Neutral Citation Number: [2021] EWHC 1204 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2021

Before:

Mr Justice Poole

- -

Re A (Hague Convention: Wrongful Retention)

Ms Chokowry (instructed by **The International Family Law Group LLP**) for th**e Applicant Father**
Mr Hepher (instructed by **Dawson Cornwell)** for the **First Respondent Mother**
Maria Stanley (**Cafcass Legal**) for the **Second Respondent Child by her Children's Guardian**

Hearing dates: 19th to 22nd April 2021

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JUDGMENT

This judgment was delivered at a hearing conducted on a video conferencing platform 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 child A and members of her 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.

Mr Justice Poole:

Introduction

1. The applicant is the father, and the first respondent the mother, of the second respondent child, whom I shall call A, who is represented by her Children's Guardian, Ms Baker. The child lives with her mother in England. The father alleges that the mother wrongly removed or retained the child from the Russian Federation, her country of habitual residence, and applies for her summary return under the 1980 Hague Convention. The mother opposes the application. The issues for the court to determine are the date of wrongful removal or wrongful retention, habitual residence, settlement, the Article 13b defence of grave risk of harm, and, if relevant, the exercise of the court's discretion whether or not to order return. In relation to the issue of wrongful retention a question to determine is whether, when parties have agreed to the retention of a child abroad for an identifiable period of time, and the left behind parent resiles from the agreement and demands the return of the child before the expiry of that period, the refusal or failure of the travelling parent to comply with the demand renders the child's retention wrongful at that time.

2. The brief history is as follows. The father has dual Russian and Moldovan nationality and the mother is Moldovan. The parties met online whilst the father was working in Germany and the mother was studying in the Russian Federation. They began a relationship and the mother became pregnant with A. The father moved to Russia. A was born there on 31 May 2014. The parties dispute the nature of their relationship over the ensuing few years but agree that the mother left with A for Moldova on 26 April 2018. The father followed approximately a month later. On 12 June 2018 the father signed a formal consent document by which, on the face of it, he consented to the mother removing A from Moldova "to all countries of the European Union and Great Britain from 12.06.2018 to back 12.06.2019". This document was prepared by a notary and states that it was orally translated by the notary into the Russian language for the benefit of the applicant. The mother arrived in England with A on 8 July 2018 and they have remained here ever since. Her parents both live here. Contact between the father and A continued but soon diminished and then ceased. On 20 January 2019, in response to attempts by the father to contact her and A through the Moldovan Police, the mother wrote a letter to the Moldovan Police, witnessed by a solicitor in Leeds, stating that she and A were alive and well, and that A was attending school. She confirmed her location but asked them to keep it confidential from the father. She attached documentation and a video. Although it does not say so in terms, the mother says that the letter "made it clear that we had no intention of returning" [C57 para. 84] and the father agrees with that characterisation of the letter. The father lodged an application for return of A to Russia to the Russian Central Authority but not until May 2020, and the application in this court for return was issued on 14 October 2020.

3. The father's case is that the mother wrongfully removed A from the Russian Federation on 26 April 2018, and then either wrongfully removed her to this jurisdiction on 8 July 2018 having never had any intention to return her upon leaving, or wrongfully retained her here at the end of August, alternatively in October 2018, or in the further alternative, on 20 January 2019, the date of her letter to the Moldovan police.

4. The mother defends this application on the following grounds:

    a. The father consented to A's removal from Moldova to the jurisdiction of England and Wales (amongst other jurisdictions).

    b. The mother communicated her firm intention not to return A by her letter of 20 January 2019. At that date, she accepts, there was a repudiatory breach of the agreement of 12 June 2018.

    c. As of 20 January 2019, the child was habitually resident in England and Wales and therefore the case falls out of the scope of the 1980 Convention.

    d. Alternatively, since the father's application was made on 14 October 2020 and therefore more than 12 months after the wrongful retention on 20 January 2019, Art 12 applies, the child was settled in this jurisdiction at the date of the application and the court should exercise its discretion not to order return.

    e. Alternatively, return of the child to the Russian Federation would expose her to a grave risk of harm or otherwise place her in an intolerable situation, and the court should exercise its discretion not to order return.

5. At the hearing the mother sought to amend her defence by adding a further element, namely, the child's objections. This application followed the receipt of the Guardian, Ms Baker's report of 7 April 2021. I refused that application. The defence relied upon appeared to be very weak: the child is only six years old and did not express her views about return to Ms Baker in a reasoned manner. The application was made very late and without giving the father a fair opportunity to address it in advance of the hearing. Ms Baker's report had not directly addressed the question of the child's objections and her maturity and understanding. Further evidence would therefore have been required, causing delay. The mother has been represented by experienced solicitors and counsel throughout the proceedings. During the hearing it transpired that there are issues about influence on the child by the parents which would have necessitated further evidence in relation to her objections had the defence been allowed.

6. In this judgment I shall set out the background in more detail, provide the legal framework for the decisions of the court, comment on the Guardian's evidence, evaluate the evidence and give my conclusions on the issues to be determined.

Background

7. The parties had only met a few times when the mother became pregnant with A. She alleges that when she informed the father of the pregnancy he told her that he had been diagnosed with leukaemia and strongly urged her to have an abortion. She says that later he told her he had spoken to her parents and they had asked him to force her to have an abortion. Neither assertion was true. The mother's mother gave the father money to ensure that the birth took place in a private hospital but, the mother alleges, he kept the money and her labour care was chaotic. Eventually she had an emergency

Caesarean section. The mother says that after the birth she struggled to find suitable accommodation and that the father was no help. Again, her mother handed over a large sum of money and the father largely kept it for himself. The mother says that she was responsible for nearly all the childcare and the father would lose his temper if his sleep was disturbed by their new baby. The father disputes the mother's account of his conduct during this period.

8. The mother returned to her degree in 2015 and completed it in 2016. She says that during this time they had little money and the father was very controlling:

> "[The father] had full control over absolutely everything throughout the course of our relationship. He held mine and A's documents. My phone number was registered to his name so he had access to my call logs. Our home was in his name. He had access to my hard drive, and as a result, access to all my photos. He knew all my passwords. He monitored my conversations, my searches and essentially, my entire life. It transpired that [the father] was watching my every step from the very beginning. [The father] would fall out and have disagreements with my family and with my friends, which meant that I was slowly becoming isolated from everyone. I always tried to avoid conflict, which came at great personal cost.
>
> We argued frequently. Every time I tried to disagree with [the father], or stand up for myself, he would show me the door. There were many occasions where he would pack my things and leave them outside the front door." [C44]

9. The father disputes this and says that the mother lived a "rather nomadic existence" during this time and would disappear for days at a time, staying overnight with female friends. He was left caring for A. He says that he organised a nursery for A and he took her to and from the nursery – the mother was little known to the staff there.

10. The mother says that the father insisted that his name alone appeared on correspondence and documents and then he threatened to kick the mother out of the home and separate her from their daughter. She says that she was on edge and terrified, and she blamed herself for everything that was going wrong. From late 2016/early 2017 she alleges that the father became physically violent. "He would get angry, grab me, pin me down, hit me on the head and on occasion, try and choke me." She says that she had nowhere else to go and felt she had to stay in the relationship. Nevertheless, she did spend two months with A with her family in Moldova in late 2017/early 2018. Again, the father disputes the mother's account in full.

11. The mother says that on 10 March 2018 the father attacked her, pinning her down and choking her. "He said he will murder me … I started to fight for my life, I clawed at him, tired to push him off, did everything in my powers to fight back." The police attended the house having been called by neighbours but neither party made a complaint. The mother exhibits a photograph of bruising to her arm and says that other photographs of extensive bruising did not come out. The father says that the mother

attacked him and exhibits photographs showing quite extensive bruising and marks to his body including what appear to be scratch marks and a bite mark. He accepts that neighbours alerted the police and that A was present. The mother says that A witnessed the father attacking her and tried to "get in the middle of us." The father does not accept that.

12. The mother says that in January 2018 she received a letter from her grandmother in Moldova asking her to come to her. She says that she was worried about her grandmother but the father would not let her travel to Moldova. Following the father's deteriorating behaviour, she decided to travel to Moldova with A and she informed the father from Moscow once she had embarked on the journey on 26 April 2018. She did not ask for his agreement in advance. The father's case is that he did not know where his partner and child had gone and he went to the police to report the matter but the mother called him the next day. He travelled to Moldova and stayed for about a month. He tried to persuade the mother to return with A to Russia. The mother then told him that her mother, who lived with her father in England, was seriously ill and she wanted to visit her with A. The mother's father had travelled to Moldova and whilst there he spoke with the father who ultimately consented to the mother taking A abroad. He says that the maternal grandfather arranged for a notary to prepare a formal consent document and that he signed it on 12 June 2018. He says "Russian is my first language and I don't read and write Moldavian … I accepted it in good faith and signed it because I felt sorry for [the mother] and I trusted her father. I seriously misjudged them both." The mother says that the father gave his consent to A travelling abroad for a year only after a series of meetings in cafes with her and her father. The father agreed to the terms set out in the formal consent document which he signed in front of a Notary on 12 June 2018 [C11].

13. The father produces a statement from a friend KY about a later visit they both made to the notary in 2019. At the meeting with the notary it is alleged the notary told them that in 2018 the mother and her father had tried to forge a document to allow them to take the child from Moldova and when that did not work, then "tricked [the father] to signing the permission". In short, his evidence is that the notary (or notaries – two are mentioned) confessed to taking part in a fraud on the father.

14. After the father signed the formal consent document, the mother left Moldova with A to travel to England arriving on 8 July 2018. She was accompanied by her father and brother. They initially stayed in her parents' apartment, her brother moving out to accommodate them. A was registered with a GP on 9 August 2018. On 11 September 2018 A started at a Primary School, settling in quickly and picking up the language. On 21 December 2018 the mother and A moved to a new address in the city of X to live with the mother's parents. The house has a garden and more space than the apartment. They stayed there for two years before moving to a new address in January 2021 with the permission of the court. On 7 January 2019 at the start of a new term A began at a new school nearer to the new home. Her school report of July 2019 states that she was an "enthusiastic learner… works really hard … built lovely friendships with her classmates and with other adults and children around the school … confident member of the Reception class … popular member of the class and shows kindness and support to her peers … always one of the first to volunteer to help out in the classroom with little jobs." Subsequent school reports have been equally positive.

