IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
**[2019] EWHC 3842 (Fam)**

No. FD19P00450

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 28 November 2019

Before:

MRS JUSTICE LIEVEN

(**In Private)**

B E T W E E N :

C H

Applicant

- and -

GLS

Respondent

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MS K. CHOKOWRY appeared on behalf of the Applicant Father.

MS A. GUHA appeared on behalf of the Respondent Mother.

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**J U D G M E N T**

(Transcript prepared without the aid of documentation)

MRS JUSTICE LIEVEN:

1 This is an application under The Hague Convention and Brussels II Revised for the summary return of the parties' daughter, A, aged four, to Spain. The father alleges that A was wrongly removed from Spain on 21 May 2019. His application to this court was issued on 28 August 2019.

2 The mother opposes the father's application. She originally relied on Article 13(a) (consent), but that is no longer relied on, and 13(b) (grave risk of harm) under the Convention, and, by a statement dated 26 September 2019, the mother added the defence of acquiescence to her claim. The mother no longer relies on consent but continues to rely on acquiescence and grave risk.

3 There were two preliminary issues raised at the start of the hearing; first of all, whether I should admit a further statement from the mother dealing with her medical condition in pregnancy and further evidence on acquiescence and, secondly, whether I should hear oral evidence. Both applications were made by Ms Guha on behalf of the mother and opposed by Ms Chokowry on behalf of the father. I allowed the further statement because I needed evidence in relation to the pregnancy and how that impacted on grave risk. Given some of the potential inconsistencies in the evidence of both parties on acquiescence, I took the view that it would be helpful for me to hear short oral evidence on acquiescence, and indeed on grave risk. In the event that evidence has assisted me, although I bear closely in mind that these are summary proceedings and I am not undertaking a fact-finding or welfare exercise.

## The Background and History

### In Spain

4 The background to this matter is that the father is a British citizen, in his mid-twenties, who moved to Spain with his family at the age of four. The mother is also a British citizen, in her mid-twenties. She too moved to Spain with her family, or some parts of her family, I think, at the age of sixteen. The parties met in Spain in 2012 and cohabited there throughout their relationship. A was conceived while the parents were on a trip to the USA and Australia for a number of months and was born in Spain in 2015. The mother is currently pregnant with the parties' second child, who is due in around February 2020.

5 There is some relevance to the fact that the mother was employed in Spain by the father's parents' business, as are still her stepfather and her brother. The mother says, and I do not think this is really disputed, that she speaks very little Spanish and can only communicate with what she describes as "supermarket Spanish". She says that, in the time that she was in Spain most if not all of the discussions with authorities were undertaken with the assistance of the father.

6 Part of the background to this case, and I will come to this at points in the chronology, is that the mother makes very serious allegations of domestic violence against the father. She has made two statements detailing these allegations and has produced a number of photographs to support those allegations. She alleges that she has been the victim of physical and psychological abuse over the last five years. The father denies the allegations, but accepts that he may have, on occasions, pushed the mother away, and he says that the mother has assaulted him. He does not advance any alternative explanations for the

numerous photographs of bruises on various parts of the mother's body, other than pushing her away.

7 The two most serious allegations are, firstly, an incident in November 2018 when the police were called to the flat. It seems that a neighbour or passer-by saw what was happening from the street and called the police. The mother says that, although she accepted in cross-examination that she thinks some of the police did speak some English, she could not communicate effectively with the police, but also that she felt intimidated and isolated, and therefore did not tell them what had happened.

8 The second incident which led directly to her leaving Spain was on 20 May 2019. By this date, the mother was pregnant, which there is no dispute the father was aware of. She describes the incident as "the worst argument we ever had", and she says that the father threw a chair at her, used his full force to push her into a wall, causing her to sustain bruising and a cut to her arm. As I have already said, there are photographs which seem to show that there were injuries to the mother, and the father does not dispute the incident, although does dispute that he caused or initiated it. The mother goes on to say that the father locked her out of the apartment, leaving her trapped on the outside balcony on a hot summer's morning and ignored her pleas to be let back in. She then threw something at the father.

9 I set out that incident in a little detail because it is important to recollect that the mother was pregnant at that stage and the father knew that. The father – when I come to correct this transcript, I will put this in a little bit earlier – the father accepts that there was a fight, but suggests he was the victim. He says that the mother had violent outbursts, and there is some dispute about what happened to A on that day. The father initially suggested that he kept A with him because he was worried for her safety if she went back to the mother, but he then said in his written statement that he was actually worried about what would happen to him if the police were called.

<u>In England</u>

10 On 21 May, the mother travelled to England on a one-way ticket. In terms of subsequent events, and particularly in the context of the issue of acquiescence, I was taken to a large number of text messages which both parties rely upon. It is neither necessary nor appropriate to read them all out, but I do have close regard to what Lord Browne-Wilkinson said in *Re H*, that particularly in the context of acquiescence, contemporaneous evidence, particularly contemporaneous written evidence, being the better evidence than later oral recollections.

