Neutral Citation Number: [2020] EWHC 1901 (Fam)

Case No: FD20P00179

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2020

Before:

MRS JUSTICE THEIS

- -

Between:

X	**Applicant**
- and -	
Y	**Respondent**

- -
- -

Mr Michael Gration (instructed by **Access Law LLP**) for the **Applicant**
Mr Graham Crosthwaite (instructed by **Lyons Davidson**) for the **Respondent**

Hearing dates: 29th & 30th June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE THEIS

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

Mrs Justice Theis DBE:

Introduction

1. This matter concerns the father's application under the 1980 Hague Convention for the return of Z, age 3, to Australia. The mother resists that application on three grounds (i) Z was habitually resident in England at the time of any retention; (ii) the father acquiesced in Z's retention in England; (iii) it would place Z at grave risk of physical or psychological harm, or in an otherwise intolerable situation, if the court were to require his return to Australia.

2. This matter was listed for two days and the hearing has taken place remotely. I heard oral evidence from the jointly instructed expert Dr Gamble yesterday and submissions from counsel for both parties this morning. I am extremely grateful for the effective preparation by the solicitors and the way this hearing has been conducted by counsel who have submitted an agreed chronology and note on the law. Those steps, together with their comprehensive skeleton arguments and focussed oral submissions have enabled the court to be able to give an ex tempore judgment today.

Relevant background

3. Both parents were born in the UK, the mother is 42 and the father 33. They married in 2012 and relocated to Australia in 2013. Z was born in 2016. Between 2017 and 2019 both parties visited the UK on several occasions with Z to see wider maternal and paternal family.

4. In 2018, sadly, the mother suffered a miscarriage. In the same year she came to the UK with Z on their own and in 2019 the father visited the UK on his own.

5. During a joint visit to the UK in May 2019 the parties discussed separation. According to the mother, the father suggested that she and Z should come back to the UK, the father denies this stating their long-term plans have always been to live in Australia.

6. In June 2019 after the parties returned to Australia they separated. The father moved out of their rented home in New South Wales into rented accommodation nearby.

7. In July 2019, according to the father, the parties agreed that the mother and Z would spend 4 months between September 2019 and January 2020 in the UK to spend time with family members, this would coincide with the father's planned trip in December. The father states the mother informed him she had booked return tickets for her and Z, with a return date on 21 January 2020. According to the mother the father said she should go to the UK with Z in order to *'see where we are happiest. He explained that if we decided to stay in England, then he would get a contract job and work for months at a time in the UK to see [Z] and then fly back to Australia'.* The father denies any such conversation took place.

8. In July 2019 the lease on the family home was extended for two months to enable the mother to take her Australian citizenship test, pack-up and sell things.

9. In August the mother took the Australian citizenship test.

10. On 20 September 2019 the mother and Z came to the UK on tickets with a booked return date on 21 January. The mother maintains this trip was on the basis of her deciding where she wanted to live and was open ended, whereas the father states it was for a fixed period. It is agreed the mother sold as many of her belongings as she could and left 15 boxes with the father, along with her car and some other household equipment.

11. On 23 September 2019 the lease on the family home expired and was not renewed.

12. Z started nursery in the UK on 8 October 2019, the mother informed the father about this.

13. On 25 October 2019 the mother was informed her Australian Citizenship ceremony was scheduled to take place on 16 November.

14. In October the maternal grandmother became ill with pneumonia and was, sadly, diagnosed with cancer in late October, which was confirmed as being terminal in early November.

15. On 8 November 2019 the mother had an emergency appointment with the GP due to concerns regarding the mother's mental health from a third party.

16. During November the parents exchanged messages about the possibility of L going to Australia for a few weeks and the logistics if that happened.

17. On 16 November 2019 the father became an Australian citizen.

18. The maternal grandmother died at the end of November.

19. The father arrived in the UK on 14 December 2019 to visit Z and his relatives. Z spent a considerable period with the father prior to his return to Australia on 27 December 2019. At one stage the mother says the father informed his family he was going to take Z back to Australia without the mother's consent, he denies this.

20. On 17 December 2019 the parties met to discuss matters. The father informed the mother he had a new partner and intended to re-locate to live in Darwin, some 2,000 miles from New South Wales.

21. On 19 December 2019 the maternal grandmother's funeral took place.

22. On 20 December 2019 the father sent the mother a message asking to talk about Z saying *'I've only got a week left but we really need to talk about [Z] and what's happening long term. I know this is the worst time but we need to get as much sorted as possible before I go.'* In another message he said, *'We've got to get an idea of what's going to happen for [Z] long term and some kind of agreement as to what's happening'.* The following day the father messaged saying he did not want to upset the mother *'we just need to come up with a plan for the little dude'.*

23. The parties met on 23 December 2019, the father wanted the mother to sign a written agreement on the basis that she and Z would return to live in Australia, which the mother refused to sign.