15. The mother contrasts A's demeanour and happiness in England with the rather quiet and often sickly child she was in the Russian Federation. She says that A made a very good friend with another little girl who was the grandchild of friends of the mother's parents, in the Spring of 2019. A's grandparents and uncle play significant roles in her life. The mother herself has taken various qualifications since arriving in England and has obtained a job at a local cleaning company.

16. Indirect contact with the father took place in the first weeks after A's arrival in England. The mother says that the father was very difficult and started to demand information such as their address in England which she did not want to provide because she was worried about safety in the light of his previous abusive conduct towards her. She found that dealing with the father about contact triggered troubling, fearful feelings about him. She allowed contact with A to continue until she became convinced that the father was using contact to manipulate the mother – he would talk to A about court documents, knowing the mother could hear him. She ceased direct communication with the father herself after a few weeks, and she terminated contact between A and the father when he told A that he would come and take her away from her mother. The father denies that he said any such thing. He says the mother terminated contact in October 2018. The mother is unsure but believes it was a little earlier. The mother says that she was aware after cessation of contact that the father was writing to her family to try to find out her address and, she says, to malign her.

17. The mother says that the move to a new home in late 2018, "was symbolic …. it was clear by that stage that we would remain living in England … we settled in so quickly and I knew that this is where we belonged and where we should live. My entire family was in England. The only family I had in Moldova were my two aging grandmothers. I had no one at all in Russia." [C53]. The mother became aware that the father had asked the Moldovan police to locate her and A. She regarded this as more threatening and manipulative conduct by the father. She corresponded with a Moldovan police officer and then on 20 January 2019 sent a letter with accompanying documents and video to the Moldovan police, the letter being witnessed by a solicitor in X. She gave her previous address but asked that her address be kept confidential from the father. In fact, the Moldovan police passed on information including her previous address to the father. At this point, the mother says, and it is accepted on behalf of the father, the mother was manifesting an intention permanently to stay with A in England and not to return within twelve months of the father's consent document, namely by 12 June 2019.

18. As noted, the application in this court was issued on 14 October 2020. Indirect contact was reinstated, initially as audio contact only, and more recently video contact. Unfortunately, Ms Baker, Guardian, has only observed the very end of one contact session. On 2 February 2021 the case came before Ms Justice Russell who was informed that the father had been recording contact sessions without the knowledge or consent of the mother or the court. She forbade the parents from recording any contact session or discussing these proceedings with the child. The father was ordered not to denigrate the mother or any member of her family to the child.

19. Ms Baker produced her report on 7 April 2021. She saw A twice in January 2021 when A told her about witnessing the father assault the mother when they were together as a family in Russia. She also reported that the mother and members of the maternal family had told her that the father had caused the death of his own mother and that he had kept

for himself money that the mother's parents had sent to her. When talking about all these matters A remained "matter of fact" and had not been upset. The mother told the court that she believed that A's assertion about the father causing the death of his mother was a product of her imagination. It was not a result of anything she or her family had told her. In his most recent statement dated 30 March 2021 the father confirms that contact had continued to go well and that A "chats away to me happily and naturally." He assured the court that he had not realised that it was wrong to record contact sessions, he had complied with Ms Justice Russell's order, and that he had made the recordings "as a personal memento of our conversations in the same way as I would have wanted to take photos of her had we been able to spend time together."

20. On 25 March 2021 I dismissed the father's application to rely on these recordings as evidence at this hearing. I did so because they had been made covertly and the father had sole control over what was recorded and could have steered recorded conversations with his child to suit his purposes. Hence, the evidence would be of very little weight. Further, the use of covert recordings, including of contact with a child, was a breach of trust with the child and the other parent and should be strongly discouraged by the court.

21. Ms Baker arranged with the father remotely to observe his video contact with A on 13 April 2021. She stood by with an interpreter ready to observe but was never sent the link to enable them to do so. The father puts this down to technical problems. Ms Baker accepts that she was having some technical issues with her emails that day. The contact session went ahead and it is reported that, for the first time at a contact session, A talked about her experience of domestic violence by the father against the mother and became upset. Following the contact on 13 April 2021 the father wrote irate emails to Ms Baker. At 1620 hours on 13 April 2021 he wrote:

> "All contacts were very good until today. Today, A told me everything I read in your report. She told me all this for the first time! A never talked to me about it before. And today she cried.
>
> It was obvious that A was forced to say it all. A doesn't remember anything from childhood. But by some miracle, today for the first time decided to talk to me about this. I am glad that the Russian psychologist was present at each of our contacts, and today too. She'll prepare her report."
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> Obviously [the mother] uses A to make her say a lie. My audio recordings prove this and the report of a Russian psychologist, I hope, will also contain this.
>
> I didn't know how to reassure A and told her that I loved her and that she wasn't guilty of anything and that I knew the truth…"

22. In her evidence the mother denied prompting A as alleged. She said that A had been upset that her father had contested something A had said about a piggy bank she had had when they were together in Russia. This appeared to have caused A then to speak about other past matters involving the father. I make no finding in this judgment about whether either parent prompted A to talk about past episodes of violence involving the father at the contact session on 13 April 2021. I understand that at least one further contact session has taken place since without incident.

23. It emerged at the hearing, that the father had informed Ms Baker about the involvement of a Russian psychologist in contact, something she had not mentioned in her report of 7 April 2021. Ms Baker was recalled to address this issue. She told the court that her first discussion with the father had been on 22 January 2021. He had told her that he had been recording contact sessions and wanted her to listen to the recordings. He also told her that a psychologist from Russian Social Services had been involved. Her understanding, from discussions with the father, was that this was normal in Russia, and that he had supplied recordings to the psychologist. She accepted that she may have misunderstood the father. When he had told her, she was awaiting the father's statement and did not inform the parties' representatives or the court about this information. She recalls informing the father that it was not appropriate to record contact without the mother's knowledge and she very properly refused to listen to recordings without approval of the court, but she accepted that she had not given advice to the father to desist from involving the psychologist, not knowing that the psychologist had been present listening in at contact sessions.

24. Ms Baker believed that the father had made the recordings and that they had ceased following the order of Ms Justice Russell on 2 February 2021. She told the court that she had had a further discussion with the father on 16 March 2021 when he had informed her that the psychologist had in fact been present during previous contacts. She did not inform the court or the parties and she has not referred to this in her report. She accepts that she should have brought this to the attention of others. Through Ms Stanley, she has apologised to the court for not having done so. From what she told the court, Ms Baker did not lead the father to believe that recording contact without the consent of the mother was acceptable, and he could not have had that impression after the hearing before Ms Justice Russell, but Ms Baker may have inadvertently given the father the impression that it was acceptable for him to continue to engage a psychologist to attend contact sessions without the mother's consent or the court's permission. Once Ms Baker had been made aware of the involvement of a psychologist she did not make it clear to the father that he should obtain the consent of the mother or the permission of the court and neither the father nor Ms Baker informed the court. Accordingly, the father was not told to desist.

25. Ms Baker told the court that on 12 April 2021, having received her report but before the next contact with A, the father emailed her saying that the psychologist had been present "from the beginning" and that he intended to file documents in Russia to explain that A was being told to say the things she had reported to Ms Baker about the father's violence.

26. The evidence shows that the father paid for a child psychologist to sit with him during every contact session, that sessions were recorded until 2 February 2021, and that the psychologist continued to sit with the father during every contact session thereafter. Ms Baker only fully understood the role taken by the psychologist on 12 or 13 April 2021.

The Law

The Convention

27. Article 1 of the Hague Convention states that its objects are:

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

28. 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."

29. By Article 3 of the Convention the removal or retention of a child is considered to be wrongful if,

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

30. Article 12 of the Hague Convention provides that:

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

31. If A was habitually resident in England and Wales at time of her removal or retention, then the Convention has no further application, and the father's application for return would fall to be dismissed. It is right to note that, notwithstanding, the court might exercise its powers under the inherent jurisdiction to order return on welfare grounds, *Re KL (A Child)* [2014] 1 FLR 772, but that is not argued in this case. If, on the other hand, A was habitually resident in the Russian Federation at the material time then it is necessary to go on to consider whether the case falls within one of the recognised exceptions under Article 13 which provides so far as is relevant to the present case that:

> "13. 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:
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> (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
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> (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.
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> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

32. If one or more of the Article 13 exceptions is made out, the court does not have to order return of the child and may exercise its judgment not to do so. This is commonly referred to as the exercise of the court's discretion. Likewise, if settlement under Article 12 is established then the court has a discretion not to order return. It is not the role of this court to determine the longer-term arrangements for this child. The nature of these proceedings does not allow me to conduct a detailed welfare assessment. However, welfare considerations may apply to the exercise of the court's discretion if that arises. The burden of proof in relation to wrongful removal or retention and habitual residence is on the applicant father. The burden of proof on settlement and the Article 13 defences is on the respondent mother. Insofar as either party alleges fraud, for example in relation to the obtaining of consent, the burden of proof in relation to that allegation falls on them. The civil standard of proof, on the balance of probabilities, applies.

Removal and Retention

33. Removal and retention are mutually exclusive concepts. Retention is a specific event. Lord Brandon of Oakbrook in *Re H (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476, at 78 – 79 held that:

> "…. Once it is accepted that retention is not a continuing state of affairs, but an event occurring on a specific occasion, it

> necessarily follows that removal and retention are mutually exclusive concepts. For the purposes of the Convention, removal occurs when a child, which has previously been in the State of its habitual residence, is taken away across the frontier of that State; whereas retention occurs where a child, which has previously been for a limited period of time outside the State of its habitual residence, is not returned to that State on the expiry of such limited period."