11 So, in an attempt to summarise the chronology, I will set out a number of the most relevant texts - and making clear that when I refer to text messages, I am going to read them out in normal speak, rather than trying to replicate text speak at every point. The relevant ones start on 21 May, when the mother was still in Spain but about to leave – there is a text from the father saying:

> *"You do not have any permission to take my daughter, A, out of the country. I'm her father and, without my consent, it's kidnapping. All I want to be able to do is say bye to her."*

And then, a few minutes later, there is a text from the mother saying, "Do I have your consent now?" and I understand that was after the father had seen A, and the father's text back says, "No."

12 The chronology suggests that very soon after the mother left Spain, the father instructed a Spanish lawyer, Ms Campos. On 24 May, there was a series of texts, and then one from Ms Campos. I should explain for any future reader of this transcript that I don't have all the texts, so sometimes the passages come somewhat out of context. But, on 24 May, the first relevant one is at 7.56 am, when the father says:

> *"I'm not doing any of this to take A off of you. I want her to live with you. I just don't want to be pushed out whenever you and your family feel like it."*

And then, at 7.57, he says:

> *"Okay then, I'll cancel my lawyers today. What's the next step? When can I come pick her up for a few days because I don't want to hang around with you or your family."*

13 Then, later the same day, the mother received a text from Ms Campos saying as follows:

> *"Hello GLS. This is Yolanda Campos, family advisor and solicitor in Benidorm. Today, CH came to visit me and he informed about your situation. I offer you to sign an agreement between both of you to regulate the custody and maintenance and the visits, the relation [sic] between your daughter and his [sic] father. He would accept you to stay in England if this is your decision, although you would need the agreement of CH or permission from a judge to change the place where your daughter lived. He will authorise you in the agreement. If not, let me know because, in that case, CH will start court case to bring back your daughter to Spain."*

14 I should make clear at this stage that there is nothing in the texts at this point, or indeed later, that would suggest that the mother intended to return to Spain. It seems to me to be obvious from these very early texts that the father fully appreciated, if not on 21 May certainly by 24 May, that it was the mother's intention to stay in England with A. That is, in my view, the only way to make sense of what Ms Campos' text said.

15 Then, a few days later, on 31 May, there were a series of texts. I am not going to read them all out. It starts with the mother saying:

> *"I can't believe you're going for full custody. You've said you don't want fully custody time and time again. Do you actually think our daughter is going to be better if living with you? Daughters need their mums. I'm pregnant FFS."*

Which I believe means "for fucks sake".

> *"Why would you want to drag us all through this? She's going to see it all. It's not fair, man."*

The father then replies:

> *"Well, then, sign some paperwork that gives us 50/50. She can live with you. But you can't stop her coming Spain for weeks in the summer. We*

*share holidays and share weekends. Get all that in writing with your solicitors and we can sort it out."*

Mother says:

*"H, it's too late if it's in the hands of the courts now."*

16 And then, a little bit further on, on the same day, the father says:

*"I've handed paperwork in for my lawyer to take to court because you won't let me see my daughter. If you, however, decided to come round and come to an agreement with me, I'll cancel it, but for that to happen, you or your lawyers will have to call my lawyer."*

17 Then, on 3 June – just for the court's note, this is C104, because it is not a dated page – the father says:

*"I don't care where you're going to live or what you're going to do, as long as A is okay."*

I put in parenthesis, in the chronology here that the father and Ms Chokowry argued that the father's evidence was that what he meant there was that he didn't care where the mother lived but wanted A to live with him. I have to say I find that interpretation of that text not believable. It is in my view entirely clear that the father was saying there that he did not care where the mother and A lived, subject to him having acceptable contact. That is the only sensible construction of what he was saying there.

18 Then, a couple of days later, on 5 June, the father is texting, it looks as if it is in the context of him trying to have Facetime or a phone conversation with A, and there is a reference to the lawyers, and then he says:

*"It's going to take way too long, minimum six months before owt will happen. I can't wait that long, so take the time to think about what you want to do now and let me know when I can see my daughter please. Next week will be three weeks and I miss her so much, and I know she misses her dad."*

19 I should make clear there were texts between these dates, and I am sure there were lots of communications, but these are the most relevant ones. On 23 June, a text from the mother says;

*"I think, in agreement between us both to suit our kids is for the best. Have a think about what you would like to come from the agreement and we----"*

I think it should be "can".

*"-- get the ball rolling. Enjoy the rest of your weekend."*

20 By 8 July, so two weeks later, the parties were, as I would describe it, inching towards an agreement. The mother sent the father a screenshot of a note of what lawyers would call the "heads of terms" of an agreement, and the relevant parts are: speak to one another respectfully; come every two to three weeks – I cannot see what is in the brackets, but I

think it is clear that was intended, "come to England"; – welcome at the birth of the baby, "I'd be happy to take A and baby over for holiday".

21 On 15 July, the father came over to England, and there seems to have been a relatively unacrimonious outing with A and discussions over a meal. The father says now, in evidence, that he made clear that he wanted A to return to Spain to live, but he accepted, as he had no choice but to do, that this is not reflected in the texts. The mother denies that the father suggested that she and A should return to live in Spain. Importantly, and I will come back to this, there is not the faintest suggestion in the texts after that meeting, that the father was saying, or the mother understood that the father wished and intended that she and A would return to live in Spain. Further that would support any suggestion that the father had said he wanted to A to return alone.

