge and sealed by the court following judgment. In the first recital to the order, it was recorded:

> "(1) By its judgment dated 25 May 2022 the court determined that at as [sic] of the date of retention in July 2021 the child was habitually resident in Germany."

The order continued with further recitals, the next three being in these terms:

> "(2) The mother failed to establish consent or acquiescence to the child's permanent stay in this jurisdiction.
>
> (3) The court rejected the mother's article 13(b) defence of harm or intolerability.
>
> (4) The court indicated and the father agreed that the child should remain in the care of the mother if she accompanies him on a return to Germany and pending any decision in respect of child arrangements made by the court in Germany."

Under paragraph 9, it was ordered that the child should be returned by 27 July 2022. A penal notice was attached to this paragraph. Under paragraph 10, it was ordered that by 17 June 2022 the mother should confirm via her solicitors whether she would accompany the child on his return and remain with him in Germany pending conclusion of child arrangements proceedings. Further paragraphs dealt with arrangements facilitating the child's return to Germany, the father's contact with the child pending the return, and the dismissal of the proceedings in Newcastle. An annex to the order set out a number of undertakings given by the father in terms commonly found in return orders made by courts in this jurisdiction under the Convention. Beyond noting that they included an undertaking not to seek to separate the child from the mother pending any determination by the German court, it is unnecessary to set out the undertakings in this judgment.

A preliminary point

47. Before considering the grounds of appeal and submissions advanced before this Court, I deal with a preliminary point on behalf of the mother. A few days before the hearing of the appeal, the mother's legal representatives applied for an order that the father attend the hearing.

48. There is clearly power to order a party to attend the hearing of an appeal. CPR r 3.1(2)(c) says "the court … may require a party or a party's legal representative to attend the court". The CPR plainly apply to the Civil Division of the CA (and CPR r 2.1(1)(c) says this in terms). The power to order a party's attendance is therefore available to this Court.

49. There is relatively little authority as to the exercise of the power and we did not invite submissions on this issue. A court may order a party to attend where it considers it necessary to do so for the purposes of the hearing, having regard to the overriding objectives in CPR r 1. This extends, for example, to cases where the court considers that one or more of the issues may be resolved by negotiation or agreement: see dicta of Brooke LJ in *Baron v Lovell* [2000] PIQR 20 at paragraph 27, Tuckey LJ in *Tarajan Overseas Ltd v Kaye* [2001] EWCA Civ 1859 at paragraph 11, and Moylan LJ in in *Lomax v Lomax* [2019] EWCA Civ 1467 at paragraph 31.

50. In this case, however, there was no obvious benefit to the conduct of the appeal to be gained by insisting on the father's attendance. He was able to watch the hearing through the live stream link and was in contact with his solicitors. The issue on the appeal was whether the judge's decision was wrong, and the determination of that issue involved legal argument from the parties' representatives. The father's attendance would not assist that process. It is very common for the lay parties not to attend a hearing before this Court. Had we ordered the father to attend, and had he complied with the order, the mother would have no doubt sought to take advantage of his presence to enforce the order made by Russell J. But in our view, it would not have been right for this Court to have ordered the father to attend, since his attendance was unnecessary for the purposes of the appeal. The fact that since the hearing before Theis J the father has unlawfully removed the child and is in breach of a subsequent order does not impinge on our role, which is to decide whether the judge was wrong to make the order for summary return. It was for that reason that we refused the mother's application.

The grounds of appeal and submissions of the parties

51. The replacement grounds of appeal asserted, in summary:

(1) The judge was wrong to find that the child's habitual residence was in Germany by September 2020.

(2) She wrongly failed to take into account the child's integration in England from September 2020 onwards and whether the child had become habitually resident in England.

(3) She failed to make a finding as to when the child was retained in England.

(4) She failed to consider whether the date of retention was the date when the mother did not return the child after the one week holiday in September 2020.

(5) She failed in her duty to consider Articles 12 and 20, namely whether the proceedings had been commenced after the expiration of one year from the date of retention and the child was settled in his new environment, had a *de facto* life in England, and should be allowed to continue to live here.

(6) She was wrong in law in not obtaining a Cafcass report on the child's views (as to his return and as to his integration) and considering separate representation for him.

(7) She failed to take into account whether the undertakings given by the father, particularly in relation to not removing the child from the mother's care before the matter was brought before the German court, could be relied on, given her findings in respect of his wrongful retention of the child in Germany in 2019, his dominance over the mother, his insistence that the child is "his child" and should live with him, and his failure to make full disclosure to the court in respect of the messages between him and the mother.