34. In *In the matter of C (Children)* [2018] UKSC 8 Lord Hughes explained the concept of wrongful retention and how it might arise before an agreed return date: [42] to [45]

> 42. …If there is no breach of the rights of custody of the left-behind parent, then it is clear that the Convention cannot bite; such a breach is essential to activating it, via articles 3 and 12. It is clearly true that if the two parents agree that the child is to travel abroad for a period, or for that matter if the court of the home State permits such travel by order, the travelling parent first removes, and then retains the child abroad. It is equally true that both removal and retention are, at that stage, sanctioned and not wrongful. But to say that there is sanctioned retention is to ask, rather than to answer, the question when such retention may become unsanctioned and wrongful.
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> 43. When the left-behind parent agrees to the child travelling abroad, he is exercising, not abandoning, his rights of custody. Those rights of custody include the right to be party to any arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's movements abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left-behind parent's rights of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is no longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live. It repudiates the rights of custody of the left-behind parent and becomes wrongful.
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> 44. The plain purpose of the Abduction Convention is to prevent the travelling parent from pre-empting the left-behind parent. The travelling parent who repudiates the temporary nature of the stay and sets about making it indefinite, often putting down the child's roots in the destination State with a view to making it impossible to move him home, is engaging in precisely such an act of pre-emption.

> 45. It is possible that there might also be other cases of pre-emptive denial of the rights of custody of the left-behind parent, outside simple refusal to recognise the duty to return on the due date. It is not, however, necessary in the present case to attempt to foresee such eventualities, or to consider whether fundamental failures to observe conditions as to the care or upbringing of the child might amount to such pre-emptive denial. It is enough to say that if there is a pre-emptive denial it would be inconsistent with the aim of the Abduction Convention to provide a swift, prompt and summary remedy designed to restore the status quo ante to insist that the left-behind parent wait until the aeroplane lands on the due date, without the child disembarking, before any complaint can be made about such infringement.

Habitual Residence

35. The Court of Appeal has most recently considered the concept of habitual residence *in M (Children) (Habitual residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105 and I have regard in particular to paras. [42] to [64] of the judgment of Lord Justice Moylan in which the significant authorities on the issue are reviewed, and the following principles are extracted:

    a. Habitual residence is an issue of fact. Lady Hale observed in *A v A* [2014] AC 1 at [54] that it is an issue which "*should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.*"

    b. The correct approach to the issue of habitual residence is the same as adopted by the Court of Justice of the European Union. In *A v A* at [48] Lady Hale quoted from the operative part of the CJEU's judgment in *Proceedings brought by A* [2010] Fam 42 at page 69, para. 2:

    > "The concept of habitual residence …. must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration."

    c. The factors listed were taken from para. [39] of the judgment in *Proceedings brought by A*, it being held that they were relevant to the objective and purpose set out in para. [38] of that judgment:

> "In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing that that presence in not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment."

d. Hence, as summarised by Lord Wilson in *In re LC, (Children) (Reunite International Child Abduction Centre intervening*) [2014] AC 1038 at [1],

> "it is clear that the test for determining whether a child was habitually resident in a place is whether there was some degree of integration by her (or him) in a social and family environment".

e. Integration does not have to be full; it may occur quickly – per Lord Wilson in *In re B (A Child) (Reunite International Child Abduction centre and others intervening)* [2016] Ac 606. The essential question is whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for their residence to be termed habitual – Lady Hale in *In re LC* at [60].

f. Lord Justice Moylan noted at [49] to [53] that another relevant factor when analysing the nature and quality of the residence is its "stability" as can be seen from *In re R (Children) (Reunite International intervening*) [2016] AC 76 where at [16] Lord Reed held that it was,

> "the stability of the residence that is important, not whether it is of a permanent character … there was no requirement that the child should have been resident in the country for a particular period of time" nor was there any requirement "that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.".

Indeed, Lord Reed held at [23] that following the children's move with their mother, in that case to Scotland,

> "that was where they lived albeit for what was intended to be a period of 12 months. Their life there had the necessary quality of stability. For the time being their home was in Scotland. Their social life was there. Their family life was predominantly there. The longer time went on the more deeply integrated they had become into their environment in Scotland…"

g. Lord Justice Moylan referred to Lord Wilson's see-saw analogy from para. [45] of *In re B*, where he said:

> "I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the

> expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.".
>
> Moylan LJ warned at [61] and [62]:
>
> "While Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in A v A and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child's situation in and connections with the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual.
>
> "Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can, as in my view is demonstrated by the present case, result in the court's focus being disproportionately on the extent of a child's continuing roots or connections with and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child's current situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is where is the child habitually resident and not, simply, when was a previous habitual residence lost."

Consent and Acquiescence

36. These are mutually exclusive concepts, the difference between them having been described as "one of timing", *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106 at 123. The main principles concerning the defence of consent are set out at para. [48] of the judgment of Ward LJ in *Re P-J (Children) (Abduction: Consent)* [2009] EWCA Civ 588. One of those principles is that consent, or the lack of it, must be viewed in the context of the realities of family life, it is not governed by the law of contract. In *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 1FLR 872 the House of Lords laid out principles applying to the issue of whether the left behind parent had subsequently acquiesced in the removal or retention of the child.

37. Consent falls to be considered under Art 13a not under Art 3, *Re P (A Child) (Abduction: Custody Rights)* [2004] EWCA Civ 871; [2005] under the name *Re P (Abduction Consent)* [2004] 2 FLR 1057.

> 33. If the giving of consent prior to the removal had the effect that the removal could never be classified as wrongful or in breach of the right of custody, then there would be no need for Article 13 at all. Whereas acquiescence is expressly recognised to be acquiescence subsequent to the removal, consent is not so limited in Article 13 and must, therefore, include permission which is given before the removal. If clear unequivocal and informed consent is given to the removal of a child, then it is difficult to see why the court should not exercise the discretion conferred by Article 13 to permit the child to remain in the country to which it was agreed he or she should go. The policy of the Convention is to protect children internationally from the harmful effects of their wrongful removal or retention. If a child is removed in prima facie breach of a right of custody, then it makes better sense to require the removing parent to justify the removal and establish that the removal was with consent rather than require the claimant, asserting the wrongfulness of the removal, to prove that he or she did not consent. Article 3 should govern the whole Convention and Article 13 should take its place as the exception to the general duty to secure the return of the child which is, after all, the basic principle of the Convention.

38. Consent obtained by fraud will not be considered valid, *Re B (A Minor) (Abduction)* [1994] 2 FLR 249.

Settlement

39. Authorities including *Cannon v Cannon* [2005] 1 FLR 938, *Re M (Abduction: Rights of Custody)* [2008] 1AC 1288, and *F v M & Anor* [2008] 2 FLR 1270, establish the legal approach that the court should take to the issue of settlement. In a recent judgment in *AL v SM* [2020] EWHC 2479 para. [49], Lieven J extracted nine principles from the authorities on settlement which I adopt.

> "42.
>
> 1. Under the Convention at Article 12, "The court shall return the child, unless settlement is established". It therefore follows that the burden on establishing settlement is clearly on the abducting parent.
>
> 2. Second, in deciding whether the child is now settled, the relevant date is the date of commencement of proceedings in England and Wales. (See F & M at paragraph 65)
>
> 3. The court should not take an overly technical approach (see paragraph 66 of F & M).
>
> 4. Each case is fact-sensitive. What I take that to mean in practice, is that there are no absolute legal rules that lead to one

definitive result. What is necessary is to look closely at the facts of a particular case and then apply the relevant law to them.

5. The court should take a broad and purposive approach. (See Cannon, paragraphs 53 and 57). It is relevant at this point to have close regard to both the purposes of the Convention, which are summarised by Baroness Hale at paragraph 11 of Re M, but also what Baroness Hale said at paragraph 54 of Re M. It is generally the case that it is in the best interests of the child for them to be returned to the country from which they were abducted, so that that country and the judicial system of that country can determine where and with whom they should live, and what contact they should have. However, it is important also to bear in mind what Baroness Hale said at paragraph 54, that in a case where there has been a lengthy delay, the purposes of the Convention may no longer be possible to meet in the same way as would be the case in a "hot pursuit" case.

6. The question of whether a child is settled involves consideration of three elements. Physical, emotional and psychological settlement. (See Cannon, paragraph 71). However, it is, in my view, important to have in mind the reality of the situation, which is that those three factors may well inter-relate, particularly between the emotional and psychological factors. It is necessary to take a holistic view of settlement, rather than try to apply three separate legal tests, or three separate issues. Each must be taken into account, but how they are then assessed and what weight is given to evidence between the three factors, must be one for the judge on the facts before him or her.

7. The court must take a child-centred approach. The issue is what is the child's perspective on whether they are settled or not.

8. Related to that, the emotional and psychological state of a principal carer will be highly important as to whether the child is settled, particularly when one is talking about a young child. (See F & M paragraph 70, and Cannon paragraph 57). That leads me to expand on the point that it may, for a young child, be very difficult to separate the emotional and psychological elements of settlement, to the degree that they are settled at all.

9. I come to the issue of concealment. In cases of concealment, the burden on the abducting parent is increased. It is important to understand why this is the case and refer back to Cannon at paragraph 53. As I understand the position, there are really two reasons why the burden has increased on the abducting parent. If the child has been actively concealed, then the court should be slow to give great weight to the delay by the left behind parent in taking any action. Because otherwise the abducting parent gains a benefit by their misconduct. The second factor is that where the abducting parent has created a (I use Black J's words)

> "web of deceit and subterfuge", then it may be more difficult and often will be more difficult to show that a child is emotionally and psychologically settled.
>
> [42] In my view, it must be the case that there is a sliding scale of concealment, and also a sliding scale of burden on the abducting parent. The sliding scale of concealment goes from the parent who is on the run, the true fugitive who changes names and hides the child, to the parent at the other end of the spectrum, who simply does not tell the left behind parent that they are leaving. Therefore, as a generality, the greater the level of the concealment, the more difficult for the abducting parent to show that the child is truly settled.
>
> 43 Finally in respect of the law on settlement, even if a child is settled in England and Wales, there remains a discretion not to return. This is dealt with in Re M, in particular Baroness Hale at paragraphs 43 and 47. It is important to have regard to the fact that Baroness Hale had started with setting out at paragraphs 11 and 12 the objectives of the Convention.
>
> 44 Mr Khan argued that it would be unusual to return a child who is settled. I am not sure the caselaw establishes that there is any presumption, but it must be the case that if the child is settled in England and Wales then normally when exercising discretion, the rights and welfare interests of the child will militate in favour of not returning. Each case necessarily involves looking at its own facts."