24. On 27 December the father returned Z to the mother's care.

25. The father flew back to Australia on 29 December 2019 and went to live in Darwin with his new partner.

26. On the 11 January 2020 the parties exchanged messages about removal of the mother's belongings from the father's home in Australia which included references to the mother and Z's expected return date on 20/21 January. On 14 January the father messaged *'Is [Z] excited to go on a plane'* to which the mother responded, *'He loves planes!'.* The mother made arrangements for her belongings to be collected from the father's home on 24 January.

27. On 17 January 2020 the mother sent a message informing the father that she would not be bringing Z with her to Australia, she would leave him in the UK whilst she attended her citizenship ceremony in Australia. The father responded complaining about the short notice stating that if she did not bring Z with her she would be wrongfully retaining him and he would seek legal advice, which he did.

28. On 19 January the father messaged the mother asking for details of who was going to care for Z whilst she was away and the need for them to discuss matters.

29. On 20 January the mother returned to Australian alone and attended the Australian citizenship ceremony on 26 January 2020. The father messaged the mother as follows on 20 January *"I'm filing legal proceedings today for the return of [Z] to Australia. You've left me with no choice, given me no information and won't communicate with me."* In a later message "*Regarding 'bullying' you at your lowest point, we both know that this is not true. I came to England seeking resolution and clarity over [Z's] future and sought arrangement on this. Only to be met with hysterics. I understand that it was a difficult point in your life. At no point have I been aggressive or intimidating. You know that is not in my character. I am just a father looking for the best life for my son with both of his parents involved.*" Later that day Mr Gration informed the court at this hearing the father notified International Social Services of the position.

30. The mother says the parties discussed matters on 30 January when, according to her, they talked about how arrangements would work when she returned to the UK. The father denies they had joint discussions and said when the mother tried to have discussions with him, he made a flippant comment about seeing them when he came over for a music festival.

31. The mother returned to the UK on 31 January 2020

32. On 5 March 2020 the father swore his affidavit in support of his application to the Australian central authority for Z's return to Australia. That application was accepted, and these proceedings commenced on 26 March 2020.

33. Newton J made standard directions on 29 April 2020 for the filing of evidence leading to this hearing.

34. The mother was prescribed anti-depressants on 15 May 2020 and a report from her GP on 21 May 2020 described the mother as having mixed anxiety and depressive order and stated as follows "*You ask whether I am able to comment on the effect on [the mother's] mental health should the court order for her to return to Australia with her son [Z]. From my review of the two relevant consults, it does seem likely that this action would be detrimental to her mental health*."

35. On 27 May 2020 the mother made a Part 25 application for a psychiatric assessment, which Williams J granted on 18 June 2020.

36. The mother saw Dr Gamble (Medical Director and Consultant Forensic Psychiatrist at Llanarth Court Psychiatric Hospital who has prepared medico legal reports for the courts for 15 years) on 19 June 2020 for over 2 hours and a report was filed on 26 June 2020.

37. There was an issue raised in Mr Gration's skeleton argument about when the mother formed the intention not to return Z to Australia. Having taken instructions Mr Crosthwaite stated it was on 28 December, the day after the father returned to Australia and she was given more information by the father's brother about his behaviour and intention to bring proceedings about Z in Australia.

38. A document was produced by Mr Gration yesterday listing the protective measures the father proposed which included agreement not to instigate any proceedings relating to the wrongful retention of Z, not to seek to separate Z from the care of his mother pending any inter partes hearing in Australia, to seek fortnightly contact if the mother continued residing in Australia on a shared care basis and to pay the sum of $10,000 to cover initial rent and financial support for two months. Thereafter he would pay $950 per month, support any application the mother made for benefits and pay for Z's air fare to Australia.

The evidence

39. Both parents have filed detailed statements and no party sought either party to give oral evidence.

40. Dr Gamble's report concludes the mother is suffering from an adjustment order, a mental disorder associated with stress and adjustment to a change in life circumstances. She is experiencing distressing symptoms of depression and anxiety, along with panic attacks, disturbed sleep, reduced appetite and weight loss. He describes she has experienced a number of stressful life events over the last two years which are likely to have had a cumulative effect and contributed to her current mental health difficulties. Although she has been prescribed medication and given information about sources of psychological support Dr Gamble considers that whilst these may be of some benefit *'her symptoms are unlikely to be fully treated while the underlying stress caused by the current court proceedings continue'.*

41. As regards the effect of a court ordered return to Australia Dr Gamble concludes that *'in the short term, there is likely to be a deterioration'* in the mother's mental health

if she is compelled to return to Australia. In the longer term, she may adapt to life in Australia, but her adjustment is likely to be prolonged and more difficult because of the circumstances of her return. Whilst she remains under stress Dr Gamble considers it unlikely that she will fully recover her mental health problems which may impact on her parenting abilities.