22 Then, on 22 July, there were further discussions about the terms of an agreement. The texts for this day are extremely confusing because they are in different places in the bundle, but the mother set out a number of points of agreement. There is a series of texts on 23 July of which I have a number, which start from the father at about 10.36am, and there were negotiations about particular dates, and dates when the mother and A would come to Spain, whether they would come to Spain in the first week of September or the last week of August, and the father says:

> *"I'll pay for all the flights, over and back, like I originally said."*

I note in parenthesis here, that is at least on the face of it, wholly inconsistent with the father's position that he either wanted A to go to Spain to live let alone that he had said that was what was going to happen to the mother.

23 There are then texts from the mother setting out a number of points, which largely reflect the earlier points made in the handwritten screenshot, and there is reference now to money for the cost of the agreement. There is then there is a dispute about whether or not A should be introduced to the father's new girlfriend, and the mother is strongly opposed to that in the texts. The father's position is somewhat equivocal, because he initially says, "I've agreed with everything you've said", but then, a little later in the sequence, he seems not to be suggesting that A would meet the new girlfriend. It is not entirely clear but certainly at the end of that day of exchanges, there is no firm agreement.

24 And then, on 2 August – this appears to where the point where negotiations start falling apart – there is a text from the mother saying:

> *"All the threats you've made, like going for custody, reporting me for abduction, when you knew we was leaving, that she's going to get sent back, you don't stick to a word you say, so yes, I would maybe bring her over."*

Let me stop there. That, as I understand it, was a reference to the fact that the mother was unwilling to bring A to Spain until there was a written agreement. She goes on to say:

> *"You shouldn't have booked flights before this was sorted, and especially before speaking to me. This is why the agreement needs put in place so things like this can't happen. You expect us to drop our plans and wait for you. It's not on."*

25 And the father then says:

> *"You stole my daughter from me, asking me for £600 for an agreement that's in your terms. You won't let me see her, you barely let me talk to her. I can't organise when I come to see her. You say I'm arguing with you when you started texting me. Wait for me. I've seen her for six hours in eleven weeks. I'm hardly asking for a lot. Coming back to pick her up. You stole her from her life."*

26 And then, on 5 August that the father lodged his application with ICACU.

27 It was the father's case in his evidence that he always wished and intended for A to return to Spain, if necessary without the mother, and he says he made this clear to the mother orally. Ms Chokowry, in her closing, said that it had been made clear orally on the first occasion when the parents met, in June, and, secondly, when the father was in England in August. It is, in my view, relevant that the father, in his statement at para 43 says, in relation to the events of 5 August:

> *"On 5 August 2019, I flew to England and stayed for five days in an attempt to persuade GLS to return A to Spain. I also tried to spend some time with A, but this proved to be extremely difficult. GLS would not allow me to see A or bring her to Newcastle for a couple of days as she did not trust me not to return A to Spain."*

28 He certainly does not explain in that statement that he was suggesting or intending, or had always intended that the mother, should return to live in Spain, or what arrangements were being made in Spain either for mother and daughter to return to live or, as he seems to be suggesting in the statement, that the daughter returned alone.

29 It was the mother's case that the father never said to her that he wished or intended that she and the child returned to live in Spain. Her understanding was, she said, that the father would agree for A to stay in England as long as he got suitable rights to see her in England and that the child would come to Spain for holidays, at least initially with the mother.

30 The progress towards an agreement, as I read the documents and hear the evidence, failed for two reasons. The mother would not agree to bring A for a holiday to Spain until a legal agreement was signed, and the mother wanted the father to agree not to introduce A to his new girlfriend. The mother said she was concerned that this would be upsetting for A. The father made his application to ICACU on 5 August.

**The Law**

31 I start with The Hague Convention. The principles and underlying policy of the Convention, which then become the principles and underlying policy of BIIR, is well-known and does not require extensive repeating. Article 1 of the Convention states that its objects are:

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

32 Baroness Hale, in *Re D (A Child: Abduction Rights and Custody)* [2006] UKHL 51, at para.48, said:

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

33 Article 3 prescribes the removal of a child to be wrongful where it is in breach of rights of custody attributed to a person, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal, and (b) at the time of removal, those rights were actually exercised.

34 Article 12 of the Convention requires a wrongfully removed child who has been in the country to which he or she has been abducted for less than a year to be returned to her home country "forthwith". That mandatory requirement applies unless a defence to return is available under Article 13. Ms Chokowry has also referred me to the statements of Mostyn J in *B v B* [2014] EWHC 1804, but I am not sure they add anything that is novel in this case and I take them into account but do not set them out.

35 There is not dispute that A was habitually resident in Spain before she was removed on 21 May 2019. Two defences relied upon here. The first is acquiescence and the second is grave risk.