Grave Risk of Harm or Intolerability

40. The mother raises the defence under Art 13b. The principles to be applied in relation to grave risk are well established and were set out in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, in particular at [31] to [36]. MacDonald J helpfully summarised the applicable principles in *MB v TB* [2019] EWHC 1019 (Fam) at [31] and [32]:

> "i. There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.
>
> ii. The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

> iii. The risk to the child must be 'grave'. It is not enough for the risk to be 'real'. It must have reached such a level of seriousness that it can be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two.
>
> iv. The words 'physical or psychological harm' are not qualified but do gain colour from the alternative 'or otherwise' placed 'in an intolerable situation'. 'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'.
>
> v. Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child's immediate future because the need for protection may persist.
>
> vi. Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child 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 the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, such anxieties can found the defence under Art 13(b).
>
> [32] The Supreme Court made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as ground the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest on the evidence available to the court and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm are identified. It follows that if, having considered the risk of harm at its highest on the available evidence, the court considers that it does not meet the imperatives of Art 13(b), the court is not obliged to go on to consider the question of protective measures."

41. At [37] of the same judgment MacDonald J addresses the way in which the court should evaluate evidence:

> "The methodology endorsed by the Supreme Court in Re E by which the court assumes the risk relied upon at its highest is not an exercise that is undertaken in the abstract. It must be based on an evaluation 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. The court does not simply assume, without more, the maximum level of risk contended for by the abducting parent. Rather, the court examines the information available to it and, having considered that information, arrives at a reasoned and reasonable assumption as to the maximum level of risk having regard to the available evidence.

42. *In Re D (Abduction: Rights of Custody)* [2006] UKHL 51, Baroness Hale held as follows at [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". It is, as article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requested state, which must have this effect. Thus, the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting State to protect him once he is there. In many cases this will be sufficient. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so."

Discretion

43. *Re M* (above), Baroness Hale gave guidance on the exercise of the discretion which applies however the discretion arises under the Convention at [43]:

> "… 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."

The Guardian's Evidence

44. Ms Baker gave careful and considered evidence. She was disadvantaged by not having observed a contact session (other than the end of an audio session when the father and A were saying goodbye to each other). Nevertheless, she had enjoyed two long, remote discussions with A in January 2021, and she had had a number of conversations with each parent, assisted by interpreters.

45. Ms Baker was able to inform the court of feedback from A's school which was glowing. She is clearly happy at school, in her friendship groups, and is an intelligent, hard-working and well-liked girl. The school also reports the mother's positive engagement with the school, albeit that she can be anxious at times. A talked fluently and confidently to Ms Baker who was satisfied that there was no-one else in the room with her. At para. 15 of her report she says,

> I asked about her life in Russia. A told me "I lived with my dad. That was very bad". I prompted A to expand on her comment and she replied, "he was hitting my mum you know but I was saying 'do not do that, do not do that' as he was doing this every day…all the day long" and she had repeated her comments to him "all the day long." A said she would stop her father hitting her mother by standing in front of him and mimicked how she did this, standing up with her arms to her side and moving from side to side and at this time her mother "was running away".
>
> [16] A then asked me if I knew that her paternal grandmother had died because of her father and explained that [the mother] had told her this. A had also been told that her maternal grandparents used to send money to her mother but "they didn't go to my mum, they go to my dad".

46. Ms Baker told the court that she considered that A was authentic throughout. She considered that A had an independent memory of standing in front of her father whilst he was hitting the mother, trying to stop him, but that she had been told of other matters by her mother, and the maternal grandparents. Another example of this is at para. 20:

> "As a result of a conversation she had had with [the mother] and her grandmother the night before our meeting when they were talking about her father, A understood he told her he loved her because he wants to remove her from her mother's care."

47. A said that contact was "very easy. Now he is not very bad now. I can see that he's very different to the past." She had told the father that she was happy in England. She joked that on the telephone the father could not hit her but she would be "very scared" if she could see him during video calls because he used to hit her. Ms Baker accepted in cross-examination that the mother had never alleged that the father had hit A, but that A had repeatedly told her that he had done so.

48. Ms Baker reported at para. 30 [D11] that,

> "... A has achieved the maximum degree of physical and emotional settlement here within an environment in which her developmental needs are largely met within the context in which she finds herself. However, give that her relationship with her father recently resumed after a sizeable gap in contact, and given that contact remains an issue, I consider the issue of contact to be the area in which her full psychological settlement remains an issue."

The Parties' Submissions

49. The father's case is that the mother wrongfully removed A from Russia to Moldova, and then tricked the father into ostensibly agreeing to her taking A to England. The mother never intended to return A from England and used her mother's illness to trick the father into agreeing for her to travel there with A. Thus, there was wrongful removal when she travelled to England on 8 July 2018. In the alternative, there was wrongful retention when she did not return A in time for nursery in Russia on 1 September 2018. Further alternatively, there was wrongful retention in October 2018 when the father had realised he had been tricked and demanded return of A. The mother manifested an intention to stay in England by cutting off contact, refusing to disclose her address and enrolling A in school. At all of these times A was habitually resident in the Russian Federation. The father submits that A was not settled in England as of 14 October 2020 because she was not emotionally and psychologically settled given the termination of contact with the father by the mother two years earlier. Further, the protective measures suggested by the father and the mother's history of living in, and familiarity with, the Russian Federation, mean that the Article 13b defence is not established.

50. The mother's case is that the father freely agreed to A travelling to and staying in England until 12 June 2019. She terminated contact once here only after a few months and because the father had been distressing A and threatening to take her away from her mother. She wanted A to be educated whilst she was in England and so enrolled her into a school. It was only over a period of about six months when she realised that she and A were thriving and happy, A was already settling into her new school, and they had a new home with the maternal grandparents, that she decided to remain in England on a permanent basis. By writing her letter of 20 January 2019 she accepts that she manifested that intention. The mother does not seek to argue that retention was on 12 June 2019. The mother says that A was habitually resident in England by 20 January 2019, indeed well before then, and was certainly settled by 14 October 2020. In any event return would be obviously harmful to A and the Art 13b defence is established.

51. Ms Stanley on behalf of the Guardian supports the mother's submissions in full. The Guardian submits that A was fully settled as of 14 October 2020 and that return would expose her to a grave risk of harm.

Evaluation of the Evidence

52. It is not possible at the hearing of this summary application to make detailed findings of fact on the nature of the relationship of the parties and allegations of coercion, control and physical assault. There is a gulf between the parties as to the history of domestic abuse in the Russian Federation and some findings may be necessary before final welfare decisions can be made, in whichever jurisdiction is appropriate.

53. I directed that oral evidence from the parties should be restricted to issues of the circumstances of the mother's departure with A to England in 2018, discussions between the parties about any agreed return and/or destination of return, and settlement of the child.

54. The father is a practising immigration lawyer, living in the Russian Federation. He gave evidence through an interpreter, and over a video link from Russia. I have to make allowances for the difficulties this caused. Nevertheless, the manner in which he dealt with cross-examination was striking. The impression I gained was that he regarded cross-examination as like a game of chess which required a careful strategy and which he was determined to win. There is nothing wrong with a witness being assertive, for example to ensure that their full answer to a question is given. The mother herself did that. But the father's approach went beyond assertiveness. He insisted on providing lengthy contexts when answering simple questions thereby avoiding giving straightforward answers to straightforward questions; he commented critically several times on the questions put to him when he regarded them as repetitive or otherwise inappropriate; he accused Mr Hepher, for the mother, of having forgotten evidence and, when Mr Hepher simply put the mother's case to the father, of being unethical. He repeatedly, and unjustifiably, accused Mr Hepher of having misunderstood the answers he was giving. Furthermore, the father introduced new evidence for the first time at the hearing. His new evidence was not about peripheral matters but went to the core of the issues in dispute. The father was dismissive when the impact of his new evidence at the hearing was pointed out to him.

    a. In his statement of 30 March 2021 (three weeks before the hearing) he set out with care his proposals for protective measures upon A's return to the Russian Federation. They included reference to accommodation for the mother and A in the area of Y where he lived and where he has lived since these proceedings began. The mother has had to prepare for the hearing by considering her position about returning to Y. The father then told the court, on the second day of the hearing, that on the first day of the hearing he had moved to Moscow where he intended to remain "as long as I live". He said that he had decided to move to Moscow four days earlier. He had an office in Moscow and wished to work there. He had no proposals for where the mother and A should now live upon return. He appeared content for the mother to choose where she should live in the Russian Federation. He seemed to regard it as of no consequence that he had so recently and swiftly decided to change location.

    b. The father revealed in his first witness statement that he had made recordings of contact sessions with A that he wished the Guardian to hear. That revelation led Ms Justice Russell to forbid recording of contact sessions. In his second

statement, dated 30 March 2021, the father told the court he had ceased recording as ordered and stated (in translation, "I recorded the calls as a personal memento of our conversations in the same way as I would have wanted to take photos of her had we been able to spend time together." However, in oral evidence he told the court that he had engaged a child psychologist, for remuneration, to sit beside him during contact (off camera once contact was by video call) and the psychologist had made the recordings for professional purposes. She had attended every contact session (about forty in total) since contact had resumed in November 2020. She had later passed the recordings she had made on to the father so he could listen to them also. The father had not referred to the psychologist in his written evidence. The father dismissed suggestions that his evidence about who had made the recordings and why, had been inconsistent but his efforts to reconcile his recent statement that he had made the recordings as mementos, with his oral evidence that the psychologist had made them for professional purposes, were wholly unconvincing.

c. Even when making disclosure about the psychologist, the father gave inconsistent evidence. The father told the court that the psychologist had attended every single contact session (about forty to date), paid for by him. He said that her role was to assist him to relate positively with his daughter. However, he had urged Ms Baker to listen to the recordings at her discussion with him on 22 January 2021, he applied to me on 25 March 2021for permission to rely on the recordings as evidence, he told Ms Baker on 12 April that he would be filing documents (apparently related to the involvement of the psychologist) in Russia, he told Ms Baker on 13 April 2021 that the psychologist would be producing a report, and he asked the court during his cross-examination at this hearing whether permission would be given to rely on evidence from the psychologist. The father told the court that he found the psychologist through contacting Russian Social Services. It is highly likely therefore that he would use her evidence in dealings with Social Services in the future. It is conceivable that the father wanted assistance from a professional when contact was re-instigated in November 2020, but I cannot accept his evidence that he needed the continuing support of a child psychologist to help him to manage contact with A who, on the father's own account, was confident and at ease with him during contact sessions. I am quite satisfied that he has used the psychologist and the recordings to gather evidence to use in this and future proceedings against the mother.

d. The father gave oral evidence that the mother had agreed to return A to Russia before 1 September 2018 when she was due to start at a nursery school. If true, this would be very important evidence in this application. It would indicate that the failure to return A by 1 September 2018 was a breach of the agreement between the parties and that A was wrongfully retained after that date. The father repeated this assertion several times during his oral evidence but it appears nowhere in his written evidence and was not part of the case put forward on his behalf in advance of the hearing. He told the court that when A was not returned by 1 September he took various steps including contacting the nursery and the Russian police. None of that is in his written evidence. Ms Chokowry, appearing for the father, stated in her skeleton argument for this hearing that "The parties agreed that A would remain in England until 12 June 2019." So,

the father's assertion that in fact the parties agreed that A would return from England to Russia before 1 September 2018 was something of a surprise.