42. Whilst Dr Gamble acknowledged the similarity in mental health provision between the UK and Australia the effectiveness of such treatment would be reduced if she continued to suffer stress caused by the circumstances of the move, and any continuing conflict with the father or further legal proceedings involving Z. Social support from friends and family in Australia would have a protective effect, although he noted the availability is disputed between the parents.

43. In his oral evidence Dr Gamble said stress over time can develop into more serious mental illness, long periods of stress can result in depressive illness where even if all stress factors resolve the depression can continue. When asked about the impact of these conditions on the ability to parent he said it depends on how persistent and how serious the symptoms are, with good and bad days, times when feeling low with a lack of interest, energy and a tendency to turn away when the person would be less responsive to the needs of a child. If over a long period it could lead to significant harm to the child.

44. Whilst Dr Gamble agreed there was no evidence during the recent period that the stresses the mother had been under had impacted on her ability to parent Z, he said the position was more nuanced than that as the mother was aware it could have an effect. He accepted that previously the stresses the mother had experienced had not affected her parenting of Z. He agreed the recent stresses were around these proceedings and the consequences. Mr Gration suggested that once they were concluded it would be a relief as that would bring certainty, Dr Gamble considered it could mean an escalation in the stress describing it as a double edged sword, which would be largely negative for the mother if she was required to return to Australia.

45. Mr Gration took Dr Gamble through the protective measures offered by the father in relation to housing, financial support and her concern about Z living away from her and asked if that framework was in place whether that would alleviate the position. Dr Gamble didn't think so, referring to what the mother said about the father not being someone she could trust and stick to what he said he would do. Whilst he could see how it could give some reassurance he was not sure that would remove the stress for this mother in the way suggested by Mr Gration. He agreed that it would take a dramatic deterioration in the mother's mental health to give rise to a situation where the child would be at risk but did not accept the protective measures proposed would make such deterioration more unlikely as it was not known what would happen to the mother's mental health. Those things may not be most important things in context where she is in Australia against her wishes, with the potential for further conflict with the father and less available support than in the UK.

Relevant Legal Framework

46 The aims of the 1980 Hague Convention are not in issue, neither are the relevant principles set out in the helpful agreed note.

47 The issue of habitual residence arises in this case in the context of whether Z was habitually resident here at the time of the alleged retention. I have helpfully been referred to the summary set out by Hayden J in *In re B (A Child) (Custody Rights: Habitual Residence) [2016] 4 WLR 156* at paragraphs 17 and 18 that the child is at the centre of the exercise when evaluating his or her habitual residence, involving looking at real and detailed consideration of the child's day to day life and experiences, family environment, including an appreciation of which adults are most important to the child. Habitual residence is essentially a factual issue.

48 In *Re B (A Child) [2016] UKSC 4* Lord Wilson at paragraph 45 uses the analogy of a see saw to illustrate how the habitual residence of a child can change.

49. Article 13 of the 1980 Hague Convention provides that

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; 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.

50. In relation to acquiescence Lord Browne-Wilkinson held in *In re H and Others (Minors)(Abduction: Acquiescence)* [1997] AC 72 summarised the position as follows:

'Summary
To bring these strands together, in my view the applicable principles are as follows:
(1) For the purposes of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in In re S (Minors) (Abduction: Acquiescence) [1994] 1 F.L.R. 819, 838: "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact."
(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.
(3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.
(4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justices requires that the wronged parent be held to have acquiesced'

51. Turning to Article 13 b) MacDonald J in *Uhd v McKay [2019] EWHC 1239 (Fam)* summarised the relevant principles at paragraphs 67 – 74 confirming the burden is on the person opposing return, it is for them to produce evidence to substantiate one of the exceptions. The risk to the child must be 'grave' and 'intolerable' when applied to a child must mean a situation which this particular child in these particular circumstances should not be expected to tolerate. The court must consider the protective measures that would be put in place and where the defence is said to be based on the anxieties of a respondent mother which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, in principle, such anxieties can found the defence. As Lord Wilson observed in *Re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27* at paragraph 34

> *"The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the courts mental state if the child is returned".*

Submissions

52. In his detailed skeleton argument Mr Gration summarised the father's position as follows:

(1) At the time when the mother travelled to the UK on 20 September 2019 she did not have the father's consent to move permanently with Z to the UK.