(8) She failed to take properly into account that the mother has never lived in Germany, that she has no support network in Germany, that she does not speak any German and that she would be isolated there. This would exacerbate her mental health issues and potentially mean that she cannot care for her child. As she is his primary carer, he will be placed in an intolerable position.

52. In submissions to this Court, Mr Gupta KC leading Ms Jones did not strongly pursue the first ground of appeal, that the judge had wrongly found that X was habitually resident in Germany in September 2020. Instead, he focussed his submissions on the judge's approach to events after that date and to the defences under the Convention.

53. Mr Gupta asserted that, contrary to established authority, the judge had failed to identify the date of retention and had failed to address the issue of X's habitual residence at that date. If, as the father asserted, the date of retention was July 2021, it was incumbent on the judge to consider whether by that date X had acquired a degree of social integration in this country so as to acquire habitual residence. Instead, she had directed her analysis of the period between September 2020 and July 2021 to the question whether the father had consented to the child remaining in this country. Parental consent is relevant to the question whether a child has acquired habitual residence, but it only one factor among many. The judge had identified the correct legal principles concerning habitual residence but failed to apply them to the facts. Had she done so, she would have concluded that by July 2021 X was habitually resident in England and that therefore he had not been wrongfully retained in this country within the meaning of Article 3.

54. In the alternative, it was argued that, if the child was wrongly retained here, the judge ought to have concluded that a summary return would expose him to a grave risk of harm or place him in an intolerable situation within the meaning of Article 13(b). In particular, it was submitted that the father's undertakings to the court could not be safely relied on in the light of his previous conduct. Mr Gupta also submitted that, although the mother's representatives had raised only two defences to the application for summary return – consent or acquiescence and grave risk under Article 13(b) – it had been incumbent on the court to identify and consider other defences which might have been open to the respondent. In this case, there were two such defences, neither of which were considered by the judge, namely (1) under Article 12, that by the date on which the proceedings had started over a year had elapsed since the child was wrongfully

retained and was now settled in his new environment, and (2) under Article 20, that the summary return of the child to Germany would be contrary to the fundamental principles relating to human rights.

55. It was also argued that, in order to analyse the extent of the child's integration in this country and the impact of a summary return, the judge ought to have (1) arranged for X to be interviewed by a Cafcass officer and (2) considered whether he should be separately represented. Mr Gupta asserted that it was highly unusual for a child of this age not even to be interviewed when the issues in the proceedings include the degree of integration and settlement and the risk of harm if the child was returned.

56. In response, Mr Michael Gration KC leading Ms Papazian on the appeal pointed out that, contrary to the mother's assertion, the judge made a positive finding, recorded in the court order, that X was retained in England in July 2021. Having identified the correct legal principles and considered the oral and extensive written evidence, she concluded that the child had acquired habitual residence in Germany by the time he came here in September 2020 and remained habitually resident in that country at the date of retention. Mr Gration submitted that the approach to this issue was undoubtedly confused by the way in which the mother had pleaded and argued her case, which made barely any mention of the possibility that the child's habitual residence may have changed after his arrival in this country in September2020. It was clear from the judgment, however, that the judge found that, having acquired habitual residence in Germany prior to coming to this country, X did not lose it or acquire habitual residence in England in the period he spent in this country prior to the date of retention.

57. Mr Gration invited us to reject the mother's complaints about the judge's treatment of the pleaded Article 13(b) defence. The father had offered undertakings in the conventional way and it was not asserted before the judge on behalf of the mother that the offered undertakings were unreliable. Through his counsel, the father had offered to apply to the German court for advance recognition of the measures recorded in the undertakings, but this offer was not pursued by the mother's representatives. In those circumstances, the judge had been entitled to reach her decision that the Article 13(b) defence was not established.

58. Turning to the arguments now put forward by the mother under grounds (5) and (6) but not advanced at the hearing before the judge, Mr Gration submitted that they are not in accordance with the law or established practice. To succeed on either ground, the mother would have to demonstrate that, in 1980 Hague Convention proceedings, a judge at both the case management stage and the final hearing has an independent obligation to investigate the case and pursue potential lines of enquiry not raised by the parties, including defences under the Convention not raised by the respondent. Such an approach would be inconsistent with the approach to litigation generally and under the Hague Convention in particular, and contrary to the Practice Guidance which requires the parties to identify the issues and imposes an obligation for expedition and robust case management. In this case, the mother's representatives repeatedly indicated that the only defences being advanced were consent/acquiescence and Article 13(b). Accordingly, the judge was entitled to proceed on that basis and was not obliged to investigate other potential defences under Article 12 or (in so far as it has any domestic effect) Article 20. Furthermore, given her finding that the date of retention was July 2021, the defence of settlement under Article 12 did not arise. In circumstances where

no party had proposed that the child be interviewed by Cafcass, the judge was entitled to proceed without ordering a report.