55. Aside from the introduction of new, and inconsistent evidence during the hearing, there were other parts of the father's evidence that were incoherent and difficult to accept. The father says that he was tricked by the mother and her father into signing the formal consent document on 12 June 2018 [C11] which he had not understood and which did not reflect the agreement they had reached after a week of negotiations.

    a. Firstly, he says that he was lied to about the maternal grandmother being seriously unwell and "expected her to die soon" [para 59 C138]. He called that "emotional blackmail". The mother said that her mother was ill and had suspected cancer and that she is still unwell but the diagnosis has even now not been confirmed. At the time of the negotiations with the father, the paternal grandfather had been in Moldova with the mother's brother, visiting other relatives, and they remained in Moldova with the mother until 8 July 2018. The father cannot truly have been under the impression that there was an urgent need to travel to England because the maternal grandmother had a terminal illness and would "die soon".

    b. Secondly, the father says that at the end of the prolonged negotiations he took on trust what he had been told was in the agreement because the paternal grandfather was "family" but it is very clear that the father had a very low level of trust in the maternal grandfather and the mother. His case is that the mother had "kidnapped" A from Russia only a few weeks earlier. He had refused to allow her to remove A from Moldova and it had taken a week of negotiations with her and her father to reach the point when the father would give his consent. The father is an immigration lawyer and demonstrated in his evidence that he enjoys attention to detail. It is inconceivable that he would have signed a formal document in front of a notary on trust, without knowing what was in the document.

    c. The father says that the formal agreement did not reflect verbal agreements that had been reached which included an agreement that A would be returned to Russia, not Moldova, before 1 September 2018 when she was due to start at nursery school. When I asked him whether the agreement was explained to him, he said that the maternal grandfather had done so. I asked if that was in front of the notary. He said it was. I asked him what the maternal grandfather had said in front of the notary that was not reflected in the agreement. The father could not identify anything. Therefore, if the description of the agreement in front of the notary was accurate, there was no trickery. Furthermore, the florid account of discussion with the notary some months later, given by the friend of the father, in which it is alleged that the notary accepted that the father had been the victim of fraud, makes no sense at all.

    d. The father said that he did not understand the formal consent document because it was written in Moldovan. Although he is Moldovan he is a Russian Moldovan. However, the document, signed by him and the notary, says "I [GA], the notary, certified the signature of citizen [the father], which was signed in my presence on a document, whose meaning was not known to him but not until after I

translated orally into Russian language." I conclude that the document was translated orally into Russian before the father signed it.

56. At one point the father's evidence under cross-examination took a sinister turn. When asked quite properly why something he had just said was not in his witness statements, he told the court that he had left some matters out of his statements in order to protect the mother. He was asked by Mr Hepher what else he had not included in his statement. The father told the court that there were some things he knew that would have serious consequences for the mother. He then said that he knew that she had contacted a "professional" to arrange to eliminate him (the father) and then to go into hiding. When he gave that evidence the clear impression was that he was threatening that he could cause the mother to be in significant trouble with the police in Russia if he so chose. When that was put to him by Ms Stanley on behalf of the Guardian, he changed course, laughing openly about the allegation and telling the court that he had not taken it seriously and he did not think that the mother had been serious about it either.

57. The formal consent document was written up in Moldova, the parties were in Moldova when it was signed, and, in translation, it refers to the father's consent to removal of A from Moldova. Return to Russia is not mentioned in the document. Indeed, the consent in translation was for "travel out Republic of Moldova… from 12.06.2018 to back 12.06.2019". This implies that the parties had agreed that the mother would bring A back to Moldova at the end of the period in which the father had consented to her travelling away from that country. I can find no evidence to support the father's assertion that the mother agreed to return A to the Russian Federation by 12 June 2019 or at all. She and A had left there in April 2018, they had no family there other than the father, who was in fact in Moldova when he gave his consent to A being taken out of Moldova. Without hesitation, I reject the father's evidence that there was an agreement to return A to Russia. I also reject his evidence that the agreement was to return A to Russia (or anywhere else) by 1 September 2018. He had not mentioned that in his witness statements, it is at odds with the formal consent document, and his Counsel referred in her opening skeleton argument to the agreement of the parties that A was to remain in England until 12 June 2019.

58. I remind myself of the authority of *R v Lucas*. Witnesses may lie for many reasons, including to protect others, and the fact that a witness lies about one matter does not mean that they are lying about everything, nor that they are guilty of the matters alleged against them. Inconsistencies in evidence may arise for many reasons, not only deliberate lies. However, whilst many witnesses are inconsistent, few display such shameless disregard for their inconsistencies as the father did at this hearing. I am sure, having regard to the evidence as a whole, that the father deliberately lied to the court about a number of matters in order to mislead the court, specifically:

    a. His allegation that there was a verbal agreement between himself and the mother to return A to Russia before 1 September 2018. I am sure that neither the mother, nor her father on her behalf, agreed to that. The father deliberately lied in his oral evidence when he alleged, for the first time, that such an agreement had been reached. The father is an immigration lawyer who signed a formal consent document in front of a notary in his native country of Moldova. The document was read to him in Russian before he signed it, as the notary certified on the face of the document. The document bears no relation to the verbal agreement

he alleges was reached to return A to Russia before 1 September 2018. He fabricated that verbal agreement at the hearing in order to mislead the court and to make out a case that the mother was guilty of wrongful retention as early as the end of August 2018.

b. The father's alleged ignorance about the contents of the formal written consent document he signed on 12 June 2018. I am sure that the father, a qualified and practising lawyer who had completed negotiations with the mother and her father before reaching an agreement, and who was signing the document before a notary who certified that he translated it into Russian for the father, knew the contents of the document he was signing. He deliberately lied to the court when he said that he did not know what was in it when he signed it. He lied in order to avoid being bound by the agreement he had signed.

c. The father's engagement of a child psychologist and the recordings of contact sessions with A. I am sure that the father arranged for the psychologist to be present and for recordings to be made in order to gather evidence to use against the mother in this and any future applications. He has repeatedly asked for the recordings, and for a report from the psychologist, to be treated as evidence in these proceedings, and has told Ms Baker on 12 April 2021 that he would provide evidence from the psychologist to the court in Russia. By his own account A has been entirely relaxed with him during contact sessions (until 13 April 2021) and there has been no apparent need for the father to be assisted by a psychologist. His evidence to this court that the psychologist was only present on contact sessions to help him deal with A, was a deliberate lie. He lied to cover up the fact that he had been covertly gathering evidence from contact sessions from November 2020.

59. The mother gave evidence remotely and through an interpreter. She told the court that when she left Russia on 26 April 2018 she had feared repercussions from the father had she told him of he departure in advance. She had asked for his agreement for her to leave several times but he had not given it. She left the house with A and called him from Moscow. She said that, to her surprise, he said he was agreeable to them visiting Moldova and then returning. The mother was clear that the father had agreed, after discussion in Moldova at which her own father was present, to the mother taking A to England for up to one year. She said that after she had come to England, contact took place for a few months – she thought it had ended earlier than October 2018, which is the date the father says it ended, but she was uncertain in her evidence on that point. Her account as to the cessation of contact and her letter to the Moldovan Police on 20 January 2019 is set out earlier in this judgment.

60. In general, the mother answered questions thoughtfully and with care. The mother's evidence that she wanted to travel to England to be with her parents is credible. Since she expected to be there for several months it was natural for her to register A with a GP and with a school. The mother clearly values her child's education and her registration with a school was not an indication that she had no intention of leaving England by June 2019. Whilst primary school education might have started a year or so later in Russia, it was the only sensible option for A in England, if she was to be in some form of education. The mother told the court that she did not know what she was

going to do in the longer term in the weeks after A started school. By Christmas 2018, however, the mother and A had been in England for over five months, they had just moved into new accommodation with the maternal grandparents, A was shortly due to start at a new school but had settled in well at her previous school. The mother says that she had noticed a positive change in A being settled here in England. She was a happier girl. The parties agree that the mother's letter of 20 January 2019 manifested an intention not to return from England by 12 June 2019. By then A had been living in England for just over six months, and there was clearly an intention on the part of the mother for her to continue to live here indefinitely.

61. There were two significant aspects of the mother's evidence that appeared to be inconsistent. The first was in relation to her departure from Russia on 26 April 2018. On her case the mother was fleeing an abusive relationship in which she had recently been violently attacked. The father was refusing to allow her to leave for Moldova to visit her grandmother. She told the court that she called the father from Moscow, having left their family home in Y, and that to her surprise he was happy for her to leave for Moldova. She did not say that in her witness statements and it is difficult to believe, given the conduct of the father. The mother was somewhat evasive when answering questions about this aspect of the case and I do not accept that the father verbally agreed to her continuing her journey to Moldova with A.