(2) The mother does not detail any discussions after that when the father gave his consent to Z being retained permanently in the UK. The highest the mother puts her case is that the father agreed to Z remaining here permanently on the basis of her self-serving interpretation of some WhatsApp messages the father sent.

(3) It is now accepted that the mother formed her intention to retain Z here around 28 December 2019 as confirmed by Mr Crosthwaite, although it is accepted that was not communicated to the father until 17 January 2020.

(4) Z did not become habitually resident in the UK as his stay was characterised by significant disruption which would have impacted on his ability to acquire any sufficient degree of integration in England to dislodge his Australian habitual residence.

(5) The Article 13 b) defence was not established as Dr Gamble's report confirms the mother would be able to manage such a return with appropriate support through continuing her medication or by appropriate therapy.

53. Mr Gration submits the evidence prior to the mother and Z's departure in September 2019 makes it clear the visit was time limited as even though the lease on the family home had lapsed, she went with relatively limited luggage and left behind boxes of

belongings, her car and other household goods. The father denies any discussions that the mother seeks to rely upon to suggest her stay was a permanent move, his position is best encapsulated in the message prior to their departure to the mother that recognised that he did think '*a bit of time in the UK would be good'* for the mother and Z. Such a message, he submits, is inconsistent with any agreement to a permanent move. Even on the mother's own case the position was described as being *'very open ended'* in her statement.

54. Turning to the position after September, Mr Gration makes the point that there is no evidence of any detailed discussions between the parents about Z's future after September 2019. He rejects the mother's reliance on some messages exchanged between them in November 2019 relating to Z returning to Australia for a period of time. Mr Gration submits there are a number of flaws in the mother's position and notes, for example, there is no reference to the mother informing the father Z was not returning on 21 January 2020 and there had been no discussion between them about how Z and the father would maintain their relationship if Z remained in the UK and the father in Australia.

55. In relation to the discussions between the parties in December when the father visited the UK the evidence is clear that the father raising the issue of Z visiting Australia for a short period was in the context of it taking place prior to the scheduled return, which the father still understood was taking place. In messages sent by the father to the mother on 20 December he was referring to their need to talk *'about so many things regarding [Z] and what's happening long term'* later that day messaging about the need to *'get an idea of what's going to happen for [Z] long term and some kind of agreement as to what's happening'.* This accords, he submits, with the mother's account of the parent's meeting on 23 December that they "*had to get an agreement in place for [Z's] future, because [they] had never agreed on one…"* and that the agreement that the father was proposing was "*on the basis that [they] returned to live in Australia which [she] was not agreeable to and which was at complete odds to what [she] had understood [the father's] position to be"*. The father then proceeded on the basis that the mother and Z were returning on 21 January referring to them being ready for sunshine in two weeks in a message on 6 January and on 15 January about Z being excited to go on a plane and the mother responding *'He loves planes'.*

56. Mr Gration submits it is notable when the mother informs the father on 17 January that Z will not be coming with her to Australia she doesn't say that is following any agreement between the parties. It has all the hallmarks of a unilateral decision by the mother.

57. In looking at the position regarding habitual residence at the time when the mother decided not to return Z in December he was not habitually resident here. Z had lived in Australia all his life prior to September 2019, he had visited the UK before but only for holidays, his father still remained in Australia, and this was a time limited trip with a fixed return date. Even on the mother's case the plans for him were unclear until she formed her intention in late December, and his stay in the UK has been characterised by instability which would have impacted on his ability to integrate in England with very little detail being given by the mother about Z's circumstances during his time here.

58. Turning to the question of acquiescence, if the mother formed her intention to retain Z here in December, she would need to establish that the acquiescence took place after that. He submits there is no evidence of that; on the contrary as soon as he became aware of the position on 17 January the father sought legal advice.

59. When considering the question of the Article 13 b) defence he stressed it is important to keep in mind that the mother needs to establish that the impact upon the mother of a return to Australia would *'destabilise her parenting of the child to a point where the child's situation would become intolerable'.* He submits that there is no evidence that her mental condition has caused her parenting of Z to be in any sense destabilised. The significant stress factors that included her mother's ill health and death did not have an adverse effect of her parenting of Z. When she saw the practice nurse in May 2020, during the currency of these proceedings, she was recorded as being able to care for Z and did not suggest during her interview with Dr Gamble that she required support to care for Z.

60. In relation to adjustment to life in Australia, having considered paragraphs 112 and 116 of Dr Gamble's report Mr Gration submits the mother could return to Australia. She has lived there previously, including through periods of stress, and her parenting of Z has not suffered. There is no evidence that her parenting of him has been in any sense destabilised notwithstanding the events that she has been through recently. It clearly has not been destabilised to the extent of being intolerable for the child.