Acquiescence

36 The leading case on acquiescence remains that of *Re H (Abduction: Acquiescence*) [1997] 1 FLR 872, as set out by the House of Lords in the speech of Lord Browne-Wilkinson. Given that some of the detail of the law on acquiescence is important in this case, I am going to set out some of the relevant passages. At p.882, Lord Browne-Wilkinson said:

*"What then does Article 13 mean by "acquiescence"? In my view, Article 13 is looking to the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted? This is the approach adopted by Neill LK in In re S. (Minors) (supra) and by Millett LJ in In re R. ... In my judgment it accords with the ordinary meaning of the word acquiescence in this context. In ordinary litigation between two parties it is the facts known to both parties which are relevant. But in ordinary speech a person would not be said to have consented or acquiesced if that was not in fact his state of mind whether communicated or not."*

37 And then, under a sub-heading of, "Is acquiescence a question of fact or law?", Lord Browne-Wilkinson said:

*"In the process of this fact-finding operation, the judge, as a matter of ordinary judicial common sense, is likely to attach more weight to the express words or conduct of the wronged [party] than to his subsequent evidence as to his state of mind. In reaching conclusions of fact, judges always, and rightly, pay more attention to outward conduct than to possibly self-serving evidence of undisclosed intentions. But in so doing the judge is finding the actual facts. He can infer the actual subjective intention from*

*the outward and visible acts of the wronged parents. That is quite a different matter from imputing to the wronged parent an intention which he did not, in fact, possess.*

*"Although each case will depend on its own circumstances, I would suggest judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child. The Convention places weight on the desirability of negotiating a voluntary return of the child: see Article 7(c) and Article 10. I disagree with the Footnote to the judgment of Waite LJ if it is intended to provide guidance to judges in their fact-finding role. Attempts to produce a resolution of problems by negotiation or through religious or other advisers do not, to my mind, normally connote an intention to accept the status quo if those attempts fail. It is for the judge, in all the circumstances of the case, to attach such weight as he thinks fit to such factors in reaching his finding as to the state of mind of the wronged parent. This was the approach adopted by the French Cour de Cassation in the case to which I have referred."*

38 Lord Browne-Wilkinson then turns to what he describes as an "exception":

*"It is a feature of all developed systems of law that there are circumstances in which one party, A, has so conducted himself as to mislead the other party, B, as to the true state of the facts. In such a case A is not allowed subsequently to assert the true facts as against B. In English law, this is typically represented by the law of estoppel but I am not suggesting that the rules of English law as to estoppel should be imported into the Convention. What is important is the general principle to be found in all developed systems of law. It follows that there may be cases in which the wronged parent has so conducted himself as to lead the abducting parent to believe that the wronged parent is not going to insist on the summary return of the child. Thus the wronged parent may sign a formal agreement that the child is to remain in the country to which he has been abducted. Again, he may take an active part in proceedings in the country to which the child has been abducted to determine the long term future of the child. No developed system of justice would permit the wronged parent in such circumstances to go back on the stance which he has, to the knowledge of the other parent, unequivocally adopted: to do so would be unjust.*

*"Therefore in my judgment there are cases (of which In re A. Z. (A Minor) ... is one) in which the wronged parent, knowing of his rights, has so conducted himself vis-à-vis the other parent and the children that he cannot be heard to go back on what he has done and seek to persuade the judge that, all along, he has secretly intended to claim the summary return of the children. However, in my judgment these will be strictly exceptional cases. In the ordinary case behaviour of that kind will be likely to lead the judge to a finding that the actual intention of the wronged parent was indeed to acquiesce in the wrongful removal. It is only in cases where the judge is satisfied that the wronged parent did not, in fact, acquiesce but his outward behaviour demonstrated the contrary that this exceptional case arises."*

39 Like so much of The Hague Convention, a huge amount of case law has been generated which seeks to turn a consideration, as Lord Browne-Wilkinson said, of the particular facts by the judge considering those facts into some legal principles. I will stay fast to the point made by the House of Lords that whether there has been acquiescence is a matter of fact for me to decide on the particular facts in front of me. But, in deference to the parties and to some of my fellow judges, I will refer to some of the cases that are being relied on.

40 Ms Chokowry relies on *R v R (Jurisdiction and Acquiescence)* [2017] 1 FLR 1750. In that case, in summary, there were two children who had British parents but were moved to Canada. After the marriage had deteriorated, in 2015, the mother took the children, without the father's consent, and returned to the UK. The mother had accepted that the children were habitually resident in Canada and they had been wrongfully removed. The parents attempted to negotiate a return but were unsuccessful. The mother then applied for orders in the English courts under the Children Act 1989, and, as is recorded at para.23 of the judgment, the father had said, in the Form C1A, that he was concerned about the effects of the proceedings on the children, and then he said:

> *"For that reason, I have decided not to pursue a claim under The Hague Convention to have the children returned to Canada."*

41 However, in the following paragraph of the form, he had made entirely clear, in writing, in the court form, that:

> *"I would like the children to return to Canada but, for the reasons explained above, I agree to the children remaining in the UK on the basis that there is a child arrangements order which confirms my extended contact with the children in Canada during their school holidays …"*