62. The second inconsistency arose when the mother firmly denied in cross-examination that a few months after her arrival in England with A the father had demanded A's return. Ms Chokowry for the father pressed the mother on this point because the father had told the court that the mother had agreed to return A to Russia before 1 September 2018. The mother denied that, but her denial that the father had demanded return to Russia at all did not sit easily with a witness statement she had given to the Police in February 2019. In that statement she said,

> "Sadly, after a few months of our stay in the UK, Victor changed his position and informed me, that the Consent letter is not valid, because it was not written in his first language, thus demanding me to return the child back to Moldova immediately." [C118]

The mother explained to the court that the father had changed his position many times, and that this position – that the formal consent was not valid and that A should return to Moldova – was not something he had said to her directly but was communicated to her parents. I note that her recollection was that it was a demand to return to Moldova not Russia, so, even if it was a demand made before 1 September 2018, it would not corroborate the father's case that there was an agreement for return to Russia. Furthermore, the mother's recollection of when contact with the father ceased is unclear, whereas the father has told the court it ended in October. After the termination of contact, I am satisfied on the evidence, the father communicated by correspondence with the mother's parents. Hence, it is far from clear that he was demanding that the mother should return A to Russia before 1 September 2018. By the time the mother wrote her letter of 20 January 2019, and when she made her witness statement to the police in February 2019, the father had, I accept, resiled from his formal consent document and made it known that he wanted A returned from England. After considering all the evidence I find that the father demanded the return of A and sought

to resile from the agreement the parties had reached that A could stay in England for a year, in or about October 2018. The mother was aware of his position at that time.

63. One valid criticism of the mother is that she has apparently told A about the father wanting to take her away from the mother, and away from England. Whatever the truth, it is not helpful for A to be caught up in disputes between the parents in that way, hearing one side of the dispute.

64. Ms Baker confirmed that the mother would, very reluctantly and with great trepidation, return with A to the Russian Federation, if a return order were made. In relation to the defence of grave risk of harm, following the authorities, I assume the maximum level of risk on the available evidence. This is not necessarily the same as the mother alleges it to be. The mother alleges coercive and controlling behaviour by the father whilst the parties lived together in the Russian Federation. She also alleges physical violence by him against her, with a particularly serious incident in March 2018 which triggered her leaving for Moldova. The mother's allegations are not manifestly incredible, and photographs adduced by both parties tend to show that there was a physical struggle between them, at the very least. The parties agree that neighbours and the police became involved and that A was present. The mother has been diagnosed with post traumatic stress disorder since arriving in England. It was very noticeable that having remained calm during the hearing, she broke down in tears, clearly distressed, when Mr Hepher spoke of some of the past alleged domestic abuse in his closing submissions. For the purposes of this application, without making any findings in relation to domestic abuse, I consider it reasonable to assume that the father was controlling, coercive and physically violent to the mother during the relationship. I bear in mind the guidance under FPR PD 12J and the approach to allegations of abuse set out in my review of the law above. I recognise that a history of controlling and coercive behaviour by the father would give rise to a risk of such behaviour continuing in the future with harm to the child in various ways. For example, the child is distressed by witnessing domestic abuse, and by witnessing the effect on her mother. The child is given a poor model of conduct. The mother who is suffering from such conduct is less able to give appropriate care for the child. For the purposes of this application I assume that there is a risk that upon return to the Russian Federation, the child would be exposed to the harmful effects of coercive and controlling behaviour by the father towards the mother, which would be magnified by closer proximity.

65. The father offered protective measures upon A's return. They are set out in his witness evidence and include financial measures to support the mother upon return. At the hearing he offered an additional measure not to apply for sole custody of A. Notwithstanding his many allegations against the mother, and his assertion as recently as 13 April 2021 to Ms Baker that A was in danger as a result of the actions of the mother and her family, the father told me that he has come to realise that it is in A's best interests to be cared for by the mother. Given the father's remarks that he held information about the mother that could land her in serious trouble on return to Russia, and given his dishonesty in relation to important parts of his evidence, it is difficult to accept the sincerity of his offers. I understand him to say that they should be set out in an order, rather than to be accepted as undertakings, because the order could be registered in a Russian court. However, I have no confidence that the father would abide by such orders once the mother and A were in Russia. In any event, his suggested financial contributions are of little meaning given that it is not clear where A and her

mother would live, in particular since he has so very recently moved to Moscow on a permanent basis.

Conclusions

Removal, Repudiatory Retention, and Consent

66. I shall set out my conclusions on the facts and then consider the application of the law concerning removal, repudiatory retention, and consent.

67. At all relevant times the father had custody rights in respect of A, and he was exercising them. I do not understand this to be disputed.

68. I find that the mother removed A from the Russian Federation to Moldova without the father's agreement or permission from the court. She did so in breach of his custody rights. I do not accept her evidence that the father agreed to her removing A to Moldova during a telephone call on 26 April 2018 made by the mother from Moscow.

69. Some weeks later, the father himself travelled to Moldova and, I find, on 12 June 2018 gave his formal consent to A being removed from Moldova to England, with the possibility of travel to and from Moldova over the ensuing months, for a period of one year until 12 June 2019. He consented to A being returned to Moldova by that date.

70. I am sure that the father freely gave his informed consent to A being removed from Moldova to the EU and/or this jurisdiction, for a period of twelve months beginning on 12 June 2018. He may have been influenced by being told of the illness of the mother's own mother but his consent to travel from Moldova for twelve months was for a longer period that would be necessary to visit someone who was ill, and it was unconditional. I accept the mother's evidence that the father was told, by her and the maternal grandfather, that the maternal grandmother was seriously unwell and had suspected cancer. I reject the father's evidence that he was told that she had cancer and/or that it was feared she would die imminently. As was quite evident to the father at the time, the maternal grandfather was spending a significant time in Moldova, something incompatible with his wife being on the verge of dying in England. I accept the mother's evidence that her own mother was seriously ill at the time and that she very much wished to spend time with her in England, with A. The fact that the maternal grandmother is still alive does not mean that she was not seriously ill at the time or that a fraud was perpetrated on the father. I find no persuasive evidence that the father was tricked or misled into giving his formal consent on 12 June 2018. I am quite satisfied that there was no misunderstanding on his part. I am satisfied that he gave his informed and genuine consent in the terms set out in the document.

71. Whilst the document signed by the father on 12 June 2018 was a consent document, not an agreement with the mother, I am satisfied that it reflected an oral agreement between the parties that the mother could travel with A to England, and to spend up to a year in England, with freedom to travel to and from Moldova during that time, but that the

mother would then return with her to Moldova at the end of that year, being 12 June 2019.

72. The mother did not agree to return A to Russia by 12 June 2019 or at all. The agreement of the parties, as reflected in the formal consent document, was that she would return to Moldova by that date. The mother did not agree to return A before 1 September 2018. The formal consent document is wholly inconsistent with that assertion and I reject the father's evidence on this point.

73. When the mother removed A from Moldova in early July 2018, I am satisfied that A was habitually resident in the Russian Federation. She had spent her entire life, save for some visits to Moldova, in the Russian Federation until 26 April 2018. The visit to Moldova from 26 April 2018 to early July 2018 was not only a temporary one, but it did not have any degree of stability. The mother moved accommodation during that period (taking A with her). She spent much of her time trying to negotiate with the father to be able to leave, and then preparing to leave. A did not integrate into the social environment there, nor did her mother.

74. I am satisfied on the balance of probabilities that the mother did not leave Moldova for England in early July 2018 with the intention of staying permanently with A in England. The mother explains convincingly at paragraph 60 of her first statement [C53] that she had formed the intention to stay in England by late December 2018 when she and A moved to a new address with her parents. From that date she and A had pleasant accommodation, A had settled well at a primary school and made friends, her health had improved, and the mother had realised that both of them were happy in England surrounded by her immediate family.

75. A started at a new school in early January 2019 and again settled in well. The mother and A both settled into the social and family environment in England. By mid January 2019 they had a comfortable home with the mother's parents, and they had a sense of stability and contentment living in England. The letter of 20 January 2019 to the Moldovan police was written at a time when the mother had finally decided to remain in England with A, and it manifested that decision, which was then communicated to the father (it is apparent from the father's solicitor's statement of 14 October 2020 that the address on the mother's letter was, contrary to the mother's wishes, made known to the father. Indeed, the whole letter was in his possession because it is exhibited to his solicitor's statement).

76. Given my findings, it follows that A's removal from the Russian Federation on 26 April 2018 was in breach of the father's custody rights. However, he then travelled to Moldova, met the mother on a number of occasions and, on 12 June 2018, agreed to the mother removing A from Moldova to England for a year, on the terms set out above. I am satisfied that he thereby subsequently acquiesced in A's retention out of the jurisdiction of the Russian Federation. Indeed, he exercised his custody rights to agree to her removal and retention in England until 12 June 2018 and then her return to Moldova. He cannot therefore now base his application on the wrongful removal of A from the Russian Federation in April 2018. Indeed, he does not seek to do so.

77. On my evaluation of the evidence, on 20 January 2019 the mother finally decided and manifested her intention not to return A to Moldova (or to the Russian Federation) on

12 June 2019. The mother was thereby in repudiatory breach of the agreement with the father. She had agreed that A would be returned to Moldova by 12 June 2019 but as of 20 January 2019 she had formed and manifested a clear intention not to abide by that agreement. A was retained in England beyond 20 January 2019 in repudiatory breach of the parents' agreement that she would remain in England temporarily until no later than 12 June 2019. The mother does not dispute this.

78. What of the possibility of an earlier wrongful retention? The father asserts that, even if he had agreed to A remaining in England until 12 June 2019, he resiled from that agreement and demanded her return in the late summer/early autumn of 2018. His primary case is that he wanted A to start nursery school at the beginning of September 2018 but his secondary case is that when the mother terminated contact in October 2018 he sought A's return.

79. I accept the mother's evidence that there was no demand by the father to return A (to Russia or Moldova) by 1 September 2018 but I have found that the father was demanding return, and the mother knew it, in October 2018. The mother nevertheless continued to remain with A in England. If the father resiled from the agreement reached in Moldova and demanded A be returned to the Russian Federation, and if, as was the case, the mother did not accede to that demand, was there a wrongful retention at that point?

80. The parties have each made submissions on what the consequences are if, having agreed to the child being removed and retained abroad for a fixed period of time, the left behind parent changes their mind, and withdraws their agreement. Ms Chokowry for the father, submits that the mother's refusal to return A upon the father withdrawing his consent to the continued stay amounted to a breach of the father's rights of custody pursuant to Art 3 and that accordingly a wrongful retention occurred at the end of the summer of 2018. She relies on *TY v HY (Return Order)* [2019] EWHC 1310 (Fam) in which Mr Justice MacDonald recorded at [43]:

> The consent required must be to more than the child's temporary removal or retention, but it does not have to be consent to the child's permanent removal…. The consent must be operative at the time of the removal or retention. In *Re K (Abduction: Consent)* [1997] 2 FLR 212 at 218 Hale J (as she then was) made clear that once consent has been acted upon it cannot subsequently be withdrawn. In that case, Hale J was clear that where the mother had acted on the father's consent, that consent could not be taken away "by the father thinking better of it".