61. There is no evidence that a return in the current circumstances would lead to an intolerable situation for Z. That is not the conclusion that Dr Gamble has reached. The mother is aware of her situation and has protected Z effectively. There is available to her in Australia a functioning medical service through which she could seek and obtain treatment of a standard commensurate to that which she can access in England. The protective measures offered by the father will, submitted Mr Gration, ease the transition in accordance with the purpose they are to serve as set out in paragraphs 43 and 44 of the HCCH Hague Convention Guidance.

62. Mr Crosthwaite submits at the time of the wrongful retention Z had been living in the UK for 4 months. He had attended nursery here since early October, fully engaging with life here such as visiting the wider family and taking part in many activities. This integration is supported by the statements from three of the mother's friends. Since coming here Z had grown up and developed fast as described by the mother in her statement. He reminds the court that the issue of habitual residence is a factual matter for the court to determine and does not depend upon parental intention, although that is a factor the court can take into account.

63. Mr Crosthwaite submits this stay was different than previous ones as the tenancy on the family home had expired, there was no home for the mother and Z to return to and she had sold many of her belongings. In reality they retained limited ties to Australia, the mother's job had ceased, and she had limited possessions. The mother states she returned to obtain her Australian citizenship to help facilitate trips there in the future. Mr Crosthwaite states that with the father having moved to Darwin there was limited left in Australia for the mother and Z. Mr Crosthwaite characterises the father's move to Darwin as a supervening event and left the mother facing the reality of no home, no job, no means of knowing she could cope financially, only time limited practical support from the father, no support from immediate family or

friends and suffering from mental health issues that would impact on her parenting of Z. Mr Crosthwaite submits by contrast Z has achieved some degree of integration in a social and family environment in the UK. Whilst acknowledging his father remains there his roots in Australia have been eroded as his home has gone, his parents have separated, the mother's job had finished and his father had gone to live in a new state with his partner. This contrasted with Z's life in the UK in settled accommodation, with the wider maternal and paternal family nearby. He had settled into nursey and was participating in life here as fully as he was able to commensurate with his age, he is comfortable and content here. Whilst recognising the fact that he would see his father in the way the father proposes Mr Crosthwaite submits that did not equate with Z having a stable family life in Australia.

64. Turning to the issue of acquiescence Mr Crosthwaite submits that whilst the mother had return tickets she did not know if this would be for a holiday or a move back due to the open ended nature of their trip, there was no agreement between the parties that the mother would definitely be returning with Z to live in Australia. This is supported, says Mr Crosthwaite, by the references to the father's suggestion for Z to have a trip back to Australia for a few weeks to enable the mother to focus on her own mother. He submits this would make no sense if Z was returning to Australia on 21 January.

65. He submits it was only when the parties met up on 23 December that the father appeared to insist on the mother and Z returning to Australia to live. Mr Crosthwaite submits that up until then father was content with the idea of the mother and Z remaining in the UK while they reached some agreement about the future, relying on the message from the father on 20 January when he stated *'I came to England seeking resolution and clarity over [Z's] future and sought arrangement on this'.* Mr Crosthwaite relies on the delay by the father in making this application, he threatened legal proceedings in January but took no other steps to communicate that to the mother until she was served with this application. This is supported by the mother's observations to Dr Gamble that she thought the parties had reached some resolution by March.

66. Turning to the Article 13 b) defence Mr Crosthwaite relies on the evidence from Dr Gamble which demonstrates she is Z's primary care giver and he is entirely dependent on her. There is no issue the mother has suffered a series of traumatic events as outlined in the evidence which have, at times, impacted on her mental health to the extent that a neighbour contacted the GP in November and she went to see the practice nurse in May. There are considerable uncertainties were she to return to Australia, she would need to secure accommodation and get a job. Even with the financial package put forward by the father she faces very great uncertainty and she would have limited support when compared to the support of her family and friends here. In addition, she and Z would have to quarantine for 14 days and face the prospect of contested proceedings if she made an application for permission to bring Z to live here. The mother summarises her concerns as follows

"*I do not know how I would cope at all if the court made an order that [Z] returns to Australia. The thought of going back on my own absolutely terrifies me and I do not believe that I will be able to cope. I am very concerned about the impact of a return on my mental health and the effect this will have upon [Z] as I am his primary carer*".

This is supported by the statements from Ms Burden, Ms Oatley and Ms Price.