59. Mr Gration therefore invited the court to dismiss the appeal. In his skeleton argument, however, he added by way of an alternative argument that the father's application be remitted for what he described as a "focussed argument" on the issue of the date of retention and the child's habitual residence as of that date.

Discussion

60. It is implicit in Mr Gration's candid alternative submission on the disposal of this appeal that the argument before the judge was insufficiently focused on the date of retention and the child's habitual residence as at that date. As noted above, the documents put before the judge show that there was a lack of clarity about this issue. The order made following the hearing included the recital that that the court had determined that, at the date of retention in July 2021, the child was habitually resident in Germany. This is broadly consistent with the father's written case. In the originating application to the German central authority, the father had identified "January 2021 and July 2021" as the date of wrongful retention. In her skeleton argument on the father's behalf, Ms Papazian asserted that July 2021 was the date. So far as I can see from the documents put before this Court, the mother did not make any assertion as to the date of retention. Her principal case was that X never acquired habitual residence in Germany. In her skeleton argument filed in March 2022, however, Ms Jones also asserted that X was now settled and integrated in this country and was habitually resident here. The fact that Ms Jones made that assertion suggests that the mother accepted that the date of retention was later than September 2020.

61. On the other hand, the judgment is silent as to the date of retention. Furthermore, it seems clear that during the hearing, both parties directed their arguments primarily to the question whether X had acquired habitual residence in Germany prior to visiting this country in September 2020. They both focused their analysis of the evidence on the question whether X had achieved the necessary degree of integration in a social and family environment in Germany at that date. In the judgment, the evidence about subsequent communications passing between the parties after September 2020, and other events occurring after that date, was considered only in the context of the mother's defence that the father had consented to the child's retention. A reader of the judgment who had no access to the other documents in the case could therefore be forgiven for thinking that September 2020 was the date on which it was being asserted that X had been retained in this jurisdiction.

62. Ultimately, however, the clearest statement about the date of retention is found in the order made following the hearing. In my view, this Court has to proceed on the basis that the judge identified July 2021 as the date, notwithstanding the fact that there is no express statement to that effect in the judgment itself.

63. The difficulty is that the judgment contains no analysis of the question whether X had achieved the necessary degree of integration in a social and family environment in England at that date. As stated above, the evidence was focused on the degree of integration X had achieved in Germany by September 2020, not on the degree of integration he had achieved in England by July 2021. If the focus had been on the latter point, the evidence about the father's consent to X remaining in this country would be

considered, not as a defence to the application for summary return, but rather as part of the analysis of whether the child had achieved the degree of integration necessary to acquire habitual residence here.

64. In most cases, the court can safely assume that if the parties are in agreement on an issue, as contemplated by the Practice Guidance, then little more need be said about it. What was unusual about the present case was that the mother did not articulate her case with sufficient clarity. She was clearly saying that X had not acquired habitual residence in Germany by September 2020 and that his subsequent retention in this country was with the father's consent or acquiescence. She did not, however, articulate her case that if, contrary to her arguments, X had acquired habitual residence in Germany by September 2020 and the father had neither consented to nor acquiesced in his subsequent retention here, the retention in July 2021 was not wrongful because by that date X had achieved a sufficient degree of integration to become habitually resident in this country.

65. Mr Gration submitted that the structure of the Convention is that the burden of proving that there has been a wrongful removal or retention under Article 3 lies on the applicant and, where established, the burden then shifts to the respondent to prove one of the defences under Article 12 or 13. Habitual residence, however, is not a matter that arises simply as an adversarial issue on which the judge adjudicates between the parties' respective arguments. The question of habitual residence goes to the heart of the court's jurisdiction to order the child's summary return under the Convention. Having identified the date on which the child was retained in this country, it was then necessary for the court to establish whether it had jurisdiction by examining the evidence to determine his habitual residence at that date.