Ms Chokowry also directs the court's attention to *C v M* (Case C0376/14 PPU) [2015] Fam 116 in which the CJEU confirmed that in circumstances where the removal of a child has taken place in accordance with a court judgment which was provisionally enforceable and which was thereafter overturned by a court judgment fixing the child's residence at the home of the parent living in the Member State of origin, the failure to return the child to that member State following the latter judgment is wrongful.

81. For the mother, Mr Hepher relies on the judgment in *Re K* (above) as clearly establishing that once consent has been given and acted upon, it cannot subsequently

be withdrawn. Here the father gave his consent to the mother and A travelling to and staying in England, with trips back to Moldova if they chose, for a period of 12 months until 12 June 2019. The mother acted upon that consent. The father cannot take away that consent during the agreed period of travel abroad.

82. The starting point is whether the removal of A to England at the beginning of July 2018 was wrongful. Any Art 13a defence of consent, or acquiescence, would have to relate to an identified wrongful removal or retention. The court cannot consider whether the father consented to a removal or retention without knowing when either of those events occurred. I have found that the father gave formal written consent to A being removed for up to 12 months from 12 June 2018. I have already referred to [42 of the judgment of Lord Hughes in *In the matter of C (Children)* (above). Although the Court of Appeal in *Re P (A Child) (Abduction: Custody Rights)* (above) held that consent to removal is to be determined under Art. 13a, not Art. 3, Lord Hughes clearly stated that if a child is removed and then retained abroad by agreement then the removal and retention are not wrongful. Whilst A was removed to England from Moldova, where A happened to be when the agreement was reached, and therefore not from her home state, the same principle applies.

83. Thus, A was not wrongfully removed in early July 2018. A removal that was not wrongful at the time cannot retrospectively become wrongful by reason of a subsequent change in circumstances. In *C v M* (above) the CJEU held that an overturned court judgment could render a failure to return the child following the later judgment wrongful. It did not render the earlier removal of the child wrongful. An agreement to the removal of the child might be invalid because of fraud, for example, but if a valid agreement has been reached, and acted upon, it cannot be rendered a nullity by one party later resiling from it. Accordingly, the question is whether, if the father resiled from the agreement after the removal, that rendered the retention of A in England thereafter, wrongful.

84. The father's submission that his unilateral decision to demand return having previously formally giving his consent to his child travelling to and staying abroad for up to a year, rendered the child's retention abroad wrongful, is deeply unattractive. If he is right then, in principle, countless parents who had the agreement of another parent to take a child abroad would be exposed to allegations of wrongful retention at the whim of the "left behind parent". The day after a child was removed abroad for an agreed holiday, the "left behind parent" could resile from the agreement and apply for a return order, leaving the travelling parent with the burden of proving an Art 13 defence. I note the warnings about allowing the left behind parent to elect the date of wrongful retention, given by Counsel for the mother in the Court of Appeal in *Re C (Children)* [2017] EWCA Civ 980, which Lady Justice Black recognised – paras. [108] to [110]. The child and the travelling parent would be entirely at the mercy of the left behind parent.

85. Counsel have not alerted me to any previous judgment on this specific issue. In *Re K,* decided before the Court of Appeal's decision *in Re P (A Child) (Abduction: Custody Rights).* Hale J said at 214F, "I have not been invited to consider the inter-relationship between Arts 3 and 13 …. And I therefore express no view on the point." However, the case proceeded before her on the basis that the outstanding issue was whether the mother had established one of the defences provided for in Art 13. Hence, Hale J's observations on consent at 218B to which both parties have referred, should be read in

the context of an Art 13a defence of consent, not the question of whether there was a wrongful retention. In the case of *Paterson and Department of Health and Community Services v Casse* (1995) 19 Fam LR 474 at 485, in the Family Court of Australia, Melbourne, Kay J considered a case where a couple had moved with their children from Mauritius to Australia by agreement but later the mother wished to stay whilst the father wished to leave.

> I am not entirely sure that the framers of the Convention intended it to apply to cases where the parties and the children took themselves, by mutual agreement, to a country other than their 'habitual residence' then one of the parties decided to go 'home'. Whose right of custody should then prevail? That of the parent who wants to go 'home' or that of the parent who wants to stay? A wrongful removal entails taking the child from a country in breach of a custodial right. A wrongful retention entails retaining the child in a country in clear breach of such right. When does this right arise where there parties are in the new State by agreement?

A similar question arises in the present case. The father did not travel to England with the mother and A, but he had agreed to their staying here and then changed his mind.

86. Wall J addressed circumstances similar to those in the present case in *Re S (Minors) (Child Abduction: Wrongful Retention)* [1994] 1 FLR 82. The Israeli parents agreed to bring their two daughters to England for at least one year. They arrived in September 1992. In December 1992 the father left their house in England and alleged that the mother refused to allow the children to speak to him after April 1993. He commenced divorce proceedings in Israel. In May 1993 the mother obtained an *ex parte* interim residence and prohibited steps order in the English court. One of the issues that Wall J identified was, "Can there be a wrongful retention within Art 3 when there has been agreement for the children to remain within the jurisdiction for a fixed term and one party requires the return of the children to the country of their habitual residence before that term has elapsed?" At 90 H to 94 A, he posed a different question and answered it. In the course of his answer he addresses the issue he had earlier identified, and which is pertinent to the present case:

> *Is the mother's action in retaining the children in England in breach of the father's rights of custody, given the agreement that the children will remain in England, in any event, for one year?*
>
> I have found this the most difficult aspect of the case. I was initially attracted to the proposition that where parents agree that children shall remain in England for a specified period there cannot be a wrongful retention until that period has elapsed. The mere fact that the relationship between the parents has come to an end cannot entitle one parent unilaterally to resile from the which has been agreed between them. The example which springs to mind is an agreement that the children should visit a foreign country for a specific time, such as a school holiday.

> Clearly, a parent in such circumstances could not unilaterally change his mind and demand the return of the children before the term of the contact had expired.
>
> Thus, if the mother's case before me were that she intended at the expiry of one year to return the children to Israel or were she to establish for the purpose of this argument that the agreement between them was that the children should be returned after 2 years and that she intended to return the children at the expiry of that term then it seems to me she would have a complete defence to the originating summons, either because her retention of the children was not wrongful, or, under Art 13(a), because the father had consented not merely to the removal of the children but, by necessary implication, had consented to their retention in England for a fixed term.

87. Wall J found that the mother had in fact stated her intention not to return the children to Israel at all. Thus, he noted that the question became whether that fact meant that there was a "wrongful retention as at the date that intention was formed or when it was communicated to the father, even though the period in which she is entitled to retain the children in England had not yet expired." That is the question subsequently answered in *Re C (Children)* (above).

88. After very careful consideration, my judgement is that not only is the father's submission unattractive, but it is also wrong in law. When a child has been removed and then retained abroad consequent to prior agreement between the parties that the child may remain abroad for an identifiable period, the retention of the child abroad during that period is not wrongful provided that the travelling parent honours the temporary nature of the agreement. In the absence of a repudiatory breach of the left behind parent's rights of custody, of the kind analysed in *Re C (Children)* (above), the left behind parent's demand that the child be returned during the agreed period does not by itself render the continued retention of the child abroad wrongful. My reasons are as follows:

a. The wrongfulness of a retention is found in the fact that it breaches the rights of custody a parent. By Art 5 of the Convention,

> For the purposes of this Convention:
>
> 'Rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

There is no dispute that the father had rights of custody and was exercising them at the relevant time. The relevant time would include the period when A was in England subsequent to the formal consent document of 12 June 2018. Just because the father was not physically caring for A after her removal to England it does not mean that he was not exercising his rights of custody – *W v W (Child*

Abduction: Acquiescence) [1993] 2 FLR 211. Art 3 defines the wrongfulness of a removal or retention by reference to whether it is in breach of rights of custody. The focus is on whether the retaining parent has acted in a manner that breaches the left behind parent's rights of custody. Thus, the question is whether, if the father sought to resile from the agreement for A to stay in England for an identifiable period by demanding return within that period, the mother's response constituted a retention in breach of those rights.

b. Lord Hughes in *Re C (Children)* (above) at [43] characterised the agreement by a parent to the child travelling and staying abroad as an exercise of their rights of custody, and a breach of those rights as an act of pre-emption. In exercising his rights of custody to agree to a stay abroad, the father agreed to restrict the exercise of his rights of custody during the agreed period of the stay. He agreed that the child would not be returned from abroad during that period. His commitment was for an identifiable period. Thus, unless the mother pre-empted the temporary nature of the stay, her failure to return the child from abroad during that agreed period honoured the father's rights of custody, it did not breach them. That is so even if the father demanded return during that period.

c. There is some assistance in the Explanatory Report of Elisa Perez-Vera, 1981:

> "Article 3 as a whole constitutes one of the key provisions of the Convention, since the setting in motion of the Convention's machinery for the return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention. Now, in laying down the conditions which have to be met for any unilateral change in the status quo to be regarded as wrongful, this article indirectly brings into clear focus those relationships which the Convention seeks to protect. [64]
>
> "Joint custody is, moreover, not always custody *ex lege*, in as much as courts are increasingly showing themselves to be in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents. Now, from the Convention's standpoint, the removal of a child by one of the joint holders
> without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding
> joint custody on the basis of facts which have subsequently
> changed. It seeks, more simply, to prevent a later decision on
> the matter being influenced by a change of circumstances
> brought about through unilateral action by one of the parties." [71]

If the Convention seeks to prevent a later decision on custody being pre-empted by a change in circumstances brought about through unilateral action by one of

the parties, then that should apply equally to the left behind parent unilaterally resiling from an agreement that the child can travel and stay abroad, as it does to an abduction abroad by the travelling parent. Unless the travelling parent's response to the left behind parent unilaterally resiling from the agreement amounts to a pre-emption of their rights of custody, there is no wrongful retention which the Conventions seeks to prevent.