67. Mr Crosthwaite submits Dr Gamble makes it clear that the mother's mental health would deteriorate were she to return to Australia. The effectiveness of any treatment would be reduced all the time that stress factors are present in her life and the mother's parenting could be adversely affected by a prolonged period of mental ill health. In his report he states that a "*prolonged period of adaptation is likely to be associated with a prolonged period of stress and associated depression and anxiety, which in turn is likely to affect her parenting of Z to some extent*".

68. Mr Crosthwaite submits that given the total uncertainty of the circumstances which the mother would find herself in were she to return to Australia with Z, it is inevitable that she would suffer from a prolonged period of mental ill health which could adversely impact her ability to look after Z. The father could provide little practical assistance living almost 2,000 miles away and the mother is critical of his care of Z in any event. Therapeutic treatment would only have limited effect on this given the continuation of the stress factors which have given rise to the mother's condition. Therefore, it is submitted that there is a grave risk of harm Z of a return to Australia or it would alternatively place him in an intolerable situation.

69. The mother suggests the estimated rental in Sydney is $200 a week higher than that suggested by the father, she estimates that she would need an additional $2,200 per month to manage after any payment made by the father and this does not include the cost of her flight or legal costs for proceedings in Australia. The mother says she does not have any savings that she could draw on or sell the property she currently jointly owns with her brother as he lives there. Mr Crosthwaite submits that the financial uncertainty in this case is not simply connected to a soft landing, it directly relates to the stress factors that would be in place upon the mother upon a return with consequences for her mental health and risks regarding her ability to parent Z. Even considering the package proposed by the father and the protective measures those stress factors would remain and are very real.

Discussion and decision

70. The first issue the court needs to consider is whether prior to or at the date of retention Z was habitually resident in England. If he was then the father's application will not succeed, as there will have been not breach of Article 3 of the Hague Convention.

71. Although the parties submitted an agreed note on the law there has been some debate about when the relevant date is. Mr Gration submits it is 28 December 2019, as that is when the mother formed the intention not to return Z back to Australia. It is when her subjective intention was formed. He relies on paragraphs 43 and 51 (i) of *Re C (Children) [2018] UKSC 8.* He submits there is no need to await what is described in paragraph 51 (ii) as an objectively identifiable act, namely the message on 17 January. He submits any other interpretation could potentially reward the retaining parent forming their intention at an earlier stage and not revealing the position until much later, thereby being able to have a longer period to seek to establish habitual residence. Mr Crosthwaite submits it is the later time on 17 January, when the mother sent the message saying she was not bringing Z back to Australia. He submits that accords with paragraph 51 (i) – (iv) of *Re C* and makes

logical sense. In fact both counsel agree that on the facts of this case it makes no difference what date is taken as there is no significant event or factor that occurred between the two dates that has an impact on the court's assessment of habitual residence. In those circumstances, whilst I prefer the submissions of Mr Crosthwaite as they seem to accord with what is set out in paragraph 52 (i) – (iv) in *Re C* it is not necessary for me to determine this interesting debate. It will no doubt arise and be considered in a case where it will be of relevance. I am going to take the operative date of when I need to consider habitual residence is prior to 28 December 2020.

72. As the cases have made clear the issue of habitual residence is a question of fact and the court needs to consider the matters helpfully summarised by Hayden J in *In Re B (ibid).* 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. As has been made clear, parental intention is relevant to the assessment, but not determinative. The court needs to consider the stability of the child's residence as opposed to its permanence; it is the integration of the child into the environment rather than solely a measurement of time. The relevant question is whether a child has achieved some degree of integration in a social and family environment. What the court is required to do is to undertake a comparative analysis of the position in both jurisdictions as set out by Lord Wilson in *Re C.*

73. Mr Gration realistically submits that when all the evidence is looked at the most likely position is that both parties viewed this trip from different perspectives. The father viewed it as a time limited trip with the mother and Z coming back, with the knowledge of the return ticket date of 21 January. In his messages during the discussions after the parties separated but before the mother and Z came here in September, he recognised that a bit of time in the UK would be good for the mother and Z. The mother described it as 'open ended' and despite having the return date on the tickets matters remained uncertain. Mr Gration relies on the fact that there is no evidence from the mother that the father agreed to any permanent stay. In exchanges during submissions he agreed that there was a state of flux combined with a lack of communication about these issues between the parties.