42 So the conditionality of his consent was made clear in a formal statement. At para.35, MacDonald J said:

> *"It is important to note that merely seeking to compromise matters by permitting the abducting parent to remain in the country to which he or she has taken the children, provided that the wronged parent is satisfied as to other matters and issues between them, has not been regarded as acquiescence for the purpose of the Hague Convention (see P v P (Abduction Acquiescence) [1998] 2 FLR 835). Similarly, a parent who enters into a conditional agreement that the children remain in the jurisdiction whilst discussions continue may not be held to have acquiesced for the purposes of the Convention [more cases cited]. Ward LJ agreed with the observations of Hale J [as she then was] at first instance that:*
>
> > *'It would be most unfortunate if parents were deterred from seeking to make sensible arrangements in consequence of what is usually an acknowledged breakdown in the relationship between them for fear that the mere fact they are able to contemplate that the child should remain where he has been taken will count against them in those proceedings. Such negotiations are, if anything, to be encouraged.'"*

43 I make clear at this point that I entirely accept, and indeed endorse, unsurprisingly, what is said by these three very experienced judges, Hale J, as she then was, Ward LJ and MacDonald J, but I do not read what MacDonald J is saying to have elevated this point to a point of law or principle by which he is saying that the court cannot have regard to what was

said in the course of negotiations or discussions, or that the judge would err in law by referring to them. The point being made is that the court should be very careful not to undermine the policy of the Convention by effectively penalising a parent who has been trying to negotiate a sensible outcome.

44 The relevance of and weight to be attached to what the father said will necessarily turn on the facts of the individual case. Here, in my view, on the facts of this case, the important point is not that the father was prepared to negotiate on the basis of A staying in England, but rather that at no stage in any of these communications does he suggest that he was seeking for A to live permanently in Spain. All the discussions were on the apparently mutually understood position that A and her mother would live in England, but the father would have a good deal of contact, both in England and Spain. As such the case is very different from that of *R v R* and the particular facts set out in para.23 of that judgment which I have referred to.

Grave Risk

45 I turn then to Article 13(b) and grave risk. Article 13(b) actually says:

> *"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is nor bound to order the return of the children if the person, institution or other body which opposes its return establishes that –*
>
> *...*
>
> *(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."*

46 The leading case on Article 13(b) is the judgment of the Supreme Court in *Re E (Children: Abduction: Custody Appeal)* [2011] UKSC 27. The key passages for these purposes are at paras.31 to 36 in the speeches of Lady Hale and Lord Wilson. Slightly ironically, Lady Hale says, at para.31:

> *"The words of article 13 are quite plain and need no further elaboration or 'gloss'."*

47 It is difficult to overstate how much further elaboration or gloss the courts have then managed to put on these words. But, at [32], she refers to the fact, not in dispute, that it is clear the burden of proof lies with the person, institution or other body which opposes the child's return, so here the burden of proof lies on the mother; secondly, the risk for the child must be "grave", and, as is apparent from the rest of [33], "grave" means "grave".

48 [34] to [36] are particularly relevant here, and state:

> *"Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation' (emphasis supplied). As was said in Re D, at para.52, '"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"'. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of*

*growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e.g., where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child."*

*Fourth, article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. As has often been pointed out, this is not necessarily the same as being returned to the person, institution or other body who has requested her return, although of course it may be so if that person has the right so to demand. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home. Mr Turner accepts that if the risk is serious enough to fall within article 13(b) the court is not only concerned with the child's immediate future, because the need for effective protection may persist.*

*There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. Mr Turner submits that there is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues."*

36. That passage has been considered in a number of cases, but I refer next to the judgment of MacDonald in *Uhd v McKay* [2019] EWHC 1239 (Fam), where he refers to *Re E*, summarises the paragraphs I have referred to, then refers to other case law in para.69, and in my view, the key passage is at para.70:

*"In the circumstances, the methodology articulated in Re E forms part of the court's general process of reasoning in its appraisal of the exception under Art 13(b) (see Re S (A Child)(Abduction: Rights of Custody) [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention."*

37. I take from that that I have to evaluate both the allegations made and the degree of risk to the child in the context of the evidence before, me but taking into account the fact that this is a summary procedure.

38. The final area of law that I need to refer to is that of protective measures, protective to protect against the "grave risk". There are three cases which I should refer to. Firstly: *Re A (A Child: Hague Abduction; 13(b): Protective Measures)* [2019] EWHC, in which Williams J summarised the principles relating to protective measures, and he makes clear that protective measures may include undertakings and undertakings accepted by the court. He refers to regulations on the mutual recognition of protection measures in civil matters and the value of the 1996 Hague Convention Practical Operation Handbook, and he says:

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

39. Then there is reference back to an older case, *Re K (Abduction: Case Management)* [2011] 1 FLR 1268 in the Court of Appeal. Paragraph 32:

> *"... very important to emphasise our obligations internationally under the [Hague] Convention are particularly due to Member States of Europe who are entitled to rely upon our courts to give full force and effect to the European policy that sought the fortification of the global [Hague] Convention in the ways that found expression in Article 11."*

40. Secondly, the Court of Appeal decision in *Re M (Children)* [2016] EWCA Civ 942, where the Court of Appeal has reiterated that the police force and justice system of other jurisdictions are part of the protective measures, and Macur LJ emphasised that the court of this jurisdiction could not legitimately doubt the efficacy of the courts and police system of a Contracting State.