d. The unilateral decision by one parent to resile from an agreement for a child to live abroad for a period of time, on which another parent has acted, cannot, without more, be regarded as rendering the original agreement null and void. The reality is that the earlier agreement existed and formed the basis of the child arrangements. The travelling parent is not obliged to disregard the earlier agreement and bow to the new demand of the left behind parent. Similarly, if a mother with a lives with order agrees that a child should spend Monday to Friday with their father, and on Tuesday demands the return of the child because they have changed their mind, the father is not obliged to return the child.

e. The focus being on the travelling parent, the question becomes whether the response of the travelling parent to the unilateral demand of the left behind parent for return of the child during the period of agreed stay abroad, amounts to a breach of the left behind parent's rights of custody. It may do so, as was the case in *Re S (Minors) (Child Abduction: Wrongful Retention)* (above). Whether it does will depend on the circumstances of the particular case and whether the travelling parent acts in repudiatory breach (as explained in *Re C (Children)*). The mere fact that the child is not returned on demand does not mean that the travelling parent has pre-empted the temporary nature of the stay.

f. If the response of the travelling parent to the left behind parent's change of position is to seek to abide by the original agreement then provided they do nothing to repudiate the temporary nature of that agreement, the retention is not wrongful. This was the view expressed by Wall J in *Re S.* He said that the travelling parent would have a "complete defence" but left open the question of whether the defence would arise because her retention of the children was not wrongful or whether it would arise by under Art 13a. Given the subsequent Court of Appeal decision in *Re P (abduction Consent)* (above) I would prefer to say that it is because there has been no breach of custody rights under Art 3 and therefore no wrongful retention. The question of the defence of consent under Art 13a does not therefore require consideration.

g. The preamble to the 1980 Convention recognises that the interests of children are of paramount importance. To hold that a retention becomes wrongful merely because the left behind parent resiles from an agreement that the child can stay abroad for an identifiable period, unilaterally, would generally be contrary to the interests of the child. It would lead to uncertainty, instability, and friction within the family.

89. Having considered the evidence in this case I am satisfied that the mother did not form or manifest an intention to remain permanently in England, and therefore out of the jurisdictions of either the Russian Federation or Moldova, until 20 January 2019. Her

continued retention of A in England until then was not wrongful. The fact that she did not comply with the father's requests to return A did not, until 20 January 2019, constitute a repudiatory breach on her part. It did not constitute any breach of his rights of custody. She continued to honour and did not pre-empt the temporary nature of the agreement the parents had reached on 12 June 2018.

90. In conclusion, I find that there was no wrongful removal of A when she was taken to England in July 2018, and no wrongful retention in England until 20 January 2019. On that date the mother wrongfully retained A in England, subject to the issue of A's habitual residence at that time.

Habitual Residence

91. I have to consider where A was habitually resident on 20 January 2019. The burden of proof on habitual residence is on the father. His case is that she was habitually resident in the Russian Federation at that date, the mother says that she was habitually resident in England. A had not lived in the Russian Federation since April 2018. She had never been to school there, but she was born there and had lived there all her life until April 2018. Her father was in Russia but her mother and maternal grandparents and uncle were in England. Her living great-grandparents were in Moldova. She was at school in England and she had established friendships here. She was registered with a GP here. She had recently moved to a home with her mother and maternal grandparents which was intended as a permanent home. She had moved schools, starting her new school only at the beginning of January 2019, but she had settled in well at both. She would have had no expectation that she was gong to leave England imminently nor even in the months ahead. She had stability in her life and was well integrated into her family and social environment in England. The mother, her main carer, had settled in England and achieved stability in her own life here. Having regard to the authorities set out above, I find that on the balance of probabilities A was habitually resident in England as of 20 January 2019.

92. Home life had become unstable for A in the Russian Federation in early 2018 and she had then had a temporary stay in Moldova from 26 April to early July 2018. In contrast, once in England she had a stable existence within the wider maternal family. She also started school in early September and settled in well. She had no ties in the Russian Federation save for her father. By October 2018 she had been out of the Russian Federation for five to six months. She had been in England for three to four months but in that time she had become integrated in the family and social environment. In all the circumstances, had it been necessary to decide, I would have found that A was habitually resident in England by October 2018.

Defences

93. Given A's habitual residence in England at the date of the otherwise wrongful retention, the case falls out of the scope of the Hague Convention 1980 and the defences under

the Convention do not arise but, in case I am wrong about habitual residence, I shall consider them. The date on which settlement needs to be considered is 14 October 2020 when this application was issued. This was nearly one year, nine months after the retention of A in this jurisdiction on 20 January 2019. By 14 October 2020 A had lived in England for two years, three months. She had celebrated two Christmases and two birthdays here. She was very well settled into school and had made friends. She had a settled home life with her mother and maternal grandparents. Ms Baker had little doubt that A was physically and emotionally settled. Indeed, she advised the court that in her opinion, overall, A was settled in this jurisdiction. She was reporting following discussions with A in January 2021 but her conclusions surely also apply to the relevant date. Ms Stanley, for the Guardian, submitted that A was settled in this jurisdiction at the relevant date. Ms Baker's only reservation was whether A could be said to be psychologically settled when contact with the father was not resolved. It is true that at the relevant date A was not having contact with her father and had not spoken to him for about two years. However, once contact resumed in November 2020, and until 13 April 2021, A found contact "easy" according to the father (and as briefly witnessed by Ms Baker). The mother confirms that description. She had no psychological difficulty talking with her father notwithstanding the long break in contact.

94. This is not a case, in my judgement, in which the mother has spun a web of lies and deceit to conceal the whereabouts of the child from the left behind parent. It is true that the mother would not reveal her address, but the father knew that A was in England and living with or close to the maternal grandparents in X. The evidence indicates that he was able to correspond with the maternal grandparents. He may not have known the address at which A was living but he knew enough that if he had chosen to do so, he could have located A much earlier than he did. When asked why he had not applied earlier he primarily blamed the Covid-19 pandemic which could not have obstructed his efforts in 2019 and referred to his need to learn all about this area of law. I found his explanations to be unconvincing. The delay between his knowledge of the letter of 20 January 2019 and the issue of his application on 14 October 2020 is not explained by the mother evading him, so much as the fact that he chose not to take steps to issue his application.

95. It is important to avoid an overly mechanical approach to the issue of settlement. In *Cannon v Cannon* (above) Thorpe LJ clearly held that there were "two constituent elements of settlement, namely a physical element and an emotional element. To consider only the physical element is to ignore the emotional and psychological elements which in combination comprise the whole child." Thorpe LJ may well have intended "emotional" and "psychological" to be synonymous. In any event, it is too mechanistic, certainly on the facts of this case, to discriminate between A's emotional and her psychological settlement. I need to consider the "whole child". In the present case the father had consented to A remaining in England until 12 June 2019. He knew that she was in this jurisdiction, and from shortly after the mother's letter of 20 January 2019 he knew that she was in X. He was able to write to the maternal grandparents. It appears that he took no material steps to locate A for well over a year after the mother's letter. In the meantime, A had a stable home, school, and family and friendship networks. Even without contact with her father she was happy, confident, and thriving physically, emotionally and psychologically. She was still young and her mother was certainly settled in England by October 2020. That is an important factor in considering

A's settlement. I find that A was settled in this jurisdiction by 14 October 2020. As such the court would not be bound to order return of A to her state of habitual residence.

96. In the circumstances I shall deal only briefly with the Article 13b defence of grave risk of harm or intolerability. I would have found that this defence was established on the primary grounds that;

    a. A and her mother have strong ties in England and none in the Russian Federation. The mother is not even a citizen of the Russian Federation and would have little to no security or stability there upon return.
    b. A would have no other family than her mother and father, in Russia, no experience of school there, and no friends there.
    c. On my evaluation of the evidence, taking the evidence at its highest on that evaluation, there would be a grave risk that the father would seek to coerce and control the mother with harmful consequences for A. That risk of harm would include harm from the mother suffering psychological trauma sufficient to render her incapable of looking after A.
    d. It would be intolerable for A to have to live in what is now for her an alien environment in Russia, with her mother at grave risk of being manipulated and psychologically and possibly physically damaged by the father.
    e. The father has made covert recordings of contact and has been in communication with social services in Russia and engaged a psychologist through their recommendation. He has threatened during these proceedings that he has information about the mother that would cause serious problems for her with the authorities upon her return if should choose to disclose it. He has told Ms Baker that he will use the evidence of the psychologist to send a file to the Russian social services with the help of the psychologist. It is likely, I find, that upon the mother and A returning to the Russian Federation, the father would find a pretext to report the mother to the authorities there. There is a serious risk of the mother's self-confidence and ability to care for A would be eroded by actions of the father were they to be compelled to live in the Russian Federation.

97. I shall also deal briefly with discretion. Whether the exercise of discretion arose because of settlement and/or grave risk of harm, the court could not ignore the fact that this is not a "hot chase" case under the Convention. The purpose of the Convention to secure a swift return cannot be achieved. The courts in the Russian Federation would not be well placed to decide issues of residence and contact because of the long time that has elapsed since the mother and A lived there. Virtually all the relevant information about A's welfare would come from sources within England, such as her GP and her school. In contrast, there is a clear case for A's best interests being served by her remaining in England. She wants to stay here, her needs are well met here, her mother strongly wishes to remain here, and her mother's ability to care for her would be put at risk by return to Russia. The changes involved in moving to Russia would be harmful to A in my judgement. The protective measures offered would not satisfy me that A's welfare would be adequately protected were she to be returned to Russia. Thus, I would have exercised my discretion, had it arisen, to refuse to return A to the Russian Federation.

Conclusion

98. For these reasons I dismiss the father's application for summary return. I have made no findings of fact about alleged domestic abuse and no findings about what caused A distress at contact on 13 April 2021. The question of future child arrangements requires careful consideration. To date the mother has remained supportive of indirect contact by video link. Aside from the contact on 13 April 2021 both parents appear to be content with how contact has progressed, and the evidence is that A has been confident and at ease during indirect contact. The parties need to reflect on this judgment. I shall receive further submissions and then give directions in relation to preparation for a final hearing to consider child arrangements.