74. Mr Gration relies the fact that Z's habitual residence before he came here was in Australia, where Z had lived all his life. Whilst acknowledging some degree of flux about the arrangements he submits it is important that one of Z's parents, who he had shared a house with during the majority of his life was left behind in Australia. In those circumstances it is, he submits, more difficult to establish a change in habitual residence. Due to his age Z's real anchor are his parents, they are the bedrock of his life and the fact that one of the parents is left behind is a significant factor in the comparative analysis the court has to undertake. The circumstances of the mother during her stay here were characterised by uncertainty and loss, thereby impacting on her own ability to settle here. He submits it is significant that the explanation for her decision not to return Z back to Australia was the information she was given about the father's drinking and that he was going to pursue proceedings in Australia in relation to Z. That, submits Mr Gration, is a factor the court should bear in mind having regard to the primary purpose of the Convention is to prevent parents removing or retaining children from a jurisdiction for such reasons. When considering the habitual residence of a child of Z's age there is the

added weight to the home and the parent's intentions than perhaps there would be for an older child.

75. Mr Crosthwaite submits that when the court considers the evidence in the mother's statement and her references to the trip being open ended, this is not inconsistent with the father's messages referring to the mother and Z going for a bit. There was a state of flux about the time period, even with the purchase of return tickets with a date of 21 January. This position he submits is entirely consistent with the subsequent texts from the father on 20 December when he states there is a need for them to *'talk about so many things regarding Z and what is happening long term'* then later that day *'We have got to get an idea of what's going to happen for Z long term and some kind of agreement as to what's happening'.* Mr Crosthwaite submits the sequence is important when the father came here in December. He informed the mother on 17 December about his new relationship and his plan to move to Darwin, he sent the messages I have referred to on 20 December and the parties met on 23 December, when he wanted the mother to sign a written agreement that she and Z return to live in Australia. That, he submits, supports the fact that there remained uncertainties about this trip as regards its purpose and the time period. This also ties in with the information the mother was receiving in messages from her sister in law on 17 December about her concerns regarding the father's behaviour. These factors coupled with the suggestion by the father that Z could come and visit Australia for a few weeks prior to the 21 January again support the continued uncertainty. He submits even with a child this age parental intention is but one of the factors, as has been made clear in *Re C* and *Re R,* it is not determinative in the global analysis the court is required to undertake. He places reliance on the fact that here the mother has a known, secure home which Z is familiar with, there is wider family on both sides nearby and practical and emotional support on hand which the mother has benefitted from during her time of loss. From Z's perspective, as described by the mother in her statement, he is in a settled home with his primary carer, started nursery in October, has settled in well and fully integrated into social and family life here, which has included the period when his father visited. This compares with what there is in Australia where the mother and Z have no home, the mother no job, the father has moved over 2000 miles away and the mother's possessions are limited to 15 boxes of personal effects and her car. Mr Crosthwaite submits there is no evidence that the uncertainty regarding the mother's return has had an impact on her ability to settle and integrate here, if anything it shows the opposite when considering the statements from the witnesses who filed evidence on behalf of the mother.

76. In considering habitual residence what the court has to do is stand back and view the evidence as a whole. Having done so I have reached the conclusion that Z's habitual residence in late December 2019 was in this jurisdiction, as a result of there has been no breach of Article 3 of the Hague Convention, these proceeding will be dismissed and Z will not be ordered to return to Australia.

77. I have reached that conclusion for the following reasons:

(1) I accept that Z's habitual residence prior to coming here with his mother in September 2019 was in Australia, he was born here and had lived here most of his life with both his parents, save for the period following their separation when he continued to see his father, who lived locally.

(2) When Z came here with his mother there was, in my judgment, a state of flux as to what the intentions were. Whilst I accept that the mother purchased a return ticket for both of them, that was not a date that any party has suggested was chosen for any particular reason. In their discussions prior to going the father accepted it would be good for the mother and Z to come here for a bit.

(3) I accept the mother's evidence that the position was somewhat open ended, this was supported by the steps taken by the parties to continue with obtaining their Australian citizenship but at the same time giving up their accommodation and the mother disposing of the majority of her possessions.

(4) My conclusions about the ongoing state of flux is confirmed by messages from the father suggesting Z visits for a few weeks in Australia just prior to 21 January, which makes no sense if the father understood from the start the mother and Z were returning to live in Australia then. Also, in his messages on 20 December he makes clear that the parents still needed to have a discussion about Z's future, the messages do not suggest that is only in the context of returning to live in Australia. I agree with Mr Crosthwaite the sequence of when the mother was given information from the father is important. Informing her on 17 December that he had formed another relationship and was planning to move some distance away, messaging her a few days later to say they need to discuss the long term plans for Z, and then on 23 December seeking to get the mother to sign an agreement to return to live in Australia with Z.