41. Finally, if I get to the stage of discretion, the principal judgment is that of *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, paras.42 and 43,

> *"42. In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the Contracting States and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the Contracting States.*

> *"43. My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first*

*place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para.32 above, save for the word "overriding" if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not."*

**Submissions**

42. Ms Guha, on behalf of the mother, argues, firstly, that the texts from the father and the form of the discussions all show that the father was content for A and the mother to stay in England. She says that the case falls within the main principle of acquiescence as explained by Lord Browne-Wilkinson in *Re H*.

43. Secondly, in the alternative, she argues that there was what Lord Browne-Wilkinson describes as the "exception", i.e. either what one might called an implied acquiescence or a form of non-legalistic estoppel. She said that there were a number of steps the father took which indicated that he had had, in reality, acquiesced in A remaining in England, or certainly that the mother understood him to do so. He sent the mother her National Insurance number, he sent her her belongings, he said that the dog could go to England eventually, and he was fully aware, she says, of the mother's intention to stay in England with A.

44. Thirdly, she argues that reliance can be placed on the father's failure to bring legal processes in Spain or England until early August, even though he had had lawyers in Spain since the day after the mother and child left, and lawyers in England since early June.

45. Fourthly, Ms Guha says that the father's story that he intended for A to live in Spain and had said this to the mother orally, although not in the texts, is simply not believable.

46. Fifthly, she says, on grave risk, that the mother is highly vulnerable and the victim of serious domestic violence. She is heavily pregnant, and it would be intolerable for her and A to be sent back to Spain.

47. Sixthly, she says that the father cannot be trusted to abide by a non-molestation order or undertaking and that, in any event, the mother will suffer such psychological distress because of her fear of the father and her isolation that there will be a grave risk to A.

48. Ms Chokowry argues, firstly, that it was always the father's intention that A should go to Spain to live.

49. Secondly, she says that the mother knew from the start that the father was not consenting to A being taken to England, and that all the discussions were in the context of him only agreeing to A staying in England if he had sufficient contact. She relies on the approach in *R v R* set out above, and effectively says that this case is analogous to the father's position in *R v R* and MacDonald J's analysis.

50. Thirdly, she says that the father took the various steps relied upon by Ms Guha to be cooperative and to help A, but not to acquiesce, and she argues that those steps should not be used by the mother to assist the case, or should not be accepted by the court to assist the case for acquiescence, so the steps in question being things such as allowing A to go to nursery and sending some of her clothes and possessions over.

51. Fourthly, Ms Chokowry says that the court should not question either the father's obeying the non-molestation order or undertaking or the Spanish authorities' willingness and ability to fully protect victims of domestic violence. She points out that the father has accepted to pay for accommodation for the mother and A and to pay her €200 a week for six months.

**Conclusions**

52. The starting point in any Hague Convention case is the strong policy imperative to support the return of children to countries in which they were habitually resident, and to do this through a summary process. I have set out the relevant case law above. That policy imperative is highly material, as is the need to respect comity between legal systems and authorities.

53. It is not in dispute that A spent her young life in Spain and was undoubtedly habitually resident there. The mother removed A to England in circumstances where the father had set out in a text that he did not consent to her doing so and that she needed his agreement. She is undoubtedly, within the language of the Convention, the abducting parent.

54. Having said that, it is, in my view, material that the mother did leave after what she says was a very serious incident of domestic violence and at a time when she was pregnant. I take account of the fact that the mother relied upon consent as a defence and only dropped that ground late in the day, but I do not accept Ms Chokowry's argument that that goes to the mother's credibility. I thought the mother was a truthful witness and her account fitted perfectly well into the narrative set out by the contemporaneous texts, which, as Lord Browne-Wilkinson said in *Re H*, is likely to be the best evidence (although Lord Browne-Wilkinson was not thinking of texts).

55. Although the decision not to continue to rely on the defence of consent was clearly the correct one in the light of the texts, the circumstances of the abduction are relevant to the mother's state of mind. Whatever the truth of what happened on 20 May, the fact that there was some kind of serious incident involving violence between the parents is clear. There is nothing in the texts of the following day, 21 May, to suggest that the mother was only going to England for a holiday, as Ms Chokowry suggested.

56. On acquiescence, there is, in my view, something of an inconsistency, in the father's account. The texts indicate, though are not completely conclusive, that the parties were moving towards an agreement by which A lived in England with the mother and had frequent weekend contact with the father and spent parts of holidays in Spain with him. In none of the texts does the father say that he wants A to return to Spain to live, either with the mother or with him alone. This is particularly surprising given that the texts are detailed and consistent and include some fairly worked up proposals for agreements.

57. Although the texts suggest that there was, unsurprisingly, a lot of hurt and anger between the parties, they also include carefully thought out terms for an agreement. Therefore, if the father always intended that A would return to Spain, it is very notable that he never said that. It is true, as Ms Chokowry points out, that the father did, at various points in the chronology, threaten the mother with court proceedings, but I read this much more as a threat than as an intention that A live in Spain with or without the mother.