66. If, as stated in the order, the court found as a fact that the date of retention was July 2021, it was necessary for the court to examine the evidence of integration in this country at that date to determine whether his habitual residence had changed. Regrettably, but understandably in the light of the way the case was presented, no such analysis was carried out by the judge in this case. Plainly, having been in this country for 10 months before July 2021, and having attended school during that period, it is arguable that X had achieved the requisite degree of social and family integration to become habitually resident here, but whether he had in fact done so is a matter for determination on the evidence by a judge at first instance, not on appeal.

67. For that reason, it seems to me that the appeal must be allowed on ground 2 and the matter remitted for rehearing.

68. In those circumstances, I confine my consideration of the other grounds of appeal to the following brief observations.

69. First, I would dismiss the mother's other challenges to the judge's treatment of habitual residence issues set out in grounds 1, 3 and 4. Ground 1 is wholly without merit. There is no basis on which this Court could conclude that the judge was wrong to find that X was habitually resident in Germany in September 2020. She made the finding after a careful and thorough examination of the evidence and it would be quite wrong for this Court to interfere with her decision on that issue. With regard to ground 3, in view of the recital to the order made at the conclusion of the hearing, it cannot reasonably be asserted that the judge failed to make any finding as to the date of retention. In respect

of ground 4, I accept that on the evidence it was arguable that the date of retention was September 2020 and that the judge did not consider this possibility, but her failure to do so was substantially attributable to the way in which the case was presented. Accordingly, I would not be prepared to allow the appeal on that ground.

70. Secondly, I reject Mr Gupta's argument under ground 5 that it was incumbent on the judge to identify and consider other defences which had been neither pleaded nor raised by the mother but which would have been open to her to put forward. That argument is, as Mr Gration submits, inconsistent with the correct approach to litigation generally and under the Hague Convention in particular. The order made at the case management hearing on 1 December 2021 included recitals that through counsel she was "formally indicating in lieu of an Answer to these proceedings that she seeks to defend them on the basis of" consent/acquiescence and Article 13(b) and that she was "expressly not seeking to rely on Child's Objections as a defence". There was no change in that position before or during the final hearing. In the circumstances, there was no obligation on the judge to investigate whether the mother could have relied on the defence of settlement under Article 13 or (to the extent that Article 20 has any domestic effect) asserted any breach of human rights.

71. Thirdly, I also reject the argument in ground 6 that the judge was wrong not to obtain a Cafcass report or consider separate representation for the child. At no point during the final hearing before the judge – nor, so far as I can discern, at any earlier stage in the proceedings – did either party suggest that the child should either be seen by a Cafcass officer or joined as a party. It is certainly strongly arguable that, at an earlier stage, consideration should have been given to asking a Cafcass officer to speak to the child. As set out above, paragraph 3.5 of the President's Practice Guidance stipulates that "where it is clear on the face of the application and supporting evidence that it will be appropriate for the child to be heard during the proceedings the court may give directions to facilitate this …." Given the father's case that the date of retention was July 2021, it should have been clear at the case management stage that the court would have to consider the extent to which X had acquired a degree of social integration in this country by that date and that a report from Cafcass might have assisted the court to determine that question. But in the event, that issue was apparently not addressed at any of the preliminary hearings nor raised by either party at the final hearing. In the circumstances, I am not persuaded by the argument that the judge should have independently decided to adjourn the final hearing for a Cafcass report or that her failure to do so justifies this Court allowing an appeal against her order.

72. Fourthly, as the father's application is going to be remitted, it is in my view inappropriate and unnecessary to make any observations about grounds 7 and 8 relating to the judge's treatment of the Article 13(b) defence. It will be a matter for the next judge to decide whether, in the light of the father's subsequent unlawful removal of the child back to Germany, and any further developments that may take place hereafter, there should be a rehearing of the father's application. If a rehearing does take place, the judge will in all probability have to consider the Article 13(b) defence, including proposals for undertakings and other protective measures, afresh in the light of the evidence and submissions presented at that stage, which will undoubtedly include evidence and submissions about the father's conduct since the last hearing. In those circumstances, it would be unhelpful for this Court to say anything about the merits, or the judge's treatment, of the Article 13(b) defence.

73. Both parties indicated through counsel that they would be content for the matter to be remitted to the same judge. But, as I have just observed, a rehearing of the father's application, if it takes place, is unlikely to be confined to the issue of habitual residence but may extend to a rehearing of the mother's defences to the application. For that reason, it seems to me to be preferable for the rehearing to be conducted by a different tribunal. If my Lords agree, I would therefore propose that the matter be remitted to the President of the Family Division to allocate the case to another judge of the Family Division.

LORD JUSTICE PHILLIPS

74. I agree.

LORD JUSTICE NUGEE

75. I also agree.