(5) From the perspective of Z during this period he was becoming increasingly integrated into the social and family environment here. That is demonstrated by the detail given about this in the mother's statement, such as Z starting at nursery, which the mother informed the father about at the time and the report attached to her statement setting out how well he has settled in there, and his wider circle of nursery friends. Her descriptions of the quality time Z spent with her parents, grandparents and the wider maternal and paternal family, as described in particular at paragraphs 80 – 85 of her statement. This integration is supported by the three statements filed by friends of the mother's which details further Z's integration in a social and family environment. It is of note that this evidence about Z's life during this period is not disputed by the father. I reject the submission made by Mr Gration that the difficulties the mother encountered created some uncertainty or instability for Z between September and December. The evidence points the other way, of Z being in a stable home environment, settling and doing well at nursery surrounded by maternal and paternal family who he has integrated with and has a good strong relationship with. In the words of Lord Wilson he has put down strong roots here.

(6) It is necessary for the court to balance this with the position in Australia. Whilst of course it is important, as Mr Gration stresses, to weigh carefully in the balance that Z's father remains in Australia where Z was habitually resident when he left in September 2019. But that factor can't be looked at in isolation. There is no settled home to come back to, no job and some considerable uncertainty about the social and family environment Z will be returning to. The father now lives some distance away, has expressed a wish to visit Z fortnightly, which may or may not be realistic, bearing in mind the distances and his financial position. Although it is accepted he will be living with his mother, Z is not returning to a settled social

and family environment, a nursery place will need to be sourced, he will need to start making friends again and I accept the evidence about the limited social and family support that would be available to the mother in New South Wales.

78. Although it is not necessary in the light of my conclusion about habitual residence, I have been invited to briefly set out my conclusions on the two Article 13 defences.

79. In relation to acquiescence in my judgment when the time period after 28 December is looked at that defence cannot succeed for the following brief reasons.

(1) The father's position had been made clear on 23 December, albeit before the retention, that he sought a written agreement that the mother and Z would return to Australia to live.

(2) The messages by the father between then and prior to 17 December contained references to the mother and Z returning to Australia in the context of a return on 21 January.

(3) Once the father received the message on 17 January, he made his position clear over the following days that he did not agree to Z not returning to Australia and specifically referred to seeking legal advice.

(4) Whilst there was a period when there was limited communication between the parties during February and March the father was following legal advice and completing the necessary documentation to enable an application to be made to the Central Authority. Whilst this period of time appears to have influenced the mother in thinking the parties had reached an agreement that was not shared by the father who was taking active steps to seek court orders.

80. Turning to the Article 13 (b) defence the issue is less straightforward. In my judgment the mother has discharged the burden in establishing that defence and the protective measures put in place would not be sufficient to reduce the risk to a level that fell below the Article 13 (b) threshold. I have reached that conclusion for the following reasons:

(1) The combination of the evidence from Dr Gamble and the mother, factoring in the necessary caution that there is the risk that the mother's evidence could be self-serving, means that the Article 13 b) test is met.

(2) I have properly weighed in the balance that there is no evidence to date that the stress the mother has been under has impacted on her ability to parent Z. However on the evidence I regard the position in Australia if the mother returned with Z pursuant to a court order to be very different and the likelihood would an escalation of the stress the mother would be under, which would not be ameliorated by the protective measures proposed, even taking account the changes to those measures proposed by the mother.

(3) I accept the analysis in Dr Gamble's oral evidence when he referred to what the mother had said about the father not being someone she felt able to trust and stick to what he had said he would do. Whilst Dr Gamble agreed that it would take a dramatic deterioration in the mother's mental health to give rise to a situation

where the child would be at risk, he did not accept the protective measures proposed would make such deterioration more unlikely, as it was not known what would happen to the mother's mental health.

(4) In my judgment this mother would be in Australia against her wishes, with the prospect of prolonged further conflict with the father and limited, if any, emotional and psychological social support available to her. I have to consider the additional stress that would provide to this mother, bearing in mind recent events.

(5) In that context, bearing in mind the particular circumstances of this mother, I do consider the risk to be grave as the levels of stress would impact on her mental health to the extent that it will create a situation that is intolerable for the child. This is because the mother has, in effect, nothing to go back to Australia for. No secure home (even taking into account the father's suggestion that the tenancy would need to be in place before she left), no job, the reality of limited if any social support, and the prospect of continued prolonged litigation with the father. Consequently, there is a grave risk the symptoms Dr Gamble describes in his report and in his oral evidence will create a situation that is intolerable for Z, due to the impact of the mother's mental ill health on her parenting of Z.

(6) I have factored into my assessment the fact that the mother has been able to care for Z to date, even during the currency of these proceedings, but that has been in the circumstances of having a secure home and a strong network of paternal and maternal family members and friends available here which, as she describes in her statement, have been a bedrock of support for her.