58. It is also the case that a number of the father's actions were consistent with the mother's position that the expectation was that A would live in England. He sent the mother's National Insurance number, which she obviously wanted either to get benefits or to get a job and plainly showed she intended to stay in England. His suggestion in oral evidence that he

did not know why she wanted it was not credible. He sent much of her belongings, and some of A's belongings, back to England. He knew that she was renting accommodation in England from, I think, early September, and he said that he would send the family dog back eventually.

59. I completely accept that, to the degree that the father was cooperating in A's best interests, for example agreeing for her to go to nursery school or sending back some of her belongings, that should not be held against him on acquiescence, but all of this evidence strongly suggests that the father well knew that the mother and A were going to stay in England and he was not suggesting otherwise. At no stage did he say in the texts that he wanted the mother and A to live in Spain, or that if he did not get suitable access then A would have to live in Spain, a noted contrast to the position in *R v R*. The threat of proceedings was, in my view, a threat to hold over the mother's head, understandably perhaps, but no more than a threat. After all, it might well be the case that if the mother and A had returned to Spain, a Spanish court would allow them to return again to England. It is not clear to me how the father could have thought the mother taking up a six-month tenancy in England was consistent with any suggestion that she would move to Spain.

60. The father says that he told the mother, when he met her in July and in August over the phone, that he wanted A to live in Spain. The mother denies this happened. I can only say that it was very convenient on the father's case that he says he said this orally but never in the texts, although in all other respects the parents communicated in texts. Overall, I believe the mother that the father did not say that he wanted A to live in Spain. It seems to me that if he had done so, either in July, when they met, or in early August, then the mother would have raised, immediately, a number of rather obvious questions; such as, where was A going to live? what was the mother going to do ? how was she going to be supported ? and the issue would necessarily have come up in later texts. There is not the slightest suggestion that that did come up; in fact, it is clear it did not, in later texts, and there is no discussion in texts, or indeed any suggestion by the father, that there was a discussion about where would A live, whether she live with the father or the grandparents, or whether the mother would go back to England. There is a strange silence on these key points.

61. If the father had said that he wanted them to return to Spain, then it is, in my view, simply not believable that the mother would not have raised this in subsequent texts, and there would not have been a full discussion about it. For these reasons, I do not believe the father's story on this point.

62. Turning to the law, the test for acquiescence is clearly a high one, and I accept, because it is difficult for me to do otherwise, that it is possible that the father did always intend A to live in Spain and that he was simply going along with the mother in order to persuade her to bring A to Spain for a holiday, and then try to persuade her to stay. There was some suggestion in his oral evidence that the father intended to make an application to a Spanish court to keep A if the mother did bring her back for a holiday. I have to say this comes very close to tricking the mother to go back under an agreement and then reneging on it, but I do not wish to make this judgment longer or get into a whole new area of law as to whether a parent has to act with clean hands. It may be that the father just intended to try to persuade the mother to stay once she got back.

63. One difficulty I find in these questions under The Hague Convention is that parties, at a very emotionally fraught time, may well not have one clear fixed intention or plan. These are not parties engaged in a contractual negotiation. However, applying the facts to the law in this case leads me to conclude that I do accept that the father had not unequivocally acquiesced in agreement to A staying in England within the meaning of the first part of Lord Browne-

Wilkinson's speech in *Re H*. However, assuming for these purposes that the father did always intend for A to return to Spain but did not make that clear to the mother, in my view, Lord Browne-Wilkinson's exception is made out.

64. All the father's texts and actions suggested he was accepting that the mother and A were going to live in England with contact in England and Spain. I put particular weight on the fact that the father never suggested otherwise in his texts,; I do not accept his evidence of the conversations, the fact that an agreement was effectively reached on contact, but then fell apart; and that the father's actions, such as raising no issue with the tenancy or sending the mother's belongings, and eventually intending to send the dog, all indicated that he, in his actions, acquiesced, or led the mother to reasonably believe he had acquiesced, in A living in England, albeit with contact with him. All of these actions, in my view, are wholly inconsistent with any intention on his part that the mother and A would live in Spain.

65. In my view, this is a case that falls within the following words in *Re H*:

> *"Therefore in my judgment there are cases … in which the wronged parent, knowing of his rights, has so conducted himself vis-à-vis the other parent and the children that he cannot be heard to go back on what he has done and seek to persuade the judge that, all along, he has secretly intended to claim the summary return of the children."*

66. That, in my view, is very close to this case. I should also add that the father was legally advised throughout, which makes the position on acquiescence even stronger.

**Grave Risk**

67. Again, I refer back to the case law set out above. "Grave" means "grave". It is a risk to the child, and it must fall within the words of The Hague Convention. There are a number of factors which lead me to the conclusion that the child here is at grave risk if I order return. The mother is clear that she would return with A, and not let her return on her own. I should make entirely clear that I would not order A to return without the mother, thus separating a four-year-old child from her primary carer at a time of what must be massive upheaval for A in any event. This is particularly in circumstances where there are very serious allegations of domestic violence against the father, including that he assaulted the mother when she was pregnant. It would, in my view, be totally irresponsible to return a young child in those circumstances, and I am clear that to do so would encompass a grave risk to the child of significant and long-term psychological harm and put her in an intolerable situation. I therefore have to consider the impact on the mother and, through her, the child, if they both return.

68. Firstly, the mother is thirty-two, and, tomorrow, thirty-three, weeks pregnant. There will very shortly be a time when she cannot fly and, for some of the airlines, she would need a GP's letter even now. Ms Guha told me that the mother had approached a GP who said it would take five weeks to get the letter, which I can only comment is not particularly helpful. In any event, I would either be returning her to give birth in Spain or to move there with a very young baby and a four-year-old child. The mother would therefore have to change her antenatal care to a new country and to new healthcare professionals, and to a country where, I accept, she has a limited ability to speak the language. I make clear I take into account the fact that she has streptococcal B infection, but I accept that that is rarely serious, although it does have medical implications.

69. I entirely accept that to require her to move in those circumstances would be extremely upsetting. But, added to that, secondly, the mother speaks, and this is not contested, very limited Spanish. She would have to give birth in Spain with professionals who she well might not be able to communicate properly with. I take into account there the fact that I know, in Benidorm and its environs, there is a large English ex-pat community, and I expect there is a relatively high number of healthcare workers who speak English. However, that does not overcome the psychological trauma of having to give birth, or care for a very young child, in those circumstances.

70. Thirdly, the mother has told the court that she has a strong support network in England. Although her own mother, and I believe sisters, live in Australia, she has grandparents, aunts and cousins who live near her and A in England, and she spoke about the level of support that she and A have had since they have come to England.

71. Fourthly, in contrast, I accept that the mother has relatively little support in Spain. The father points to the fact that both the mother's stepfather and brother live nearby in Spain, however, as I was told, both of them work for the father's family, and the mother's perception, rightly or wrongly, is that their loyalties lie with the father's family, and they will give her little or no support. She does have one close friend in Spain, and this would undoubtedly be of some help, but that is very different from having a wider family or support network in the situation the mother will find herself in. The reality is that this is a mother who would be highly isolated in Spain, with nobody, save perhaps one close friend, who she could turn to in moments of need. That, I cannot emphasise too much, is in the context of a woman who is thirty-two weeks pregnant and has a four-year-old.

72. Fifthly, the mother alleges very serious domestic violence against the father, as I have recounted above. I fully accept that the Spanish authorities and police are capable and indeed I have no doubt would be willing, to protect victims of domestic violence, and I have taken into account what Williams J said in *Re A* and the Court of Appeal in *Re K* and *Re M*.

73. It is not my task to make findings about the domestic violence, and I appreciate that the father denies the allegations, but, as I have said above, the normal approach in Hague cases is to take those allegations at their highest, and for me to consider the evidence upon them but not reach any conclusions. In my view, the allegations here are credible, which is not to say that they are found to be true. The mother has produced a series of photos which show very serious bruising on her arms, legs, face and torso. The father accepts at least one incident, but says the mother attacked him and he was merely holding her off. The Guardia Civil were certainly in attendance on one occasion, and there seems to have been a third-party witness.

74. The evidence here indicates very clearly that the mother did not feel, at that time, that she was protected in the past, partly through the language barrier, and partly because she says she felt intimidated by the father and his family. Whatever the truth of the allegations, I have to consider the psychological impact of sending the mother back and the impact that will have on A. To send a heavily pregnant woman, or one with a very young baby, into such an isolated situation, in circumstances where she is, beyond doubt, in fear of her ex-partner, seems to me to obviously give rise to the kind of risk of serious psychological and emotional harm that Article 13(b) is intended to cover, that is harm to the child, A, of living in those circumstances with her mother.

75. If the mother was not heavily pregnant, it might well be appropriate to send A and her back and wait for the Spanish courts to decide what happens next, with protective measures in place. But if I were to do that on these facts, I think the risk of serious and potentially long-

term harm, grave harm, to Mother and A, is very great, and could be great also for the unborn baby in so far as I should consider his or her wellbeing. I do not accept that The Hague Convention can force a judge to take that kind of risk with this family's psychological and emotional welfare. I have no doubt on the facts of this case that if I were to send A back, she would be at grave risk of being in an intolerable situation. I accept there is no evidence the father will breach a non-molestation order or undertaking, and he has not been subject to any such order in the past. I also accept the Spanish authorities will be able to enforce such an order or undertaking. It is also relevant that the mother and father have split up and would not be living together. But there will inevitably be considerable contact between the mother and the father, not least because the mother does not have a support network in Spain to act, as it were, as intermediaries. I have to consider the impact, ultimately, on A if I were to send them back, and I take the view, as I have already said, that there is a grave risk to A, and it would place her in an intolerable situation.

76. In those circumstances, I need say little about discretion. I have considered *Re M* and I am fully cognizant of the policy considerations under The Hague Convention, but, as Lady Hale makes clear, my discretion is at large and, in my view, it points indubitably to not ordering return on these cases.

77. I say finally that I disagree with Ms Chokowry in her skeleton argument, where she says this is a paradigm case of wrongful removal. It is not a paradigm in my view, even in these cases, for a woman to be fleeing the kind of injuries which are shown in these photographs and to be sent back when she is thirty-three weeks pregnant.

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**CERTIFICATE**

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